

(2003) 02 BOM CK 0097

In the Bombay High Court

Case No : Appeal From Order No. 281 of 2002 in Notice of Motion No. 2932 of 2001 in B.C.C.C.S.C. Suit No. 3752 of 2001

Ravindra Mutneja, Rajendra Mutneja, Chandraprakash
Menda, Kalpesh Patel, Kamal Aggarwal, Divya Sippy,
Gurvinder Singh, Monthchand Parul and Vinod Narang

APPELLANT

Vs

Bhavan Corporation, Wescan Housing (India) Pvt. Ltd., Mrs.
Pushpaben Rasiklal Parekh, Mr. Rasiklal Manilal Parekh, Mr.
Sanjay Patel, Mohan Vijan and Shri Gupta

RESPONDENT

Date of Decision : 27-02-2003

Acts Referred:

Maharashtra Ownership Flats (Regulation of the promotion of construction etc.) Rules,
1964 — Rule 9
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale,
Management and Transfer) Act, 1963 — Section 10, 11, 12, 7, 7A
Maharashtra Ownership of Flats Regulations — Regulation 23, 28, 29

Citation : (2003) 3 ALLMR 521 : (2003) 5 BomCR 695

Hon'ble Judges : F.I. Rebello, J

Bench : Single Bench

Advocate : Anil C. Singh, instructed by D.R. Shah, for the Appellant; A.K. Abhyankar, instructed by Shiralkar and Co. for Defendants/Respondent Nos. 1 and 3 to 5 and Sangeeta V. Mehta, for Defendant/Respondent No. 2, for the Respondent

Judgement

F.I. Rebello, J.—The appellants herein have preferred this Appeal against the order dated 19.12.2001, whereby a learned Judge of the City Civil Court dismissed Notice of Motion No. 2932 of 2001 in S.C. Suit No. 3752 of 2001, taken out by the appellants herein. The learned Judge found in favour of the appellants that the provisions of the Maharashtra Ownership of Flats Act (MOFA) was applicable. The learned Judge also found in favour of the appellants that the new structure is an extension to the old building Puspha Castle. However, on the ground of balance of convenience considering the delay in the plaintiffs approaching the Court, dismissed their Motion. It is that order which is the subject matter of the present Appeal.

2. In this appeal, Motion for Interim relief was taken out on 25.9.2002 and an order was passed that pending hearing and final disposal of appeal there would be ad-interim relief in terms of prayer Clause (a) of Civil Application No. 1063/2002. The order also sets out that issue of re-construction and demolition of structure, can be considered when the appeal is heard. A statement made on behalf of the counsel appearing for the respondents that the compound wall had been demolished, was recorded. The Petitioner was directed to maintain status-quo as of that day. The matter was heard and placed for orders.

3. The plaintiffs in the plaint have described themselves as flat purchasers in the building constructed by defendant No. 1 M/s. Bhavan Corporation. Defendant No. 2 had been sued as defendant who is putting up the construction of the building which is the subject matter of the present Suit. It is averred that construction of the building has been started and commenced by the defendant No. 2 and other defendants jointly with one another. The plaintiffs have averred that their building Pushpa Castle was constructed on Sub plot G-4 of land bearing Survey No. 41, CTS No. 626. The building constructed consists of still + 7 floors. There is one Sandeep Gaiwal, who is an Officer with the Bombay Municipal Corporation. He is occupying Flat No. 701. There are several allegations which are not necessary for the purpose of dispose of this Appeal. Work in the plaintiff's structure was commenced in 1991-92 and completed in 1993. The plaintiffs are occupying the flats ever since they were put in possession thereof.

4. It is the case of the plaintiffs that defendants commenced the construction of the new building touching the old building in and around August 2000. It is the case of the plaintiffs that structure under construction appears to be an extension of the existing structure occupied by the plaintiffs. It is the case of the plaintiffs that the new construction appears to be still plus 22" floors. The stage of the construction of the new building was upto 11-12 floors.

The case of the plaintiffs is that Suit is filed under the provisions of Maharashtra Ownership of Flats Act whereunder the defendants are liable under the statutory obligations to form and register a society and to convey the property to the flat purchasers, which the defendants have failed to do so. The defendants have failed and neglected to give copies of the sanctioned plans, I.O.D. & C.C. and hand over the management and administration of the building occupied by the plaintiffs to the plaintiffs. According to the plaintiffs, the defendants have deliberately avoided to do so, as the defendants are admittedly interested in putting up additional construction and selling away the same. The construction being put up according to the plaintiffs contentions, is without their consent; express or otherwise. None of the plaintiffs have ever given consent to the same. The construction thus is contrary to the provisions of Section 7 of the MOFA Act. It is also averred that the construction is contrary to the Rules and Bye-laws of the Corporation. It is also the case of the plaintiffs that the work undertaken by the defendants has commenced in such a manner that there is total blockage of air, light and ventilation of the bathrooms and/or toilets. It is averred that

plaintiffs will be taking separate independent steps challenging the sanctioned plan and take appropriate steps for revocation and cancellation of the plans. It is the case of the plaintiffs that they believe that the defendants have misrepresented to the Corporation and obtained consent. When in fact no consent has been given by the plaintiffs. In the light of that reliefs have been prayed for which are to form a registered society, to convey the property to the society so formed and registered and other necessary reliefs. Prayer Clause (b) is to remove to unauthorized construction put up contrary to Section 7 of the MOFA Act, 1963. It is not necessary to advert to the other reliefs. The Motion taken out was supported by the affidavit, in which the averments in the plaint were reiterated.

5. Shri. H.R. Parekh, partner of the defendant No. 1 has filed an affidavit on behalf of the defendant No. 1. It is averred that the flats had been sold to the various purchasers in or about 1996-97 and that under the agreement for sale executed between the first Defendant and various purchasers, the 1st defendant has agreed to comply with the obligations cast under MOFA Act including formation and registration of society and conveying the property to the society and other such related obligations. In para 3 it is set out that the defendants shall comply with all such obligations. It is stated on behalf of defendant No. 1, that they have no concern with the construction going on of the stilt + 22 story building, as alleged. It is contended that the plaintiffs ought to have made the developers, who are concerned with the construction on the property, a party to the Suit. The owners of the property, which is the subject matter of the present Suit on which the building is being constructed, are Mrs. Pushpaben Rasiklal Parikh and Rasiklal Manilal Parikh (HUF). It is the affiant's case that the aforesaid owner has developed the property alongwith one Mr. Sanjay Patel as a joint venture. Subsequent to this the owners and developers have been joined as Defendant Nos. 3 to 5.

6. Affidavit has been filed by Shri. V.M. Devendran, on behalf of 2nd defendant in which it is contended that the 2nd defendant is a private limited company and is in no way connected/concerned with the site on which the construction as mentioned in the plaint is going on and as such there is no cause of action against them.

7. Shri. Sanjay K. Patel-defendant No. 5 has filed an affidavit of himself and on behalf of defendant No. 3 and 4. It is the case of Shri. S.K. Patel that the defendant Nos. 2,3,4 and 5 do not have any privity of contract whatsoever with the plaintiffs so as to establish the relationship of promoter and flat purchasers between them. That flat purchasers are residing in the building constructed and developed by the defendant No. 1. and the other defendants are altogether separate and distinct legal entities and only defendant Nos. 3, 4 and 5 are involved in carrying out construction of the building. It is contended that in so far as the prayer Clause (a) is concerned, only the defendant No. 1 is concerned and as against the others, no relief can be granted. In so far as the other reliefs in

respect of the said construction, it is contended that the Suit is bad for mis-joinder of parties as well as mis-joinder of causes of action. It is set out that the building is being constructed as a joint venture alongwith the defendant Nos. 3 and 4. Necessary permission has been obtained from the statutory authorities by following Development Control Rules. The construction activity was started prior to August 2000. The plaintiffs have therefore, acquiesced in the construction and the suit suffers from gross delay and laches as the plaintiffs could have at the first available opportunity approached this Hon"ble Court for appropriate reliefs. The plaintiffs did not do so and acquiesced in the construction activity and allowed them to complete 17 slabs of the building. This conduct, it is contended, shows that the plaintiffs are out to blackmail them. It is also contended that the plaintiffs have come to the Hon"ble Court with unclean hands and with a view to extort moneys from defendant Nos. 3 to 5. It is then set out that out of the 23 flats available for sale in the building under construction, third party rights have been created in respect of 6 flats by taking money from prospective flat purchasers and issuing letters of allotment. It is denied that the the constructions which is undertaken by the defendants is commenced in such a manner that there is total blockage of air/light of one of the bathrooms or toilets of the plaintiffs and also touching the bedroom of the plaintiffs as alleged or otherwise or at all. It is specifically averred that the construction of the building is started after obtaining necessary permission of the local bodies such as B.M.C. It is further set out that the construction work is undertaken in such a manner that there is no total blockage of air/light of one of the bathrooms or toilets of the plaintiffs and also touching the bedroom of the plaintiffs as alleged or otherwise or at all. The construction is of 19 floors and was in progress for more than one year. The attempt to explain the delay is, therefore, dishonest and devoid of any merit and bonafides. It is further stated that the building being put up by them is an independent building. The said two buildings are separate as can be ascertained from the photographs produced by the defendant and there is a distinct gap between the walls of the two buildings and as such provisions of Section (7) (i) of the MOFA are not attracted.

It is further contended that Section 7(A) permits the construction of an additional building by the promoter, subject to the sanctioning of plans by the Statutory body like B.M.C., which has been done in the case in hand. It is denied that construction is being put up contrary to the Municipal Rules and Bye-laws. The allegation against Shri. Sandeep Gaiwal are made with view to prejudice the Court. It is, therefore, contended that the Motion deserves to be dismissed and and ought to be dismissed with exemplary costs.

In an additional affidavit filed by the said Shri. Sanjay K. Patel, on 23.11.2001, it is again specifically set out that the building under construction is separate and independent structure. It is further pointed out that sanctioned plan adverted to, forms part of such affidavit.

8. Rejoinder was filed on behalf of the plaintiffs. The plaintiff No. 1 in the said

rejoinder has reiterated in the form of denials the averments made by the defendants. It is pointed out as mentioned in para No. 8 of the plaint, that the plaintiffs were negotiating with the defendants are tried to put an end to the dispute, believing in such efforts and did not take any action till filing of the Suit. It is stated that they found the defendants only talking of settlement but no settlement was arrived at and therefore, the plaintiffs are left with no alternative but to file the present Suit.

Exhibit A to the additional affidavit of Shri. Sanjay K. Patel, according to the affiant is the approved plan of the plaintiffs building. It is a completion plan dated 14.10.1997. The plan is signed by Sanjay K. Patel, the defendant No. 5 as constituted Attorney of P.R. Parikh who is described as the owner. As Exhibit B to the said affidavit, is annexed the plan of the new building under construction. That plan is certified by the Municipal Engineer on 11th July 2001. On 16.5.2001 the Municipal Engineer wrote to the Architect with reference to letter dated 16.5.2001 of the Architect that there was no objection to the construction in terms of the amended plans submitted vide letter dated 16.5.2001. The final approval is by letter dated 23rd December, 2001.

The commencement certificate as earlier issued for the plaintiff's building, the last extension was upto 29.4.95. Then on 8th June 1999, after a gap of four years there is suddenly an extension as per approved plan dated 9.4.99. A perusal of the approved plan of the plaintiff's building dated 14.10.1997 will reveal that Sanjay Patel was involved in construction of the plaintiff's building as also now the new building. On the first building plan he has signed as Constituted Attorney of owners. No approved plan of 8th June, 1999 has been produced. The permission by letter of 19.12.2001 is with reference to I.O.D. of even number dated 4.3.93.

Letter dated 11th July 2001 would show that in respect of proposed building "B" on the same property there is no objection given by the Executive Engineer. This is with reference to I.O.D. dated 4.3.1993. It further requires that D.C. regulation Nos. 45 and 46 shall be complied with. There is again another letter dated 19th December 2001 from the Corporation giving no objection. The document was filed pursuant to the direction from the Court to furnish the approval plan of the new Building and the old Building.

The document dated 14th October, 1997 from the Executive Engineer is also produced. That shows final approved for development of Building "B" on plot No. F-41, F-44, the plaintiffs Building. The other important contention is that the society shall be registered within three months i.e. by 13th January, 1998. Reservation i.e. reserved areas should be handed over before asking for O.C.C. to Building No. 1 and 2. The plan enclosed shows that it is signed by Sanjay Patel as C.A. of P.R. Parikh, the date is 19.6.93. The approved plan is dated 14th Oct. 1997. The recreational area is show as 15%. The Floor Space Index is one and the area to be constructed upon is 0.989. The plan shows building No. 1 has occupied 3560.85 Sq. Meters and Building No. 2 1175.09 Square meter. Thus

consuming 4764.42 Square Meter out of the permissible plan area of 4815 Square Meter. The plan approved on 19th December, 2001 of the building now under construction shows the new building as B-2. That plan was drawn up on May 2001 and the Architect Certificate shows that it was certified by Mumbai Municipal Corporation under No. E B/CHE/4129/AK dated 11th July, 2001. The new building is described as building No. B Wing 2 in old Plot No. F-41 and F-44. The plaintiffs building earlier was "B", is now re-designated as "B-1".

The two approved plans are on recorded. In terms of the approved plans of 14th October 1997 reservation is shown under item 2(C), as under:-

(RG + M.P.) $967.30 + 370.90 = 1338.40$.

The approved plan of 19.12.2001 for item 2(c) shows (RG+MDP) $31.60 + 370.90 = 402.50$. In other words there is a huge difference of 935.9 square meters. The total deduction in 1997 was 2029.40 square meters under item No. 3 and under item 4 as 666.20 Meters. In 2001 the total deduction is $1093.50 = 935.9$ Square Meters under item 2 and 806.45 Square Meter under item No. 4.

9. At the time of hearing of the Appeal, on behalf of the plaintiffs, their learned counsel contends that once the Trial Court came to the conclusion that the provisions of MOFA were applicable and that the new construction was an addition to the plaintiffs' building and as plaintiffs have right to get property transferred in their names, then the developer/owner could not develop considering statutory duty cast under the Act and Rules. Once there is violation of the statutory duty imposed under the act, it would give rise to a cause of action. Therefore, even if there be delay or laches that could not be a ground to refuse injunction as the breaches cannot be condoned. The time for registering the society and property if not provided for in the agreement, then it must be in terms of the Rules framed under the Act. In these circumstances, question of the defendant Nos. 2 to 5 putting up further construction/development would not at all arise. If they have so done it has been done at their own risk and they can claim no equitable rights. As construction is done in violation of law it can not be protected. Reliance is placed on some judgment in support thereto which will be adverted in the course of judgment.

10. On the other hand, on behalf of the defendants their learned counsel has contended that the Trial Court on facts came to conclusion that the plaintiffs had initiated the action belatedly and in these circumstances, has chosen not to grant injunction. Once the Trial Court exercises discretion, this Court should not in appeal interfere with the discretion exercised by the Trial Court. It is contended that violation of building Rules is not the subject matter of the present Appeal, as the Municipal Authorities have also not been joined as a party. The plaintiffs are no entitled to the reliefs as sought for also on that ground. It is also pointed out that the defendants have incurred heavy expenses for constructions and considering this aspect and third party rights that are created, this Court ought also not to interfere with the order of the Trial Court.

11. At the time of hearing some photographs of the building constructed, have been placed on record by the Appellants. From the photographs placed on record, it is clear that the two buildings are touching each other. The said photographs are marked as Exhibit "A" and "A-1" collectively. There was no objection to take the photographs from the Respondents. Even otherwise reference to the photographs has been made by the defendants themselves which has been referred to earlier. Even otherwise the Court could have appointed a Commission to examine that aspect. The case of the respondent Nos. 3 to 5 is that theirs is an independent building.

We may now consider one of Suit agreements for sale which has been entered into between the 1st defendant and one of the plaintiffs and Sanjay C. Patel/ Kalpesh C. Patel. Kalpesh C. Patel is the plaintiff No. 4. The flat bears No. 202 and is located on the 2nd floor. The property is described in the schedule. Under Clause 3, the defendants have agreed to abide and comply with all the requirements imposed by the local authority of handing over the flat. Clause 4 sets out that while developing the said property if the developer has utilized any floor space index of any other land or property by way of floating F.S.I. then the particulars of such floors space index shall be disclosed by the Developer to the Flat Purchaser. The residual F.A.R. (F.S.I) if any, in the said property available but no sanctioned till the registration of the society, and transfer of the said property and building, will be available to the Developer whereas after the said property and the building are transferred to the society the residual F.A.R. (F.S.I.) not sanctioned till then, shall be available to the society. It is further set out that till the time, the society or limited company is formed and registered and land and building is conveyed to the society the Developer will be permitted to have the entire available F.S.I. on the aid property whether sanctioned or not and shall be entitled to utilize the same by making additions alterations or putting up any additional structures as per the plan that may be approved by the local authority so as to consume the entire available F.S.I. in respect of the said property that may be available but not sanctioned ever after registration of the society. Such addition, structures, or floors, shall be the property of the Developer and the Developer will be entitled to dispose of the same in any manner as Developer may deem fit without adversely affecting the Flat of the Flat Purchaser even after transfer of the said property. In Clause 9 it is set out that the developer hereby agrees that they shall, before handing over possession of the Flat to the Flat purchaser and in any event before execution of the conveyance of the said land more particularly described in the first schedule would disclose any material facts necessary for the purpose of conveying clear and marketable title. The possession of the flat was to be given on or before 31st January 1997. In Clause 17, it is set out that The Developer shall within four months of the completion of the building and handing over the possession of all the flats to all the purchasers as aforesaid cause to be transferred to the society or limited company all the right, title and interest in the developer and/or the owners, all part of the said land together with building etc.

From a reading of the above clause, it is clear that the defendant No. 1 developer had agreed to convey in favour of the society of limited company within four months of putting all the purchasers in possession. From the affidavit of Shri. R.M. Parekh, it is set out that the flats have been sold to the plaintiffs in or about 1996-97. The construction of the new building according to the defendants, commenced in the year 2000, though the plan approved under which construction commenced is of December 2001.

On 14th October 1997 occupancy certificate was granted amongst others with several conditions. One of the condition was that the society shall be got registered within 3 months. Alongwith that was annexed plan of the building already constructed. In the agreement the developer had agreed to abide with the conditions imposed by the local authorities. It is in the light of the above, that question arise whether the Trial Court after coming to the conclusion that the construction was covered by the provisions of MOFA Act and secondly that construction was extension of the old building addressed itself to the correct test in rejecting the relief as prayed for.

The contention of the defendant Nos. 3, 4, and 5 is that the construction is new building. The finding of the Trial Court prima facie is that it is an extension of the plaintiffs' building. This is further fortified by the commencement certificate which is the same for both the buildings evidenced by extension granted on 8th June, 1999. Though no relief has been sought for against the Corporation nor are sanctioned plans challenged at this stage, considering the provisions of MOFA Act, the provisions of B.M.C. Act and D.C. Regulations will have to be considered to ascertain the legal rights of the parties.

12. Let me, therefore, firstly refer to some of provisions of the MOFA Act and the Rules. u/s 7 of the Act after the plan as specified of the building has been approved by the local authority and disclosed or furnished to the persons who agrees to take one or more flats, the promoter shall not in respect of the building without previous consent of all persons who have agreed to take flats in said building make alteration or additions in the building

Rule 9 of the Maharashtra Ownership of Flats Rules 1964 reads as under:-

"If no period for conveying the title of the promoter to the organization of the flat purchasers is agreed upon, the promoter shall (subject to his right to dispose of the remaining flats, if any) execute the conveyance within four months from the date on which co-operative society or the company is registered or, as the case may be, the association of flat takers is duly constituted.

The rules therefore, contemplate that when there is no period set out in the agreement for conveyance, the conveyance must be executed within four months from the date on which Co-operative society or Company is registered. The Society in terms of the condition imposed by the local authority had to register the Society within four months from approval of 14th October 1997. The builders/developers/promoter cannot defeat this object by not forming or registering the

Society or association or company and contend that because of the subsequent changes in building regulations or increase in FSI for construction they are not bound by the development plan as already filed with the authorities under the Act because the additional FSI subsequently available. Let us now consider the effect of Section 7A as introduced to the MOFA Act.

Section 7A was introduced for removal of doubts consequent to the substitution of Section 7(i) (ii). The amendment by the Maharashtra Act No. 36/86, sets out that as certain doubts had arisen and to remove the doubts consequent to the amendment being retrospective, it was provided that it is deemed never to apply or to have applied in respect of the construction of any other additional buildings or structures constructed or to be constructed under a scheme or project of development in the lay-out after obtaining the approval of a local authority in accordance with the building rules or building bye-laws or Development Control Rules made under any law for the time being in force. Therefore, the important and relevant aspect is the approved lay-out.

What is relevant therefore, is that there can be construction of additional building or structure constructed or to be constructed by the owner/developer under a scheme or project of development in the lay out after obtaining the approval of local authority. The real question therefore, is, if the building in the lay out plan were constructed and there was no F.S.I. available and the purchasers have been put in possession but Society is not registered or conveyance effected in favour of the society, can it mean the builder because of subsequent events can alter the lay out and construct additional building, in accordance with the Building rules or building Bye-laws or Development Control Rules made under any law for the time being in force. The Court in my opinion is not precluded from examining whether the construction. *prima facie* being put up is as per the development plan as filed and registered u/s 4 of the MOFA Act. If it is the case of the defendant Nos. 3 to 5 that building is an independent building then the developer-defendant No. 3 to 5 must show that the building plans, as approved and sanctioned are in terms of the lay out plan and confirm to the requirements of the building rules and bye-laws when there is an existing building on the plot. This will require leaving open space and as also recreational areas. The Mumbai Municipal Corporation, the licensing authority u/s 302, is also the development authority under the provisions of the Maharashtra Regional Town Planning Act 1966. The lay-out plan would have be approved under the M.R.T.P. Act, Regulation and bye-laws. Therefore, the builder must obtain the permission both under the Development Regulation as also licence under the Mumbai Municipal Corporation Act, 1888.

Factually, on the facts of the case as on record the two buildings are touching each other. The building plan approved for building the 2nd building shows that new construction as the 2nd wing of the building already constructed. The commencement certificate is the same. It is, therefore, a wing of the building already constructed. Let us, therefore, examine whether the building is an

independent building for the purpose of MOFA. The Trial Court has found against the Defendants. For the purpose of constructing a new building adjacent to an old building the provisions of the Regulations, Rules and Bye-laws must be satisfied. The building B-2 was not part of the lay-out plan when building B-1 as now being described by the builder, was constructed. The building plan must be submitted. The building plan must satisfy the requirements of the Regulations 23, 28 and 29. Regulation 28 provides for Setback and Open spaces even where the building are constructed as two wings. Factually, there are no open spaces between the plaintiff's building and the new building of 21 stories as required. Under the provisions if one of the wings does not depend for light and ventilation on the open space between the two wings, the said open space shall be the one required for the higher wing. The so called new wing is approved in December 2001. That is the higher wing. The plaintiffs have pleaded that their right to light and air is effected by the construction of the new building. The 2nd wing was not part of the original lay out plan. There is no open space between the two wings. The open spaces are required in terms of Regulations 28(C). The defendant Nos. 3, 4, and 5 have, prima facie, taken advantage of permission granted for construction of the plaintiffs building, if plan sanctioned by the local authority and approved is seen. However, they have not met the requirements of Regulation 28. Therefore, Section 7A of MOFA cannot be availed by the builder/promoter. If that could not be availed of, there cannot be any question of delay or laches on the part of the plaintiffs in coming to the Court. The approved plan for wing B-2 is of December 2001. The building work commenced in August 2000. The right to open places essential part of the Right to Life. as held by the Apex Court. This Court has explained the same in Down Mangor Valley, Mr. Cruz Dias and Mr. Carmelino Machado, Joint Secretary, Down Mangor Valley Residents Welfare Association, Mangor Hill, Vasco da Gama, Goa Vs. Mormugao Municipal Council, State of Goa, Shri Babu Laxman Rao, Shri Vithal R. Deshmukh, Shri Hirappa Kahndapnur, Shri Makanu Kattimani, Shri Amunsab Kattimani, Shri Makdum Kattimani, Ms. Renuka Rathod, Mrs. Kassimbi Dastagir Shaikh, Shri Babu Makandar, Mrs. Timarva Patrod alias Mrs. Tima Paturtit, Shri Abdul Razak Shaikh and Mrs. Mumtaina Shaikh alias Magdumsab Shaikh, . No doubt the development authorities are not before this Court but the plaintiffs have reserved their right to file Suit on that count. The Court can take notice of that aspect of the matter considering Section 7A of MOFA. In these circumstances, the prima facie material on record shows that the construction is in violation of the Development Regulations. The Planning and Development authorities who are also the licensing authorities cannot grant occupation certificate. The question, therefore, of the defendant Nos. 3 to 5 contending that they have spent large amounts would be of no consequence. A party cannot be entitled to take benefits of its own wrong. They have chosen to put up construction knowing fully well the law in force and by which they are also well bound.

13. The real issue as has been noted earlier is what is the stage up to which the developer/owner can put up additional construction after the building in terms of

the registered plan has been constructed and occupied. In my opinion, once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA Act, have been completed and possession handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the Act he is entitled to take advantage of any additional F.S.I. that may become available because of subsequent events. That would be so at the stage the building is under construction or the building is not completed and/or purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not effected by the revised development plan. Once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the rules framed under MOFA is over, the permission of such purchasers would be required.

In the instant case, the building completion certificate for the plaintiff's building, was issued in the year 1997. The builder/owner Defendant Nos. 1, 3 and 4 had to put up the construction, based upon the permission/license granted. The defendant Nos. 1, 3 and 4 had to construct the building and to convey the title by sale deed in terms of Rule 9. If property had been conveyed, prima facie the remaining FSI or FSI which become subsequently available on the facts of the case, would be to the society to whom the land had to be conveyed. The record shows that the building was approved in December, 2001. It cannot prima facie, be said that defendant Nos. 1, 2, 4 and 5 have any rights under which they are entitled to put up an additional building contrary to Section 7A of the Act.

14. We may now examine the judgments of this Court to find out whether the construction of the provisions would be contrary to the law as interpreted by this Court. The first such judgment is in the case of Neena Sudarshan Wadia (Smt.) Vs. Venus Enterprises, . The judgment is before Section 7A was introduced. The issue therein involved the blanket consent or authority obtained by a promoter at the time of entering into an agreement for sale or at the time of handing over possession and whether that amounted to consent contemplated by Section 7. This Court held that notwithstanding the agreement of sale and non registration thereof nor obtaining blanket consent of the purchasers of the flat at the time of entering into agreement for sale and delivering possession of the flat, cannot deprive the flat owners of invoking the provisions of Section 7 (i) (ii) of the Act as it stood before its amendment in 1986. The promoter/builders/ owners could not, under the cloak of the blanket consent obtained under the proforma agreement for sale, carry out the work of additional structures and thus set at naught the provisions of Section 7(1) (ii). The Court also held expression

"additional" means only extension either vertically or horizontally to an existing structure.

We may now consider the judgment in *The Mohatta Nagar Co-operative Hsg. Soc. Ltd. Vs. Vishram Khimji and Sons and Others*, . On the facts of that case the land totally admeasured 2351 sq. yds. The builders between 1962 to 1966 sold certain flats. Out of admitted 21 purchasers of flats, the agreement in respect of 14, provided for construction of one building subject to construction of upper floor if permitted by Municipal Corporation. Six flat owners entered into an agreement which restricted the plot of the building to 1104 Sq. yds. The original plot with approval of the authorities had been sub-divided in the year 1967. The unconstructed plot admeasure 1,250 sq. yds F.S.I. for the plot of 1,250 sq. yds. had not been exhausted. Possession of the plot was held to be with the owners/developers. The suit was filed in the year 1970. Amendment to Section 7 as also insertion as Section 7A was in 1986. Section 7A was introduced to clarify that the amendment to Section 7(i) (ii) was deemed never to apply in respect of any additional building or structure constructed or to be constructed under a scheme or project of development in the lay out after obtaining the approval of a local authority in accordance with the building rules or building bye-laws or Development Control Rules made under any law for the time being in force. On those set of facts and considering the Statement of Objects and Reasons the learned Judge observed the intention behind the amendment becomes apparent that it was to remove the impediment of new building and set out as under "if total lay out permits constructing of more building in accordance with the building rules or building bye-laws or the Development Control Rules, where such proposal for additional construction was already approved or was submitted in future to the appropriate authority" Therefore the learned judge held that it would include not only proposals which are already approved but also proposals which could be sent for approval of the local authority. On the facts of that case consistent with the project of development of the suit plot, the right of the defendants was upheld. It may be noted that the Planning authority had approved the Sub-division of the plot, before the amendment. Therefore a building with necessary permission could be constructed in the said sub-division plot. If this aspects are considered the correct ratio of the judgment can be really understood.

The law may be explained thus. An owner of the land or developer considering the provisions of the Maharashtra Regional and Town Planning Act, 1966 and development regulations framed thereunder, if a scheme or lay out plan has been approved, whether the building is constructed or not then the owner developer inspite of MOFA can carry out development of such structure or building. It may be also possible to hold that with a development permission under Development regulations it obtained, the owner/developer can develop, but as long as the permission was obtained and could be legally obtained. If under the permission granted for construction the Society had to be registered within a time frame and the land had to convey to the society under the agreement within a time frame

and if not, within the time set out under Rule 9, after that time frame the owner/developer, is legally precluded from putting up of further construction without consent. At any rate if building is to be put up as a wing of an existing building considering Section 7, it cannot be constructed without permission of the flat purchasers. There can, therefore, be no question of further development by the owner or developer. This is considered in the judgment in Kalpita Enclave Co-Op. Housing Society Ltd. and Ors. v. M/s. Kiran Builders Pvt. Ltd., and Ors. 1986 Mh.L.J. 110, as proposition seven. In Vrindavan (Borivali) Co-Operative Housing Society Ltd. v. Karmarkar Brothers and Ors. 1982 Mh.L.J. 607, a learned judge noted the statutory duty cast on the owner/developer and observed after considering the various sections of MOFA as under ".....All these liabilities read with further obligation u/s 10, 11 and 12 go to show that the promoter is under a statutory obligations who should complete the and pass a conveyance to the organization named thereunder."

15. The attention of this Court was then invited to the judgment of this Court in Appeal No. 21 of 1988 in Notice of Motion No. 2488 of 1985 in Suit No. 3226 of 1985 in Kalpita Enclave Co-Op. Housing, Society. Ltd. and Ors. v. M/s. Kiran Builders Pvt. Ltd., wherein a learned single Judge has observed that it would not be proper for any Court to consider the case of violation of Development Control Rules made out in the Affidavit-in-rejoinder or a case based on lack of bonafides in the Municipality or its officers or lack of legality, validity or property under any arrangement with the Corporation or the consequential effect without having before it, the concerned authorities, viz., the officers and/or the Corporation. It is not possible to accept such a broad proposition. There is not absolute requirement that authorities who have sanctioned plans must be necessary parties to the proceedings. That would depend on the Act and Rules and the facts of the case. To come to the conclusions that permission has been taken contrary to the Rules and Regulations, what will have to be considered are the issues that the Court has to answer to consider the reliefs. In a case where development permission or license is challenged, it may be necessary to have those authorities before the Court. In my opinion it is mere expression of a view by the learned Judge in interlocutory proceedings and cannot be construed as the ratio decidendi of that judgment, considering the various aspects required to be satisfied to cull out the ratio decidendi of a judgment.

16. This Court in another judgment in the case of Bombay Environmental Action Group v. Bombay Municipal Corporation in Writ Petition No. 1473 of 1984 decided on 19.10.1994 when it was argued on the part of the developer that financial loss would be caused if they were restricted from building, the Division Bench rejected the contentions in the following words:-

"We are not at all impressed by the claim made about financial loss. It has repeatedly come to our notice that in the city of Bombay builders by joining hands with the officer of the Corporation openly flout every conceivable rule, including Development Control Rules. The builder are under the impression that

once the shell of the building is illegally constructed then the Court can be persuaded to take a sympathetic view and permit the construction even though in total breach of every legal provision. The Development Control Rules were enacted by the State Government as it was realized that unregulated construction is put up by the builders at every nook and corner of the city leading to serious problems and causing serious hardship in providing civic amenities to the citizens. It is not a secret that the land available in the island city of Bombay is very limited and the prices are shooting up to an unimaginable level. Taking advantage of the situation the Builder lobby is exploiting need of the people by setting up illegal construction and it is unfortunate then indulging in these illegal activities assistance is secured from some of the officers of the Corporation. It is only because of the continuous efforts of the groups like the petitioners that illegalities are brought to the attention of the Court. Once it is for that the grant of sanction to the construction of the building Arihant was in total breach of law, then we would be failing in our duty if the builders are permitted to regularize the illegalities by offering to make payment. The time has come when everyone should realize that rule of law is not a purchasable commodity and illegalities will not be tolerated merely because someone is willing to offer payment in lieu of violating the law in our judgment as the shell of the building Arihant has been set up in violation of the Development Control Rules, it is necessary to demolish the same."

In the case of *M/s. West Coast builders Pvt. Ltd. v. Collector of Bombay and Ors.* in Appeal No. 92 of 1994 in Writ Petition No. 391 of 1994 decided on 8th February, 1994, this Court observed what is reiterated in *Bombay Environmental Action Group (Supra)*. The order for demolition was upheld.

17. Considering the above, to my mind, *prima facie* the construction is in violation of the provisions of the Development Control Regulations and in violation of the MOFA Act. The learned Trial Court found in favour of the Appellants on merits. However, came to the conclusion that because of delay and the financial loss that would be incurred refused injunction. The Trial Court did not address itself to the correct test on that count. The Trial Court was wrong in rejecting the prayer sought for by the plaintiff on the ground that there was delay. It has come on record, firstly that Sanjay Patel acted as Power of Attorney for the owners on behalf of defendant No. 1, when the plaintiffs building was constructed. This was not disclosed to the Court. Secondly the building permission for construction of the new building was finally granted in December 2001, at the highest in July 2001. *Prima facie*, the building commenced without an approved plan by the local authority. The Suit was commenced before that. The Plaintiff/ had explained that there were negotiations. Lastly, once the Court came to the conclusion that the building was an extension of the plaintiffs, building, rejecting the contentions of the defendants that it was an independent building, Section 7 of MOFA was attracted. A strong *prima facie* case had been made out. The delay as such would not disentitle the Plaintiff's/Appellants for the reliefs which they sought. The Court must in all such matters enforce the law

so that builders/developers are restrained from such illegal constructions and innocent purchasers are not put to hardship and loss and purchasers of flats are not denied their legal and statutory rights.

18. In view of the above findings the said impugned order dated 19.12.2001 is set aside. The relief as sought for in Notice of Motion No. 2932 of 201 in S.C. Suit No. 375/2001 is made absolute in terms of prayer Clause (a) and (b). Considering the facts involved, the Trial Court is directed to expedite the suit.

19. The learned counsel for the defendant Nos. 3 to 5 prays that the order be stayed. Considering the building permission placed on record before the Court is dated 19.12.2001, this would not be a fit case to grant stay. Application for stay is rejected.