

(1993) 09 BOM CK 0045
In the Bombay High Court
Case No : First Appeal No. 1018 of 1989

The Mohatta Nagar Co-operative Hsg. Soc. Ltd.	APPELLANT
Vs	
Vishram Khimji and Sons and Others	RESPONDENT

Date of Decision : 17-09-1993

Acts Referred:

Bombay Court Fees Act, 1959 — Section 6
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Evidence Act, 1872 — Section 115
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 10, 7, 7A
Transfer of Property Act, 1882 — Section 53A

Citation : (1994) 1 BomCR 444 : (1994) 96 BOMLR 906

Hon'ble Judges : B.V. Chavan, J

Bench : Single Bench

Advocate : M.N. Vepari, for the Appellant; G.D. Dave, instructed by K.A. Sampat, for the respondent No. 1, for the Respondent

Judgement

B.V. Chavan, J.—Appellant-Original defendant No. 26, by name "The Mohatta Nagar Co-operative Housing Society Ltd.", Vikroli, Bombay-79, has by this appeal challenged the judgment and decree passed by the Judge, City Civil Court, Bombay on 29th April, 1988 in Suit No. 3204 of 1970, filed by respondent No. 1 M/s. Vishram Khimji & Sons.

2. The undisputed facts giving rise to the present appeal, may be stated thus :Plaintiff is a partnership firm registered under the Indian Partnership Act. In 1962, in pursuance of an Agreement of Sale, plaintiffs entered into possession of a plot of land, bearing Survey No. 27/A, Hissa No. 1(pt) and S.No. 90, H.No. 23 (pt), totally admeasuring 2,351 square yards, at Vikroli, Greater Bombay, for the purpose of developing the same by constructing flats and selling such flats to prospective buyers on ownership basis. At a later stage, on 22nd December, 1963, plaintiffs by a Deed of Conveyance, purchased the said plot from the owner Smt. Sushila. Between 1962 and 1966, certain flats were sold. Defendant

Nos. 1 to 21, who had originally joined as parties, were such purchasers of flats constructed by plaintiffs on the said land. Original defendant Nos. 22 to 25, according to plaintiffs, were in wrongful possession of the flats in their possession in the said building.

According to plaintiffs, after purchasing said plot of land, plaintiffs submitted to the Bombay Municipal Corporation, Greater Bombay, a plan for construction of one Building, consisting of ground and three upper storeys on the eastern side of the said plot and thereafter, another plan of a building which was proposed to be constructed in the rear portion i.e. to the west of the said plot consisting of ground and two upper floors. It was further case of the plaintiffs, that in the meantime, they made a proposal for sub-division of the said plot into two plots, one of 1,140 square yards and other of 1,250 square yards approximately. Said proposal were granted in 1967. So far as eastern portion of the said plot is concerned, according to plaintiffs, construction of the building of ground and three upper storeys, was complete, and those flats were sold under several Agreements executed between plaintiffs on one hand and defendant Nos. 1 to 21, severally and individually, on the other hand. According to plaintiffs, some of the defendants, have signed the Agreements when the said plot was undivided while the remaining defendants have signed such Agreements, after the said plot was sub-divided. However, it is contention of plaintiffs that whatever may be the variations in the form of two Agreements, plaintiffs' right to construct on the entire plot to the full extent including raising further storeys was implicitly reserved. According to plaintiffs, under the Agreement entered into with the flat owners, it is the right and duty of the plaintiffs to promote and form a co-operative society or all Ltd. Company of the acquirers of the flats and after the plaintiffs, complete the entire construction, on the said plot, and all the flats have been sold and consideration recovered, that such a society or limited society was to be formed. Plaintiff has alleged that defendants had no right to form a co-operative society by themselves as they had done, so as to in any manner, prejudice the rights of other flat holders coming to occupy flats in other building proposed to be constructed by the plaintiff on the rear building. Therefore, it is contention of plaintiff that defendant Nos. 1 to 25, have wrongfully formed the society defendant No. 26, without reference and without concurrence of the plaintiffs. It is alleged by the plaintiffs that before filing of the suit, defendants had unauthorisedly started excavations to the rear of the building which, they had no right to do. According to plaintiffs, defendants have no right to the use of any part of the ground to the rear of the building for any purpose whatsoever, and the ground of the front building, save and except for ingress and egress, to and from, said building, in which they reside. According to plaintiffs, they had not handed over possession of the said building or any portion of the plot of land to the defendants or the said society, nor the plaintiffs had executed any Conveyance in favour of any society or corporate body nor they have become liable to do so on the facts stated earlier. It is in these circumstances, plaintiffs filed a suit in April, 1970, claiming relief :

(a) for a permanent injunction against the defendants and each of them restraining the defendants, their servants and agents from interfering with the possession of the plaintiffs in respect of the said building known as "Mohatta Nagar" and/or of the said plot bearing Survey No. 27-A Hissa No. 1(Plot) and Survey No. 90, Hissa No. 23 (part) at Vikroli, Greater Bombay and more particularly, described in Exhibit A hereto, save and except by due process of law.

(b) for a permanent injunction against the defendants and each of them restraining the defendants, their servants and agents from carrying out any digging or construction work or any other work of any nature whatsoever and from entering upon or remaining upon the said plot of land referred to in prayer (a) above ; or any part thereof save and except the purpose of effecting ingress and egress to and from the said building known as "Mohatta Nagar".

(c) for a permanent injunction against the defendants and each of them restraining the defendants, their servants and agents from preventing or obstructing the plaintiffs, their servants and agents in carrying out further construction and doing all acts incidental thereto on the said plot of land referred to in prayer (a) above, and for interim and ad-interim orders in terms of prayers (a), (b) and (c) above.

3. Defendants, by their Written Statement, contended inter-alia that the suit was totally misconceived and not maintainable in view of the provisions of Maharashtra Ownership Flats Act, 1963. The suit was bad, for misjoinder of causes of action. City Civil Court had no jurisdiction to try and entertain such a suit. Defendants, were in settled possession of the suit plot and as such, suit was liable to be dismissed. It was contended that defendants, were in possession for the last more than six years, before filing of the suit and plaintiffs were never in possession, either juridical possession or physical possession of the suit plot. According to defendants, plaintiffs in part performance of the contract, have put the defendants in possession of the entire plot, and as such, they have been in continuous and uninterrupted enjoyment of the said plot since then. An objection was also raised on the ground that the suit was beyond the pecuniary jurisdiction of the Bombay City Civil Court. They denied that defendants Nos. 22 to 26 were in wrongful possession of the flats in their possession or that defendants have wrongfully promoted society-defendant No. 26. According to defendants, plaintiffs have made a representation that flats were available on ownership basis by means of advertisements, in a building to be constructed in the suit plot and that suit plot would be conveyed to the society that will be formed by the flat owners. According to defendants, on the basis of the said representations, they purchased flats in the said building, under several agreements executed by different defendants. According to defendants, in pursuance of different agreements executed by them, they were put in possession of the building as well as suit plot and as such, were in enjoyment of the same in part performance of their part of the agreement, as from 1964 or thereabout. Defendants contended that plaintiffs however, did not complete the building in its entirety,

deliberately and intentionally nor, bothered to get electric supply to the building or water connection as promised by them. Therefore, a criminal complaint was filed against the plaintiffs u/s 420 and 114 of the Indian Penal Code. Said complaint was compounded between the parties on certain terms and conditions. According to defendants, plaintiffs tried to dispose of part of the land, by concealing the said fact from them. Defendants therefore, informed the purchaser that they were the owner of the entire suit plot admeasuring 2,350 sq.yards and plaintiffs were not entitled to transfer to anyone else. Defendants contended that they had put barbed wire fencing and had also caused work of levelling of the adjoining plot to enable flat owners to make proper use of the same. According to them, they have been using open space on the said plot as a badminton Court. It is contention of defendants that since the original agreement between the plaintiffs and defendants was to construct a single building on the suit plot and hand over possession of the building, as well as plot, plaintiffs had no right in or over the remaining part of the open plot. They have denied that under the Agreements executed by them, any right to construct is implicitly reserved. Defendants have contended that plaintiffs have not deliberately and intentionally carried out their part of the undertaking given to the Hon'ble Presidency Magistrate Court, Mulund, Bombay in a criminal case by not getting the society registered within a reasonable time, although defendants had carried out their part of the undertaking and agreements. According to defendants, it was in these circumstances, they got the society registered. It is further contention of the defendants, that in equity, they are owners of the entire plot and are in possession in part performance of the contract in their favour. It is in these circumstances, they have prayed that suit of the plaintiffs be dismissed.

4. On these pleadings, the learned trial Judge framed the issues and the parties went to trial. The learned trial Judge held that he had jurisdiction to try the suit both pecuniary as well as in view of the provisions of Maharashtra Ownership Flats, Act, 1963. He further held that plaintiffs had a right for further construction on the suit plot of land. However, he held against the plaintiffs on the issue of possession. According to him, plaintiffs had failed to prove they were in possession of the building and suit plot of land. He held in favour of the defendants on the point that plaintiffs had agreed to convey the entire plot admeasuring 2,350 square yards with one building consisting of ground floor and three upper floors to defendant No. 26 society. Consistent with these findings, the learned trial Judge passed an equitable decree of injunction against defendants restraining them from preventing or obstructing the plaintiffs from carrying out construction of additional building or structures to be constructed by the plaintiffs, under the project of development of the suit land, subject to condition:

(1) that said plot of land, shall be considered as one unit and defendant No. 26 society, shall be considered to be owner and its sub-division was not permissible, and the plaintiffs will not be entitled to sub-divide the said plot;

(2) Plaintiffs will under take construction of additional buildings or structures only after obtaining approval of the Bombay Municipal Corporation and in accordance with the Building Rules or Building Bye-Laws or Development Control Rules made under any law or development for the time being in force, for which, due notice would be given to defendant No. 26 society;

(3) Plaintiffs will not be entitled to transfer or convey their right, to construct additional buildings or structures on the plot of land in any manner whatsoever in favour of 3rd person;

(4) Plaintiffs would be entitled to sell the entire structures, constructed by them, in the additional building to any person or persons of their choice but purchaser will be under an obligation to become member of the society-defendant No. 26;

(5) Plaintiffs will convey their right, title and interest in the plot of land and the building, within a reasonable time, from the completion of the project or as prescribed and provided by law in this regard, in favour of defendant No. 26-society ;

(6) The project of development to be completed by the plaintiff, within a period of three years from the date of judgment ;

(7) If the plaintiffs are unable to obtain approval or sanction from competent authority for construction of any other building or structure, and/or said construction is not permissible as per the rules, plaintiff will have no right to undertake construction on the plot of land subject to this, rest of the claims made by the plaintiff, were dismissed

5. It is this decree that is passed against defendants that is challenged by appellant-Original defendant No. 26-Society. It may be mentioned that originally, respondent Nos. 2 to 26, purchasers of different flats were joined to this appeal but, later on their names have been deleted.

6. The main question that falls for determination in the present appeal, is whether respondent-Original plaintiff, have a right for further construction on the suit plot of land, which, the learned trial Judge, has held while answering Issue No. 4 and passed a decree, subject to certain conditions which are a part of the operative order. Shri M.N. Vepari, learned Counsel appearing on behalf of the appellants, invited my attention to the fact that respondents had initially come into possession of the whole of the plot admeasuring 2,351 square yards in the year 1962 under Agreement of Sale and while they were in possession of this land, under such Agreement, first set of Agreement of the type of Exhibit 1 came to be exhibited in the year 1962. He pointed out that no doubt, this Agreement Exhibit 1, does make mention about the construction of two buildings, but, he also pointed out that at a subsequent stage, idea of constructing two buildings, appears to have been given up by the respondents, which is clear from further Agreement Exhibit C dated 17th July, 1963, as well as Exhibit R, dated 28th February, 1966, which only speak about construction of one building, with ground

+ three upper floors and additional construction if permitted by the Municipal Corporation of Greater Bombay. He pointed out that respondents acquired full title to the suit plot on 18th December, 1963 but, there was nothing produced on record by the respondent to show that at any time, between 1963, and filing of the suit, in the year 1970, they had got approved construction plan for a second building, on the western portion of the suit plot. He pointed out that no doubt in the third set of Agreement, like Exhibit R, executed in 1966 and onwards, the respondents did mention that building to be constructed was on a plot of land admeasuring 1,104 square yards only and thereby, indicating that remaining area of 1,250 square yards did not form part of the Agreement. Shri Vepari pointed out that since it was realised by the respondents that in the year 1963 or so, the second Building could not be constructed, they tried to sell western portion of the plot admeasuring 1,250 square yards on two occasions by private negotiations, but, on account of the opposition of the flat purchasers, said attempt could not succeed. He further, pointed that in the year 1964, since the respondents did not form any co-operative society, nor conveyed title to the suit plot in favour of such a society, one of the flat purchasers filed a criminal complaint, which ultimately, came to be compromised by a compromise purshis Exhibit 3 dated 18th August, 1965 under which, respondents gave an undertaking to form a co-operative society of the flat owners, within a reasonable time. Shri Vepari pointed out that inspite of the solemn undertaking respondents got the suit plot sub-divided with the permission of the Bombay Municipal Corporation in the year 1967 or so, and tried to dispose of the western portion admeasuring 1,250 square yards. According to Shri Vepari, all this evidence clearly indicates that between 1963 and 1970, when the suit came to filed, there was no evidence on the part of the respondents to indicate that they had infact submitted any proposal for construction of the second Building and on the other hand, their very conduct namely trying to dispose of the western portion of 1,250 square yards initially, without sub-dividing and at a later stage by sub-dividing the same, is an indication that they never intended to construct second building on the western portion of the suit plot. Shri Vepari them, invited my attention to section 7 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (Hereafter the Act) and pointed out that after this Act came into force in Greater Bombay, on 10th February, 1964, between that date and the filing of the suit in the year 1970, Respondents had no right to make any additional construction without taking prior consents of the flat owners, when, they had failed to produce any plans in respect of the second Building, as approved by the local authorities. His contention, therefore, was that on the date when, the suit was filed in April, 1970, respondents did not have a right to make additional construction of second Building and consequently, there was no justification for passing any decree in their favour, holding that they had a right of further construction on the suit plot of land.

7. Now, so far as factual position is concerned, there is no doubt that anything

has been produced on record on behalf of respondent-plaintiffs to show that between 1963 and 1970, they had got any plan for construction of second building approved from the appropriate authority, or that they had submitted any proposal for such additional construction. Section 7 of the said Act, as it then stood, on the date of suit, reads thus :

7. (1) After the plans, and specifications of the building, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make ---

(i) any alterations, in the structures described therein in respect of the flat or flats which are agreed to be taken, without the previous consent of that person; or

(ii) make any other alternations in the structure, of the building or construct any additional structures, without the previous consent of all the persons who have agreed to take the flats.

It is clear from this provision that a promoter of a flat of buildings, could not make any additional construction or construct any additional structures, without previous consent of all the persons, who had agreed to take flats in such a buildings, once plans and specifications of the buildings, as approved by the local authority, were disclosed or furnished to a flat taker, of one or more flats. There was, clearly, an absolute prohibition on the promoter either to make any alterations in the structures of the building or flats, described to the plan or to make any alterations in the structure of the building, or construct any additional structures without previous consent of all the persons, who had agreed to take the flats. If legal position had continued, as per sub-section (1) of section 7 of the Act quoted above, on the date, when the present suit came to be decided in the year 1988, then, contention of Shri Vepari, on behalf of the appellants-Original defendants, could no doubt, have been accepted by the trial Court.

8. However, during the pendency of the suit, in the year 1986, section 7 of the said Act, came to be amended and for the purpose of removal of doubt, additional section 7-A also came to be added by Maharashtra Act 36 of 1986. By this amendment, from section 7(1), (ii), words:

"or construct any additional structures"

as they stood prior to the amendment, came to be totally deleted, with consequential amendments in sub-section (ii) of section 7, and this amendment by section 7-A, was declared as having been retrospectively substituted and it was deemed to be effective as if the amended clause as substituted by the amendment, had been in force, at all material times. It was further declared in section 7-A, that :

"expression, "or construct any additional structures" in Clause (ii) of sub-section (1) of section 7, as it existed, before the commencement of the Amendment Act, shall notwithstanding anything contained in this Act, or in any Agreement, or in

any judgment, decree or order of any Court, be 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 layout 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."

9. It appears that when the suit came up for hearing, sometime in the year 1988, and was decided on 29th April, 1988, parties proceeded to address the learned trial Judge on the basis of the provisions of section 7 and section 7-A of the said Act, as amended by the Amendment Act of 1986, and after taking into consideration, these amended provisions, the learned trial Judge, came to the conclusion that after the Amendment of the said Act by Maharashtra Act 36 of 1986, right of the plaintiffs to construct additional building or structures, is protected and this right, which, section 7-A has given to the promoter, is not only in respect of past constructions, but, also enables the promoter to construct in future, under the scheme or project or development in the layout, with the only restriction that he can do so, after obtaining approval of a local authority, in accordance with the Building Rules or Building Bye-laws. The learned trial Judge held that if the plaintiffs are able to secure sanction for additional building which, they proposed to construct on the remaining open plot, they are entitled to do say under the law and consistent with these findings, he passed a decree in favour of plaintiffs as stated earlier.

10. Now, Shri Vepari, learned Counsel appearing for the appellants, objected to this part of the finding as well as decree passed on principally two grounds :

According to Shri Vepari, section 7-A, no doubt, after the amendment, clearly provided that expression "or construct any additional structures" as it existed prior to amendment in section 7(1)(ii), did not exist and therefore, question of taking prior consent of the flat owners, did not arise, after the amendment in respect of any construction of additional structures. However, according to Shri Vepari, if the respondent-plaintiffs, wanted to take benefit of this amendment, in the first instance, they should have amended the plaint, and by appropriate amendment, raised a specific issue involving determination of fresh rights if any, sought by the amendment, by section 7(1)(ii) read with section 7-A of the said Act. He, therefore, contended that the learned trial Judge should not have proceeded to consider the amended provision particularly, in respect of suit filed in April, 1970, when there was no such amendment. In any case, by way of alternative argument, Shri Vepari pointed out that even assuming that additional construction was permitted by section 7(1)(ii) by the amendment Act, yet, this right could come into existence only in respect of construction or an additional structure, which was already a part and parcel of an approved plan, by a local authority concerned. He invited my attention to the opening words of sub-section (1) of section 7, which are to the effect that :

"After the plans and specifications, of the building, as approved by the local

authority, as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make certain changes."and urged that these words, clearly indicate that right to make any construction of additional structures could come into existence only on the passing of a plan by the approved authorities. Shri Vepari pointed out that in the present case, apart from the fact that prior to the filing of the suit, there was no such approved plan, for the construction of second building, on the western portion of the said plot, even after the amendment came into force in the year 1986, during the pendency of the suit, there is nothing to show that respondents made any attempt to submit a plan for approval of the appropriate authority, for construction of second building, and therefore, according to Shri Vepari, unless and until, such a plan was approved, the respondent-plaintiffs do not get any right, to make any additional construction even as per the amended provision of section 7(1)(ii) read with section 7-A, of the said Act. Shri Vepari also contended that even assuming that such a right existed, having regard to the conduct of the respondents, it would be unjust and inequitable, to give a right to construct the additional building, particularly, if regard be had to their conduct amounting to breach of statutory and contractual obligations as well as having regard to the right of conveyance, which is in favour of appellant, on the formation of the society in the year 1970, with certain way of living, being carried on by the existing members of the appellant-Society. He pointed out in this context that u/s 11, read with Rule 9 of the said Act, it was incumbent upon the respondents to form a society, as soon as flats were purchased by sufficient number of persons which will enable the respondents, to form a society, but, respondents failed to discharge this liability. He pointed out that not only that, but, when one of the flat owner approached the Court of the Magistrate, by filing complaint for breach of statutory responsibility, the respondents although gave a solemn undertaking to the Magistrate that they will register the society within a reasonable time, failed to carry out said responsibility and undertaking, even thereafter, from 1965 up to 1970, when flat owners themselves got registered the appellant-Society. He, therefore contended that having regard to this conduct of the respondents and the further attempts on their part to dispose of portion of the plot, even after compromise before the Magistrate, clearly disentitles them, for the equitable relief of injunction. He also pointed out from the evidence of P.W. 1 Devji Vishram Patel, as well as P.W. 2 Ramchandra Krishnaji Deole, examined on behalf of the respondents, that they have deliberately suppressed evidence in respect of suit plot, under the pretext of loss of relevant papers.

11. On the other hand, Shri Dave learned Counsel appearing on behalf of the respondents, urged that no doubt, respondents did not amend their plaint, so as to make it consistent on coming into force of amended provision of section 7(1)(ii) and section 7-A, of the said Act, but, according to him, both parties proceeded before the learned trial Judge on the footing that parties are governed by the said amendment, and at on stage, any objection as such, was taken on the ground that the plaint was not amended by the plaintiffs, consistent with the

amended rule. He, therefore, submitted that now, it was too late in the day to take any objection on the ground that there was no pleading in the plaint, so as to take into consideration the amended provisions of the said Act. So far as other part of argument of Shri Vepari is concerned, Shri Dave, pointed out that prior to 1986, nobody was aware that such an amendment was going to come into existence, and therefore, the question of having any approved plan for additional construction, or submitting a proposal for such additional construction, could not arise. He pointed out that even, otherwise, so far as facts of present case are concerned, it is clearly brought out in the evidence of witnesses No. 1 and 2, that his original intention was to construct one building and thereafter, to submit plans for the construction of second building, which could not materialise, because, of the disputes that erupted between the parties, right from the year 1964 onwards. He pointed out that since construction of one building, on the whole plot of land, was not possible, plaintiffs tried to dispose of the unutilised plot of land, whose F.S.I. was intact but, such attempts proved fruitless on account of the opposition of the flat owners, who had purchased the flats, in the existing building, standing on the eastern portion. He pointed out that thereafter, also, although plaintiffs tried to get the plot sub-divided according the regular permission of the Municipal Corporation, still they could not sell the land, on account of the opposition of the flat purchasers after which, litigation started in the year 1970, when by Court's order, plaintiffs were restrained from making any change, in status quo in respect of the western open plot. He, therefore, contended that there was no question in and after 1970, till the suit was disposed of in the year 1988, for the plaintiffs to apply for making additional construction on the remaining plot. He pointed out that after the suit was decided in their favour, plaintiff did apply to the Municipal Corporation and got appropriate permission for construction of additional building, but, on account of the restrain order passed in the present appeal, that permission had lapsed. In this context, he therefore, urged that provisions of section 7-A, will have to be so construed that any additional construction, which a promoter had a right to make, notwithstanding any agreement between the parties and it applied in respect of any additional building or structures, already constructed or to be constructed in future, under a scheme or project of development in the layout, after obtaining the approval of the local authority, concerned. Shri Dave, therefore, submitted that the only obligation cast on the promoter was to submit a scheme of project of development, to the appropriate local authority, in accordance with the Building Rules or Building Bye-laws or Development Control Rules and after obtaining necessary sanction, the promoter was entitled to construct such additional structure, as has been permitted by the decree passed by the trial Court. He, therefore, contended that there was no ground for disturbing that part of the decree, of the trial Court, by which, plaintiffs have been given a right to make any additional construction as permitted by section 7(1)(ii) read with section 7-A of the said Act, subject to certain conditions and restrictions, as contained in the operative part of the order.

12. Now, if regard be had to the Statement of Object and the Reasons for substitution of section 7(1)(ii) by the Amendment Act, No. 36 of 1986, it is clear that the object was to make legal position clear that even prior to amendment of 1986, it was never intended that original provision of section 7(1)(ii) of the said Act, operate even in respect of construction of additional buildings, according to a scheme of project of development of total layout. It is also made clear that on account of the interpretation of section 7(1)(ii) of the said Act, in *Kalpita Enclave Co-operative Housing Society Ltd. and Others Vs. Kiran Builders Pvt. Ltd.*, that contravention contemplated in section 7(i) and 7(ii) which includes alterations in the structures or construction of additional structures, is not confined to the constructions of the buildings only and this contravention may extend to the construction of any additional structure, not in the original plans and specifications as approved by the local authority, since the legislature never intended that provisions of section 7(i) and 7(ii) should, operate in respect of the construction of additional buildings, the relevant provision came to be suitably amended and the main object of this amendment was that if the total layout, permits construction of more buildings, in accordance with the Building Rules or Building Bye-laws, or Development Control Rules, made under any law for the time being in force, there should be no impediment in construction of additional buildings. The only restriction that came to be put by the amendment, was while approving any proposals, for construction of additional buildings, in the layout, the local authority will no doubt see to it that requirements of open spaces etc. are provided under the Building Rules, or Building Bye-laws or Development Control Rules.

13. If, it was permissible, only to look at the Statement of Object and Reasons for carrying out amendment of section 7(1)(ii) and section 7-A, then, there should be no hesitation at all in coming to the conclusion that the intention behind the amendment was to remove the impediment in construction of the additional buildings, if total layout permits construction of more buildings 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. But, now it is well-established that Statement of Object and Reasons, can be looked at only to a limited extent as an aid to the construction of the particular words in statute and ultimately, intention of the legislature, is to be gathered from the express words used in the piece of legislation or by necessary implication if words used so permit. Now, if this rule of construction was to be applied to the amended provisions of section 7(1)(ii) read with section 7-A of the said Act, no doubt, so far as section 7 is concerned, sub-section (1) thereof, opens with the words :

"7(1) : After the plans and specifications of the building, as approved by the local authority, as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make---

(i) any alterations in the structures etc--

(ii) any alterations or additions in the structure, of the building, or construct any additional structures without the previous consent of all the persons who have agreed to take the flats in such building.

Now, by section 7-A, the expression "or construct any additional structures" has been totally taken of, from section 7(1)(ii), as it existed prior to amendment with retrospective effect notwithstanding any agreement, judgment, decree or order of any Court, and it is further declared that such amendment and its expression shall be 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 the scheme or project of development in the layout, after obtaining approval of 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. These words, used in section 7-A make it amply clear that construction of any other additional building or structures, whether made in the past or to be made in future, after coming into force of the amended Act, is permissible so long as it is under a scheme or project of development in the layout, and subject to the relevant rules and bye-law. It does not mean that before a promoter could take advantage of this provision of section 7-A, it must necessarily be that additional buildings or structures, must be a part of the plan already approved by the local authority. If such additional building or structure, is already constructed, after coming into force of the amended provisions, it would be legal, provided it is under the scheme or project of development in the layout, and with the approval of local authority, in accordance with the Building Rules or Building Bye-laws. In my view, therefore, words "additional buildings or structures constructed or to be constructed" would include proposals which, are not already approved but, which could be sent for approval of the necessary local authority and on obtaining such approval, it would be perfectly legal for the promotor to make such additional construction of buildings or structures, though, it was not permissible prior to the amendment as per section 7(1)(ii) of the said Act. In my view, therefore, the amended provisions, in express terms, translate the Statement of Object and Reasons, for bringing this amendment namely, to remove the impediment, in construction of additional buildings, already constructed or to be constructed in future, provided proposals in respect thereof, are approved by the concerned local authority, and are in accordance with the Building Rules or Building Bye-laws or Development Control Rules. Therefore, so far as present case is concerned, although admittedly, from the date of suit, till the date the suit was decided, on 29th April, 1988, there was neither any approved proposal nor proposal submitted for approval of the concerned local authority, yet, by virtue of the amended provisions of section 7(1)(ii) read with section 7-A of the said Act, respondent-plaintiffs had a right to carry out additional structure/construction by submitting necessary plans for approval of the local authority, and consistent with the project of development of the suit plot, such development being permissible in accordance with the provisions relating to development in Greater Bombay. In my view therefore, the learned

trial Judge was right in answering Issue No. 4 in favour of respondent-plaintiffs, that they had a right for further construction on the suit plot of land.

14. In fact, answer to this point, practically disposes of the present appeal but, I would like to mention particularly, certain other points urged at the bar and record my findings, with reasons therefor.

15. Shri Vepari, learned Counsel for appellants, urged that in this case, respondents, clearly made representations to the flat purchasers, occupying the constructed building that there will be only one building and acting on this representation, the flat purchasers have entered into various agreements and occupied the flats and in such circumstances, the respondents are estopped from constructing the second building in the suit plot on account of promissory estoppel. No doubt, out of the admitted 21 purchasers, who purchased their flats from the respondents, 14 of them, entered into agreements in the form of Exhibit "C" which states about the proposal to construct only one building subject to construction of upper floors, if permitted by the Municipal Corporation of Greater Bombay. Whereas, about 6 flat owners, subsequently, entered into agreements in the form of Exhibit "R" with restricted plot of the building to 1,104 sq-yards. Now, taking case of the appellants, that except for the agreement entered into in the year 1962, rest of the agreements contain the stipulations for the construction of one building, could it be said that necessary requirements of promissory estoppel are fulfilled in the present case, so that respondents can be estopped from raising a plea that they are entitled to construct a second building. If legal provision had continued to be what it was, in unamended provision of section 7, then certainly, it could have been said that once, plan for a single building was submitted and approved, unless and until, flat takers of a particular building give their previous consent, promoters have no right to make any construction of additional building or structures, by way of second building as in the present case. However, after the amendment, since the said impediment, has been removed, so long as law does not prohibit the construction of additional building and structure, in accordance with the legal provision, one cannot say that Promissory estoppel has come to operate against the respondents. The reason is ultimately, even if we look at the relevant agreements namely Exhibits "C" and "R", the recitals clearly show that promoter proposed to construct a building consisting of ground and three upper floors, and other floors if permitted by the Bombay Municipal Corporation, which, indirectly, suggests that parties were aware that there was a possibility of other construction over and above the construction of the building, already undertaken as per plans, approved by the local authority, once shown to the concerned flat owners. It is well established that there cannot be estoppel against the provision of any statute, and therefore, even if respective Agreements at a certain stage, mentioned proposal to construct one building only, now by virtue of the amendment of the year 1986, since the impediment in the construction of additional building and structures, has been removed, the respondents had a right to make such construction of a second building, provided it satisfied the

requirements of the amended provisions of section 7-A

16. Shri Vepari, also tried to contend that relief (c) claimed in the plaint, if valued on the basis of the total loss likely to be caused to the respondent-plaintiffs, not being able to make construction of the remaining open plot of 1,250 sq.yards, then certainly, claim would exceed the pecuniary jurisdiction of the Bombay City Civil Court. He urged that the such value, would show monetary loss of the respondents, that can be ascertained in terms of money and having regard to the prices of the flats, even at a low rate at which, they were sold at the material time, are taken into consideration, the claim will exceed the pecuniary jurisdiction of the Bombay City Civil Court. It is difficult to accept this contention. The reliefs claimed in the plaint, are in the nature of an injunction on the basis that respondent-plaintiffs are in possession of the whole of the plot, as promoters and owners of the said plot, and for injunction :

(a)Restraining the respondents, from interfering with their possession.

(b)From carrying out any construction work or entering upon the said plot.

(c)Restraining the respondents from preventing or obstructing the plaintiffs in carrying out further construction.

Therefore, nature of the claim is such, that it will clearly fall in the relevant provision, which provides for a fixed notional value of the subject matter at Rs. 300/- u/s 6(iv)(j) of the Bombay Court Fees Act, 1959. It cannot be said that relief claimed in terms of prayer (c) by which, injunction is asked against defendants, restraining them from preventing or obstructing the plaintiffs in carrying out further construction, will fall under any other provision than section 6(iv)(j) of the Bombay Court Fees Act, so as to require valuation of the claim at full ad-valorem fee on the market value of the suit property.

17. Incidentally, it may also be mentioned that Shri Dave appearing on behalf of the respondents, contended that the finding recorded by the learned trial Judge, on n of possession, i.e. Issue No. 5, was not correct, both factually as well as in law and although, he was bound by the decree passed by the trial Court, as it is and cannot claim any variation in the said decree, in the absence of cross-Appeal or cross-objections, he would support the decree but, on a different ground as permissible under Order 41, R. 22 of the Code of Civil Procedure. He also cited certain authorities in support of his article.

18. So long as the attempt is not to get the decree varied, it is now well-established that under the provisions of O.41, R. 22 of the Code of Civil Procedure, it is permissible for a decree-holder in appeal, to support the decree, on different grounds as well as challenge the finding on a particular point as incorrect. It is not necessary, therefore, to refer to the several authorities, cited by Shri Dave.

19. Shri Dave contended that in the absence of any evidence, either oral or documentary, to show that possession of the plot under the suit building as well

open plot, was at any time delivered either to the flat owners or to the appellant-Society, the learned trial Judge, was not justified in coming to the conclusion that possession of the whole property was delivered to the original defendants. He pointed out the relevant evidence of the plaintiff-witnesses P.W. 1 and 2 and also witnesses examined on behalf of the defendants, namely D.W. 1 Bhende and D.W. 2 Narayanswamy Iyer from whom, D.W. 1 purchased his flat in the year 1966. He also took me through the relevant documents, namely Exhibits C and R, in order to show that there was nothing in these documents to indicate, that at any time, possession was delivered to the defendants of the whole of the plot. According to Shri Dave, what was delivered to the defendants, was possession of individual flats with right of ingress and egress, and nothing more. On the other hand, Shri Vepari, learned Counsel appearing on behalf of the appellants, invited my attention to Clause 2 of Exhibit 1, and contended that it gives a right to obtain possession of the suit plot from the promoters, and accordingly, all the flat purchasers, were in factual possession, which can be inferred from the fact that admittedly, all the Corporation taxes, N.A. Assessments, to the Government, and other charges were being paid by the appellants in respect of the whole of the plot. It is in this context, it would be advantageous to deal with another aspect namely, Application of Doctrine of Part Performance, incorporated in section 53-A of the Transfer of Property Act. The learned trial Judge has held that the promoter i.e. the respondent, in part performance of the contract of sale, entered into with different flat owners, have transferred possession to respective flat-purchasers and in as much as plaintiff have agreed to convey the whole plot of land, admeasuring 2,350 square yards in favour of the society to be formed by the flat-purchasers. On the transfer of possession of respective flats in furtherance of the Agreement of Sale, the plaintiffs had lost their right of possession, having parted with it in favour of the defendants who were transferees in the transaction and therefore, plaintiffs were estopped from claiming that they were in possession of the building and the suit plot of land, except for the purpose of exercising their right conferred in favour of the plaintiffs by section 7-A of the said Act.

20. In this context, it would be advantageous to look at the relevant provisions of the said Act as it stood, before the amendment, as well as after the amendment. Section 10, prior to amendment, cast an obligation on the promoter to form a co-operative society, or a Company of the flat takers, as soon as minimum number of persons, required to form a co-operative society, have taken flats, within a prescribed period and it further provides that the promoter shall join, in, respect of the flats, which have not being taken, in such an application, for membership of a co-operative society, or as the case may be, of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act. Sec. 11, provided that "a Promoter shall take all necessary steps to complete his title, and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company, as aforesaid, or to an association of flat-

takers (or apartment owners) his right, title, and interest in the land and building, and execute all relevant documents-therefore in accordance with the agreement executed u/s 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power." Rule 8 of the Rules framed under the said Act, inter alia provides that "Where a co-operative society or a company of persons taking the flats is to be constituted, the promoter shall submit an application to the Registrar for registration, within four months from the date on which the minimum number of persons required to form such organisation have taken flats. Rule 9, which is material, provides that if no period for conveying the title of the promoter to the organisation 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 the co-operative society or the company is registered, or as the case may be, the association of the flat takers is duly constituted. Therefore, relevant provisions of the Act and the rule, referred above, clearly indicate that duty is cast on the promoter to register the co-operative society or a company, within four months and he is expected to be a member of unsold flats of such a society. Similarly, if such a society is formed, a further duty is cast on the promoter to execute a Deed of Conveyance, where no specific period is provided by agreement within four months from the registration of the society or a company, and subject to his right to dispose of the remaining flats if any. The relevant agreements namely Exhibits 1, C and R also, contain similar provisions and the ultimate effect that one can gather from these legal provisions and the document is that the purchasers of the flats, have a right to get possession of their individual flats on payment of the full amount and the conveyance of the building as well as land thereunder, is to be made by the promoter within a certain period, both in favour of the co-operative society or a company, as the case may be and not in favour of any individual flat owner. This is also made specifically, subject to the right of promoter to dispose of the remaining flats, if any, at the time of execution of conveyance. The scheme of the Act and the rules thereunder, contemplate that even after the conveyance is executed, the promoter remains in possession of undisposed of flats, and his right to dispose of them. If that be the true and legal position, so far as the fact of the present case, are concurred, the piece of land admeasuring 1,250 square yards had for some reason or the other remained to be developed and dispute started between the parties; merely because, the flat owners in the building already constructed in the eastern portion of the suit plot, were delivered possession as required by law, they cannot claim to be in possession of the western portion of land, in the absence of any conveyance of title to the suit land, in favour of the appellant-Society. Even, there, law permits conveyance subject to the right of promoter to dispose of the flats in the remaining land. In the present case, as stated earlier, till disposal of the suit, there was no proposal made nor approved by the local authority, but, merely on the basis of delivery of possession of the flats, to individual persons, it cannot be said that defendants

were put in possession of the open plot of land, on the western side of the plot. It may be that taxes were being paid by defendants, which legally they are under an obligation to pay after getting possession of their respective flats. That cannot be construed as an act of possession as such, of the whole plot of land. In fact, it appears that when in the year 1970 or thereabout, defendants started putting a fencing around the plot and make some changes in the situation that the present suit came to be filed seeking injunction against the defendants. It is not disputed that so far as F.S.I. in respect of the remaining open plot of 1,250 square yards is concerned, it is not yet exhausted and as held earlier, the respondents have a right subject to approval of plans and other Rules and Regulations, to make construction thereon. In such circumstances, it is difficult to say as to how atleast in respect of the open plot of land, the principle of part-performance, incorporated in section 53-A of the Transfer of Property Act, will apply in favour of the defendants.

21. Therefore, after having considered the arguments advanced on both the sides, I have come to the conclusion that the decree passed by the learned trial Judge does not call for any interference. It must be mentioned that Shri Vepari urged that the notice contemplated in part A(ii) of the operative order of the trial Court should be at the stage of submission of the proposal by the respondents to the Bombay Municipal Corporation, so that the defendants will be in a position to place their objections before the authority, for consideration in accordance with law. Shri Dave, strongly opposed this, on the ground that if the society & members are allowed to give their objections, at the stage of passing of land, then, having regard to the history of the litigation, the respondents cannot hope to get any such plan passed within a reasonable future. I agree that on the facts and circumstances of the present case, what the learned trial Judge has provided in Condition No. A(ii) of the operative part, which requires plaintiff to undertake construction of additional building or structures only after obtaining approval of the Bombay Municipal Corporation and after giving due notice to the appellant-Original defendant No. 26 is a sufficient safeguard for the observance of law. If at all, appellant intends to give their objections. After the relevant notice is given, by the respondents, on their proposed construction in pursuance of an approved plan, it will be open to the appellant, to take such measures as are open to them in-law.

21. Subject to this, the decree passed by the trial Court is confirmed, and Appeal stands dismissed with costs. Since the appeal is itself disposed of, Civil Application No. 5799 of 1989, also stands disposed of. The trial Court by its decree, has granted three years to the respondent-plaintiff to complete the project of development from the date of its judgment. That period has already expired. So in place of said condition No. A(vi), it is substituted that the period of three years will be from the date of this judgment.

22. Shri Vepari at this stage, requests that operation of the order passed just now, be stayed for 8 weeks. At the moment, such the respondents have no

approved plans with them, there should be no objection to stay operation of the order passed by this Court for a period of eight weeks from today. It is however, made clear that it will be open to the respondents to get the plans and permissions re-validated and take frustration except starting construction. Certified copy expedited.