

Received On: 15-12-90

Registered On: 15-12-90

Section : 16-4-96

Description : Sy. An. Cl. 1.

IN THE COURT OF HON'BLE CIVIL JUDGE JUNIOR DIVISION  
AT PUNE

EXHIBIT

REG. CIVIL SUIT NO. 2331/90.

Archananagar Co-Op. Housing Society,  
39/2/2 Erandavane, Pune-411 004.  
(Through its Chairman Shri Anand  
Damodar Patankar, Age-37 yrs.  
Occ- Service, R/o-Plot No. 6,  
Flat No. 7, Archananagar Society,  
PUNE-411 038.

the plaintiff

v/s

1. M/s A.V. Mulay Construction Co.,  
A registered Partnership Firm  
registered under the Indian  
Partnership Act 1932 having its  
office at 1231-A Shivajinagar,  
Pune-411 004.

2. Shri Anand Vitthal Mulay,  
Age- 42 yrs. Occ- Business,  
R/o - 989/90 Navi Peth,  
PUNE-30.

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3. M/s A.V. Mulay & Company,  
1231/A Shivajinagar,  
Deccan Gymkhana,  
PUNE-411 004.

the defendant

4. Raichand Brijlal Kukulol,  
Age - Adult, Occ- Business,  
R/o - "Paras" 13 Amar Society,  
Erandavane,  
PUNE-411 004.

5. Premchand Brijlal Kukulol,  
Age - Adult, Occ- Business,  
R/o - "Paras" 13 Amar Society,  
Erandavane,  
PUNE-411 004.



6. Laxman Moreshwar Fulkarni,  
Age - Adult, Occ- Service,  
R/o - 1457, Shukrawar Path,  
PUNE-411 002.

7. Shamrao Moreshwar Fulkarni,  
Age - Adult, Occ- Business,  
R/o - 1457 Shukrawar Path,  
PUNE-411 002.

} The Defendants.

Advocate for the plaintiff Mr. S.V. Kanetkar.

Advocate for the defendants 1 to 5 Mr. A. . . . .

Advocate for defendants 6 and 7 Mrs. AG Kalvankar.

FACTS

1. This is a suit by a Co-Op. Housing Society of flat purchasers against the promoter builder and its assigns and against the owners of the suit land for a decree of mandatory injunction for execution of the deed of conveyance in favour of the plaintiff and for perpetual injunction to restrain the promoter builder from constructing additional flats by raising one more floor on the existing buildings or from making any structural changes in the suit property. The suit has been contested by the defendants by claiming right to construct additional flats over the terraces of the existing buildings in view of section 7(A) of the Maharashtra Ownership of Flats Act, 1963.

2. As per admitted facts defendants 6 and 7 are the owners of <sup>u</sup>plots of land admeasuring 3 acres and 4 gunthas situated at Survey No.39, Hissa No.2/2, Varadavana, Pune. This land was excess land of defendant no. 7. Hence, defendants 6 and 7 approached the competent authority under Urban Land Ceiling laws and by the order dated 9-3-84, the competent authority exempted <sup>part of</sup> the land for the development scheme for the poor and weaker sections. Defendants 6 and 7 assigned the developments rights to S.V. Deshpande & Company. S.V. Deshpande & Company assigned their rights of development to defendant No.3 a partnership firm. Defendants 2, 4 and 5 and Vitthal Muley were the partners of defendant No.3. Defendant No.3 under took the scheme of development and construction and entered into agreements with the intending purchasers as per the provisions of Maharashtra Ownership of Flats Act. Defendant No.3 got <sup>it</sup> plans approved and constructed six buildings on <sup>part of</sup> the land which was exempted by the competent authority vide order dated 9-3-84. The work of construction was over and the prospective flat purchasers were put in possession of their respective flats in April 1986 or there-about. Thereafter, further land from the same Survey number was released by the competent authority for

further scheme as per its order dated 31-3-86.

Meanwhile, defendants 3, 4 and 5 retired from

defendant No. 3, Vitthal Mulay died. The rights and

liabilities of defendant No. 3 were taken over by defendant

no. 2 and he started his construction business under the

name and style as defendant No. 1. Though the plaintiffs

have claimed that defendant No. 1 is a partnership firm,

it is not disputed that it is a proprietary firm.

Admittedly, defendant No. 2 constructed two more buildings

as per the scheme sanctioned by the competent authority

by its Order dated 31-3-86. Admittedly the builder

promoter had agreed that the flat purchasers <sup>were</sup> to form

co-operative housing society. Admittedly, the flat

purchasers had paid charges for formation of co-operative

housing society, but defendants 1 to 5 did not form the

co-op. housing society. Hence, the flat purchasers

themselves formed a registered co-op. housing society

on 27-8-89 (i.e. the plaintiff).

3. Defendants 1 to 7 in spite of <sup>the</sup> plaintiffs request

letter dated 27-10-89 and service of notice dated

28-1-90, did not execute deed of conveyance of the



buildings and the land in favour of the plaintiff. Hence, this suit for mandatory injunction. Admittedly in November, 1990, defendant No.2 visited the shop and took the measurement and inspection for construction of additional structure on the buildings of the members of the plaintiff.

4. According to the plaintiff's case, <sup>by</sup> the proposed construction of defendant's <sup>No</sup> 2 was changing or modifying the earlier plan sanctioned by the Pune Municipal Corporation for which the consents of the flat purchasers were not taken. The proposed construction is in contravention of the provisions of Maharashtra Ownership of Flat Act. The suit was valued for each relief at Rs.300/-, with a contention that the reliefs were not susceptible for monetary evaluation.

5. Defendants 1 to 3 resisted the suit by written statement Exh.28. Their written statement is adopted by defendant

No.4 by purshis exh.66. Defendants 1 to 3 have raised the following legal pleas:-

Formation of the plaintiff's society is illegal as the builder promoter was not a party. Besides the members have formed <sup>the</sup> society in respect of the suit land inclusive of area of 2000 sq.mtrs. which was exclusively reserved for

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between the owners and the promoters. It is also contended that all the flat purchasers were necessary parties. Secondly, it is contended that the suit has not been properly valued and no proper court fees is paid thereon. According to defendants 1 to 3 the suit for specific performance should have been valued on the market value of the property and the subject-matter is beyond the pecuniary jurisdiction of this court. Besides it is contended that the subject-matter is governed by Section 7(2) of the Maharashtra Ownership of Flats Act and hence, this court has no subject-wise jurisdiction. Thirdly it is contended that defendant no. 1 is a proprietary firm and not a legal entity, whereas defendant No. 3 is dissolved. Hence, the suit is not maintainable against them.

5. On merits, defendants 1 to 3 admitted the plaintiff's claim about their right to get conveyance executed. However, it is their case that they were always ready and willing to execute the deed of conveyance. According to them, the defendants have registered the name Archana Co-op. Housing Society Ltd

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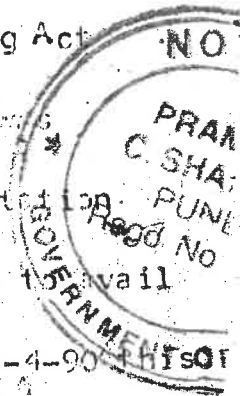
have opened a bank account and deposited the charges received for registration of the society in the said account. However, the scheme of the defendants is yet incomplete. Still both the F.S.I. is ~~xxxxxxx~~ to be consumed. Hence, the co-operative society was not formed and deed of conveyance cannot be executed till the entire scheme of defendant 1 to 3 is over.

6. The crucial question in this suit was raised regarding defendants 1 to 3's right for carrying out additional construction. According to defendants 1 to 3, they have right to construct additional flats by raising one more floor on the terraces of the already constructed buildings.

7. Defendants 1 to 3 contended that after the construction of 8 buildings, there were changes in the buildings by laws of the Pune Municipal Corporation, whereby defendant no. 3 was in a position to construct one additional floor on each building. Defendant No. 2 was contemplating such change in the bye laws. Hence, he had made provisions in the RCC designs to bear the weight of one additional floor. Besides the flat purchasers were given specific knowledge about the fact and as per Clause-16 of the agreement, the right for

construction of additional floor was reserved by defendant No.3. Thus, according to defendants their project is yet incomplete and as per the municipal bye laws, they have right to construct one additional floor on each building. Secondly, defendants 1 to 3 contended that they could not complete the construction work as per the sanctioned order of competent authority under Urban Land Ceiling Act dated 9-3-84 because some area of the plot was reserved for High Capacity Mass Transportation route and hence, the defendants were unable to avail the unconsumed F.S.I. By the order dated 23-4-90 reservation was cancelled by the Commissioner of Pune Municipal Corporation and the balance F.S.I. was made available to the defendants. The defendants have paid for the development rights of this F.S.I. and as per Section 7-A of the Maharashtra Ownership of Flats Act they have right to construct one additional floor on each building and the members of the plaintiff have no right to obstruct them.

8. Defendants 6 and 7 have filed written statement



Exh.37 which is almost identical with the written statement of defendants 1 to 3. In addition they have contended that out of the suit land a part of land of 2000 sq.mtrs. from the southern side which was reserved for shopping centre was not allotted by them to the defendants 1 to 5, and the same cannot be conveyed in favour of the plaintiff. It is alleged that the members of the plaintiff were unauthorisedly trying to use the said land as their play-ground.

9. Defendant No.5 was duly served, but he did not appear. Hence the suit proceeded ex parte against him.

10. On the basis of the pleadings, the issues were framed Exh.38. They were modified by me.

10. The parties did not lead any oral evidence. Both the parties relied on documentary evidence which was admitted by each other. Learned advocate Mr. E.V.Kanetkar for the plaintiff and Mr. A.A. Deshpande for the defendants 1 to 5 advanced elaborate arguments. Mrs. Kalvanekar advocate for defendants 6 and 7 also advanced her arguments. On the basis of the evidence on record my issuewise findings are as follows

1. Whether the formation of the plaintiff society is illegal? ... In the negative.
- 1b. Whether the suit is maintainable without joining the flat purchasers?

... .. In the affirmative.

2. Whether the suit is properly valued and whether proper court fee is paid thereon?

... .. In the affirmative.

3. Whether this court has pecuniary and subject-wise jurisdiction to conduct this suit in the light of Section 7(2) of the Maharashtra Ownership of Flats Act?

... .. In the affirmative.

4. Whether defendants 1 and 2 are local parties and whether the suit is maintainable against them?

... .. Defendant No. 1 is necessary party. Suit ~~not maintainable~~ against defendant no. 3-

5. Whether the defendants have right to carry out additional construction of flats above the suit building?

... .. In the negative.

6. Whether the defendants can postpone the execution of conveyance in favour of the plaintiff's society till they complete the construction of additional flats?

... .. In the negative.

7. What reliefs?

... .. The suit is decreed with costs. Defendant No. 2 and 4 to 7 are hereby directed by ~~the court~~ mandatory injunction to execute the deed of conveyance of the buildings & the suit land excluding the land under reservation in favour of the plaintiff society. The expenses for registration of the society shall be met from the amount taken by defendant no. 3 from the flat purchasers and in case the funds are short the plaintiff shall bear <sup>the</sup> further expenses.

The defendants 2 and 4 to 7 are hereby perpetually restrain from carrying out any additional construction of flats over the terraces of the existing buildings without taking prior permission of the flat purchasers who are occupying the flats from the respective buildings.

REASONS

ISSUE NO.1:

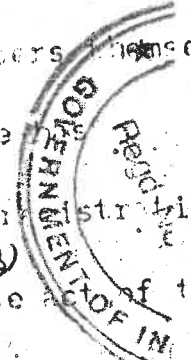
11. Before considering the facts of the case in order to decide the main factual issues (Nos.5 and 6), it is necessary to decide the technical objections raised by the defendants.

12. First objection taken by the defendants was that the plaintiff is not a legal society and the suit is not maintainable without joining all the flat purchasers. However, this objection was given up by the learned advocate Mr. A.A. Deshpande at the time of arguments. Besides learned advocate Mr. S.V. Kanetkar has rightly relied on the ratio laid down in Dr. Devendra Shah V/s The State of Maharashtra 1985 C.T.J.37.

In the said case also the flat purchasers attempted to register their society and the builder promoter had raised objection for registration. It was also contended that some more buildings were yet to be constructed and subdivision of the plot was not possible and therefore society should not be registered. However, the Hon'ble His Lordship did not accept this contention and it was held that as soon as the minimum number



the flat purchasers entered into agreement with the builder promoter, the society can be registered. Accordingly directions were issued to the Dy. Registrar for registration of the society. Besides u/s 10 of the Maharashtra Ownership of Flats Act there is statutory obligation on the promoter builder to register the co-operative society as soon as the minimum number of members enter into agreements. Thus as per the ratio laid down in Dr. Devendra Shah V/s The State of Maharashtra, 1985, C.T.J. 37 and Section 10 of the Maharashtra Ownership of Flats Act, the promoter was bound to form a society and he could not have delayed the formation of society on any ground. Therefore, the formation of the society by the flat purchasers themselves is in no way illegal. The Registrar in this case registered the society. The letter showing the registration of the society is at exh.56 dated 27-10-89. The act of the Registrar has not been challenged. In the circumstances, the registration of the plaintiff society is not illegal.



13. The Co-operative society being a legal entity. It can sue in its own name and the members of the society are not necessary parties. Hence, issue No.1 is allowed accordingly.

ISSUE NO. 2:

14. In the written statement, objections were raised to the valuation of the suit and it was contended that the suit is susceptible to monetary valuation. <sup>The</sup> learned advocate Mr. S.V. Karietkar has rightly relied on Brindavan Co-operative Housing Society Ltd. V/s Karmarkar Bros. 1982 Wh.L.J. 407.

"The plaintiff was seeking enforcement of the obligations of the defendants under sections 4, 10, 11 and 12 of the Ownership Flats Act. The suit could not be said to be an ordinary suit for specific performance of a contract of sale. The relief which the plaintiff was claiming for enforcement of these obligations was not susceptible of monetary valuation and it was not otherwise provided by the Bombay Court Fees Act also. Therefore, the suit valued by the plaintiff under section 6(iv)(j), Bombay Court Fees Act is properly valued".

"The other obligation is that the defendants-flat owners are required to join as members of the co-operative society. Therefore, if the plaintiff is seeking relief in regard to enforcement of these obligations, in my opinion the suit cannot be said to be an ordinary suit for specific performance of a contract of sale. The relief which the plaintiff is now claiming for enforcement of these obligations, is not susceptible of monetary valuation and it is not otherwise provided by the Court Fees Act also. Because the only provision in the Court Fees Act as provided in Section 6 (xi), as I have said earlier the Court Fees Act could not provide in any suit to compel the obligations of such sort as are given in the said Act. Therefore, the suit valued by the plaintiff is properly valued under section 6 (j) of the Bombay Court Fees Act.

"The subject-matter of the suit being of right to compel the performance of statutory obligation and the plaintiff who is asking assistance of the court to compel the promoter to perform his statutory obligation, such a right to compel to perform the obligations provided

by the statute being incapable of monetary valuation and there being no provision in the Court Fees Act for such a suit the provision of section 6 (j) of the Court Fees Act are attracted, and they are applicable to this suit. As the Court Fees paid relying on the provisions, the valuation of this suit is quite proper and the plaint will have to be accepted and the suit will have to be proceeded with as the valuation of the plaint is proper. Therefore, the appeal is allowed. The order of the learned trial judge is set aside. It is directed that the plaintiff will swear the plaint within 15 days from the time when the writ of this Court reaches the City Civil Court, Bombay."

15. The learned advocate Mr. A.A. Deshpande for the defendants fairly admitted this legal position. Hence, I answer issue no.2 in the affirmative.

ISSUE NO.3:

16. There was objection to the pecuniary jurisdiction of this court. But in view of my findings on issue no.2 as above, the objection to the pecuniary jurisdiction also does not stand.

17. There was also objection to the jurisdiction of this court in view of Section 7(2) of the Maharashtra Ownership

of Flat Act. However, learned advocate Mr. S.V. Kanetkar rightly relied on ratio in Kalpita Enclave Co-operative Housing Society Ltd. V/s Kiran Builders (P)Ltd, 1986

Mh.L.J. 110. In this case also in the light of similar facts similar objections were raised but they were dispelled in following words:

"I refuse to accept this interpretation placed by the learned advocates on the scope of sub-sections (1) and (2) of section 7 of the Ownership Flats Act. I refuse to accept that contravention of Section 7(1) though giving rise to a cause for civil action, cannot be made the subject-matter of a suit merely because at some later stage when this contravention is completed and perfected, the legal remedy provided for remedy under section 7(2). Section 7(1) imposes an obligation upon a promoter not to do a particular act. It bestows upon the flat owners a right to see that such a prohibited act is not done. If duty is breached a cause of action automatically accrues to the party affected thereby to enforce his right".

"I do not see how this argument can be used for the purpose of preventing an aggrieved party from resorting to a civil court where a right has accrued to him."

18. In Para 26, 27 and 28 of the judgment, and lastly in Para 34 the propositions were summarised and at point No. 5 it is held as follows:

"Since section 7(2) applies to completed structures, any act towards further contravention even after the possession is given can be prevented by filing a suit in the Civil Court".

19. This legal position was also fairly admitted by the learned advocate Mr. A.A. Deshpande for the defendants 1 to 5.

Hence, I answer issue No. 3 in the affirmative.

ISSUE NO. 4:

20. Admittedly defendant No. 1 is proprietary firm of the defendant No. 2. Defendant No. 2 is already party. No doubt as per order 30, rule 10 C.P.C. the suit is maintainable against proprietary firm but when the proprietor himself is joined as a party, it is unnecessary to join the firm as well.

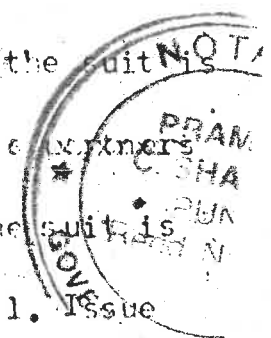
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Thus though the suit is maintainable against defendant no.1, defendant No.1 is unnecessary party.

21. Admittedly, defendant No.3 was a partnership firm which is dissolved and the right and liability of defendant No.3 are taken over by defendant No.2. Hence, the suit is not maintainable against defendant No.3, and the partners who were retired from defendant No.3. Thus, the suit is not maintainable against defendant No.3 as well. Issue no.4 is answered accordingly.

ISSUE NOS: 5 and 6:

22. In the written statement, defendants 1 to 7 have admitted statutory liability to execute the deed of conveyance in favour of the plaintiff society. Learned advocate Mr. A.A. Deshpande also contended that the defendants are ready to execute the deed of conveyance. However, it was contended that the conveyance cannot be executed until the whole scheme of defendant 1 to 3 is complete and secondly it is contended that there cannot be execution of deed of conveyance in respect of the land of 2000 sq.mtrs which was reserved for shopping centre.



Learned advocate S.V.Kanetkar fairly admitted that the land reserved for shopping centre cannot be conveyed in favour of plaintiff unless the reservation was lifted. The fact that the land of 2000 sq.mtrs. was reserved for shopping <sup>shopping</sup> is also not disputed. Hence, the question for my consideration is whether the defendant can postpone the execution of the conveyance in favour of the plaintiff society till they complete the construction of additional flats. There are two aspects of this issue. First one is whether the defendants have right to carry out additional construction of terrace. Which is <sup>independent</sup> issue No.5 and if yes, whether the execution of conveyance can be postponed. As far as the later aspect is concerned, the learned advocate Mr. S.V.Kanetkar has rightly relied on Section 11 of the Maharashtra Ownership of Flat Act and ratio laid down in Mohatta Nagar Co-Operative Hsd. Society Ltd. V/s Vishram Khimji & Sons. 1994 (1) Bombay C.R. 444. In the present case admittedly the society of the flat purchases was registered on 27-10-89. Section 11 reads as follows :-

"Promoter to convey title, etc, and execute documents, according to agreement:-

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

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execute all relevant documents therefor in accordance with the agreement executed under section 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".

23. No specific period was prescribed in the agreement between developer and flat purchaser. Hence, the conveyance will have to be executed within the period as prescribed by rule 9 of the Bombay Ownership of Flat Rules 1964. It reads as follows :

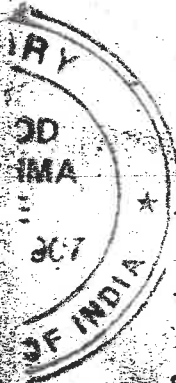
"Period for conveyance of title of promoter to organisation of flat-purchasers :-  
If no period for conveying the title of the promoter to the organisation of the flat-purchasers is agreed upon, the promoter shall (subject to his right to dispose of the remaining flats, if any) execute the conveyance 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. When a promoter has submitted his property to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing the registering a Declaration as required by section 2 of the Act, and no period for conveying the title of the promoter in respect of an apartment to each apartment-taker is agreed upon, the promoter shall execute the conveyance or deed of apartment in favour of each apartment-taker within four months from the date the apartment-taker has entered into possession of his apartment."

24. Thus the defendants were bound to execute the deed of conveyance in favour of the plaintiff society on or before 27-2-90. The learned advocate Mr. S.V. Kanetkar therefore, argued that as held in *Kalpita Inclusive v/s Kiram Builders*,

1986 Wh.L.J. 110 it was statutory obligation of the defendant to execute the deed of conveyance in favour of the plaintiff and if the defendants were not performing their statutory obligation mandatory injunction can be granted to compel them to perform the statutory obligation. He argued that in case it is held that the defendants have right of carrying out additional construction, still the execution of deed of conveyance cannot be postponed. At the most the execution of deed of conveyance can be made subject to a condition that the defendants shall bind the prospective flat purchaser to become the members of the plaintiff society and to pay necessary proportionate charges of conveyance expenses. There seems to be quite force in the arguments of learned advocate Mr. S.V. Kanetkar. Learned advocate Mr. A.A. Deshpande has no serious objection for granting mandatory injunction for execution of deed of conveyance if the rights of the defendants (if any) for carrying out additional construction will be protected while granting mandatory injunction for execution of deed of conveyance.

25. However, crucial question for my consideration is whether the defendants have right to carry out construction of terrace flats on the existing buildings.

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26. In order to decide this question it is necessary to state certain admitted facts. Admittedly, defendants 6 and 7 were owners of land of three acres and 4 gunthas from Survey No.39, Hissa No.2/2 at Yerandavane, Pune. Admittedly, this land was surplus land of defendants 6 and 7 and was therefore, under the ceiling. Admittedly defendants 6 and 7 had entered into a development agreement with S.V. Deshpande & Company and all of them submitted a scheme for weaker section before the competent authority under the Urban Land ceiling laws. By order dated 9-3-84 exh.46, the competent authority exempted part of the land of defendants 6 and 7 measuring 6569.75 sq. mtrs. for construction of flats as follows :-

- 58 Tenements of 39.45 sq. Mtrs. plinth.
- 33 Tenements of 69.70 sq. Mtrs. plinth.

27. Admittedly, this land which was exempted by Urban Land Ceiling authority was inclusive of area of under High Capacity Mass Transportation Route and inclusive of surplus land of defendant No.7 S.M.Kulkarni retained by defendant No.6 L.M.Kulkarni, but excluding the area declared as surplus of defendant No.6 L.M. Kulkarni which was handed over to Pune Housing and Area

Development Board. Admittedly, thereafter S.V. Deshpande & Company assigned development rights to defendant No.3 and defendant No.3 got the plans approved, a copy of which is at exh.72. As per the approved plan, six buildings each consisting of ground plus two floors with four floor flat per floor i.e. 12 flats per building, i.e. 72 flats were agreed to be constructed. Each flat from building Nos. 1 and 2 was of the area around 80 sq.mtrs. while each flat from building nos. 3 to 6 was of the area around 40 sq.mtrs. Thus 72 flats admeasuring total area of 4232.97 sq.mtrs. were constructed as per the approved plan. Admittedly defendant No.3 entered into agreement with flat purchaser and received the full consideration from respective flat purchasers. Admittedly, in April 1986 all the flat purchaser were put in possession of the respective flats. Admittedly, thereafter the competent authority under Urban Land Ceiling

Act by order dated 31-3-86 exempted ~~the~~<sup>an</sup> additional area of 2548.78 sq.mtrs. for construction of 15 tenement of 80 sq. mtrs. area each and 33 tenements of 40 sq.mtrs. plinth. Admittedly defendant No.3 or defendant No.2 got the plans sanctioned and completed the construction of two more buildings and handed over the possession of the flats

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these two buildings to the respective flat purchasers. However, admittedly, <sup>the</sup> promoter builder i.e. defendants 1 to 5 were reluctant to execute the deed of conveyance in favour of the plaintiff. Admittedly some part of the suit land was acquired by Pune Municipal Corporation for high capacity mass transportation route, besides the area acquired for shopping centre and area acquired for D.P. Road. Admittedly on 21-4-90 by Circular Exh.87 it was declared that the land owners whose lands were acquired for high capacity mass transportation route would be entitled to get additional F.S.I. in lieu of the land acquired from them. Admittedly in pursuance of such additional F.S.I. available, defendant No.2 who has taken over the rights and liabilities of the original promoter/developer, defendant no.3, got the plans approved on 21-1-91. The copy of the same is at Exh.73. Admittedly, the Pune Municipal Corporation has permitted the builder defendant No.2 to construct one additional floor on existing buildings at the suit site. As per the copy of the approved plan exh.73, defendant No.2 was permitted to construct identical flats on the terrace of the buildings and thereby

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there was proposed additional construction of 3564 sq.ft. on each building i.e. 331.10 sq.mtrs.

28. <sup>learned</sup> According to advocate S.V. Kanthar the proposed construction of terrace flat is barred by Section 7 of the Maharashtra Ownership Flat Act. In this regard he relied on Kalpita Enclave V/s Kiran Builders, 1986 Ph.L.J. 110 and strong reliance is placed by him in M/s. Khatri Builders v. Mohmed Farid Khan, Bom. C.R. 305, 1992(1). On the other hand the learned advocate Mr. A.A. Deshpande has argued that the proposed construction was permissible under the development rules and was according to the development plan of the local authority. Hence, in view of the amendment of Sec.7 (1)(ii) of the Maharashtra Ownership of Flat Act r/w 7(A) of the said Act, the proposed construction is permissible under the law and the plaintiffs and its members have no right to object such construction. He also argued that the consent of the flat purchasers was obtained at the time of agreement and therefore, section 7(1) (ii) of the Act is not applicable.

29. In order to properly appreciate the rival contentions it is necessary to go through the अवसर्गिय मरिती अधिका-अधिनियम २००५ section 7(1) and section 7(A) of the Maharashtra Ownership of Flat Act. It reads as follows:

Sec-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 agree to take one or more flats, the promoter shall not make

(i) any alternation 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,

(ii) any other alternations or additions in the structure of the building without the previous consent of all the persons who have agreed to take flats in such building.

30. Section 7-A reads as under:

"Removal of doubt :- For the removal of doubt, it is hereby declared that Clause (ii) of sub-section (1) of Section 7 having been retrospectively substituted by clause (a) of section 6 of the Maharashtra Ownership Flat (Regulation of the promotion of construction, sale, management and transfer) (Amendment) Act 1986 (hereinafter in this section referred to as "the Amendment Act"), it shall be deemed to be effective as if the said clause (ii) as substituted had been in force at all material times, and the 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 and the expressions "constructed and completed in accordance with the plans and specifications aforesaid" and "any unauthorised change in the construction" in sub-section (2) of section 7 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 loan 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.

31. Before amendment there were words or construct

any additional structure' in Section 7(1)(ii) after the word 'building' and before the word without the previous consent.

32. This section came up for interpretation and was discussed in Kalpita Enclave v/s Kiran Builders, 1986 Mh.L.J.

110. With regard to the structural alterations, propositions laid down in Para 34(6), are as follows.

"The contravention contemplated in Section 7 (1) or in section 7(2) which includes alteration in the structure or the construction of additional structure is not confined to the construction of the buildings only, this contravention may extend to the construction of any additional structure not in the original plans and specifications as approved by the local authority. Thus if the original plans and specifications on the basis of which the persons were persuaded to purchase the flats disclosed that certain areas will be kept open, it would be a clear contravention of the agreements as well as of law if the promoter proceeds to construct additional structures on those open spaces even with the sanction of the Municipal Corporation".

33. Thereafter the need for amendment of this section was felt. The reason and objections for such amendments were given as follows :-

"The prohibition of making alterations and additions under this provision is in relation to a building wherein the purchasers of the flats have taken or to take flats. It was never intended that this provision should operate even in respect of construction of additional buildings according to a scheme or project of development of total layout. In Kalpita Enclave Co-operative Housing Society Ltd. v. Kiran Builder P. Ltd. 1986 Mh.L.J. 110. The High Court of Bombay has held that the contravention contemplated in section 7(1) or in section 7(2) which includes alterations in the structure or construction of additional structures is not confined to the construction 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. Such an interpretation of these provisions would result into the flat purchasers in one building, objecting to the additions and alterations being made in any other buildings, although such alterations and additions are consented to by the persons who have taken or who are to take flats in such other buildings or even if they are permissible under the building rules or building bye-laws or Development Control Rules and are approved by the local authority. This would further result into retarding the growth of construction of buildings and increasing the housing stock. If the total layout permits construction of more buildings in accordance with the building rules or building bye-laws or the Development Control Rules made under any law for the time being in force there should be no impediment in construction of the additional buildings. While approving any proposals for construction of additional buildings in the layout the local authority will, no doubt, see to it that the open spaces etc. to be provided under the building rules or building bye-laws or Development Control Rules are in fact provided. It is, therefore, proposed to amend section 7(1)(ii) suitably and also to make a suitable provision for removal of doubt in respect thereof".

34. The question of effect of amendment came up for consideration in following two cases :

- (1) Khatri Builders v/s Mohmed Farid Khan 1992(1) Bom. C.R.305.
- (2) The Mohatta Nagar Co-Operative Hsg. Soc. Ltd. v. Mis Vishram Khimji & Sons, 1994(1) Bom. CR.444.

35. I have carefully gone through all these rulings and considered the arguments of learned advocates for the parties.

36. On careful consideration it is crystal clear that in Kalpita Enclave V/s Kiran Builders case, it was held

that the prohibition u/s 7 (1)(i) and 7(1)(ii) of the Maharashtra Ownership of Flats Act was a negative statutory obligation on the promoter builder and he was bound to carry out the construction strictly in accordance with the agreement entered into with the flat purchasers and the plan and specifications on the basis of which the agreements were entered into. Section 7(1) discloses that the promoter builder was bound to carry out the construction as per the plan and specifications of the building as approved by the local authority and as were disclosed, furnished to the prospective flat purchasers. In Para 34 Sub Clause-I in the judgment of Kalpita Enclave V/s Kiran Builders, 1986 Mh.L.J. 110, the following propositions has been laid down, in following words

(1) Section 7 of the Ownership Flats Act imposes an obligation on the promoter to construct the buildings and otherwise develop the property strictly in accordance with the agreements entered into with the flat purchasers and the plans and specifications upon the basis of which the agreements are entered into.

(2) The said provision, therefore, also bestows a corresponding right upon the flat purchasers to compel the discharge of this obligation on the part of the promoter.

37. In Kalpita Enclave V/s Kiran Builders case the builder promoter had completed the construction of one

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building as per the approved plan and thereafter was intending to construct one more building for which the plans were approved by the local authority. However, the flat purchasers from the first building raised objection to the proposed construction of new building and it was held that the promoter builder was not entitled to construct new building even if it was permissible under the lay out and as per the bye-laws of the local authority as Section-7 (1)(i) was applicable only to construction of new building. It was therefore, held that consent of the flat purchasers was necessary.

38. From the objects and reasons as well as from the language used in the amendment to Section 7 and in Section 7-A, it is crystal clear that the legislature intended to clear their intention by amendment that Section 7 (1)(ii) was not applicable to construction of new building and the flat purchasers from one building were not entitled to object for construction of another building if the proposed lay out plan and the municipal bye-laws were permitting such construction and the promoter builder was getting the plans

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approved from the local authority. It is pertinent to note that as far as the ratio in Kalpita Enclave V/s Kiran Builders case with respect to construction of additional structure in the same building was concerned, it was not touched or disturbed by the amendment.

39. The facts in the present case are very similar with the facts in Khatri Builders v/s Mohmed Farid Khan, 1992 (1) Bom. C.R.305.

40. In the said case the construction of one building as per the approved plan was completed. Thereafter, the builder purchased additional adjacent land and intended to raise one additional floor on the existing building so as to avail the additional F.S.I available in view of purchase of additional land. His Lordship in the said case i.e. Khatri Builders v. Mohmed Farid Khan 1992 (1) Bom. C.R.305 held that :

"In view of the above, in my view, the amendment would not make any difference to the point involved in the present appeal. If in a given case, the layout permits the construction of more building or buildings in accordance with the Building Rules and Bye-laws, it is possible to say that there should be no impediment to the construction of additional building or buildings. While, therefore, in a given case, if one a plot of land, buildings "A" and "B" existed, which have been occupied by the flat owners and if a third

building "C" is being put up the question would be as to whether despite the third building "C" being permissible in accordance with the Building Rules and Bye-Laws, can the flat owners in Buildings A & B raise an objection. I need not go into this question in this case since I am only concerned with the question of a terrace flat being constructed on an existing structure. In my view, in the facts of this case, the insertion of section 7-A the Amending Act 36 of 1986 would not make any difference to the ratio of the judgment of Jahagirdar, J. If, therefore, the plaintiffs have objected to the terrace flat being constructed, in my view the Civil Court would have jurisdiction to entertain the suit of the plaintiffs and the plaintiffs would be entitled for an injunction prayed for".

11. In The Mohatta Nagar Co-Op. Hsg. Soc. Ltd. V/s

M/s Vishram Khimji & Sons 1994(1) Bom.C.R.444

the point involved was different. In the said case the construction of building was complete and there- after the promoter builder got some plans approved from the local authority for construction of additional building and not additional flats on the existing building. In the said case while confirming the decree of the learned trial court His Lordship held that in view of the amendment to Section 7(1)(ii) and it being retrospective in operation and in view of Section 7-A, the builder promoter has right to construct additional building if the proposed lay out and



Municipal Bye-laws permit such construction and if the local authority approved <sup>the</sup> plan <sup>or</sup> for construction of additional building.

42. This ruling can be easily distinguished. In the present case there is no question of construction of additional building. The defendants intend to construct additional terrace flats which is a structural alterations in the building in which the flat purchasers are residing who are raising objections. Thus, two ratios one from Khatri Builders v. Mohamed Farid Khan, 1992 (1) Bom.C.R.305 and other from Mohatta Nagar Co-Op. Hsg. Soc. Ltd. V/s Visharam Khimji & Sons, 1994(1) Bom.C.R.444 can be easily reconciled. The effect of the amendment is that promoter builder is now entitled to construct additional building on the remaining land without taking consent of the flat purchasers provided the proposed lay out and development

plan and Municipal Bye-Laws permit such construction and he gets the plan approved from the local authorities.

However, even if the municipal bye-laws and proposed lay out permit and the local authority approves the plans, the promoter builder cannot construct the additional terrace flats over or above the existing building, once the construction

as per the approved plans (which were furnished to the flat purchasers at the time of agreement) is over.

43. Learned advocate Mr. A.D. Deshpande argued that the facts in Khatri Builders case are different from the present set of facts. He argued that in that case the

promoter builder had exhausted the whole F.S.I. and the proposed construction was to be carried out in view of additional F.S.I. available to him on the ground of

purchase of additional land. Whereas in the present case,

there is no additional F.S.I. available. The present case

is a case of release of withheld F.S.I. However, his

arguments cannot be accepted. It is no doubt true that

the proposed construction is permissible in view of the

additional F.S.I. received by the promoter builder in

lieu of the land acquired for high capacity mass

transportation route. It is true that the competent

authority under Urban Land Ceiling Act had permitted

the construction of structures on the land of

6969.75 sq. Mtrs. whereas the previous construction of

six building was only on the land of 4232 sq. mtrs.

However, the language used in Section 7(1) of the Act

has nothing to do with the circumstances in which



the additional F.S.I. was available. The words used are as follows :-

"After the plan and specification 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 take....."

44. It is therefore, clear that once the construction is over as per the approved plans which were shown or furnished to the intending flat purchasers, section 7(1) prohibits further construction in the same building by way of alterations or additions of structure without taking prior consent of the flat purchasers. I am fortified on this issue by the judgment in Khatri builder's case. In Khatri Builder's case it was held that the builder promoter had no right to carry out additional construction, not because the said construction was in view of additional F.S.I. received by the purchase of additional land, but because it amounted to construction of additional structure falling under the prohibition of Section 7(1)(ii) of the Maharashtra Ownership of Flat Act. The learned advocate Mr. A.A. Deshpande also relied on <sup>As</sup> the same observation from the judgment <sup>in</sup> Mohatta-Nagar Co-Op. Hsg. Soc. Ltd. case. However, the facts in the said case were quite different. Some stray sentences cannot

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be picked up from any judgment to interpret the section. It is well settled that the authority is to be considered as <sup>the</sup> ratio laid down in the said ruling with respect to the point involved, argued, considered and decided therein.

45. In the facts and circumstances, the ratio laid down in Khatri Builder's case is directly hence <sup>is</sup> applicable and held that the defendants cannot carry out construction of a additional terrace flat without the consent of the flat purchasers from the respective buildings.

46. The next question for my consideration is whether there was such a consent granted by the flat purchasers. A copy of one of the such agreements is at exh.52. Clause-8, 8-A and Clause 16 reads as follows :

"(8) TRANSFER: Nothing contained in this agreement shall be construed nor shall be deemed as a demise or transfer of the interest in the said Flat or scheduled land or any portion of the land or building in favour of the Flat Holder or any other person, whatsoever.

The covenants contained in this agreement on the part of the flat holder are enforceable not only



against the Flat Holder but in case of his demise against all his heirs local representatives and against his estate. However, the covenants contained in this agreement on the part of the builders are personal and are enforceable only against the builders and only by the Flat Holder and by no person other than the Flat Holder.

The Flat Holder shall have no right to transfer, assign or otherwise deal with any of his right conferred under this agreement and the Builders shall not be responsible for covenants on their part except to the Flat Holder.

"(8)A: CONVEYANCE: The builder shall be liable to execute the individual sale deed of conveyance in favour of the Flat Holders but the builders may execute the sale deed in favour of the co-operative housing Society or Company or Condominium, as the case may be, in respect of the whole of the land and building provided that at the time of executing such sale deed, the builder shall be entitled to reserve for themselves right for construction of garage and other structures, if any, and/or further floors on the building whenever permission for such construction of garage structure or floor has become permissible as per the relevant rules and regulations and bye-laws of the Poona Municipal Corporation as amended from time to time whether before or after the execution of this document.

(16) BUILDERS RIGHTS OF ADDITIONAL CONSTRUCTION:

The Builders shall have a right to make additions, alterations, raise storeys or put up additional structures at any time as may be permitted by the Municipal Corporation of Pune and other competent authorities. Such additional structures and storeys will be the sole property of the Builders who will be entitled to dispose it off in any way as they choose and the Flat Holders hereby consents to the same. The agreements with the Flat Holder and all the purchasers of the Flats/Shops/Carages/Parking spaces/Godowns in the said building shall be subject to the aforesaid rights of the Builders and the Flat Holders shall not be entitled to raise any abatement in the price of the tenements agreed to be acquired by him/her or to any compensation or damages on the ground of inconvenience of any of the ground whatsoever.

47. - It was argued that the consent taken herein is blanket consent and relying on ratio laid down in Kalpita Enclave V/s Kiran Builders, 1986 Mh.L.J.110 and Nina Wadia V/s M/s Venus, 1994 (2)Eom.C.I.505, it was argued that it is no consent as contemplated in Sec. 7(1)(ii) of the Act. On careful reading all these clauses, I find that this is ~~not~~ <sup>not</sup> indeed a blanket consent. In these clauses, it has not been anywhere stated as to how many floor can be constructed by the builder and how many flats can be constructed by the builder. It is also not stated as to what would be the restrictions as to the right of the construction of additional flats. For example, it is not stated that builder promoter would be entitled to construct additional flats in respect of the additional

~~F.S.I. available or to use the language of learned~~

advocate Mr. A.A. Deshpande, the release of withheld FSI on account of acquisition of land for High Mass Capacity Transportation Route. The language used in Clause 8 and 16 ~~is~~ <sup>is</sup> certainly granting unrestricted and unlimited powers to the builder or promoter to

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carry out any additional construction as he wishes to do subject to the restriction of other statutory bars. It is certain that even if there is a consent of the flat purchasers, still it is no consent in the eyes of the law as far as any additional construction contrary to the statutory bars like construction without approval of the plan or construction not permissible by any bye-laws are concerned. If the promoter builder would have restricted his right of additional construction only to the extent of availing the F.S.I. which was expected

in lieu of ~~xxxx~~ acquisition of land for high capacity mass transportation route, then it would have been a specific consent. Hence, I hold that the consent taken

by the defendants from the members of the plaintiff is blanket consent and therefore, the defendants have no right to carry out further construction of additional

floors or additional flats on the terrace of the existing buildings.

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48. In the Written Statement it was also contended that the builder, promoter was entitled to carry out construction of additional flats as per the scheme sanctioned by the competent authority under Urban Land

Ceiling Act. However, Section 7(1)(ii) prohibits all constructions whether they were under the scheme of promoter or not and whether such constructions were approved by the competent authority Under Urban Land Ceiling Act or not, if such constructions were not shown in the approved plans, which were shown to flat purchasers. Hence, I hold that the defendants have no right to construct additional terrace flats over the existing buildings.

49. Hence, the defendants cannot postpone the execution of the conveyance in favour of the plaintiff society. Even otherwise the deed of conveyance could have been executed subject to imposing the conditions on the prospective flat purchasers from additional structure.

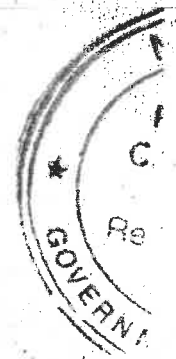
50. Hence, the suit will have to be decreed with costs.

Hence, I pass the following order.

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The suit is decreed with costs.

Defendants Nos. 2, and 4 to 7 are hereby restrained by perpetual injunction from carrying out any additional construction



in the form of flats over the terraces of the existing buildings without obtaining the previous consent of the flat purchasers occupying the flats from the respective buildings.

By grant of mandatory injunction, defendants no. 2, 4 and 7 are hereby directed to execute the deed of conveyance of all the buildings and the suit lands excluding the land of 2000 sq. mtrs. under reservation for shopping centre within a period of two months subject to the members of the plaintiff depositing in court all the necessary expenses for execution of deed of conveyance within two months. However, the amount deposited by the members of the plaintiff for formation and registration of the society that are already with the defendants, if not utilised earlier by them, should be used for execution of deed of conveyance and the balance amount shall be borne by the members of the plaintiff.

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Dated: 16-4-1996.

*A.M. Dhavle*  
16-4-96  
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JND JT. CIVIL JUDGE J.D.  
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