

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 962 OF 2019

**DUMUBAI CO-OPERATIVE
HOUSING SOCIETY LTD.**

**) APPELLANT
(ORIG. PLAINTIFF)**

**V/S.
MR. PETER JOHN D'SOUZA
AND ORS.**

**) RESPONDENTS
(ORIG. DEFENDANTS)**

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**Mr. Vaibhav Mehta a/w. Ms. Mitaali Shah i/by. Vaibhav Mehta
and Associates, Advocate for the appellant.**

**Mr. Gauraj Shah a/w. Mr. Siddhant Sawhney i/by. Mr. Tejas
Shah, Advocate for respondents no.1 and 2.**

**Mr. Rajiv Narula a/w. Ms. Mehek Chowdhary a/w. Mr. Tarang
Jagtiani i/by. Jhangiani Narula and Associates, Advocate for
respondent no.3.**

Mr. Ravindra Sirsikar, Advocate for respondent no.4-M.C.G.M.

CORAM : SANDEEP K. SHINDE, J.

JUDGMENT RESD. ON : 21st March, 2022.

JUDGMENT PRON. ON : 29th March, 2022.

JUDGMENT :

1. This Appeal, by plaintiffs, preferred, under Order 43
Rule 1(r) read with Section 104 of the Civil Procedure Code

(‘CPC’ for short), challenges the order dated 15th May, 2017 passed by the learned Judge, City Civil Court.

2. Briefly stated facts are like this; Petitioner is tenant Ownership Housing Society. Its’ members, have purchased their flats from M/s. Rahul Developments, a Promoter, of which defendant no.1, claims to have become the sole proprietor. The plaintiff instituted the, suit in November 2013, seeking decree to; (i) declare, its exclusive entitlement to consume and/or use a development potential, relatable to suit plots of land described in the Schedule, (ii) declare, that Intimation of Disapproval (IOD), dated 2nd March, 2005 issued by the Municipal Corporation alongwith approval to plans, concerning the building, “Bonaventure”, is nullity, fraudulent and contrary to the provisions of the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1964 (“MOFA” for short) and Maharashtra Regional and Town Planning Act, 1966 and Development Control Regulations for Greater Mumbai, 1991; (iii) declare, that Commencement Certificate dated 14th March, 2008 issued by the Corporation, concerning building

“Bonaventure” is nullity, illegal and void; (iv) mandatory decree to demolish and pull down the structure of “Bonaventure”, if found constructed in contravention of Rules, Regulations, Bye-laws etc.

. Pending suit, plaintiffs sought injunction to restrain the defendants from creating third party rights and interest in the building “Bonaventure”; temporary prohibitory injunction restraining defendants no.1 to 3 from carrying out any construction within or outside the said “Bonaventure” building; appointment of Court Receiver and to restrain the Corporation from issuing Occupation Certificate to the said “Bonaventure” building. Indisputably, construction of the building “Bonaventure” was commenced in 2008, in accordance with the building permission granted in March 2005, by the Planning Authority and completed in 2012-13. Flats in “Bonaventure”, were sold by the promoter-defendants no.1 to 3 or defendants no.2 and 3, during 2009 to 2013. One of the reasons, to refuse interim reliefs, was that, reliefs sought by the plaintiffs, if granted, would affect the interest of the flat purchasers, while they were not the defendants in the suit. Thus, after declining interim reliefs, flats purchasers have been

impleaded as the defendants in the suit. However, this was not sole reason for refusing reliefs. In fact, almost, all reliefs sought, were rendered infructuous, since by then, flats in “Bonaventure” were sold and purchased by bonafide purchasers. That being the case, the learned Judge, has correctly declined the reliefs. Hence, no interference is called for. Any how, the reliefs sought by the plaintiffs, are consequential in nature. To put it differently, the plaintiffs have not asked for the substantive decree to execute conveyance of the building and the land underneath thereto. When, I put a question, learned Counsel for the appellant submitted, plaintiffs have instituted proceedings before the Consumer Forum, seeking conveyance of the suit land. Yet, prima-facie, in my view, plaintiffs could not have omitted to seek substantive relief; in the suit instituted for “Declaratory Decree”. Be that as it may, plaintiff’s grievance is, that the defendants no.1 to 3, could not have used the FSI and development potentials attached to the land admeasuring 6844.45 sq.mtrs for constructing the “Bonaventure” building, in breach of their statutory obligations under MOFA, in terms of agreement executed with the flat purchasers. It is therefore

argued that, the building permissions granted by the Corporation, were equally illegal. As a consequence, Corporation be restrained from granting Occupation Certificate or permission to occupy the “Bonaventure” building till the disposal of the suit. This argument is rejected, reason being, it is not plaintiff’s case that, building permission was granted in breach of building regulations. Moreover, building permissions have been acted upon long back. Yet, Learned Counsel for the appellant, relied on the orders passed by this Court in Writ Petition No. 393/2013 filed by the plaintiff-Society, before instituting the suit. The learned Counsel has relied on the orders dated 25th February, 2013 and 20th November, 2013. However, vide order dated 25th September, 2013 the petitioner was granted permission to withdraw the petition with liberty to file suit. At a time, all interim orders were vacated forthwith. Therefore, the orders passed in the Writ Petition filed by the plaintiff before filing the suit are of no consequence. All the same, building “Bonaventure” has been constructed in accordance with the building permissions granted in 2005 and therefore, flat purchasers in the same building, cannot be denied the Occupation Certificate, unless the Corporation is of

the view, the construction has been carried out in contravention of permissions and sanctioned plan. For all that reasons, stated above, the order impugned calls for no interference. The Appeal from Order is dismissed.

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(SANDEEP K. SHINDE, J.)