

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

INTERIM APPLICATION NO. 6603 OF 2025

IN

SUIT NO. 300 OF 2025

Erle Benedict Pereira

.. Applicant

IN THE MATTER BETWEEN

Erle Benedict Pereira

.. Plaintiff

Versus

Erlyn Apartment Co-operative Housing Society
Ltd

Defendant /
.. Respondent

.....

- Mr. Karl Tamboly a/w Ms. Anuja Jhunjhunwala & Ms. Pooja Mehta i/by M Mulla Associates, Advocates for Applicant / Plaintiff
- Mr. Sean Wassoodew a/w Ms. Ashna Shah & Mr. Abdul Rehman, Advocates for Defendant / Respondent

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CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 10, 2025

JUDGMENT:

1. Heard Mr. Tamboly, learned Advocate for Applicant / Plaintiff and Mr. Wassoodew, learned Advocate for Defendant / Respondent.

2. Interim Application is filed by Applicant / Plaintiff. Suit is filed seeking declaration for extra FSI / additional area in respect of Plaintiff's entitlement under the registered Deed of Conveyance dated 27.09.1994 executed between Mr. Alexander Benedict Joseph Pereira (ABJ Pereira) and predecessor-in-title of Plaintiff and Defendant

Society. Pleadings are completed in the Interim Application. By consent, Interim Application is heard for interim reliefs.

3. Briefly stated Mr. ABJ Pereira was the owner of a plot of land bearing CTS No. C/257 (part) and C/258 (part) of Bandra being Municipal Ward No.II-E-1405-2 admeasuring approximately 1160 sq. yards situated at St. Joseph's Road, Bandra (W), Mumbai (hereinafter referred to as the "**subject land**"). Plaintiff is the son and legal heir of Mr. Pereira. Mr. ABJ Pereira established a Partnership Firm under the name of 'Erlyn Enterprises' along with three other partners under a Deed of Partnership dated 25.09.1978 to redevelop the subject land. The firm constructed one multi-storied building on the subject land and sold various tenements comprised therein to third party purchasers / members of Defendant Society and entered into agreements in this regard with them. There are two Agreements which are required to be looked into for determination of interim relief which are both appended to the Suit plaint. First is the Development Agreement i.e. Registered Deed of Conveyance dated 27.09.1974 and second is the individual MOFA Agreement for Sale executed between Developer and individual flat purchasers. Both learned Advocates Mr. Tamboly and Mr. Wassoodew have referred to and relied upon the contents and covenants in the aforesaid agreements. On 08.09.1982 occupation certificate was obtained and the Partnership Firm handed

over possession of respective flats to the flat purchasers. Flat purchasers thereafter registered the Defendant Society some time in 1984 as per its registration certificate.

4. Mr. Tamboly appearing on behalf of Plaintiff would submit that by Deed of Dissolution dated 19.02.1991 the Partnership Firm was dissolved and Mr. Pereira took over the business of the Firm as his Proprietary concern. He would submit that upon dissolution of the Firm, Mr. Pereira received flat Nos.101, 102 and 111 in the building towards his share of the partnership profits and became the sole owner thereof. He would submit that these flats were registered in the name of Erlyn Enterprises with Mr. ABJ Pereira being the sole proprietor thereof.

4.1. He would submit that on 27.09.1994 Deed of Conveyance was executed by Mr. ABJ Pereira as Vendor and by his Proprietorship concern "Erlyn Enterprises" as confirming party in favour of Defendant Society as Purchaser, *inter alia*, conveying the subject land to the Society on the terms and conditions set out therein. He would straight away draw my attention to the Deed of Conveyance (appended as Exhibit 'B' at page Nos.110-130 of Suit plaint) and covenants (i) to (iv) appearing immediately before Schedule "A" in the said Conveyance, interpretation and enforcement of which is the contentious issue between the parties. After reading the aforesaid 4

covenants, he would submit that as per clause (i) it is agreed between parties that if any extra or additional FSI is made available concerning the said property then in that case the Vendor shall be entitled to such extra or additional FSI to the extent of 900 sq.ft. Therefrom and it shall be utilized and/or consumed by the Vendor to cover the open terrace space adjacent to Vendor's flat No.111 on the 11th floor of the existing building known as "Erlyn Apartment" belonging to Vendor. He would submit that clause (ii) thereof excludes the Defendant Society from having any rights to the extent of 900 sq.ft. of FSI coming to Mr. Pereira under clause (i) and categorically states that Society shall be entitled to utilize any additional or extra FSI excluding the aforementioned 900 sq.ft. as mentioned in clause (i). He would submit that in addition clause (iii) records that four stilt car parking spaces shall always belong to Mr. Pereira. He would then draw my attention to clause (iv) which states that parties have agreed that the said covenant shall run with the land.

4.2. He would submit that clause (i) puts the time limit to exercise extra additional FSI that shall be available in view of what is stated in clause (iv) and Mr. Pereira would have exclusive right to the extent of 900 sq.ft. and four stilt parking spaces which covenants run with the subject land and are binding upon the Society. He would fairly submit that all additional FSI over and above 900 sq. ft would be

for benefit of the Society. He would submit that it is also an admitted fact which is agreed in the Deed of Conveyance as also by parties that as on the date of the Conveyance the entire FSI available in respect of the subject land was fully utilized for construction.

4.3. He would submit that the need and necessity of invoking the aforementioned covenants has arisen in view of the Society now going in for redevelopment and despite initially recognizing the right of the Plaintiff (who is successor-in-title to Mr. Pereira) has resiled from its own stand and does not want to recognize the right of Plaintiff for additional / extra FSI to the extent of 900 sq. ft. He would submit that correspondence between the parties recently has prompted the Plaintiff to file the present Suit proceedings and seek urgent interim relief since the Society has issued the tender document disregarding the Plaintiff's right under the aforementioned covenants.

4.4. He would submit that from 1994 to 2023 Society did not raise any objection regarding the above covenants. He would submit that Plaintiff being son of Mr. Pereira by virtue of operation of the Deed of Conveyance and his parents' respective Wills, is admittedly the owner of Flat No.111. There is no dispute about this fact. He would submit that the dispute rather the *lis* between parties began in July 2024 when Defendant Society commenced discussion on the possibility of redevelopment of the subject land and the Society

building. He would draw my attention to the relevant correspondence in this regard for the purpose of seeking interim relief. On behalf of Plaintiff and Defendant – Society there is substantial correspondence in the form of emails exchanged between parties which is all appended to the Suit plaint.

4.5. At the outset, he would draw my attention to Exhibit "C" at page No.152 which is the email dated 04.07.2024 addressed by Society pertaining to discussion held in the meeting on 02.07.2024 and draft of the resolutions that needed to be passed and adopted in the Special General Body Meeting that would be conveyed for that purpose. He would draw my attention to draft resolution No. 4 appearing at page No.154 wherein it is stated that the Society and Plaintiff have agreed to review and discuss this matter relating to FSI based on prevailing BMC guidelines / notifications or other rules when a final decision is taken to conclude the same.

4.6. He would draw my attention to the email dated 05.07.2024 appended at page No.158 which pertains to the minutes of the meeting held on 02.07.2024. Next he would draw my attention to the notice issued for convening the Special General Body Meeting of the Society on 07.07.2024. Agenda Item No.3 of the said meeting pertains to ratification of discussion in the meeting held on 02.07.2024 on FSI to the extent of 900 sq.ft. as documented in the

Deed of Conveyance as recorded in the draft resolution which was circulated. Next minutes of the Special General Body Meeting held on 07.07.2024 are appended at page No.163 wherein it is stated that based on discussion and after making some corrections in the draft resolution the edited resolution attached was unanimously passed by all members present. Resolution(s) passed are appended at page Nos.165-166 and he would draw my attention to Resolution No.4 which, *inter alia*, states that Society has agreed to be bound by the above clause i.e. operative clause (i) of the Deed of Conveyance which has been alluded to herein above and if FSI is available 900 sq.ft. will be due to the Plaintiff and if is not available then Plaintiff will not be entitled to 900 sq.ft. of the said extra available FSI. The said resolution records that entire FSI pertaining to the subject land was utilized at the time of construction of the building and hence extra FSI was not available.

4.7. He would submit that despite the Society having unanimously passed the above resolution in its Special General Body Meeting held on 07.07.2024, Society on its own volition without following the due process of law while sharing the minutes of the Special General Body Meeting revised and modified Resolution No.4 which is appended at page No.169 wherein the Society stated that the Society and Plaintiff agreed to review and discuss the matter relating

to FSI later based on prevailing BMC guidelines / notifications or other rules when a final decision is taken on the same in keeping with clause (i) of the Deed of Conveyance.

4.8. He would submit that thereafter parties entered into substantial correspondence which is appended in seriatim from page No.170 onwards in the form of emails on the above subject. He would submit that Resolution No.4 dated 07.07.2024 was unanimously passed by all members who were present in the Special General Body Meeting and thereafter minutes were circulated to all members wherein the Society categorically agreed to be bound by the said covenant / clauses in the agreement dated 1994. However it was unilaterally amended by the Managing Committee of the Society within 10 minutes of the original Resolution having been circulated and a contrary resolution was instead shown to have been passed on 07.07.2024. He would submit that in the meanwhile Defendant Society commenced preliminary discussions with potential developers and during one such discussion with one Mr. Shailesh Jhunjunwala, the Society suggested that Plaintiff's entitlement under the Deed of Conveyance shall be discussed by Mr. Jhunjunwala with the Plaintiff and the same should not hinder redevelopment process of the Society building.

4.9. He would submit that this fact is recorded by Defendant Society in the summary of discussion circulated by email on 22.10.2024 which is appended at Exhibit “N” to the Suit plaint. He would submit that Society thereafter appointed PMC to prepare a Feasibility Report for redevelopment and prepared tender documents thereafter. He would submit that under the Section 33(11) of current Development Control and Promotion Regulations (**DCPR**) 2034, FSI of 4.05 is available in respect of the subject land.

4.10. He would submit that malafide intention of the Society came to the fore only in April 2025 when Plaintiff noticed the fact that the tender document issued by the Society did not disclose entitlement of Plaintiff to the extra / additional FSI of 900 sq. ft. He would submit that despite Plaintiff’s repeated requests to the Society rectify and grant Plaintiff’s substantive right under the covenants in the Deed of Conveyance dated 27.09.1994, Society did not pay any heed to the Plaintiff. He would submit that in the meanwhile two bids were received along with necessary EMD and on 12.07.2025 in the email correspondence exchanged with the Society, the Society members refused to recognize Plaintiff's entitlement for additional / extra FSI to the extent of 900 sq. ft. under the Deed of Conveyance dated 27.09.1994 which prompted the Plaintiff to file the present Suit.

4.11. He would submit that in the Deed of Conveyance Defendant Society had expressly agreed that Plaintiff's predecessor-in-title Mr. AJB Pereira shall be entitled to extra / additional FSI concerning the subject flat No.111 to the extent of approximately 900 sq.ft. to be used or consumed to cover the open terrace adjacent to flat No.111 then belonging to Mr. Pereira along with any additional extra FSI concerning the subject land to belong to the Society. He would submit that Defendant Society by virtue of the said Conveyance Deed agreed that the covenants would exist in perpetuity until exercised and expressly covenanted that the covenants would run with the subject land and therefore Defendant Society is bound by the same and it cannot resile from the same. He would vehemently submit that any developer appointed by Defendant Society would necessarily be bound by the said covenant as recorded in the Deed of Conveyance which would run with the subject land and therefore it is not time bound. He would submit that if the Defendant Society wanted to object to the said covenants it was at liberty to exercise its right which it chose not to challenge the covenants from 1994 until today.

4.12. He would submit that since 1991 development control regulations in Mumbai have undergone significant changes and as per the Feasibility Report prepared by Defendant's PMC M/s. Cove Architects under Section 33(11) of current DCPR 2034, FSI of 4.05 is

available in respect of the subject land out of which Plaintiff is exclusively entitled to 900 sq.ft. to the exclusion of Defendant Society whereas Defendant Society would be entitled to entire balance additional / extra FSI as per the covenants in the Deed of Conveyance. He would submit that contention of Defendant Society in one of the email exchanged that the open terrace adjoining flat No.111 is part of common areas of the Society is incorrect in the facts of the present case. He would submit that it is indisputable that the said open terrace adjacent to Flat No.111 is accessible only to Flat No.111 and it has been exclusively used by Plaintiff and his family since inception years and having accepted this position it is now not open to the Defendant Society to assert wrongful entitlement over the said open terrace as it being common area for benefit of the Society.

4.13. That apart, he would draw my attention to the individual MOFA Agreement (at page No.93 of Suit plaint) entered into with each of the member of the Defendant Society and more specifically clause 16 and 43 thereof to contend that the said clauses entitled the Vendor to possess exclusive right over the terrace of the building attached to Flat No.111 on the terrace even after execution of conveyance which was agreed upon by each of the individual flat owners. In that view of the matter, he would persuade me to consider the case of Plaintiff for interim relief seeking restraint on the Society by an order of temporary

injunction from appointing developer or entering into any agreement for the purpose of redevelopment without providing for Plaintiff's entitlement under the Deed of Conveyance dated 27.09.1994 and restrain the Society from taking any further steps in furtherance of the tender document issued by the Society.

4.14. In support of his submissions, Mr. Tamboly has referred to and relied upon the following three decisions of the Supreme Court and this Court:-

- (i) *Prem Singh v. Birbal Singh*¹;
- (ii) *Cauvery Coffee Traders v. Hornor Resources Co Ltd*²;
- (iii) *Grand Paradi CHS v. Mont Blanck Properties & Industries*³.

5. *PER CONTRA* Mr. Wassoodew, learned Advocate for Defendant Society would make the following submissions to oppose grant of interim relief:-

5.1. He would submit that flats in the Society building were sold by Developer / Vendor in the year 1982 and until a few years Society was not formed and thus Developer promoter failed in his obligation. He would submit that under Section 11 of the Maharashtra Ownership of Flats Act, 1963 (for short "**MOFA**"), conveyance executed by Vendor with Society virtually transfers all existing rights of the Vendor to the Society and therefore contention of Plaintiff seeking

¹ (2006) 5 SCC 353

² (2011) 10 SCC 420

³ (2011) 5 Bom CR 249

entitlement to 900 sq.ft. of the extra / additional area post conveyance cannot be countenanced. He would however admit the fact that since entire available FSI of the land was exhausted at the then time the covenants were stated in the Deed of Conveyance but would argue that on execution of the said Deed of Conveyance, the provisions of Section 7A read with Section 11 of the MOFA Act would apply and all rights of the Vendor would stand extinguished. He would submit that any such covenant retaining any right to the Vendor as stated in the Deed of Conveyance or for that matter in the individual MOFA agreements executed with each member of the Society exists, it becomes a clear case of contracting out and the said clauses are liable to be ignored. He would draw my attention to Clauses 12 and 13 of the MOFA agreement executed with each of individual flat purchasers which records that the Vendor shall have the right in the said land only until the execution of conveyance and once conveyance is executed all rights of the Vendors would stand extinguished.

5.2. Next, he would draw my attention to clause 16 of the same agreement to contend that it is stated therein that vender shall execute conveyance in favour of the Society that may be formed by the purchasers of the premises of the entire land and premises which shall be subject to the provisions of Maharashtra Apartment Ownership Act, 1963 (MOFA).

5.3. He would draw my attention to the decision of this Court in the case of *Hareesh Vijaysinh Bhatia & Ors. Vs. District Deputy Registrar and Ors.*⁴ to contend that on a conjoint reading of the provisions of Section 11(1) of MOFA, Rule 5 and Clause 13 of Form V agreement under MOFA Rules, it leaves no room for doubt that the Promoter is required to transfer and convey in favour of the Society his entire right, title and interest in the land and building. He would submit that on such transfer and conveyance everything that is owned by the Promoter stands transferred and conveyed in favour of the Society. He would submit that Section 11 of MOFA does not permit Promoter to retain or hold onto himself any right in the land and building or future potential and it amounts to automatic divesting of ownership of the Promoter's entire right in the land and transfer in favour of the Society in entirety. He would candidly submit that during the time when the Deed of Conveyance was executed Form V agreement was not in place though the above decision holds that Form V agreement is mandatory and required to be executed with all flat purchasers under Section 4 of MOFA. He would nevertheless submit that under the extant provisions of Section 11 of MOFA, the Promoter / Developer is not entitled to reserve any right for himself and therefore in that view of the matter the covenants which the

4 (2025) 4 Bom CR 222

Plaintiff is relying upon is required to be read down as it is contrary to the provisions of Section 11 of MOFA.

5.4. In support of his above submissions, he would refer to and rely upon the following three decisions to contend that it cannot be open to the Promoter / Developer or Vendor / owner of the land to reserve any right unto him after execution of the conveyance in favour of the Society:-

- (i) *Lakeview Developers v. Eternia CHS Ltd* ⁵;
- (ii) *Ravindra Mutenja & Ors. v. Bhavan Corporation & Ors.* ⁶;
- (iii) *Madhuvihar CHS, Mumbai & Ors. v. Jayantilal Investments Mumbai* ⁷

5.5. He would next persuade me to consider the fact that any such right reserved by the Vendor in the Deed of Conveyance *qua* the open terrace of the Society cannot be allowed since it would be contrary to the statute as a terrace is considered to be a common area and open space for the benefit of the members of the Society. He would submit that in that view of the matter Society has taken a considered decision not to abide by the covenant in the Deed of Conveyance for reserving the additional area of 900 sq. ft. for the Plaintiff in respect of flat No.111 in the Society building on redevelopment when the additional / extra FSI would be available.

5 2015 SCC OnLine Bom 3824

6 2003(5) Mh.L.J. 23

7 2011(1) Mh.L.J. 641

5.6. On the basis of above submissions, he would submit that all rights of the predecessor-in-title of Plaintiff came to an end and stood extinguished on date of execution of Deed of Conveyance and the alleged right contemplated and envisaged by Plaintiff under the covenant cannot be countenanced in view of the provisions of Section 11 of MOFA in favour of the Vendor / Plaintiff.

5.7. On the basis of the above submissions, he would persuade the Court to reject the Application for interim relief.

6. I have heard both the learned Advocates appearing for the respective parties and with their able assistance perused the record of the case. Submissions made by both learned Advocates have received due consideration of the Court.

7. At the outset, before I decide and adjudicate the above issue it needs to be stated that Mr. Wassoodew, learned Advocate for the Defendant Society has refrained from addressing the Court on the issue of the General Body of the Society having considered and passed the resolution namely Resolution No.4 in its Special General Body Meeting held on 07.07.2025 in respect of which Plaintiff has made a grievance that it was unilaterally changed by the Managing Committee members despite it having been passed unanimously and circulated to all members. Said Resolution which was agreed unanimously is

appended at page Nos.165 and 166 of the Suit plaint and is reproduced below for immediate reference:-

"4. FSI to the extent of 900 sq feet as documented in the Deed of Conveyance

Operative Clause (i) of the Deed of Conveyance states that "in the event that any extra or additional FSI is made available concerning the said property, then the vendor shall be entitled to such extra or additional FSI to the extent of 900 Sq. feet only and the same shall be utilized and/or consumed by the Vendor to cover the open terrace space adjacent to the Vendor's flat, being flat No. 111 on the 11th floor of the existing building known as "Erlyn Apartment", belonging to Mr. A.B.J. Pereira, being the vendor herein".

The Society agrees to be bound by the above clause, that is to say if FSI is available, 900 Sq. feet will be due to Erle Pereira, and if it is not available, then Erle Pereira will not be entitled to 900 Sq. feet of the said extra available FSI.

The entire FSI potential of the plot was utilized at the time of the construction of the building and the Occupation Certificate in respect of the same was granted. Hence no extra FSI is presently available

The above would be binding on the heirs, executors, administrators and assigns of both sides; the same will be documented/formalized in consultation with a lawyer, by way of a written Agreement."

8. In the present case, it is seen that there are two distinct points of submissions advanced by Plaintiff and which are opposed by the Society. First issue which requires determination *prima facie* on the basis of the documentary evidence placed before me is the interpretation of the covenant appearing in the Deed of Conveyance dated 27.09.1994 between Plaintiff's predecessor-in-title Mr. ABJ Pereira and Society and the effect of the said covenant. For the sake of convenience, the said covenant is reproduced herein below:-

- “i) In the event of any extra or additional F.S.I., is made available concerning the said property then and in that case the Vendor shall be entitled to such extra or additional F.S.I. to the extent of approx 900 sq.ft. only and the same shall be utilised and / or consumed by the Vendor to cover the open terrace space adjacent to the Vendor’s flat being flat No.111 on the 11th floor of the existing building known as “Erlyn Apartment” belonging to Mr. A.B.J.Pereira, being the Vendor herein.*
- ii) It is further agreed that if any extra or additional F.S.I. (excluding) 900 sq.ft. mentioned in cl. (i) above is made available concerning the said property , then the same shall exclusively belong to the Purchaser Society and the Purchaser’ Society shall be be entitled to utilise the said F.S.I. as it may deem fit and proper in the said property.*
- iii) It is further agreed that concerning the stilt portion on the ground floor of the said building four of the same bearing Nos.101 to 111 shall always belong to the Vendor and 2 stilts shall always belong to Mr. Dyllis D’souza bearing No.91 an the remaining 2 stilts shall belong to Mrs. Joy Pereira bearing No.92. It is specifically agreed that the said Vendor (Erly Enterprises and the said Mr. Dyllis D’souza and Mr. Joy Pereira shall be entitled to use the said stilt portions themselves or through their nominee and assigns and the Purchaser Society shall have no objection for the same and in any manner whatsoever.*
- iv) It is further agreed that the said covenant shall run with the land.”*

9. There is no dispute about entitlement of Plaintiff and the fact that he is the legal heir of Mr. ABJ Pereira and thus entitled to the benefit accrued to him under the Deed of Conveyance. This is not even disputed by the Society. The aforesaid covenant (i) expressly agrees that Mr. Pereira would be entitled to extra additional FSI concerning the subject land to the extent of approximately 900 sq. ft. to be used or consumed to cover the open terrace space to Flat No.111, then belonging to Mr. Pereira and now belonging to Plaintiff. It is an admitted fact that this Deed of Conveyance and the above covenant

therein has remained unchallenged from the year 1994 until today. Even today, there is no challenge intended by the Society to the aforesaid covenant. Though it is vaguely argued by Mr. Wassoodew that the said covenant was entered into by fraudulent means to the detriment of the Society and the Society had no option to enter into the Conveyance, this submission cannot be accepted. Society subsisted and permitted with the said covenant till today. Even today there is no challenge to it; except that Society has refused to abide by the same. The contingency for the said clause / covenant to arise and be implemented has arisen. Society is not even denying existence of the said covenant. Its case is that all rights of the Vendor got transferred to the Society and the Vendor could not have retained any right in view of Section 11 of MOFA.

10. In cases of fraud, coercion or undue influence the party pleading the same must set-forth full particulars and mere allegations which are vague and insufficient no matter how strong the language is cannot be accepted by the Court. The Deed of Conveyance is a statutory contract rather a registered document and there is presumption that the registered document is validly executed and *prima facie* valid in law which has stayed and subsisted until today without it being challenged. Therefore submission of the Society at the outset that the aforesaid covenant was induced in the Agreement

by the Developer to their detriment and they did not have any choice stands completely defeated.

11. For this another reason which is the second issue argued by Plaintiff needs to be looked into. General Body of the Society itself accepted the said covenant, but even after doing so, the Managing Committee of the Society has unilaterally changed and modified the Resolution which was accepted by the General Body and circulated a fresh Resolution to all Members of the Society without taking recourse to law. Thus on the face of record and more specifically in the absence of specific pleadings and strict proof, defence of the Society cannot be accepted rather the conduct of the Society and its Managing Committee is *prima facie* dishonest and driven by greed on the face of record in the facts and circumstances of the present case.

12. It is observed that the aforesaid covenant pertaining to reserving additional FSI to the extent of 900 sq. ft. to the Vendor and all remaining additional FSI to the Society as stated in clause (i) and (ii) of Deed of Conveyance runs with the land (as stated in clause iv) and is not time bound. Society cannot today plead that inclusion of the said covenant amounts to contracting out of the statutory provisions when it is an express condition of the Deed of Conveyance duly accepted by the parties to the conveyance which includes the Society. It is seen that from 1994 right of the Plaintiff has today

accrued to exercise his right under the said covenant since it states it will accrue at any time as and when additional FSI became available in respect of the subject land. Further, if the said covenant is read carefully, clause (i) takes precedence over clause (ii) therein meaning that as and when any extra / additional FSI is available, 900 sq. ft. will be accrued to the Vendor and all other balance FSI to the Society.

13. Both parties are/were *ad idem* with the fact that when Deed of Conveyance was executed the entire FSI as available for the subject land at the then time was fully utilized.

14. Both parties are also *ad idem* today that under Section 3(11) of DCPR 2034, FSI of 4.05 is available today in respect of the subject land. Thus when the same is implemented and if additional or extra FSI is sought to be loaded onto the subject land the aforesaid covenant comes into effect and entitles the Plaintiff to 900 sq. ft. of exclusive FSI as agreed between the parties. Additionally, it is also seen that this 900 sq. ft. which accrues to the Plaintiff would be covered FSI to the extent of the terrace area admeasuring 900 sq. ft. which the Vendor / Plaintiff has / had been enjoying right since inception i.e. from 1994 onwards by having exclusive possession of the terrace area adjacent to Flat No.111. Though a very lame argument is made by Mr. Wassoodew late in the day that terrace area has to be treated as common area, the same cannot be accepted in the facts and

circumstances of the present case. Society has not rather never objected to the exclusive use of the terrace by Vendor / Plaintiff for the past 31 years. It now cannot resile from its obligation contained in the covenant in the Deed of Conveyance to adopt a contrary stand altogether without itself taking any steps whatsoever to challenge the said covenant.

15. The conduct and action of the Society *qua* the aforesaid covenant is nothing but a complete afterthought driven by its greed to having the entire additional area / FSI post redevelopment for the use of its Members to the detriment of the Vendor / Plaintiff. Though Mr. Wassoodew would also argue that indirectly Plaintiff being a Member of the Society would also be a beneficiary on behalf of the Society for the additional area that may accrue to its Members, but this argument is completely invalid, misconceived, misplaced in the facts and circumstances of the present case because if such an argument is accepted, then it would amount to reading down of the covenant agreed between parties in the Deed of Conveyance.

16. Society today is well aware about the fact that it cannot challenge the aforementioned covenant as being contrary to law as argued before me today or the said clause having been induced upon the Society by the Developer by fraud or undue influence. In the face of argument advanced by the Society that the said covenant was

induced on account of fraud and/or undue influence by the Vendor Article 59 of the Limitation Act would get attracted and in that event it would have been incumbent for the Society to take appropriate steps within the prescribed limitation period and not argue this ground across the bar after 31 years in defence.

17. That apart clause 43 in the MOFA Agreement executed by each Member of the Society with the Developer which is appended at Exhibit 'A' to the Suit plaint makes it crystal clear that each and every Member of the Society before they entered into their MOFA Agreements were made aware about the Vendor's right, title and entitlement to the aforesaid exclusive right over the terrace area of the Society building even after execution of the Deed of Conveyance.

18. The Society therefore cannot plead ignorance of this fact neither each and every Member of the Society since they were aware about the effect of the covenant which was their knowledge much prior even before the execution of the conveyance in the year 1994. The submission advanced by Mr. Wassoodew that the Developer did not take any steps to registered the Society for 7 years from 1982 to 1987 and therefore he derelicted in his duty as Promoter also cannot be accepted as a valid ground to hold against the Vendor / Developer with regard to the subject covenant in question. The Society

Registration Certificate is appended at page No.109 of the Suit plaint and it shows that the Society was registered on 11.05.1984.

19. Hence in view of the above observations and findings *qua* the covenant in the Deed of Conveyance, it is indisputable that the Plaintiff is entitled to additional / extra FSI of 900 sq. ft. in addition to the intensive FSI and 4 stilt car parking spaces as per the said covenant as applicable as the said covenant runs with the land.

20. This brings me to the next factual issue which *prima facie* reflects the dishonest conduct of the Society on the face of record. It is seen that Defendant – Society by a Resolution dated 07.07.2024 shared vide email dated 10.07.2024 and time stamped at 14:36:24 hours infact accepted that the Society is bound by the Deed of Conveyance and recognized Plaintiff's entitlement to the additional FSI contained in the Deed of Conveyance. Copy of said Resolution is appended at page No.166 of the Suit plaint. For the sake of convenience, the same is reproduced below:-

"4. FSI to the extent of 900 sq feet as documented in the Deed of Conveyance

Operative Clause (i) of the Deed of Conveyance states that "in the event that any extra or additional FSI is made available concerning the said property, then the vendor shall be entitled to such extra or additional FSI to the extent of 900 Sq. feet only and the same shall be utilized and/or consumed by the Vendor to cover the open terrace space adjacent to the Vendor's flat, being flat No. 111 on the 11th floor of the existing building known as "Erlyn Apartment", belonging to Mr. A.B.J. Pereira, being the vendor herein".

The Society agrees to be bound by the above clause, that is to say if FSI is available, 900 Sq. feet will be due to Erle Pereira, and if it is not available, then Erle Pereira will not be entitled to 900 Sq. feet of the said extra available FSI.

The entire FSI potential of the plot was utilized at the time of the construction of the building and the Occupation Certificate in respect of the same was granted. Hence no extra FSI is presently available

The above would be binding on the heirs, executors, administrators and assigns of both sides; the same will be documented/formalized in consultation with a lawyer, by way of a written Agreement."

20.1. It is seen that the aforesaid Resolution whereby the Society has agreed to be bound by the covenant i.e. clause (i) of the Deed of Conveyance with regard to availability of 900 sq. ft. of FSI due to Plaintiff. The subsistence of the said covenant without it being challenged by the Society in an appropriate Court of law makes it clear that Plaintiff is entitled to the same. It is seen that this Resolution has been unilaterally changed and modified by the Society / Society's Managing Committee to read it differently and that changed Resolution No.4 is appended at page No.169 of the Suit plaint. That changed Resolution No.4 reads thus:-

"4. FSI to the extent of 900 sq feet as documented in the Deed of Conveyance

Operative Clause (i) of the Deed of Conveyance states that "in the event that any extra or additional FSI is made available concerning the said property, then the vendor shall be entitled to such extra or additional FSI to the extent of 900 Sq. feet only and the same shall be utilized and/or consumed by the Vendor to cover the open terrace space adjacent to the Vendor's flat, being flat No. 111 on the 11th floor of the existing building known as "Erlyn Apartment", belonging to Mr. A.B.J. Pereira, being the vendor herein".

The entire FSI potential of the plot was utilized at the time of the construction of the building and the Occupation Certificate in

respect of the same was granted. Hence no extra FSI is presently available

The Society and Erle Pereira have therefore agreed to review and discuss this matter relating to FSI later, based on prevailing BMC guidelines / notifications or other rules, when a final decision is taken on the same, in keeping with clauses (i) of the Deed of Conveyance.

The above would be binding on the heirs, executors, administrators and assigns of both sides; the same will be documented/formalized in consultation with a lawyer, by way of a written Agreement."

20.2. Thus it is *prima facie* seen that unnumbered paragraph Nos.1 and 4 remain as it is. Unnumbered paragraph No.3 becomes paragraph No.2, but original numbered paragraph No.2 is completely changed to read to the contrary and is now shown as unnumbered paragraph No.3. It is seen that the Society has unilaterally changed the original Resolution on its own volition by circulating the minutes of the same General Body Meeting on 10.07.2024 later time stamped at 14:44:55 hours i.e. within 10 minutes after having circulated the original Minutes / Resolutions unanimously passed by its Members. This conduct of the Society and its Managing Committee speaks volumes of its intent rather *malafide* intent on the face of record.

21. I must note here that Mr. Wassoodew has fairly not touched upon the aforesaid submissions and argument made on behalf of the Society at all. In his response and reply to the present Interim Application, Mr. Wassoodew has repeatedly argued and reiterated that by virtue of the provisions of MOFA and more specifically Section 7

read with Section 11, the Deed of Conveyance if at all executed conveys all right, title and interest of the Vendor / owner to the Society and the Vendor cannot withhold any right unto himself as has been done in the present case. According to the Society allowing the Deed of Conveyance dated 1994 to subsist with the contentious covenant of reserving right of retention to the Vendor would amount to a farce and render the provisions of Section 11 completely otiose in the facts and circumstances of the present case.

22. Mr. Wassoodew has relied upon the decisions of this Court in the case of (i) *Lakeview Developers (supra)*, (ii) *Ravindra Mutenja & Ors. (supra)* and (iii) *Madhuvihar CHS, Mumbai & Ors. (supra)* which envisage that the Developer cannot claim to exploit the building potential for eternity and it is the obligation of the Developer to convey the land in favour of the Society within the prescribed time frame and once that is done, any further benefit that would accrue on account of any additional TDR or FSI being made available cannot be used by the Developer for his own benefit. He would submit that this principle needs to be adopted and followed in the facts of the present case notwithstanding the fact that the covenant exists in the Deed of Conveyance for the Vendor retaining extra / additional FSI of 900 sq. ft. for himself in future. This argument is not open to the Society. Facts in the present case are entirely different. This is a clear case of

contract agreed by the parties and it cannot be equated to an argument of exploitation. Registered Conveyance has been entered into in 1994. The only answer to this argument of the Society is that it ought to have then taken steps if at all it was aggrieved with the contentious covenant / clause. Society cannot approbate and reprobate both at the same time *qua* the Deed of Conveyance under which it would be entitled to additional FSI, but it refuses to act upon the covenant to which it has agreed to in the Conveyance *qua* the right reserved to the Vendor. The Deed of Conveyance is valid and subsisting and Society did not take any steps to challenge the same for 31 years.

23. The covenant read alongwith clause 43 of MOFA Agreement executed by Developer / Vendor with each Member of the Society leaves no room for doubt about the transparency by the Developer / Vendor in the present case having acted *bonafidely* with all complete disclosure and therefore submissions of the Society advanced by Mr. Wassoodew that the said covenant should be read down and not be looked into cannot be accepted by the Court. The conduct of the Society in accepting the right of the Vendor and now attempting to resile from it and its own act of modifying the General Body Resolution clearly smacks of deceit on the part of the Society.

24. In view of the above the tender document issued by the Society to prospective developers without adhering to the covenant in the Deed of Conveyance under which the Society derives its title and its non-adherence to the covenant for providing additional / extra FSI of 900 sq. ft. to the Vendor / Plaintiff acts which are illegal and contrary to the terms of the Deed of Conveyance between the Vendor and the Society as also contrary to rights of the Plaintiff which cannot be allowed to sustain. The dishonest conduct of the Society having accepted Vendor / Plaintiff's entitlement since 1994 and now resiling and disregarding it in the manner in which it has been done does not entitle the Society to go ahead with redevelopment and utilization of additional FSI / area without granting Plaintiff's right to additional / extra FSI under the Deed of Conveyance. These are the *prima facie* observations and findings emanating from the record of the case which has been placed before me by the parties.

25. In view of my above observations and findings Plaintiff is entitled to interim relief. Hence Interim Application is allowed in terms of prayer stated in paragraph No.67(a)(i) and (ii) which read thus:-

"67. The Applicant therefore prays:

a. That pending the final hearing and disposal of the present proceedings, that this Hon'ble Court be pleased to -

i. restrain the Respondent by an order of temporary injunction from appointing a developer or entering into any agreement for the purpose of its redevelopment without providing for

the Applicant's entitlement under the Deed of Conveyance dated 27th September 1994 being provided for;

- ii. *restrain the Respondent from taking any steps in furtherance of the Tender document issued."*

26. Interim Application is disposed in the above terms.

[MILIND N. JADHAV, J.]

Amberkar

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by AJAY
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Date: 2025.12.10
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