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**SooperKanoon Citation : [sooperkanoon.com/1184203](http://sooperkanoon.com/1184203)**

**Court :** Mumbai

**Decided On :** Jul-18-2016

**Judge :** R.M. Savant

**Appeal No. :** Appeal From Order No. 624 of 2016 alongwith Civil Application No. 798 of 2016

**Appellant :** Our Lady of Vailankanni and Perpetual Succour Co-operative Housing Society Ltd.

**Respondent :** St. Michael's Church and Others

**Judgement :**

Oral Judgment:

1. The above Appeal from Order takes exception to the order dated 04.05.2016 passed by the Learned 2nd Additional Principal Judge, City Civil Court, Mumbai, by which order, Notice of Motion No.957 of 2011 filed by the Appellant/original Plaintiff came to be dismissed.

2. The Plaintiff is a Cooperative Housing Society and has filed the suit in question being SC Suit No.875 of 2011 for a mandatory injunction and for execution of Deed of Conveyance against the Defendant No.1 which is a public charitable trust and which is the owner of the land in question on which the buildings of the

Plaintiff are situated. The reliefs by the Plaintiff in the said suit are therefore revolving around the provisions of the Maharashtra Ownership of Flats Act, 1963 (For short the MOFA ). In the said suit, the Plaintiff had filed the instant Notice of Motion being No.957 of 2011 claiming the relief of restraining the Defendant No.3 who is a developer from carrying out any activity on the suit property and or restraining the Defendant No.3 from entering into remaining upon, digging, excavating, constructing, putting up structures in any manner dealing with the suit property. The substance of the case of the Plaintiff is that in the original plan sanctioned by the MCGM, three gardens were shown in the suit property. However, the Defendant No.3 has got a new sanctioned plan, wherein the Defendant No.3 proposes to construct a multistoried building in place and instead of the gardens thereby depriving the right of the Plaintiff society to the said three gardens. The Plaintiff has therefore sought the injunctive reliefs in the above Notice of Motion which have been referred to hereinabove.

3. The Defendants filed their affidavits in reply to the said Notice of Motion. In so far as the Defendant Nos.1 and 2 are concerned, it is their case that the Charity Commissioner vide order dated 11.08.1992 passed under Section 36 of the Bombay Public Trust Act, 1950, has accorded sanction for the development of the suit property. It is the case of the Defendant Nos.1 and 2 that the Plaintiff is not entitled to the benefits and rights under the statutory provisions of the MOFA and that it is the Defendant Nos.1 and 2 who have permitted the Defendant No.3 to construct the building pursuant to the order dated 11.08.1992 passed by the Charity Commissioner. The Defendant Nos.1 and 2 have also contended that the suit in question is not maintainable.

4. In so far as the Defendant No.3 i.e. developer is concerned, in its reply it has been stated that the development in the suit property is being carried out in terms of the modified DCR 33(7). The Defendant No.3 has also contended that the NOC of the MHADA has been obtained and a further revised NOC dated 25.06.2012 in terms of the modified DCR 33(7) has also been obtained. It is the contention of the Defendant No.3 that in terms of the conditions mentioned in the NOC issued by the MHADA the existing tenants/occupants of the 12 cessed structures and Quinny House are required to be rehoused free of cost. It is contended in the

affidavit-in-rejoinder that the property is being developed not only for the benefit of the tenants but also for the benefit of MHADA.

5. The Trial Court considered the said Notice of Motion and by the impugned order dated 04.05.2016 has dismissed the same. The Trial Court has adverted to the fact that the suit property is being developed under the DCR 33(7) after obtaining NOC/NOCs from the Defendant No.5 MHADA. The Trial Court thereafter has adverted to the contention raised on behalf of the Plaintiff that as per clause 43 of the agreement executed by and between developer and the flat purchasers it is provided that the said agreement shall always be subject to the provisions of the MOFA. The contention raised on behalf of the Plaintiff that the developer cannot make construction without the consent of the Plaintiff has been recorded by the Trial Court. The Trial Court has thereafter adverted to the contention raised on behalf of the Defendant No.3 that since the property is being redeveloped under DCR 33(7) therefore in view of the provisions of Section 190 of the MHAD Act the provisions of MOFA are not applicable to the authority duly constituted under the MHAD Act or to any land or building belonging to or vesting in any such Authority. The Trial Court thereafter concluded that in view of the fact that the redevelopment is under DCR 33(7) and in view of Section 190 of the MHAD Act, the provisions of MOFA are not applicable and therefore dismissed the Notice of Motion. Hence, the Trial Court has primarily dismissed the Notice of Motion on the ground of the applicability of Section 190 of MHAD Act. In so far as the above Appeal from Order is concerned, the Respondent No.3 i.e. original Defendant No.3 has filed an affidavit in reply raising diverse contentions based on the fact that the development being under DCR 33(7) and hence the obligations under provisions of the MOFA would have to be considered in the said context.

6. At this stage, it would be relevant to reproduce Section 190 of the MHAD Act which for the sake of ready reference is reproduced hereinunder:

The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, shall not apply to the Authority duly constituted under the Maharashtra Housing and Area Development Act, 1976, or to any land or building belonging to or vesting in any such Authority.

A reading of the said provision therefore discloses that the said provision is not applicable to an Authority duly constituted under the MHAD Act and in respect of any land or building belonging to or vesting in any such authority. In the instant case, it is an undisputed position that the property belongs to the Respondent No.1 trust and is therefore a private property wherein there are cessed structures. It is only in respect of property where there are cessed structures belonging to a particular category that redevelopment is permissible under DCR 33(7). Hence, in the instant case, it cannot be said that the property belongs to MHADA or is vested in or belonging to MHADA which is a prerequisite for Section 190 to be applicable. The Development Control Regulations are part of the development plan which regulate the development in the city of Mumbai. Merely because the redevelopment is in respect of structures which are amenable to cess which a private landlord is required to pay to the Municipal Corporation, it would not mean that the properties either vest in or belong to the MHADA. In my view, therefore, the finding recorded by the Learned Judge of the Trial Court that Section 190 of the MHAD Act is applicable is therefore unsustainable and is accordingly set aside.

7. It is not necessary for this Court to go into the aspect of the consequences of a redevelopment undertaken under DCR 33(7) visavis the obligations under the provisions of the MOFA. Since the Trial Court has not adjudicated the Notice of Motion from the said angle, it would be in the Trial Court that the parties are free to urge their respective contentions in that regard. This Court does not deem it appropriate to go into the said contentions, and also does not express any opinion on the said aspect. Hence, what would be the effect of the redevelopment undertaken under DCR 33(7) visavis the obligations under the provisions of the MOFA would be an issue for the Trial Court to adjudicate. Hence, the following directions are issued:

1) The impugned order dated 04.05.2016 passed by the Learned 2<sup>nd</sup> Additional Principal Judge, City Civil Court, Mumbai is quashed and set aside and the Notice of Motion is relegated back to the Trial Court for a denovo consideration of the same in terms of the observations made in the instant order.

II) The Plaintiff and the Defendant No.3 to file further affidavits in support of their respective assertions within two weeks from date.

III) The Trial Court is therefore directed to hear and decide the Notice of Motion within six weeks from date.

IV) The Notice of Motion would be decided on its own merits and in accordance with law having regard to the issue which has been culled out in the instant order.

V) Needless to state that the contentions of the parties are kept open for being urged before the Trial Court.

8. The interim order which was in operation pending the Notice of Motion would continue to operate pending the disposal of the Motion on remand.

9. With the aforesaid directions, the Appeal from Order is disposed of.

10. In view of the disposal of the Appeal from Order, the Civil Application does not survive and to accordingly stand disposed of as such.

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