NATIONAL CONSUMER DISPUTES REDRESSAL COMMISSION
NEW DELHI

JUDGMENT RESERVED ON: 16.04.2026
JUDGMENT PRONOUNCED ON: 17.08.2026

CONSUMER COMPLAINT NO. 45 OF 2013

With

IA/3370/2021 (Directions)

(1) Tirupati Devi Cooperative Housing Society Ltd., Having its registered office at Sarojini Road/V.P. Road, Santa Cruz (West), Mumbai – 400054.

(2) Mr. Amrik Singh Suri, Secretary, Tirupati Devi Cooperative Housing Society Ltd., R/o 201/301, Tirupati Towers, Sarojini Road, Santa Cruz (West), Mumbai – 400054. ....Complainants

Versus

(1) M/s Raja Construction Company, Regd. Office at Pooja Apartments, Jain Derasar Marg, Santa Cruz (West), Mumbai – 400054.

(2) Mr. Narendra V. Bhatia, M/s Raja Construction Company, Regd. Office at Pooja Apartments, Jain Derasar Marg, Santa Cruz (West), Mumbai – 400054.

(3) Mr. Amitabh N. Bhatia, M/s Raja Construction Company, Regd. Office at Pooja Apartments, Jain Derasar Marg, Santa Cruz (West), Mumbai – 400054.

(4) Mr. Avinash N. Bhatia, M/s Raja Construction Company, Regd. Office at Pooja Apartments, Jain Derasar Marg, Santa Cruz (West), Mumbai – 400054.

.......Opposite Parties

BEFORE :
HON'BLE MR. JUSTICE A.P SAHI, PRESIDENT
HON'BLE MR. BHARATKUMAR PANDYA, MEMBER

For the Complainants : Mr. Akshay Shrivastava, Ms. Sumbul Ismail, Mr. Tanishq Sirohi, Ms. Khushi Singhal, Advocates

For the Opposite Parties : Mr. Shree Prakash Sinha, Mr. Sameer Tiwari, Advocates

JUDGEMENT

PER HON'BLE MR. BHARATKUMAR PANDYA, MEMBER

1. The present complaint has been filed by the complainant society comprising of 33 members occupying 25 flats in A and B Wings of the apartments known as 'Balaji Apartments' at Santa Cruz (West), Mumbai. Members of complainant no. 1 society entered into an Agreement dated 14.03.2005 with OP-1 as per which OP-1 was granted development rights to demolish the existing buildings and construct two new buildings.

As per clause (g) of the Agreement, OP-1 was to carry out the development work and provide new flats to the members free of cost. In return, OP-1 was granted the right to utilize the TDR/FSI (Transferable Development Rights/Floor Space Index) and sell the balance flats not earmarked for members. As per clause 11.7, if there was any change in Development Control Rules, 1991, whereby there is an increase in basic TDR/FSI exceeding 100% consumption thereof, the same shall be exclusively for the benefit of the society and its members. As per clause 11.3 of the agreement, OP-1 was to hand over certified copies of the sanctioned plan of the new building to the society before commencing construction work and was not to amend the sanctioned plan without the approval of the society. OPs commenced construction and handed over possession to the respective flat owners from the year 2008. OPs were required under the terms of the agreement and also gave assurance to the flat owners that completion certificate and occupation certificate shall be provided shortly to the members. However, when despite repeated assurances, the OPs failed to supply the sanctioned plan and the OC, one of the members of the society filed an RTI application with the local municipal authorities. From the reply of the RTI application, members came to know that the OPs had not carried out the construction in accordance with the sanctioned plan. It is due to the malafide, illegal and deficient acts of the OPs that the completion certificate as well as occupation certificate had not been granted by the authorities. On 06.01.2012 municipal authorities of Mumbai issued a notification whereby it was provided to regularize Floor Space Index not exceeding 35% for the residential development at a premium of 60% of the circle rate. As there was an unauthorized construction of 45% by the OP-1 in each flat as per which the OPs submitted fresh plans to the municipal authorities for approval of additional construction which clearly showed that there was difference between what was approved initially by the municipal authorities and what had been constructed by the OPs. Being aggrieved by the deficiency in services on the part of the OPs, the present complaint has been filed by the complainant on 21.02.2013 seeking compensation towards delay in construction, towards difference in area of each flat as per sanctioned plans, payment of additional amounts towards regularization and compensation towards non-furnishing of occupation and completion certificates.

2. Written version was filed by the OPs on 27.05.2013 whereby they deny each and every averment and submission made by the complainant in the present complaint. It is the averment of the OPs that an exorbitant amount has been claimed by the complainant which in itself is not at all justifiable. Moreover, the complainant is not a consumer under the CP Act and the complaint is barred by limitation also. The present complaint has been filed by Complainant No.1 through Complainant No.2 in its representative capacity for the monetary benefit of its (old and new) members, therefore prior to filing the present complaint, it was mandatory on the part of the complainants to obtain the leave of this Commission as contemplated under Section 12(1)(c) read with Section 13(6) or, alternatively, it was necessary for the Complainant No.1 society to implead its 33 members as proper and necessary party to the present complaint. Furthermore, Complainant No.2 was previously the Chairman of the Complainant No.1 society and in his capacity as Chairman he did various acts, deeds and things that were detrimental to the working of the Complainant No.1 society and did various acts and violations against the members of the Complainant No.1 society including the illegal act of giving redevelopment to one M/s. Narang Builders for which all the members of the Complainant No.1 suffered by way of litigation. Upon the building being completed and being ready for possession, all the members including Complainant No.2 were handed over possession of their respective flats from June to 2008 onwards. After taking possession of the flat, members of the society had ample time and opportunity to point out deficiency, if any but they have, after verifying everything have happily accepted the possession. Complaint is barred by limitation as complaint ought to have been filed by June, 2010 whereas the same is filed on 21.02.2013 i.e. after a delay of almost over 24 months. Even no application seeking condonation of delay has been filed by the complainants. Some of the members of the Complainant No.2 Society have not only received their respective flats as per the Agreement, but have given the same on Leave and License basis and are earning the returns therefrom and thus, the complaint of shortfall in the area is bogus and is required to be rejected. Complainant No.2 has not only carried out several additions and alterations to his three flats in deviation of the plans as approved, but has also inter alia changed the locations of the kitchens, merged and amalgamated the bedrooms and illegally extended the bathrooms. Various issues raised by Complainant No.1 Society are the creation of the members of the society and the same cannot be attributed to the Opposite Parties. Hence, the delay in obtaining of Occupation Certificate, permanent water connection and Building Completion Certificate is wholly and solely attributable to the Complainants and members of Complainant No. 1 for which the Opposite Party cannot be held responsible and liable for any deficiency in service. To get the Occupation certificate and the building complete certificate, all the flats were to be restored to their original position as per the sanctioned plans. In view of the facts as discussed above, the complaint deserves to be dismissed with compensatory costs.

3. Complainants filed their rejoinder on 31.07.2014. As per complainants all the denials/allegations of the OPs in their reply are baseless. There is a clear deficiency on the part of the OPs and the complainants, being the consumer, their complaint is maintainable in this Commission. It is further explained by the complainants that the present complaint has been filed by the Society and the list of the members has already been filed along with the complaint. Since the details of the members have been already furnished and Society is a registered society, there is no requirement of making all the members as complainants in the present case. Appropriate Resolution was passed on the proposal and terms of the OPs for redevelopment of the property and accordingly the Development Agreement was executed and the said Development Agreement clearly stipulates certain obligations on the part of the OPs which they failed to perform as agreed in the said Development Agreement dated 14.03.2005. In the present case, the OP builder simply handed over the possession and did not provide Sanctioned Plans and occupancy certificate and the requests made repeatedly were not acceded too and therefore, an RTI application was filed by one of the members' for the Sanctioned Plans and on scrutiny of the same they were shocked to see that the OPs had deviated from the sanctioned plan and not carried out the construction in accordance with sanctioned plan. Complainants came to know that there was an unauthorized construction of 45% done by the OPs in each flat of in the building. As per the complainants, the present complaint is correct in all ways and OPs need to compensate them for deficiency in their service and for unfair trade practice adopted by them.

4. We have heard learned counsels for the parties and have carefully gone through the material on record. The matter was taken up for hearing on 28.10.2025 and 18.02.2026 and following orders was passed:

19.06.2025

"Heard both the Counsels of the two sides.

It is submitted by both the Counsels that the efforts for arriving at the settlement that were going on as recorded by the Order dated 21.02.2022, have failed.

It is also seen that vide Order dated 04:03.2024, it is recorded that the mediation failed between the parties.

The Occupation Certificate has not yet been received. The Opposite Parties are directed to follow up on their Application for Occupation Certificate and submit any communication received from the competent authority in this regard within one month.
List for final hearing on 28.10.2025 as item No. 1."

28.10.2025

1. *Mr. Akshay Srivastava, learned counsel on behalf of the complainant society commenced his arguments by handing over a short list of dates and an explanatory note on the nature of transactions between the complainant and the OP builder. To begin with, our attention has been drawn to the order dated 19.06.2025, wherein the OP builder is directed to follow-up on their application for Occupancy Certificate, to To point out that admittedly the occupancy certificate, the application for and receipt whereof is the primary obligation of the OP builder under the development agreement between the parties, has not been received even till date. It is further pointed out that the compliance affidavit in terms of the said order dated 19.06.2025 has also not been filed by or on behalf of OP.*
2. *Explaining the broad facts, it has been pointed out that the complainant society, comprising of 25 members occupying residencies in two towers entered into a Redevelopment Agreement with the OP builder on 14.03.2005. The obligations of the OP in terms of the said development agreement particularly in terms of clauses 2, 3, 4, 6, 7, 11, 22, 24, 26, 27 and 34 have been highlighted by reading the relevant clauses on page 17 to 28 of the complaint file. It has been emphasized that fundamentally, there is some delay in handing over the physical possession in as much as the possession was to be handed over within two years from the date the last of the member-occupant handed over the vacant possession of the old unit. Such physical possession was belated. However, in any case, as admittedly the physical handing over of the possession was without any validly obtained occupancy certificate as mandatorily required, the full and complete possession has not been received by any of the members of the society till date.*
3. *As per clause 2 and clause 3.5, the OP-1 is to construct the new buildings and all amenities after demolishing the previous one and the complainant society or its members shall not be required to pay any construction costs or any other charges. As per clause 6 and 7, the OP-1 has made necessary physical verification and has informed the residents about the area available for construction as per available FSI under the extant rules and regulations. As per clause 11, the OP was supposed to get the construction plans sanctioned and to hand over the copy of the same to the complainant society. It was categorically stipulated in clause 11.7 that if there is any changes in the development control rules permitting for additional TDR/FSI than what is sanctioned in the plan (and of which copy has been provided to the complainant), the*

same shall be exclusively for the benefit of the complainant and its members (and the builder can derive no benefit therefrom). After reading from the development agreement and highlighting the above clauses, the learned counsel has taken us through the chart consisting of 16 columns on page 320 of the reply filed by OP. Drawing our attention to column 3 ("old flat area"), and columns 13 to 16, it has been attempted to demonstrate that as against the area of 21424 sq. ft. to be constructed as per plan as per column 13, the actually constructed area in the project is as high as 32170 sq. ft. The deviation (additional construction) from the sanctioned plan is 10764 sq. ft. which additional area when constructed was in violation of the sanctioned plan and therefore unauthorized and such additional unauthorized construction is not only an unfair trade practice but has also resulted into deficiency in service in as much as it has created obvious obstacles in issuance of the occupancy certificate by the respective authorities apart from having unjustly and illegally enriched the OP at the cost of the complainant and its members. The additional construction, if any, in terms of clause 11.7 of the development agreement, belong exclusively to the complainant society but still such additional construction has neither been regularised by the OP by paying requisite premia, nor has it been handed over to the complainant society and nor occupation certificate has been obtained with regard to any of the units which together constitute serious deficiency in service. Additionally, the absence of occupancy certificate and consequent absence of official water and electricity connections requires the complainant society has to incur additional expenses/charges in obtaining these essential services. These deficiencies and such damages need to be compensated.

4. *For further arguments by both the parties, list on 18.02.2026 at 2 P.M.*

<u>18.02.2026</u>

1. *The present complaint has been filed by the complainant society comprising of 33 members occupying 25 flats in A and B Wings of the apartments know as 'Balaji Apartments' in Mumbai, who entered into an Agreement dated 14.03.2005 with OP-1, who was granted development rights to demolish the existing buildings and construct two new buildings. As per clause (g) of the Agreement, OP-1 was obliged to carry out the redevelopment and provide the new flats to the members free of cost and accordingly development rights in respect of the property were granted to the OP developer. OP-1 was granted the right to utilize the Transfer Development Rights (TDR) / Floor Space Index (FSI) and sell the flats not earmarked to any of the members.*

1.1. *As per Clause 11.3 of the Agreement, which is reproduced below, OP-1 was to handover to the complainant society certified copies of the sanctioned plan of the new building before commencing of the construction work and was not to amend the sanction plan in carrying out construction:*

> *"11.3 The Developer shall obtain the approval of the society before putting up their plans for sanction by the MCGM. The Developers shall handover to the society certified copies of the sanctioned plans of the new building to the Society before the commencement of the construction work. The Developers shall not amend the sanctioned plans without obtaining the society's approval if such amendment entails any change in the Members flats. The Developers are entitled to amend the plans pertaining to the free sale flats without seeking the Society's approval."*

2. *It was further agreed between the parties that in the event OP developer fails to complete the project within a period of 24 months, they shall be liable to pay to the complainant society a compensation of <u>Rs</u> One lakh per month.*

3. *OP developer commenced the construction after executing the Agreements and handed over the possession to the respective flat owners from time to time in the year 2009. However, approved sanctioned plan as well as occupation certificates and the new water connections were not provided to the flat owners despite repeated* *reminders. As a result, one of the members of the complainant society filed a RTI application with the local municipal authorities in August, 2011 and received a reply in 2011. As per reply of the RTI, OP developer did not carry out the construction in accordance with the sanctioned plans and therefore, the completion certificate and water connections etc. were not provided by the authorities and in fact, the construction is carried out according to floor plans annexed in the Individual Agreements. As OPs have not carried out the construction as per the sanction plan and they deviated from it, the completion certificate, occupation certificate and water connections will not be provided and all the members of the Society will have to pay heavy charges for regularization of the same or face demolition as per law. On 06.01.2012, the Municipal authorities of Mumbai issued a notification, as per which all members of the complainant society were to pay regularization charges as per agreed circle rate which would approximately come between Rs.15 lacs to Rs.20 lacs per flat but still additional unauthorized construction of 10% would still remain and the Society will not be able to get completion certificate as well as water connections. When members of the complainant society requested the OPs to pay the same, they refused to do so. There is clear deficiency on the part of the OP developer in not completing work firstly in time and secondly not completing the construction according to the sanctioned plan, not providing the water connections, occupancy certificates and therefore, being aggrieved by the deficiency in services on the part of the OP developer, the complainants filed the present complaint.*

4. *Order dated 28.10.2025 passed by this Commission is reproduced below:*

> *1. Mr. Akshay Srivastava, learned counsel on behalf of the complainant society commenced his arguments by handing over a short list of dates and an explanatory note on the nature of transactions between the complainant and the OP builder. To begin with, our attention has been drawn to the order dated 19.06.2025, wherein the OP builder is directed to follow-up on their application for Occupancy Certificate, to To point out that admittedly the occupancy certificate, the application for and receipt whereof is the primary obligation of the OP builder under the development agreement between the parties, has not been received even till date. It is further pointed out that the compliance affidavit in terms of the said order dated 19.06.2025 has also not been filed by or on behalf of OP.*
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> *2. Explaining the broad facts, it has been pointed out that the complainant society, comprising of 25 members occupying residencies in two towers entered into a Redevelopment Agreement with the OP builder on 14.03.2005. The obligations of the OP in terms of the said development agreement particularly in terms of clauses 2, 3, 4, 6, 7, 11, 22, 24, 26, 27 and 34 have been highlighted by reading the relevant clauses on page 17 to 28 of the complaint file. It has been emphasized that fundamentally, there is some delay in handing over the physical possession in as much as the possession was to be handed over within two years from the date the last of the member-occupant handed over the vacant possession of the old unit. Such physical possession was belated. However, in any case, as admittedly the physical handing over of the possession was without any validly obtained occupancy certificate as mandatorily required, the full and complete possession has not been received by any of the members of the society till date.*
>
> *3. As per clause 2 and clause 3.5, the OP-1 is to construct the new buildings and all amenities after demolishing the previous one and the complainant society or its members shall not be required to pay any construction costs or any other charges. As per clause 6 and 7, the OP-1 has made necessary physical verification and has informed the residents about the area available for construction as per available FSI under the*

extant rules and regulations. As per clause 11, the OP was supposed to get the construction plans sanctioned and hand over the copy of the same to the complainant society. It was categorically stipulated in clause 11.7 that if there is any changes in the development control rules permitting for additional TDR/FSI than what is sanctioned in the plan (and of which copy has been provided to the complainant), the same shall be exclusively for the benefit of the complainant and its members (and the builder can derive no benefit therefrom). After reading from the development agreement and highlighting the above clauses, the learned counsel has taken us through the chart consisting of 16 columns on page 320 of the reply filed by OP. Drawing our attention to column 3 ("old flat area"), and columns 13 to 16, it has been attempted to demonstrate that as against the area of 21424 sq. ft. to be constructed as per plan as per column 13, the actually constructed area in the project is as high as 32170 sq. ft. The deviation (additional construction) from the sanctioned plan is 10764 sq. ft. which additional area when constructed was in violation of the sanctioned plan and therefore unauthorized and such additional unauthorized construction is not only an unfair trade practice but has also resulted into deficiency in service in as much as it has created obvious obstacles in issuance of the occupancy certificate by the respective authorities apart from having unjustly and illegally enriched the OP at the cost of the complainant and its members. The additional construction, if any, in terms of clause 11.7 of the development agreement, belong exclusively to the complainant society but still such additional construction has neither been regularised by the OP by paying requisite premia, nor has it been handed over to the complainant society and nor occupation certificate has been obtained with regard to any of the units which together constitute serious deficiency in service. Additionally, the absence of occupancy certificate and consequent absence of official water and electricity connections requires the complainant society has to incur additional expenses/charges in obtaining these essential services. These deficiencies and such damages need to be compensated.

4. *For further arguments by both the parties, list on 18.02.2026 at 2 P.M.*

5. *On 18.02.2026 hearing further proceeded wherein learned counsel for the complainant has briefly reiterated the contentions already recorded as above in particular, it has been re-emphasized that the respondents had not carried out construction as per the sanctioned plans, resulting into illegal constructions and sale of extra area which ultimately has resulted into non-issuance of completion certificate which is a major unfair trade practice on the part of the opposite party. Though the Municipal authorities of Mumbai have issued a notification dated 06.01.2012 for regularizing additional FSI to the extent of 35% by payment of premium of 60% of circle rate, the unauthorized construction resorted to by the OP builder is more than 35% i.e. about 45% which is also a reason that the OP is unable to obtain the OC on account of its own illegal acts for which the complainant society and its members have to suffer and incur additional expenses towards water tax and property tax. The OP builder has also not paid any premium till date though it is the obligation of the OP to obtain at its own cost the occupation certificate and completion certificate which are now delayed for more than 15 years. Drawing attention to page 312 to 320, it was contended that the comparison of originally sanctioned plan dated 07.08.2006 and the revised plan submitted by the OP on 20.12.2013 would bring out clearly the additional carpet/built-up area already constructed illegally by the OP builder. The 12th floor in the 'B' Wing is completely illegal which also has contributed to failure of the OP in obtaining the OC. As is clear from tables on page 320, the additionally constructed area is 10,764 sq. ft. (i.e. constructed 32170 less sanctioned 21424 sq. ft.) which is the illegal construction. Therefore, the compensation as claimed in para 15 of the complaint need to be* *awarded to the complainant society for the continued deficiency in service and delay in obtaining the completion certificate.*

6. *Learned advocate Mr. Shree Prakash Sinha, on behalf of the opposite party has began his arguments by raising the preliminary objection that the complaint is barred by limitation because the subject agreement was entered into as early as on 14.03.2005 and the possessions of the respective units, after completion of the redevelopment, was handed over as early as between June, 2008 to December, 2008 and therefore the complaint filed in the year 2013 is far beyond the limitation period. While accepting the possession in 2008, the allottees have unconditional certified that the construction and the area of the flat is as per the agreement. Further, placing reliance on Synco Industries Vs. State Bank of Bikaner and Jaipur (2002) 2 SCC 1, it was contended that this complaint which has raised a claim of compensation of more than Rs.100 crores involving serious disputed questions of fact cannot be decided in summary proceedings before the consumer forum.*

7. *It has been further submitted that the fundamental fact is that as per the development agreement dated 14.03.2005, the OP was entitled to utilize, as per clause 7 of the agreement, the available FSI and TDR of 1610 sq. yards, i.e. 1344 sq. mtrs. However, when the building plans based on such projected available area of the plot were attempted to be prepared and submitted to the municipal authorities, the authorities required the property register card. Such property card provided by complainant no. 1 reflected area only of 1264.20 sq. mtrs. and not 1334 sq. mtrs. as was projected by the complainant society in the development agreement, and consequently, the plan submitted to the municipal authorities could be only such as was compatible with 1264.20 sq. mtrs. of plot as evident from property card. The society was aware of such building plan as was submitted to the municipal authorities and which was also available for inspection by the office bearers of the society at OP's office. Thus, the discrepancy in the area of the flat as per plan submitted for sanction and the area per flat which was required as per the redevelopment agreement existed, about which the society was very much aware from the very beginning. This would also be clear from the fact that many of the occupants have even leased out their units wherein the area leased out as mentioned in the lease agreement is in tune with the area as mentioned in the redevelopment agreement. There are also issues of illegal construction done by the occupants after obtaining the possession.*

8. *As a matter of fact, the present complainant no. 2 Mr. Amrik Singh had filed a consumer complaint no. 367 of 2011 against OP No. 1 and the complainant no. 1 society, claiming compensation, and now, both complainant no. 1 and complainant no. 2, surprisingly enough, have joined hands in raising this belated complaint. It is Mr. Amrik Singh Suri, who became secretary of the complainant no. 1 society, who has taken up this litigation by making the society as complainant no. 1 and thus raising the claims of astronomical sums against the OP builder. Drawing our attention to document DW-1/2 to DW-1/7, which as per the OP, is the document showing the dispute or litigation undertaken by complainant 2 against complainant no. 1, it is contended that this whole complaint is essentially a proxy litigation of complainant no. 2 taken up in the name of the complainant-1 society. It is further submitted that in suit no. 2100/2005, titled as M/s Narang Ville Pvt. Ltd. Vs. Tirupati Devi Cooperative Housing Society Ltd., in their written statement filed on 09.06.2009,, the complainant no.1 have taken a stand that the construction made by the OP is absolutely in accordance with the development agreement dated 14.03.2005, but despite such averment in 2009 a wholly contrary and false allegation of deviation from the sanctioned plan has been alleged by them in the present complaint. As such, the flat occupants including complainant no. 2 have themselves undertaken illegal and additional construction which hinder the obtaining of the completion certificate. It is further informed that the OP has also filed a suit no. 1931/2016 titled as Raja Construction Co. Vs. Municipal Corporation of Greater Mumbai, wherein in para 4 of the ad-interim order dated 26.07.2016 (page 13 of the written arguments), the learned Judge, City Civil court, has noted that the OP appears to have constructed the building by utilising the FSI as per the approved plan and that* *vide letter dated 05.11.2012, amended plans to avail fungible compensatory FSI benefit in view of Circular/Notification bearing no. CMS-4311/452/CR-58/2011/UD-11 dated 06.01.2012 have been submitted. In short, it is the submission that the OP is ready and willing to obtain the OC and has taken necessary steps in this behalf and is also willing to pay the requisite premium. However, the matter is held up only on account of illegal constructions and alterations by the members of the complainant society including complainant no.2. Mr. Shree Prakash Sinha has also prepared, submitted and relied upon compilation of case laws, reference to which shall further be made on the next date of hearing.*

9. *Now, the learned counsels shall, on the day of the next hearing, i.e. on 16.04.2026, briefly re-summarize the arguments, after which, the matter shall proceed for further concluding arguments by the counsels.*

10. *List on 16.04.2026.*

5. On 16.04.2026, Mr Shree Prakash continued his submissions by referring to the 16 column chart in the context of pleadings in IA/6036/2021 and IA/3370/2021. In particular, as stated in LC/1816/2013, which came to be dismissed by the Bombay HC after which a further suit in 2016 is filed, wherein, as stated, the interim order of the HC continues, the area of the plot itself is in dispute with the authorities in as much as as per the property cards, which were not made available before or on the date of the development agreement, the area of the plot is only 1264.20 square meters though as per the conveyance deeds executed in favour of the society in 1971 through four conveyance deeds, the area stands at 1344 square meters which fact finally impacted the available FSI creating discrepancy between the construction and the building plans. Drawing attention to page 320 onwards of the file, the counsel has further read through the written arguments to further buttress and emphasize the point that while the OP is ready and willing to get the OC, by undertaking regularisation process permissible under the extant rules, the same is held up due to non-cooperation of the complainant society. Referring to page 108-109 and Annexure A-1 of the complaint and LC/1445/2013, it is submitted that serious disputed questions of facts are raised in this complaint which cannot be adjudicated in summary proceedings. Referring to para 4 and 5 of the reply and prayer clause in the complaint seeking astronomical compensation of more than Rs.100 crores, it is urged that the complaint is not for any deficiency in service but it is a property suit for damages. Apart from this, the complaint suffers from the defects of (a) capacity and authority of the signatory, (b) being a proxy litigation by complainant no. 2, (c) lacking in proper authority. It is also reiterated that the complaint is barred by limitation as the cause of action if any arose when the possession without OC was obtained by the society and when the members knew the ground reality, and still certified that "everything is satisfactory". The subsequent affidavit of the complainant does not make it clear whether the complaint is under Section 12(1)(a) or under Section 12(1)(c). The members have owned up and accepted the area by renting out the unit and mentioning the area as per planned construction. It is stated that there are inherent contradictions in Annexure A-7 on page 108-109 of the complaint and page 4 (xi) of the written arguments of the complainant. The facts are evident from DW-1/11, page 98-159 of the reply. In rejoinder, Mr. Shrivastava has reiterated and attempted to demonstrate that the complaint is maintainable. As submitted, the issue of property card is wholly irrelevant and that as per the actual construction, as against the sanctioned construction of 21000 sq. ft., the OP has in fact raised construction of 32000 sq. ft., implying nearly 45% surplus area. He, after relying on *Vinit Bahri & Anr. Vs. M/s MGF Developers Ltd. & Ors. in Civil Appeal No. 6588 of 2023 decided on 04.02.2026* urged further to refer to written arguments already on record, including the fresh affidavit filed in 2024 and evidence affidavit of 2015 in support of the complaint. As per the development agreement, and otherwise also statutorily, the obtaining of the OC being the responsibility and obligation of the OP from which it cannot escape and wherein OP has admittedly failed, the compensation as per the complaint prayer need be awarded for such deficiency.

6. We have heard learned counsels for the parties and have carefully gone through the material on record. First submission of Mr. Shrivastava, learned counsel on behalf of the complainants is that since the complainant society was in a dilapidated condition, the services of OPs were hired for redevelopment of the society. The two buildings were to be demolished and same were to be reconstructed with a total of 33 flats. As per clause (g) of the Agreement, OP-1 was to carry out the development and provide the new flats to the 25 members with 20% more carpet area, free of cost, and in return, OP-1 was granted the right to utilize the TDR/FSI and sell the remaining eight flats earmarked to them. As per clause 11.3 of the Agreement, OP-1 was to hand over certified copies of the sanctioned plan of the new construction to the complainant society before commencing construction work and they were supposed not to amend the sanctioned plan without the society's approval. But when the sanctioned plan was not provided by the OPs even after repeated requests, an RTI application was filed with the local municipal authorities and from the reply of that RTI, it came out as a shock that OPs had not carried out the construction work as per plans sanctioned by the authorities. Complainants were completely deceived as construction of the society was in total deviation from the sanctioned plans and the carpet area of each flat had been increased substantially qua what was actually sanctioned by the authorities. Total sanctioned area was 21,424 sq. ft. whereas total constructed area was 32,170 sq. ft. thereby there was the difference of the area amounting to 10,746 sq. ft. This additional area constructed in violation of the sanctioned plan for profits by way of additional flats constructed and sold, was to be compensated as per the market rate. Learned counsel further argued that it was the willful and malafide intention of the OPs to reconstruct the society on an unauthorized and unsanctioned plan. Due to the failure of the OP developer in not complying with its obligations under Development Agreement, the complainant society was faced with penalties and taxes from the authorities. Hence, all such penalties and taxes due and already paid should be borne by the OPs. Reliance is placed on *R.V. Prasannakumar v. Mantri Castles Pvt. Ltd. 2019 SCC Online SC 224 and City & Industrial Development Corporation of Maharashtra Ltd. v. Lambda Therapeutic Research Centre 2019 SCC Online SC 1425*

7. On the other hand, it is the submission of Mr. Shree Prakash Sinha, learned counsel on behalf of the OPs that the present complaint has been filed by the complainants seeking exorbitant monetary claim of more than Rs.101 crores but the same is without any base and needs to be dismissed. As per learned counsel for the builder, the claim for such a huge amount cannot be adjudicated by a consumer court and it needs to be disposed of in a summary way in a civil court. It is the further submission of counsel for the OP developer that OP-1 had actually prepared the plans for construction of the new building on the basis of the area of the property to be 1344 sq. mtrs. However, the complainants informed the OPs that the area of the property mentioned in the register property card is only 1264.20 sq. mtrs. and not 1344 sq. mtrs. and requested the OPs to submit the plans as per the calculations based on the lesser area as mentioned in the property register card, and, that the amended plan can subsequently be submitted and got sanctioned once the property card is corrected.

Reduced area also resulted into shortfall of TDR/FSR and consequent loss to the OP-1 with regard to portion falling to the share of the OP after handing over the committed portion to the complainants. In any case, sanctioned plan was handed over to the complainant society and on the basis of same, members of the complainant society also obtained bank loans. Finally when the possession was handed over to all the members of the complainant society, they categorically stated that all the amenities including the area, as per the development agreement, i.e. original carpet plus 20% of the area as per annexure to the agreement were provided to them and that they had no complaints in this regard at the time of taking the possession or thereafter for five years. Certain members of the complainant society gave their flats on leave and license basis and even illegal construction was also done by some members of the society including complainant no. 2 in their respective flats. However, complainants completely denied all these facts in their rejoinder. Legal notice dated 24.08.2011 was issued to the OP-1 developer and Complainant no. 1 society by the complainant no. 2 alleging cheating, etc. for the alleged shortfall in the area of the flat. The fault on the part of the complainant society went against the OPs and that OP-1 had to file a suit for correction of area of the property in the property register card from 1264.20 sq. mtrs. to 1344 sq. mtrs. It is the further submission of the OPs that the above referred facts should be taken into consideration while adjudicating the present complaint. OPs have relied on the decisions in support of the contentions regarding the dimensions of maintainibility including delay in filing the complaint, and the principles for award of compensation while the complainants have also relied on few decisions to buttress the contentions on maintainibility including the delay being the continuing cause of action and on the reasonability of the quantum of compensation as claimed in the complaint, as under. While we have duly considered the principles in the decisions, we have to point out that the compilation, as submitted by the learned counsel for the OP, does not at all either specify that which particular proposition of law laid down in the decisions is relied upon or that which paras are being relied upon. However, we may briefly mention that how reliance on each of the decisions, is misconceived in the peculiar facts of the present case.

1) *Synco Industries Vs. State Bank of Bikaner & Jaipur and Ors. (2002) 2 SCC 1* - If the excessive and unjustified relief, if claimed, the complaint may validly be dismissed if the merit also otherwise require such a decision in view of the weight and quantum of evidence required to be considered.

2) *Krrish Florence Estate Buyer's Welfare Association Vs. Angle Infrastructure private Limited. 2015 SCC OnLine NCDRC 1779* - The NCDRC has followed the above principle, on facts.

3) *Jagan Yadav & Anr. Vs. Pepsico India Holding Pvt. Ltd. 2015 SCC OnLine NCDRC 4545* - The NCDRC has followed the above principle, on facts.

4) *Union of India & Ors. Vs. S.K. Kapoor (2011) 4 SCC 589* - The principles to be kept in mind while following and applying the precedent.

5) *Fida Hussain & Ors. Vs. Muradabad Development Authority & Anr. (2011) 12 SCC 615* - The principles to be kept in mind while following and applying the precedent.

6) *Rajasthan Art Emporium Vs. Kuwait Airways & Anr. (2024) 2 SCC 570* - The principle of modulation of relief claimed in the complaint and which can be granted.

7) *Pyarelal Vs. Subhendra Pilania (Minor) & Ors. (2019) 3 SCC 692*

8) *V.N. Shrikhande (Dr.) Vs. Anita Sena Fernandes (2011) 1 SCC 53* - The principle that the Consumer Fora are obliged to reject the belated complaint under section 24A if no application for condonation of delay filed or if delay not justified.

9) *State Bank of India Vs. B.S. Agriculture Industries (1) (2009) 5 SCC 121* - The principle that the Consumer Fora are obliged to reject the belated complaint under section 24A if no application for condonation of delay filed or if delay not justified.

10) *Kandimalla Raghavaiah & Co. Vs. National insurance Company & Anr. (2009) 7 SCC 768* - The principle that the Consumer Fora are obliged to reject the belated complaint under section 24A if no application for condonation of delay filed or if delay not justified.

11) *Trai Foods Ltd. Vs. National Insurance Co. and Ors. (2004) 13 SCC 656* - When the complainant would be required to be relegated to the civil court in the light of requirement of requisite evidence and the summary nature of proceedings before the Consumer Commission.

12) *Ashok Kapil Vs. Sana Ullah (Dead) & Ors. (1996) 6 SCC 342* - Principle of the need for modulating the relief granted or decision about the acceptance of the complaint when the complainant is either negligent or has contributed to the OP's deficiency or has not come with clean hands.

13) *Treaty Construction & Anr. Vs. Ruby Tower Cooperative Housing Society Ltd. (2019) 8 SCC 157* - When the illegal construction by the occupant after entering in the premise, who has been granted possession without OC, is established on record, such fact has to be taken into account while considering the maintainability or quantum of relief for absence of OC.

14) *Ghaziabad Development Authority Vs. Balbir Singh (2004) 5 SCC 65* - Principles of award of compensation, and must depend on the facts of the case and on the quantum of damage suffered by the complainant.

15) Chief Administrator, HUDA & Anr. Vs. Shakuntala Devi (2017) 2 SCC 301 - When the complainants have, due to lack of diligence, been responsible for escalation in the cost of construction, such escalation cannot form part of the compensation.

16) Union of India & Ors. Vs. Master Construction Company (2011) 12 SCC 349 - The case relates to arbitration and the principles may not strictly apply.

17) Laxmi Engineering Works Vs. P.S.G. Industrial Institute (1995) 3 SCC 583 - Relates to the principles of deciding, on facts, whether complainant can be non-suited on the ground of a transaction being for commercial purpose.

Sant Rohidas Leather Industries and Charmakar Development Corporation Ltd. v. Vijaya Bank, Civil Appeal No. 4841 of 2023, 2026 LiveLaw (SC) 267. The relevant para is reproduced herein below:

> **27.** In the case on hand, the deposit was by one business entity, namely, the appellant company, with another business entity, namely, the Bank. It was thus, a business-to business transaction. Admittedly, the Bank had set up a case that FDR was pledged to avail credit facility and the maturity value of the FDR was adjusted against the dues. Though the appellant has denied this loan transaction, this issue is not settled by either a criminal court or a civil court even though a criminal complaint has been made in that 7 8 regard. In such circumstances, it is not a simple case of not fulfilling contractual obligation qua the deposit but a case where a subsequent contract of pledge is set up which, if accepted, would override the contractual obligation under the FDR. Thus, without determining whether there was fraud played upon the appellant, or forged documents were created for a false pledge /loan, it would not be possible to determine whether the services availed by the appellant from the respondent-Bank were for a commercial purpose or not. Issue No.(i) is decided accordingly.
> **33.** In light of our conclusion on Issue No.(ii), we are of the view that NCDRC was justified in dismissing the complaint even though the reasons recorded by it for such dismissal may not be entirely correct. As a result, the appeal lacks merit and is, accordingly, dismissed. Dismissal of the complaint shall not be a bar on the right of the appellant to take recourse to appropriate proceedings before appropriate court/ forum. There shall be no order as to costs.

HUDA v. Shakuntla Devi, (2017) 2 SCC 301. The relevant para is reproduced herein below:

> **13.** The sine qua non for entitlement of compensation is proof of loss or injury suffered by the consumer due to the negligence of the opposite party. Once the said conditions are satisfied, the Consumer Forum would have to decide the quantum of compensation to which the consumer is entitled. There cannot be any dispute that the computation of compensation has to be fair, reasonable and commensurate to the loss or injury. There is a duty cast on the Consumer Forum to take into account all relevant factors for arriving at the compensation to be paid.
> **18.** In the facts and circumstances of this case, we are of the opinion that award of interest would have been sufficient to compensate the respondent for the loss suffered by him due to the delay in handing over the possession of the plot. The compensation of Rs 15 lakhs awarded by the State Commission is excessive. As we have not reversed the impugned order on any other ground, it is not necessary for us to delve into other points that were urged by the respondent.

8. The complainants, on the other hand hand have relied on Parsvnath Developers Ltd. v. Mohit Khirbat, CA No. 5289/2022, para 25-28:

> 25. The issue of offering possession without an Occupancy Certificate is no longer res integra. In Samruddhi Cooperative Housing Society Ltd v. Mumbai Mahalaxmi Construction (P) Ltd[11], this Court held that failure to obtain the requisite Occupancy Certificate constitutes deficiency in service, entitling consumers to seek compensation. The relevant paragraphs read thus:
>
> "24. Section 2(1)(d) of the Consumer Protection Act defines a "consumer" as a person that avails of any service for a consideration. A "deficiency" is defined under Section 2(1)(g) as the shortcoming or inadequacy in the quality of service that is required to be maintained by law. In its decisions in Arifur Rahman Khan v. DLF Southern Homes (P) Ltd. [(2020) SCC 512] and Pioneer Urban Land and Infrastructure Ltd. v. Govindan Raghavan [(2019) 5 SCC 725 : (2019) 3 SCC (Civ) 37], this Court has held that the failure to obtain an occupancy certificate or abide by contractual obligations amounts to a deficiency in service. In Treaty Construction v. Ruby Tower Coop. Housing Society Ltd. [(2019) 8 SCC 157: (2019) 4 SCC (Civ) 141], the Court also considered the question of awarding compensation for not obtaining the certificate. In that case, the Court declined to award damages as there was no cogent basis for holding the appellant liable for compensation, and assessing the quantum of compensation or assessing the loss to the members of the respondent society.
>
> 25. In the present case, the respondent was responsible for transferring the title to the flats to the society along with the occupancy certificate. The failure of the respondent to obtain the occupancy certificate is a deficiency in service for which the respondent is liable. Thus, the members of the appellant Society are well within their rights as "consumers" to pray for compensation as a recompense for the consequent liability (such as payment of higher taxes and water charges by the owners) arising from the lack of an occupancy certificate."

9. We have carefully considered the material on record and the rival contentions. We have duly applied our mind to and noted the decisions/authorities relied upon by the parties and the principles laid down therein. The fundamental fact remains that the OP-Builder, in performance of the contract/ development agreement dated 14.03.2005 (page 15), has completed the construction of the project, and handed over the physical possession to the members of the complainant society from June-2008 itself. Clause 3.1 stipulates that the developer shall be required to construct and handover 20% additional carpet area to each of the 25 old members. In consideration for such re-construction, the OP-developer was entitled to bring construct and sell the flats to other by utilising the balance FSI and eligible fungible TDRs as available to it under the existing regulations in this behalf. The provisioning of the amenities, car parking spaces etc. have also been duly stipulated and delivered as there are no specific grievances or allegations in this behalf Particularly clause 6 and 7 of the agreement mentions that the developer has "physically verified the area of the said property and the area of the existing flats. The developer has also verified the available FSI. The carpet area of each of the members, and the total constructed carpet area after completion of the project stood more or less ascertained as clause 7 provides that against 1610 sq.yards of plot area, the FSI of 3220 sq.ft. shall be available. As per clause 34, the developer is specifically obliged to obtain and make available after constructing and handing over the unit in 24 months after vacating of last unit by the member, (a) occupancy certificate and (b) New water connection under Section 234A of DC Rules. It appears that 8 flats fill to the share of the developer which as per the complainant, generated total revenue of 32 crore. The fundamental dispute is that while the members have been duly handed over and have occupied their respective flats in June-2008 onwards, the OC has not yet been received. The absence of OC and the consequent additional liability of the occupants/member for municipal taxes continues and the the absence of proper new water connection continues. The Society has filed the present compliant alleging continuing deficiency in service of the OPs and compensation for such continuing deficiency.

10. The OP in defence has raised issues on maintainability on the grounds of (a) The complainant is not a consumer u/s 2(1)(d) of the CP Act because of rental income limitation, stating that cause of action, if any, arose as mentioned in para 19 of the complaint beyond two years from filing of the complaint on 21.02.2013 relying on *V.N. Shrikhande v. Anita Sena Fernandes, (2011) 1 SCC 53 and State Bank of India v. B.S. Agricultural Industries (2009) 5 SCC 121* (c) No permission asked for or obtained under section 12(1)(c), though admittedly, the society comprises of both old and new members (d) Now members cannot ask any relief under agreement dated 14.03.2005, and also that complaint no.2 is also a part of the complainant (e) The present complaint is a proxy litigation by complainant no.2 who is a "chronic litigant", and that his averment in suit no. 2100 of 2005 are contrary to the averments in the present complaint (f) the complaint has not been filed with due authority of the society (g) illegal construction by the members. (h) Huge relief of 100 crores is claimed in the complaint while simultaneously saving the court fees and hence, in view of *Syncho Textiles*, the complaint is liable to be dismissed.

11. Having heard the counsels, we find that all the preliminary objection are superfluous and duly explained and established by the complainant-society. It has been held by the Supreme Court in *Samruddhi Coop. Housing Society Ltd. v. Mumbai*

Mahalaxmi Construction (P) Ltd., (2022) 4 SCC 103 that non-handing over by the Developer of legally valid possession after duly obtaining the OC within the stipulated time is a continuing cause of action. Under the MOFA and additionally in the present case, due to express and specific obligation undertaken by the OP for obtaining the Occupation certificate in the agreement with the society itself, the Society itself as vested with legal right to enforce such obligation, failure wherein of the OP is a valid and continuing cause of action for the Society. As such, even the positive illegal action of handing over the possession of the units without obtaining the Occupancy Certificate by the developer, in itself is a deficiency in service. The change in composition of or increase in the membership, if any, in the Society would be immaterial as far as the society itself has initiated the proceedings though the compensation is claimed on the basis of defects/deficiencies and the damage suffered by itself and by individual members of the Society. The authority of the Society or signatory to file the complaint is also unquestionable because individual claim affidavits of as many as 25 members have been placed on record. The complaint would thus be maintainable and would be within time as the cause of action is a continuing one. Similarly, in the face of admitted absence of valid occupancy certificate even as on the date of this order, the society itself is obviously and continuously suffering the breach of the agreement dated 14.03.2005. The relevant contemporaneous resolutions by the society and subsequent affidavits of majority of the members have also been placed on record supporting the institution and continuation of the present complaint. Hence, there is no merit in the objections on maintainability of the complaint. On the issue of excessive compensation, we have perused the *Synco* decision, but in light of

12. With regard to the fundamental issue of OC, the OP, during the course of hearing as also in the written arguments filed on 20/01/2021, has maintained that the OP is ready and willing to obtain and handover the OC by paying necessary regularization charges for any addition FSI as per the extent of statutory and regulatory requirement but only impediment is that the members have made "Illegal construction" which should be allowed to be demolished by them. The relevant portion of the written arguments along with the ad-interim order dated 26/07/2016 relied upon by the OP a~~nd the relev~~ant

~~para of the Supreme Court decisions relied upon~~ by the parties ~~are scanned and~~ extracted as under:

Written arguments page 10 to 20

....

I. ILLEGAL CONSTRUCTION COMMITTED BY THE MEMBERS OF THE COMPLAINANT NO.1

The O.Ps. respectfully reiterate that in its reply as well as in the evidence as filed on their behalf it has categorically been stated that the members of the complainant No.1 including the complainant No.2 has made major changes in the construction of their respective flats contrary to the sanctioned plan which are coming in the way of grant of OC. The complainants deny the same and in the same breath state that it was committed by the O.P. No.1. It is the respectful submission of the O.P. No.1 that such illegal constructions are required to be removed for the purpose of grant of O.C. In this regard requisite application is also being moved. The O.P. is relying upon judgment of the Hon'ble Supreme Court in the matter of "Treaty Construction & Anr. Vs. Ruby Tower Cooperative Housing Society Limited" (2019) 8 SCC 157 as well as in the matter of "Ashok Kapil Vs. Sana Ullah (Dead) & Ors." (1996) 6 SCC 342.

J. ONLY MONETARY CLAIM

A bare perusal of the complaint indicates that only monetary claim has been made without there being any prayer for declaration of deficiency in service or unfair trade practice by the O.P. Under the Circumstances the instant complaint is not maintainable. It may be noted that the complainant has abused the process of law to invoke jurisdiction of this Hon'ble Commission under CPA, 1986 as it never wanted to pay the court fee for the exorbitant claim as made by them.

K. PRAYER AND QUANTUM OF DAMAGES

The O.Ps. while denying maintainability of the instant consumer case and in the absence of any prayer for declaration of deficiency in service; respectfully submits that the quantum of damages has to be decided in accordance with provisions of Section 14(1)(d) of CPA, 1986 which postulates that the same should be commensurate with the losses suffered for which the basis for quantification with evidence is required to be pleaded. In this regard the ratio of judgments of Hon'ble Supreme Court in the matters of amongst other "Ghaziabad Development Authority Vs. Balbir Singh" (2004) 5 SCC 65, and "Chief Administrator, HUDA & Anr. Vs. Shakuntala Devi" (2017) 2 SCC 301 may kindly be perused. In the backdrop of the above referred the claim as mentioned in the prayer of the complaint is responded in the following manner:

(a) Claim of Rs. 60 lakhs for compensation towards alleged delay in carrying out construction is beyond the limitation period and therefore, cannot be granted. It may be noted that the possession was handed over in the year 2008 and the complaint was filed in the year 2013. Even otherwise all the members of the complainant No.1 accepted the possession without any objection and rather certified the same in accordance with agreement dated 14/03/2005.

(b) Claim of Rs. 71 Crores towards alleged loss of area is misconceived in as much as the complainants while claiming lesser area of each flat has submitted greater construction by more than 45% each flat. The same is also not maintainable in view of the contents of the possession letter as well as undertaking granted by the members of the complainant No. 1. Even otherwise this is disputed question of fact and given the exorbitant claim made in the complaint; cannot be decided in the instant proceedings.

(c) Claim of Rs. 10 Crores towards regularization of the illegal construction committed by the members is also not maintainable on the ground of limitation and also on the ground that the complainants cannot take advantage of their own wrong.

(d) & (f) Claim of Rs. 10 Crores towards compensation for not furnishing OC cannot be granted in view of the illegalities committed by the members of the complainant No. 1. The O.P. has already stated that it is duty bound to bring OC provided the members co-operate in removing the illegal structure made by them post-possession.

(e) Claim of Rs. 10 Crores towards compensation for mental agony is also not maintainable in view of no pleadings of the basis for such claim in the complaint.

SOLUTION

It is the respectful submission of the O.P. No.1 that it is duty bound to bring OC for the constructed building in question provided the members of complainant No.1 co-operate in demolishing the illegal construction made by them. O.Ps. are also filing requisite application in this regard.

The portion of the ad interim order of the Dindoshi Court:

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ANNX—1

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IN THE CITY CIVIL COURT AT DINDOSHI
(BORIVALI DIVISION), GOREGAON, MUMBAI

Draft Notice of Motion
in
L.C. Suit No.1931 of 2016

Raja Constructions Company ..Plaintiffs
V/s.
The Municipal Corporation of
Greater Mumbai ..Defendants

Adv. Mr.Ashwin Bhalekar with Adv. Mr. Chetan Chodankar for Plaintiffs.
Adv. Mr. Shingade for Defendant No.1/MMC.
AGP Mrs. Shanti Kadam for Defendant No.2/State.

Coram : His Honour Judge
Shri R.M. Khan
(C.R. No.6)
Date : -26/7/2016

ORAL ORDER

Superintendent
City Civil Court, Bombay
Borivali Division
Dindoshi (Goregaon)

The Plaintiffs-Raja Constructions Company have filed the instant suit for declaration and injunction, more particularly mentioned in the plaint and have also tendered draft Notice of Motion praying that the Defendant No.1 be restrained from taking any demolition action in respect of construction carried out by the Plaintiffs on the suit property namely the suit property i.e. Tirupati Balaji Tower CHS Ltd., till the Defendant No.1 considers the amended Fungible FSI plans bearing No.E.B./CE/1994/WS/AH dated 5/11/2012 in the light of their policies and amendments to the Development Control Regulations vide notification bearing No.CMS-4311/2152/CR-58/2011/UD-11 dated 6/1/2012 and in

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the light of measurement of the suit property actually carried out by the Defendant No.2 and further injunction restraining the Defendant No.1 from disturbing the use, occupation and possession of the Plaintiffs and their flat purchasers in respect of the suit building, without following due process of law and before considering the amended fungible FSI plans as stated above.

2. Learned Advocate for Plaintiffs submitted that the Plaintiffs are a partnership firm, duly registered under the Indian Partnership Act and engaged in the business of construction and development. The Defendant No.1 is a statutory body constituted under the provisions of the Municipal Corporation Act. The Defendant No.2 is the State of Maharashtra.

By an Agreement for Sale dated 31/5/1971, the members of Uddhavdas family agreed to sell to Mr. Shamsunder J. Bajaj, on behalf of and as the Chief Promoter of Tirupati Devi Co-operative Housing Society Ltd., piece and parcel of land situated on Plot No.B-5 and B-14 of Manekji Gazdar's Private Scheme of Santacruz and being portion of land bearing Survey No.367, Hissa No.1 of Danda respectively adm. 851 sq.yards equivalent to 712 sq.mtrs. and adm. 759 sq.yards, equivalent to 632 sq.mtrs. or thereabout, as described in para 3 of the plaint. Under the Development Agreement, the Plaintiffs agreed that in consideration of the society appointing the Plaintiffs as Developers of the suit property and granting them development rights in respect thereof, the Plaintiffs would demolish the existing building on the suit property which was in a dilapidated state and construct two new buildings in its place and provide

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... the suit property as mentioned in the property register ... 1264.50 sq.mtrs. and not 1344 sq.mtrs.

... After submission of documents namely 4 Deeds of conveyances dated 27/8/1971 the BMC ought to have sanction the building plans on the Basis of title documents and actual physical measurements of the suit property. The Plaintiffs submitted the plans for construction of the building on the suit property in the year 2005 which was duly approved by the Defendant No.1. So accordingly, I.O.D. and C.C. were issued. Pursuant to the said plan, the Plaintiffs commenced the construction on the suit property in the year 2006 after demolishing the existing building and completed the same in the year 2008. The newly constructed building consist of stilt plus 12 floors. During construction of the new building the Plaintiffs repeatedly met the concerned officer of Defendant No.2 and applied for carrying out survey of the suit property so as to ascertain the actual area and thereafter make appropriate corrections in the property register card. The officers of Defendant No.2 visited the suit property and measured the area of the suit property and came to the conclusion that the area of the suit property is in fact 1344 sq.mtrs. The Plaintiffs requested Defendant No.2 to issue correct City survey record and property register card so as to enable the Plaintiffs to put up modified plans for consuming the entire FSI of the suit property. However, for the reasons best known to the Defendant No.2, correct record was not furnished to the Plaintiffs. The delay was causing immense prejudice and financial loss to the Plaintiffs. In the meantime, the Government of Maharashtra as per its notification No.CMS-4311/452/CR-58/2011/UD-11 dated 6/1/2012 have come out with amendments to The Development

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Control Regulations for Greater Bombay, 1991 and [illegible] in order to safeguard the interest in whole of the general public have come out with the concept of fungible FSI. According to the new [illegible], the balconies, flower beds, terraces, voids and niches would [illegible] the Floor Space Index. So to compensate for the [illegible] FSI [illegible] to the tune of 35% for residential development and 20% for industrial and commercial developments, has been allowed with premium. [illegible] can be used for making flower beds or voids, else used for [illegible] bigger habitable areas.

The Plaintiffs' Architect vide his letter dated 5/11/2012 addressed to the Assistant Engineer (Building Proposal) of the Defendants Corporation submitted the amended plan to avail fungible compensatory FSI benefit. The plans included revisions as per the fungible plans. Due to huge financial pressure and pressure from the society members, the Plaintiffs completed the construction of the suit building as per the said Fungible FSI plan. The entire construction is carried out as per the actual area of the suit property with the permission of the Defendant No. 1 who in fact has charged requisite penalty and premiums from time to time. On completion of the suit building, the Plaintiffs applied for Occupation Certificate in respect of the suit building to the Defendant No.1 on 3/1/2008, through their Architect. The Defendant No.1 carried out a routine inspection of the suit building pursuant to the said application for Occupation Certificate by the Plaintiffs. The Plaintiffs were awaiting issuance of Occupation Certificate. However in the last week of March, 2013, the representatives of the Plaintiffs were told by the officers of the Defendant No.1 that they would grant Occupation Certificate to the

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Plaintiffs only provided the new building is constructed on the basis of the area mentioned in the Property Register Card. The Plaintiffs repeatedly pointed out the above facts to the office of the Defendants, however, they did not give proper hearing to the Plaintiffs and contemplating for demolishing the constructed area which was purportedly unauthorized according to the Defendant No.1. The concerned Executive Engineer of the Building Proposal Department is very well aware that the Plaintiffs' Architect has duly submitted the amended plan to avail fungible compensatory FSI benefit. In view of the said amended plan, no area of the suit building can be termed as unauthorized or beyond the approved plans. The concerned officers of the Defendant No.1 had negligently not taken into consideration the said amended plans before coming to the conclusion.

It is also submitted by the learned Advocate that the proposal of the amended plan has been already filed and has not been rejected by the Defendant No.1 till date and intends to take action of demolition of the alleged unauthorized construction. The Plaintiffs have also filed suit bearing No.1816/2013 against the Defendants wherein the officers of Defendant No.1 had contended that issues involved in the suit can be amicably worked out and resolved by the concerned officers of Defendant No.1 in the light of policies and amendments of D.C. Regulations. On account of said assurances given by the officers of Defendant No.1, the Plaintiffs did not move the said suit for hearing and ultimately, it was dismissed by the court for want of service of Writ of Summons. After dismissal of the said suit, certain RTI activists in collusion with certain officers of the Defendant No.1 started harassing the Plaintiffs with ulterior motives and malafide intentions to extort money from the Plaintiffs. Therefore, the Plaintiffs was constrained to lodge complaints to Anti Corruption Department against them. Accordingly action has been taken against them by the department. Therefore, the officers of Defendant No.1 are intentionally harassing the Plaintiffs and threatening to demolish the portion of the suit building. In view of the above stated circumstances, learned Advocate for Plaintiffs submitted for grant of ad-interim relief as prayed for in the draft Notice of Motion.

3. On the contrary, learned Advocate for Defendant No.1 submitted that Defendant No.1 has received amended plans from the Architect of Plaintiffs and the same is pending for consideration with the department. However, leaned Advocate submitted that the construction of some portion of the building is illegal and required to be demolished and submitted for rejection of ad-interim relief.

4. On perusal of the documents on record, it appears that Plaintiffs have constructed the suit building by utilising the FSI as per the approved plan. The Plaintiff have by their letter dated 5/11/2012 addressed to the Assistant Engineer (Building Proposal) of the Defendant No. 1 submitted amended plans to avail fungible compensatory FSI benefit available in view of Circular/Notification bearing No. CMS-4311/452/CR-58/2011/UD-11 dated 6/1/2012. The Defendant No.1 had vide their demand letter have charged the Plaintiffs with penalty and premium and issued I.O.D. and C.C. accordingly. Advocate for Defendants has also admitted about receipt of amended plan to avail fungible compensatory

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FSI benefit and the same is pending for consideration. Under such circumstances, I find that the Plaintiffs have made out prima facie case for grant of ad-interim relief in terms of prayer (a) and (b) of the draft Notice of Motion till the filing of reply of the Defendants. If the ad-interim relief is not granted, the Plaintiffs will suffer loss which cannot be compensated in terms of money. Therefore, I pass the following order:

ORDER

Ad-interim relief in terms of prayer (a) and (b) of the Notice of Motion is granted till filing of reply by the Defendants.

(R.M. Khan)
Judge,
City Civil Court,
(Borivali Division),
Dindoshi.

26/7/2016

Dictated on 26/7/2016
Transcribed on 29/7/2016
Checked & signed by HHJ on : 29.7.16

CERTIFIED TRUE COPY
This 4 AUG 2016 day of
Registrar
City Civil Court Bombay
Borivali Division at
Dindoshi (Goregaon)

Superintendent
City Civil Court
Borivali Division

13. As per the evidence on record, the "satisfactory possession" in terms of the development agreement, along with balance of the part of the "corpus fund" consideration as agreed to between the society and the developer was handed over from May-June 2008 onwards to and so received by the members/allotees. There is no dispute that the carpet area as handed over to the members, which was to be more by 20% from the original pre-redevelopment carpet area, is in any way less or that the amenities as agreed were not provided. The typical letter of such obtaining of the possession when perused, does reveal that the members were fully satisfied about the area obtained and about the satisfactory execution of the development agreement. Though the possession is being enjoyed by the members from 2008 onwards, the legality of the extent of construction and of such possession is in jeopardy in view of the refusal or resistance by the authorities to grant such permission in view of the fact of part of the construction being in excess of or contrary to the approved plan as submitted by the Developer to the the authorities. Though there appears a serious issue evident on record with regard to the actual area of the plot on which the redevelopment has been carried out, i.e whether it is 1344 square meter or 1264 square meter, it is the OP developer who has expressly, consciously and obviously and categorically after due evaluation of risk and reward, agreed and undertaken the redevelopment work and also to allow hand over 20% more carpet area to the old members. The OP has categorically, with open eyes and after duly evaluating the circumstances, also submitted the building plan for an area of 1264 square meters and in fact constructed the larger area as it stands, including the area of construction of 8 flats which fell to his share and has been sold by the Developer in the open market. It is with this specific consciousness, and perhaps with the calculated though risky hope and confidence that the amendment to the building plan including the correction in the municipal record of the "correct" area of the plot, shall be eventually obtained, the OP also categorically undertook to obtain the OC and the new water connection and only thereafter to handing over of the possession within 24 months, in clause 34 of the Development Agreement. The developer has not only surveyed the plot and area before the agreement, such specific recital is also expressly made in clause 6 of the agreement. Complete financial and procedural obligations with regard to obtaining of the OC and, if required, paying any regularisation charges or bringing in fungible TDR from the market as permissible or available under the extant regulations, and taking necessary steps in this behalf, are stipulated in the agreement to be of the Developers and further that no expense or responsibility whatsoever is to be borne by the society or its members. There is no evidence on record and no merit in the contention of the OP that the members have made any illegal construction in their units. It is the OP who promised, constructed and handed over the flats with 20% additional carpet area to the original members. It was thereafter for the developer to diligently calculate and compute the balance permissible construction as per the extant regulations, which only would be falling to his share and only thereafter accordingly prepare the building plans, get it so sanctioned and raise only that much and no more construction. The whole gamble of raising nearly 33000 square feet of construction as against the sanctioned construction as per plot area of ~~2164~~ 1264 square meter of only 22500 square ~~meter~~ feet is made by the OP primarily to obtain larger balance area to his own share of free-sale flats resulting into additional revenues even at the risk of jeopardy of the OC and tremendous inconvenience and anxiety to the members. It was indeed for the developer to submit the valid and sanctionable plans and get due sanctions including the OC, and also to ensure speedy due correction in the property card if it was so viable. Amended building plans themselves were also not submitted till 2009, 2012 and 2021 and those attempts also appear to have not been seriously followed up and have yielded no results. In such a scenario, when the statutory and contractual obligation of Developer of raising construction by utilizing and bringing in available and permissible fungible FSI and TDR as per extant regulation incorporated in the submitted and sanctioned plan, of allocating 20% additional carpet area to the members first, and modulate his own share, the building plan and the construction in compliance of such obligation, and accordingly obtain and provide the OC while handing over the physical possession, were the OPs, the absence of OC is absolutely a serious and continuing deficiency in service for which the OPs are jointly and severally liable to compensate the society and the members. The very feeble and bald contention that the members have themselves raised illegal construction in their flats which impede the OC is, on the face of the contention itself, not acceptable after 18 years of illegally and irresponsibly handing over the possession without obtaining the OC. Such a fact though is not established, even if established, still cannot in any way dilute the illegality of handing over the possession without OC in the first place, and the continuing deficiency in service attached to such illegality. The illegal and intentional revenue and profits from illegal extra construction of nearly 45% have been pocketed by the OP by raising and selling extra construction in violation of the sanctioned plan. Having illegally handed over the possession, the OPs now cannot be allowed to take shelter under the plea of "post handing-over illegal construction" of the members. We may also mention that while the dispute or discrepency of 70 square meters of plot area may perhaps have some substance, that in itself also does not explain the whole additional construction of nearly 11000 square foot in as much as such actual additional area of plot, even if so, may perhaps account for liberal 2100 square foot of construction, but still cannot and does not explain the whole additional construction of 40-45% at 11000 square foot. This absence of OC and this unauthorised additional construction is a continuing deficiency in service for which the OPs, i.e. the firm and its partners are jointly and severally liable to compensate the society and its members.

14. We at the same time, agreeing with Mr. Sinha, find that the claim of compensation in the complaint is made in an arbitrary and wholly unsubstantiated form and that the amounts claimed are certainly excessive. However, the action of the complainants in raising and quantifying the claim itself can neither be fatal to the complaint nor be a limitation on this Commission to arrive at and award fair and just compensation justifiable under the established facts and circumstances. First, It is not the averment or the grievance in the complaint that the carpet area of the flat as handed over by the OP is less than what was promised in the development agreement or even in the respective agreements by the OP for flats falling to his own share. On the contrary, the averment and the emergent fact is that the OP has constructed 40-45% more construction qua the sanctioned plan. As such, all the members have accepted the possession with full satisfaction after verifying each aspect including the carpet area of the flat. The main grievance is the absence of OC and the absence of municipal water connection, and that the "construction is not in accordance with the sanctioned plan", which, as per the society, was not handed over to them during the construction period, and had to be obtained through RTI. Annexure A to the complaint compares, wholly baselessly, the area sanctioned in the approved plan with the area promised in the agreement but without specifying how much area the occupant or member had been in fact handed over and whether such area is less than what is promised in the agreement. After considering the rival contentions, we are of the view that the all the members including the old members have been duly, though without OC, handed over the area of 120% of the original carpet area or agreed area and, apart from the fact that "full satisfaction" has been shown while taking over the possession, obviously no requirement of any technical advice or of the sanctioned plan can be envisaged to broadly measure the carpet area of a unit, regarding which full satisfaction has already been recorded while obtaining the possession. Therefore the claim of Rs. 71 crores, which is based on the deficit area in the sanctioned plan *qua* what has been agreed in the development agreement, is in itself misconceived and misplaced. Claims under other heads are, in our opinion, also overlapping and highly exaggerated without any sound basis having been demonstrated before us. Therefore, we are of the considered opinion that the Society is eligible for compensation amount to be based on the considerations of (a)delay compensation and (b)compensation for the obvious and unquestionable erosion in the value of the property and for constantly hanging sword of demolition due to the absence of the OC, and, (c)need to follow up on and obtain or supplement the OP's efforts for OC including mental, financial and time-costs incurred and further likely to be incurred by the Society in itself attempting to follow up on obtaining OC and (d)the fact that the OP has already pocketed the fruits of additional illegal construction, though the primary liability shall continue to be that of the OP.

15. While the principles in *Arifur Rehman* and in *D.S. Dhanda* lay down the principle that the delay compensation at 6%, without any further grant under multiple heads, is sufficient and fair for delay in handing over the possession, those principles are not operationalisable in the circumstances of the present case for the reason that the physical possession has already been obtained by the complainants and further that no cash amount was "deposited" by 25 out of 33 allottees, and therefore, compensation on such basis is not computable. We note that the agreement itself stipulates in clause 38 that "in case the developer do not complete the entire project as envisaged herein within

24 months from the date of the last member vacating the existing unit, the Developer shall be liable to pay the society a compensation of Rs. 1 lac per month". In our considered opinion, the non-obtaining of the OC and putting the members under the continuing risk of demolition of the building due to illegality in construction over a longish period of more than 20 years, calls for the compensation at enhanced 1.5 times the stipulated rate, which would be just and fair and would duly take care of the anxiety and mental agony and adversity faced and being faced by the society and its members. At such rate, the liability for the period of June-2008 to August-2026 i.e. 218 months, the amount of compensation amount would come to Rs. 324 lacs. We deem it proper to add a further amount of Rs. 26 lacs, so as to bring it to Rs. 350 lacs for compensating the society for the additional agony and expenses due to absence of municipal water connection and additional municipal taxes.

16. Additionally, we are of the view that the liability under both the agreement and in law of obtaining the OC and towards that end, incurring all the charges including the charges for purchase and use for additional utilisable fungible TDR/FSI is on the Developer. No such charges have been paid by the OP and no OC has been received till date. OPs, at least now, in the face of its failure till date and not-so-serious efforts in that direction, should therefore in our considered opinion, need to be further directed to pay some reasonable amount to the society so that the society and members themselves may undertake efforts to supplement OP's efforts or submit appropriate revised plans, or follow up on the already submitted plans by the OP. Otherwise also, on the basis of the facts on record, and in view of the uncontested averments of the complainant that the actual construction is 45% higher than the sanctioned plans, and in view of the further fact that some litigation with Municipal authorities is also underway, we can only wish and direct the OP to obtain the OC within one year, which in any case we will do. We also cannot overlook the fact that the OP has successfully pocketed the fruits of illegal extra construction. Though there is no cogent material on record, except the obvious continuing agony of the members, to help us arrive at such further amount of compensation, in the light of the absence of OC even after 3 applications by the OP, and in light of constantly hanging sword of demolition, we deem it in these special facts and circumstances to be proper to award a further sum of compensation for such constant and unending fear and threat of demolition not only till date but likely to be continuing till OC is received by the OP. In that factual background, therefore, we deem it fair, just and proper in the circumstances to direct the OPs to pay a further sum of Rs. 250 lacs to the society as further compensation, bringing the total compensation to Rs. 600 lacs. We are of the considered opinion that the society and its members deserve such compensatory amount at the minimum. We therefore direct as under:

(a) The OPs, the Developer and its partners, are jointly and severally liable for deficiency in service and for compensation and for positive actions as directed under this order.

(b) The OPs shall pay all necessary charges and obtain the Occupancy Certificate within 12 months from the date of this order and shall positively hand over the same to the society with copies to each of the 33 current members/unit holders and shall duly obtain the receipt from each of the members.

(c) OPs shall jointly and severally be liable to pay compensation of Rs. 600 lacs to the society within a period of three months from the date of this order, failing which, the amount shall bear simple interest at the rate of 8% till the amount with interest is fully paid.

(d) The Society, i.e. the current Office bearers of the society shall deliver the copy of this order to all the 33 members/unit holders of the society and obtain a receipt from them within one month from the date of this order and shall strictly keep the sums received under this order in a Nationalised Bank till the Members, in a General Body Meeting duly called for the purpose as per the extant provisions of law, decide about the use or distribution of the sums of compensation, and duly and strictly follow and act in accordance with such decision in the Meeting about the utilisation or distribution of the sums.

(e) The litigation costs of Rs. 10 lac shall be paid by the OP to the society within 3 months from the date of this order.

17. The complaint is thus partly allowed. All IAs stand disposed off.

Sd/-

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(A.P. SAHI, J.)
PRESIDENT

Sd/-

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(BHARATKUMAR PANDYA)
MEMBER

aj/-