

M/S.Noopur Developers vs Himanshu V Ganatra on 14 January, 2010

Author: C.L.Pangarkar

Bench: C.L.Pangarkar

1

lgc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLAE JURISDICTION

APPEAL FROM ORDER NO.1195 OF 2009
WITH
CIVIL APPLICTION NO.1495 OF 2009

M/s.Noopur Developers]
a registered partnership firm formed under]
the Indian Parnership Act, 1932 having its]

address at 4, Vishal Apt., L.T.Road,].. Appellant/
Borivali(West), Mumbai-400 092
ig]Original Defendant

versus

1. Himanshu V Ganatra]
age 46 years]
]]
2. Parul Hinanshu Ganatra]

age 42 years]

both adults Indians inhabitants having]
residing at Flat No.701 and 702,]
"A" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]

Borivali(West), Mumbai 400 092]

3. Sureshkumar Umedmal Jain]
age 54 years]

4. Nirmala Sureshkumar Jain]
age 51 years]
both adults Indian Inhabitants having]
residing at Flat No.703 and 704,]
"A" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
5. Manoj V Vora]
age 45 years]

::: Downloaded on - 09/06/2013 15:30:51

2

6. Chetna Manoj Vora]
age 43 years]
both adults Indians inhabitants having]

residing at Flat No.601 and 602,]
"A" Wing, Megh Bldg., situate at]

- Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
]
7. Kewalchand J Jain]
8. age 61 years]
Nileshkumar Kewalchand Jain]
age 35 years]
]
9. Kalawati Kewalchand Jain]
age 59 years ig]
all adults Indians inhabitants having]
residing at Flat No.603 and 604,]
"A" Wing, Megh Bldg., situate at]
- Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
]
10. Laxmichand Malshi Chheda]
- age 56 years]
11. Hemlata Laxmichand Chheda]
age 53 years]
both adults Indians inhabitants having]
- residing at Flat No.501 and 502,]
"A" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
]

12. Mahesh Roopchand Talsera]
age 41 years]
]
13 Kiran Roopchand Talsera]
age 44 years]
both adults Indians inhabitants having]
residing at Flat No.503 and 504,]
"A" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]

::: Downloaded on - 09/06/2013 15:30:51 :

3

- 14 Pravin Dhanrak Khimavat]
age 47 years]
15 Veena Pravin Khimavat]

age 44 years]
both adults Indians inhabitants having]

residing at Flat No.401 and 402]
"A" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]

- 16 Jinnalal L Jain]
age 61 years]
]

17 Pinkesh J Jain]
age 26 years ig]
]]
18 Manjula J Jain]
age 58 years]
]]
19 Mitesh J Jain]
age 30 years]
]]

both adults Indians inhabitants having]

residing at Flat No.301 and 302]
"A" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]

20 Vikas H Jain]
age 38 years]
]]
21 Rekha Vikas Jain]

age 37 years]
]]
22 Sheela H Jain]
age 40 years]
]]
23 Kailash H Jain]
age 42 years]
]]
both adults Indians inhabitants having]
residing at Flat No.303 and 304]

::: Downloaded on - 09/06/2013 15:30:51 :::

"A" Wing, Megh Bldg., situate at]

Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]

24 Sanjay Harakchand Jain]
]

age 48 years]

25 Meena Sanjay Jain]
age 35 years]

]
both adults Indians inhabitants having]
residing at Flat No.203 and 204]
"A" Wing, Megh Bldg., situate at]

Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
ig]

26 Lalit C Jain]
age 48 years]

27 Asha Lalit Jain]
age 46 years]
]

all adults Indians inhabitants having]

residing at Flat No.201 and 202]
"B" Wing, Megh Bldg., situate at]

Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]

28 Navnitbhai Manilal Shah]
age 57 years]
29 Dhanlaxmi Navnitbhai shah]

age 55 years]
both adults Indians inhabitants having]
residing at Flat No.203 and 204]
"B" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]

30 Bhartesh J Shah]
age 50 years]

::: Downloaded on - 09/06/2013 15:30:51 ::

5

31 Piyush Bhartesh Shah]
age 47 years]
]

both adults Indians inhabitants having]
residing at Flat No.301 and 302]

"B" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
]

32	Rajubhai C Jain]
	age 48 years]
]
33	Saraswati R Jain]
	age 46 years]
	ig]
	both adults Indians inhabitants having]
	residing at Flat No.303 and 304]
	"B" Wing, Megh Bldg., situate at]
	Junction of Factory Lane, S.V.Road]
	Borivali(West), Mumbai 400 092]
]
34	Ramnik Jivraj Saiya]
	age 53 years]
]
35	Pravina Ramnik Saiya]
	age 50 years]
]
]
	both adults Indians inhabitants having]
	residing at Flat No.401 and 402]
	"B" Wing, Megh Bldg., situate at]
	Junction of Factory Lane, S.V.Road]
	Borivali(West), Mumbai 400 092]
]
36	Dinesh Popatlal Rathod]
	age 33 years]
]
]

37 Pushpaben Popatlal Rathod]
age 55 years]
]]
both adults Indians inhabitants having]
residing at Flat No403 and 404]
"B" Wing, Megh Bldg., situate at]

::: Downloaded on - 09/06/2013 15:30:51 ::

6

Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
]

38 Krishnankant V Shah]
age 58 years]

]]
an Indians inhabitants having]
residing at Flat No.502]
"B" Wing, Megh Bldg., situate at]

Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
]

39 Hasumati Mulraj Parmar]

age 56 years]
ig]
40 Hitesh Mulraj Parmar]
age 38 years]
]

both adults Indians inhabitants having]
residing at Flat No.503 and 504]
"B" Wing, Megh Bldg., situate at]

Junction of Factory Lane, S.V.Road]

Borivali(West), Mumbai 400 092]

41 Surbhi Manmohandas Shah]
age 67 years]
]

both adults Indians inhabitants having]
residing at Flat No.601 and 602]
"B" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]

42 Ketan N Shah]
age 36 years]
]
both adults Indians inhabitants having]
residing at Flat No.701 and 702]
"B" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092]
]

::: Downloaded on - 09/06/2013 15:30:51 ::

7

43 Mahendra K Soneji]
age 53 years]
]

both adults Indians inhabitants having]
residing at Flat No.703 and 704]

"B" Wing, Megh Bldg., situate at]
Junction of Factory Lane, S.V.Road]
Borivali(West), Mumbai 400 092].. Respondents
] (Original Plaintiffs)

Mr.V A Thorat, Senior Advocate, with Mr.Jain and Mr.G S Godbole
i/by M/s. L J Law for the Appellants

Mr. Niranjan Lapashiya with Ms.Uma Jha i/by M/s.Niranjan & Co. for
Respondent Nos. 1 to 43.

ig

CORAM : C.L.PANGARKAR, J.

DATE : 14th JANUARY 2010

JUDGMENT :

-

1. This Appeal has been preferred by the Original Defendant against whom an order of injunction has been passed.

2. The facts giving rise to this Appeal are as under :-

The Original Defendant/Appellant is a promoter. He constured a building known as "Megh" at Borivali-Mumbai on Original Plot No.78, Final Plot No.120. He constructed the building having two wings `A' and `B' on the said plot. The Plaintiffs purchased the flats in wings `A' and `B'. Both the wings consist of Ground+7 upper floors.

Besides wings `A' and `B', there is in existence structure of W.C., Pump Room Suction Tank, Underground Water Tank and old building. In the year 1997, the Defendant/Appellant represented to the Plaintiffs that the Defendant is the owner of the property and he has requisite permission for redevelopment of the said property. When the said flats were offered for sale it was also represented that an area of 335 sq.mtrs. would be left for recreation ground and there would be space for parking of cars etc. The Defendant/Appellant therefore entered into agreement for sale for various flats and as stated earlier the Plaintiffs purchased some of the flats. The

Plaintiffs were requesting the Defendant/Appellant to form a co-operative society but the Defendant/Appellant avoided to do so. According to the Plaintiffs since the Defendant/Appellant avoided to form a society, the Defendant/Appellant has lost his right to develop the property and use the TDR. The Plaintiffs further contended that the Defendant/Appellant is now seeking demolition of old building which was standing on the said plot and has decided to construct a new building. The Plaintiffs submit that the Defendant/Appellant has no right to do so, inasmuch as the rights of the Plaintiffs would be affected thereby. The Defendant/Appellant cannot take disadvantage of his own wrong. Further it is contended by the Plaintiffs that without consent of the Plaintiffs, the Defendant/Appellant cannot make any addition, alteration and/or change in the sanctioned plan and the Defendant's proposed construction of new building is in breach of provisions of law. The Plaintiffs/Respondents, therefore, sought an injunction.

3. The Defendant/Appellant resisted the said Application of the Plaintiffs by filing an affidavit. It is the contention of the Defendant that the Defendant has every right to make construction. The Plan was approved by the Municipal Corporation. Further it is the contention of the Defendant that the old building was in occupation of the tenants and the tenants have recently vacated that building and due to vacation of that building, an additional FSI has become available to the Defendant. The Defendant has therefore a right to use the said FSI and therefore intends to make that construction. It is also contended by the Defendant that major part of construction is over and the Plaintiffs have approached the Court deliberately after the major part of the construction is over. It is contended that this is being done by the Plaintiffs in order to pressurise the Defendant. Further it is contended that the injunction relief being an equitable, the Plaintiffs should have promptly approached the Court.

4. The learned Judge of the trial Court after hearing the parties found that the Plaintiffs were entitled to an injunction as they have made out a prima facie case. Holding so, he has granted injunction in favour of the Plaintiffs. Being aggrieved by the said order, the Defendant/Appellant has preferred this Appeal.

5. I have heard the learned senior counsel for the Appellant/Defendant and the learned counsel for the Respondents/Plaintiffs. The Defendant is a promoter/owner of a plot measuring 2642 sq.mtrs. The Defendant constructed one building having two wings consisting of Ground+7 upper floors. The plans of Wings A and B were approved way back in 1993. Certificate of occupation was issued by the Municipal Corporation in 2002. The Plaintiffs purchased their respective flats in these two wings. It is the contention of the Plaintiffs that the Defendant/Appellant had shown approved plan to the Plaintiffs and in that plan one old residential building, W.C. etc were shown. It is also their contention that the old building, the WC and other small structures were in fact shown to be retained and yet the Defendant has now demolished the old building, the WC etc and has undertaken construction of new building which is an additional structure.

6. The Defendant contended that as a promoter /developer, the land and the FSI vests in it, it has a right to make construction. It was also contended that the construction sought to be made is in no

way illegal, since the Municipal Corporation has approved the plan of the new additional building. There is no dispute about the fact that the old building was in occupation of the tenants and the tenants have now vacated the said old building. There is also no dispute about the fact that under the DCR besides actual FSI, an excess FSI becomes available to the developer and he can make use of it.

7. The Plaintiffs mainly contended that once the building to be constructed on a plot is occupied by the purchasers, the developer cannot make any construction on the said plot without consent of the flat owners. The Appellant/Defendant also mainly contended that the flat owners have no business to object in view of the insertion of Section 7A of the Maharashtra Ownership Flats Act and also the amendment whereby the words "whereas after the registration of the society the residual FAR shall be available to society" are deleted from Clause 4 of the model agreement under the rules framed under the Act. The Gazette Notification dated 6/3/1997 goes to show that the said words are deleted from the clause 4. The society is not as yet registered is a fact. This model agreement has a statutory force is also not disputed. Clause 4 now says that until society is registered, the said residual FSI shall vest in the promoter.

8. The Government was required to insert Section 7A in the act so as to over come the interpretation put by the Court in the case of Kalpita Enclave Co-operative Housing Society Ltd. v. Kiran Builders Private Ltd, reported in 1986 Mh.L.J. 110 and to explain what the legislature actually intended. Section 7 was interpreted in Kalpita's case to mean that the promoter is prohibited from making any construction once the promoter hands over the flats to the purchasers. The amendment makes it clear that consent of the flat purchasers was never applicable to the construction of additional building by the promoter. By the amendment, the legislature not only inserted Section 7A to the Act but deleted the words "or construct additional structures" from Section 7(1)(ii). That clause reads now as follows :-

"Section 7 :- After plans and specifications are disclosed no alterations or additions without consent of persons who have agreed to take the flats; and defects noticed within [three years] to be rectified (1) After the plans and specifications of the building, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make-----

(i)

(ii) any other alterations or additions in the

structure of the building without the previous consent of all the persons who have agreed to take the flats in such building"

9. This Court had an occasion to interpret Sections 7 and 7A in two following decisions. One such

decision is reported in 2003(5) Bombay Case Reporter 695 in the case of [Ravindera Mutenja & others v/s. Bhavan Corporation & others.]. The Court observed as under :-

"13. The real issue as has been noted earlier is what is the stage up to which the developer/owner can put up additional construction after the building in terms of the registered plan has been constructed and occupied. In my opinion, once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA Act, have been completed and possession handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the Act he is entitled to take advantage of any additional F.S.I. that may become available because of subsequent events. That would be so at the stage the building is under construction or the building is not completed and/or purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not effected by the revised development plan. Once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the Rules framed under MOFA is over, the permission of such purchasers would be required.

In the instant case, the building completion certificate for the plaintiff's building, was issued in the year 1997. The builder/owner defendant Nos. 1, 3 and 4 had to put up the construction, based upon the permission/license granted. The defendant Nos. 1, 3 and 4 had to construct the building and to convey the title by sale deed in terms of Rule 9. If property had been conveyed, prima facie the remaining F.S.I. or F.S.I. which become subsequently available on the facts of the case, would be to the society to whom the land had to be conveyed. The record shows that the building was approved in December, 2001. It cannot prima facie, be said that defendants Nos. 1, 2, 4 and 5 have any rights under which they are entitled to put up an additional building contrary to section 7-A of the Act.

14. We may now examine the judgments of this Court to find out whether the construction of the provisions would be contrary to the law as interpreted by this Court. The first such judgment is in the case of (Smt. Neena Sudershan Wadia v. M/s. Venus Enterprises)2, 1984(2) Bom.C.R. 505. The judgment is before section 7-A was introduced. The issue therein involved the blanket consent or authority obtained by a promoter at the time of entering into an agreement for sale or at the time of handing over possession and whether that amounted to consent contemplated by section 7. This Court held that notwithstanding the agreement of sale and non registration thereof nor obtaining blanket consent of the purchasers of the flat at the time of

entering into agreement for sale and delivering possession of the flat, cannot deprive the flat owners of invoking the provisions of section 7(i), (ii) of the Act as it stood before its amendment in 1986. The promoters/builder/owners could not, under the cloak of the blanket consent obtained under the proforma agreement for sale, carry out the work of additional structures and thus set at naught the provisions of section 7(i), (ii). The Court also held expression additional means only extension either vertically or horizontally to an existing structure.

We may now consider the judgment in (The Mohatta Nagar Co-operative Housing Society Ltd. v. M/s. Vishram Khimji & Sons and others)³, 1994(1) Bom.C.R. 444. On the facts of that case the land totally admeasured 2351 sq. yds. The builders between 1962 to 1966 sold certain flats. Out of admitted 21 purchasers of flats, the agreement in respect of 14, provided for construction of one building subject to construction of upper floor if permitted by Municipal Corporation. Six flat owners entered into an agreement which restricted the plot of the building to 1104 sq. yds. The original plot with approval of the authorities had been sub-

divided in the year 1967. The unconstructed plot admeasured 1,250 sq. yds. F.S.I. for the plot of 1,250 sq. yds. had not been exhausted. Possession of the plot was held to be with the owners/developers.

The suit was filed in the year 1970. Amendment to section 7 as also insertion of section 7-A was in 1986. Section 7-A was introduced to clarify that the amendment to section 7(i), (ii) was deemed never to apply in respect of any additional building or structure constructed or to be constructed under a scheme or project of development in the lay out after obtaining the approval of a local authority in accordance with the building rules or building bye- laws or Development Control Rules made under any law for the time being in force. On those set of facts and considering the Statement of Objects and Reasons the learned Judge observed the intention behind the amendment becomes apparent that it was to remove the impediment of new building and set out as under "if total lay out permits constructing of more building in accordance with the building Rules or building bye-laws or the Development Control Rules, where such proposal for additional construction was already approved or was submitted in future to the appropriate authority....." Therefore the learned Judge held that it would include not only proposals which are already approved but also proposals which could be sent for approval of the local authority. On the facts of that case consistent with the project of development of the suit plot, the right of the defendants was upheld. It may be noted that the planning authority had approved the sub-division of the plot, before the amendment. Therefore a building with necessary permission could be constructed in the said sub-division plot. If this aspects are considered the correct ratio of the judgment can be really understood.

The law may be explained thus. An owner of the land or developer considering the provisions of the Maharashtra Regional and Town Planning Act, 1966 and

development regulations framed thereunder, if a scheme or lay out plan has been approved, whether the building is constructed or not then the owner developer inspite of MOFA can carry out development of such structure or building. It may be also possible to hold that with a development permission under development regulations if obtained, the owner/developer can develop, but as long as the permission was obtained and could be legally obtained. If under the permission granted for construction the society had to be registered within a time frame and the land had to convey to the society under the agreement within a time frame and if not, within the time set out under Rule 9, after that time frame the owner/developer, is legally precluded from putting up of further construction without consent. At any rate if building is to be put up as a wing of an existing building considering section 7, it cannot be constructed without permission of the flat purchasers. There can, therefore, be no question of further development by the owner of developer. This is considered in the judgment in (Kalpita Enclave Co-op Housing Society Ltd. and others v.

M/s. Kiran Builders Pvt. Ltd. and others)⁴, 1987(1) Bom.C.R. 355 : 1986 Mh.L.J. 110, as proposition seven. In (Vrindavan (Borivali) Co-operative Housing Society Ltd. v. Karmarkar Brothers and others)⁵, 1983(2) Bom.C.R. 267 : 1982 Mh.L.J. 607, a learned Judge noted the statutory duty cast on the owner/developer and observed after considering the various sections of MOFA as under

".....All these liabilities read with further obligation under sections 10, 11 and 12 go to show that the promoter is under a statutory obligations who should complete the and pass a conveyance to the organization named thereunder."

The ratio of this decision appears to be two fold. One that whether or not the society is formed the FSI must vest in the society, if the time to form the society' statutorily fixed under Rule 9' has expired. Time fixed by Rule 4 is four months. The second ratio is that if the building is to be put up as a wing, the permission of the society would be required.

10. The Division Bench of this Court in a decision reported in 2008 (6) ALLMR 550, in the case of M/s.Manratna Developers v/s.

Megh Ratan Co-operative Housing Soc. Ltd. has observed thus :-

"Para-6 :-

ig Coming to the question as to whether the consent of the flat owners is required by the developer/promoter for raising the additional structure/building, the change in position of law will have to be addressed to.

Section 7 of Maharashtra Ownership Flats Act, 1963 ("MOFA" for short) was interpreted by the Bombay High Court in Kalpita Enclave Co-

operative Housing Society v/s Kiran Builders Pvt. Ltd. reported in 1986 MLJ 110 holding that a promoter was not entitled to put up additional structure not shown in the original lay out plan without consent of the flat purchasers. The said interpretation of Section 7 by the High Court prompted the legislation to amend Section 7. Section 7 was amended with retrospective effect and Section 7-A was newly inserted which was of a clarificatory nature. By amending section 7, the words or construct any additional structures were deleted. Section 7-A which was newly added, clarifies the position that the consent of flat holders in a building is not necessary in respect of construction in the scheme or layout, after obtaining approval of the local authority in accordance with the building buy-laws or Development Control Rules. Section 7-A, thus, does not enable the flat purchasers to prevent construction of the additional structures once the plan is modified and sanctioned under the building bye-laws or Development Control Rules.

"Para-11 :- From the agreement it is revealed that the parties had agreed that the promoters would be developing the property in phased manner and in accordance with the sanctioned plan or modified sanctioned plan as approved by the concerned authority. The entire FSI/TDR was to be used by the Promoter to the exclusion of the flat purchasers or the Society that they would form.

The disclosure only in regard to TDR is not made in the agreement, as according to the appellant the very concept of TDR was non-existent in the year 1988. Thus, on that count, it could not be said that the appellants have not made true and full disclosure as is obliged to be made by them under clauses 3 and 4 of the agreement."

11. Shri Thorat, the learned senior counsel for the Appellant/Defendant submits before me that this decision lays down the correct position of law and is a decision by Division Bench. He submits that the Court clearly lays down that the flat owners have no right to object to any additional construction that is sought to be put up if it is approved by the municipal corporation. But then Para 11 of the judgment reveals that under an agreement the construction was to be made in a phased manner. The Court also observed that all disclosure was made except with regard to the TDR and such a concept of TDR was non-existent in the year 1988. Obviously it is because the construction was to be made in a phased manner and the disclosure of such scheme was made, the Court found that the flat owners have no right to object.

12. In the instant case the learned counsel for the Respondent submits that the construction sought to be made was not shown to be done in a phased manner and there was no correct disclosure of the entire scheme with regard to its further development. He submits that the new proposed construction also abutts the building in which the Plaintiffs have purchased the flats. The plans as I see them do not go to show that the new proposed construction sought to be made in any way touches wing A or wing B. Although it is vehemently argued that the new proposed building touches wing A or B, the Plan does not show so. The proposed construction could be said to be touching or abutting wing A or B only if it could be treated as part of the same building. Be that as it may. It is clear to me that the new proposed building does not abut either wing A or wing B and can be said to

be detached one. If it is actually abutting while making construction, that could be in breach of sanctioned plan and for that purpose remedy must lie elsewhere. However, we need to address ourselves to the two main contentions; (1) Whether the right of the promoter is lost after four months in the residual FSI, if the promoter does not take necessary steps to register society within one month and; (2) Whether this case could be said to be a case where there is no disclosure of the entire scheme by the promoter and the effect thereof.

13. I may first reproduce here the Rules 8 and 9 framed under the Maharashtra Ownership Flats Act.

Rule 8 : Period for submission of application for registration of co-operative society or company of Flat purchasers Where a co-operative society or a company of persons taking the flats is to be constituted, the promoter shall submit an application to the Registrar for registration of the co-operative society or the company as the case may be, within four months from the date on which the minimum number of persons required to form such organisation have taken flats 1[Where the apartment takers propose to submit the apartments to the provisions of the Maharashtra Apartment Ownership Act, 1970, by executing Declarations and Deeds of Apartments as required by that Act, the promoter shall inform the Registrar as defined in the Maharashtra Co- operative Societies Act, 1960, as soon as possible after the date on which all the apartment owners (being not less than five) have executed such Declaration and Deeds of Apartment.] Rule 9 : Period for conveyance of title of promoter to organisation of Flat purchasers.

If no period for conveying the title of the promoter to the organisation of the flat purchasers is agreed upon, the promoter shall (subject to his right to dispose of the remaining flats, if any) execute the conveyance within four months from the date on which co-operative society or the company is registered or, as the case may be, the association of flat takers is duly constituted.

2[When a promoter has submitted his property to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing and registering a Declaration as required by section 2 of that Act, and no period for conveying the title of the promoter in respect of an apartment to each apartment-taker is agreed upon, the promoter shall execute the conveyance or deed of apartment in favour of each apartment-taker within four months from the date of apartment-taker has entered into possession of his apartment] Rule 8 casts a duty on the promoter to see that the society should be registered within four months and, Rule 9 further casts a duty on the promoter to convey the flats to the owners within further four months.

The Appellant/Defendant has not done either of the things as such.

The further question therefore is, whether as per the agreement the property could still be said to be vested in promoter or not. The legislature certainly intended that the formality of conveying the title and formation of society must be completed within the time as stipulated so that an unscrupulous promoter should not take disadvantage of the same. Although the words "whereas after the registration of the society, the residual FAR shall be available to the society" are deleted from clause 4 of the model agreement, the question is whether the promoter can indefinitely postpone the registration of society and thus retain alleged FAR with him. In spite of deletion of words as stated

above, neither Rule 8 nor clause 4 can be interpreted to give an unfettered right to the promoter to postpone registration of society and take away the right of the flat owners to avail FAR after four months. If that is to be interpreted in that way, that would defeat the intention of the legislature to vest the society with residual FSI and to convey the flats to the owners within further four months. In Ravindra Mutenja's case, referred to above, this Court observed as follows :-

"13. The real issue as has been noted earlier is what is the stage up to which the developer/owner can put up additional construction after the building in terms of the registered plan has been constructed and occupied. In my opinion, once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA Act, have been completed and possession handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the Act he is entitled to take advantage of any additional F.S.I. that may become available because of subsequent events.

That would be so at the stage the building is under construction or the building is not completed and/or purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not effected by the revised development plan. Once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the Rules framed under MOFA is over, the permission of such purchasers would be required.

In the instant case, the building completion certificate for the plaintiff's building, was issued in the year 1997. The builder/owner defendant Nos. 1, 3 and 4 had to put up the construction, based upon the permission/license granted. The defendant Nos. 1, 3 and 4 had to construct the building and to convey the title by sale deed in terms of Rule 9. If property had been conveyed, prima facie the remaining F.S.I. or F.S.I. which become subsequently available on the facts of the case, would be to the society to whom the land had to be conveyed. The record shows that the building was approved in December, 2001. It cannot prima facie, be said that defendants Nos. 1, 2, 4 and 5 have any rights under which they are entitled to put up an additional building contrary to section 7-A of the Act.

The ratio of the decision is very clear inasmuch as the Court says that the permission of flat owners would be necessary if time to form society and convey property is over or expired. Admittedly, in this case, till this day, neither there is formation of society nor covenancy is executed in favour of the Plaintiffs.. I respectfully agree with the

proposition as laid down in the Ravindra Mutenja's case. If the ratio as laid down is to be followed the result would be, the said TDR or FSI was not available to the promoter /Appellant. Shri Thorat, the learned Senior Counsel for the Appellant/Defendant, contended that clause 19 of the agreement between the parties gives right to the Appellant/Defendant to make extra construction or additional construction as such FSI or TDR has become available because the tenants have vacated the old building. This has to be considered in the context of requirement of disclosure of the entire scheme to be carried out on the lay out. Shri Thorat, the learned senior counsel for the Appellant, has submitted that in the instant case, there was no question of carrying out any additional construction when the first plan was approved as the other old building was in occupation of the tenants and no additional construction could be made at that time. He submits that in such circumstances, there was no question of disclosure at all. We have to see in what circumstances such disclosure would be necessary and at all necessary. In the context, it would be necessary to refer to the decision of the Supreme Court in the case of M/s. Jayantilal Investments v/s. Madhuvihar Co-operative Housing Society & ors, reported in JT 2007(2) SC 368. Shri Thorat the learned senior counsel for the Appellant submits that the ratio of the decision is to be found in para 17 of the said judgment. Para 17 reads as follows :-

17. The judgment of the Bombay High Court in Kalpita Enclave case (supra) was based on the interpretation of unamended Section 7 of MOFA. Consequently, it was held that a promoter was not entitled to put up additional structures not shown in the original lay out plan without the consent of the flat takers. Thus, consent was attached to the concept of additional structure.

Section 7 was accordingly amended. Section 7A was accordingly inserted by Maharashtra Amending Act No. 36/86. Section 7A was inserted in order to make the position explicit, which according to the legislature existed prior to 1986, implicitly. Section 7 of MOFA came to be amended and for the purpose of removal of doubt, additional Section 7A came to be added by Maharashtra Act 36/86. By this amendment, the words indicated in the parenthesis in the unamended Section 7(ii), namely, "or construct any additional structures" came to be deleted and consequential amendments were made in Section 7(1)(ii). Maharashtra Act No. 36/86 operated retrospectively. Section 7A was declared as having been retrospectively substituted and it was deemed to be effective as if the amended clause had been in force at all material times. Further, it was declared vide Section 7A that the above quoted expression as it existed before commencement of the Amendment Act shall be deemed never to apply in respect of the construction of any other additional buildings/structures, constructed or to be constructed, under a scheme or project of development in the lay out plan, notwithstanding anything contained in the Act or in any agreement or in any judgment, decree or order of the court. Consequently, reading Section 7 and Section 7A, it is clear that the question of taking prior consent of the flat takers does not arise after the amendment in respect of any construction of additional structures. However, the right to make any construction of additional structures/ buildings would come into existence only on the approval of the plan by the competent authority. That, unless and until, such a plan stood approved, the promoter does not get any right to make additional

construction. This position is clear when one reads the amended Section 7(1)(ii) with Section 7A of the MOFA as amended.

Therefore, having regard to the Statement of Objects and Reasons for substitution of Section 7(1)(ii) by the Amendment Act 36/86, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act No. 36/86 was to change the basis of the judgment of the Bombay High Court in Kalpita Enclave case (supra). By insertion of Section 7A vide Maharashtra Amendment Act 36/86 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, if the total lay out allows construction of more buildings, subject to compliance of the building rules or building by-laws or Development Control Regulations. At the same time, the legislature had retained Section 3 which imposes statutory obligations on the promoter to make full and true disclosure of particulars mentioned in Section 3(2) including the nature, extent and description of common areas and facilities. As stated above, sub-section (1A) to Section 4 was also introduced by the legislature by Maharashtra Act 36/86 under which the promoter is bound to enter into agreements with the flat takers in the prescribed form. Under the prescribed form, every promoter is required to declare the FSI available in respect of the said land. The promoter is also required to declare that no part of that FSI has been utilized elsewhere, and if it is utilized, the promoter has to give particulars of such utilization to the flat takers. Further, under the proforma agreement, the promoter has to further declare utilization of FSI of any other land for the purposes of developing the land in question which is covered by the agreement.

Shri Thorat submits that the promoter is only bound to disclose that no part of FSI is utilised elsewhere. The Supreme Court was not only considering Section 7 and 7A of the Maharashtra Ownership Flats Act but was considering the other provisions such as Sections 3, 4, 10 and 11 of the said Act as well as the effect of the model agreement and the rules. The contention of Shri Thorat that the ratio of the judgment is to be found only in Para 17 of the said Judgment is not correct. The ratio is to be seen upon going through the judgment as a whole. In fact the Supreme Court observed further as follows in Para 18 to 22 of the Judgment.

"18. Therefore, the legislature has sought to regulate the activities of the promoter by retaining Sections 3 and 4 in the Act. It needs to be mentioned at this stage the question which needs to be decided is whether one building with several wings would fall under amended Section 7(1)(ii). Section 7A basically allows a builder to construct additional building provided the construction forms part of a scheme or a project. That construction has to be in accordance with the lay out plan. That construction cannot exceed the development potentiality of the plot in question. Section 10 of MOFA casts an obligation on the promoter to form a cooperative society of the flat takers as soon as minimum number of persons required to form a society have taken flats. It further provides that the promoter shall join the society in respect of the flats

which are not sold. He has to become a member of the society. He has the right to dispose of the flats in accordance with the provisions of the MOFA. Section 11 inter alia provides that a promoter shall take all necessary steps to complete his title and convey the title to the society. He is obliged to execute all relevant documents in accordance with the agreement executed under Section 4 and if no period for execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period. Rule 8 inter alia provides that where a cooperative society is to be constituted, the promoter shall submit an application to the Registrar for registration of the society within four months from the date on which the minimum number of persons required to form such society (60%) have taken flats. Rule 9 provides that if no period for execution of a conveyance is agreed upon, the promoter shall, subject to his right to dispose of the remaining flats, execute the conveyance within four months from the date on which the society is registered.

19. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the lay out plan on the one hand vis-à-vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure of the flat takers remains unfettered even after the inclusion of Section 7A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36/86. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964 are quoted hereinbelow:

"3. The Promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions if any, which may have been imposed by the concerned local authority at the time sanctioning the said plans or thereafter and shall, before handing over possession of the Flat to the Flat Purchaser, obtain from the concerned local authority occupation and/or completion certificates in respect of the Flat.

4. The Promoter hereby declares that the Floor Space Index available in respect of the said land is square metres only and that no part of the said floor space index has been utilized by the Promoter elsewhere for any purpose whatsoever. In case the said floor

space index has been utilized by the Promoter elsewhere, then the Promoter shall furnish to the Flat Purchaser all the detailed particulars in respect of such utilization of said floor space index by him. In case while developing the said land the Promoter has utilized any floor space index of any other land or property by way of floating floor, space index, then the particulars of such floor space index shall be disclosed by the Promoter to the Flat Purchaser. The residual F.A.R. (F.S.I.) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the Society the residual F.A.R. (F.S.I.), shall be available to the Society."

(emphasis supplied)

20. The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of lay out plan to declare whether the plot in question in future is capable of being loaded with additional FSI/ floating FSI/ TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/ scheme, be it a one building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.

21. In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title.

Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder put up additional construction in accordance with the lay out plan, building rules and Development Control Regulations etc..

22. In the light of what is stated above, the question which needs to be examined in the present case is whether this case falls within the ambit of amended Section 7(1)(ii) or whether it falls within the ambit of Section 7A of MOFA. As stated above, under Section 7(1) after the lay out plans and specifications of the building, as approved by the competent authority, are disclosed to the flat takers, the promoter shall not make any other alterations or additions in the structure of the building without the prior consent of the flat takers. This is where the problem lies. In the impugned judgment, the High Court has failed to examine the question as to whether the project undertaken in 1985 by the appellant herein was in respect of construction of additional buildings or whether the project in the lay out plan of 1985 consisted of one building with 7 wings. The promoter has kept the requisite percentage of land open as recreation ground/ open space. Relocation of the tennis court cannot be faulted. The question which the High Court should have examined is:

whether the project in question consists of 7 independent buildings or whether it is one building with 7 wings? The answer to the above question will decide the applicability or non-

applicability of Section 7(1)(ii) of MOFA, as amended. The answer to the above question will decide whether the time to execute the conveyance has arrived or not. This will also require explanation from the competent authority, namely, Executive Engineer, "R" South Ward, Kandivali, Mumbai-400067 (Respondent No. 8 herein). In the dates and events submitted by the appellant-promoter, there is a reference to the permission granted by ULC authorities dated 16.11.1984 which states that the owner/developer shall construct a building with 7 wings. One needs to examine the application made by the promoter when he submitted the lay out plan in 1985. If it is the building with 7 wings intended to be constructed in terms of the lay out plan then the High Court is also required to consider the effect of the judgment in the case of Ravindra Mutneja and Ors. v. Bhavan Corporation and Ors. 2003 (5) BomCR 695 in which the learned single Judge has held that if a building is put up as a wing of an existing building, it cannot be constructed without the prior permission of the flat takers. In that connection, the High Court shall also consider Permission dated 16.11.1984 under section 21(1) of ULC Act, application made to the competent authority when initial lay out plan was sanctioned, applications for amendments to lay out plans made from time to time and also agreements between promoter and flat takers."

The Supreme Court says in Para 18 of the Judgment that Section 7A allows a builder to construct additional building provided the construction forms part of a scheme or project. Therefore what is necessary is that any additional construction sought to be made must form part of the original scheme or project. This is made clear by the Supreme Court in Para 20 of the Judgment. The Judgment says that the promoter is required to make disclosure concerning the inherent FSI and also at the stage of lay out plan he is required to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. Further in para 21, the Supreme Court says that if the promoter places all these things before the flat purchasers, then the permission of the flat purchasers would not be necessary. Necessarily, therefore, if the entire scheme including the information about TDR/FSI is not disclosed, then the promoter loses his right to use the residual FSI. If we look into the original plan, it would be clear that the plan disclosed construction of one building only having A and B wings. The plan further shows that one old building (which is now demolished) and the W.C were the structures which were to be retained. Thus, what was represented was that that old building shown to the east in plan and the W.C to the north were to be retained. It did not disclose that as and when the tenants in old building would vacate the old building, the same would be pulled down and new construction would be put up there. The Plan therefore did not show proposed development of these area in a phased manner. Had the original lay out plan shown the proposed construction in a phased manner, then the promoter did have a right to make construction of additional building without permission of the flat purchasers. Even if we look into the judgment of Division Bench of this Court in M/s.Manratna Developers's case, the ratio is that if the original plan shows the construction of building in a phased manner on single

plot, then the promoter is not supposed to take consent of the flat owners. Such is not the case here.

14. It was then contended that the flat owners had in fact consented to such construction and my attention was drawn to the Minutes. The Minutes go to show that all flat owners have not given such consent. Hence the consent if any is not valid.

15. The next point that was urged before me relates to acquiescence. It was submitted that injunction is an equitable relief and such relief is not available to those who sleep over their right.

There is no doubt that the large portion of the new building has come up and the Plaintiffs did not approach the Court promptly. In the instant case the construction sought to be made is in breach of the provisions of law as laid down by the Supreme Court and hence even if there is a delay in approaching Court, the construction cannot be allowed to be carried out any further.

16. In the circumstances, I do not find that the learned Judge of the trial Court committed any error. There is no substance in this Appeal. The same is accordingly dismissed. No order as to costs.

17. In view of dismissal of the Appeal, Civil Application No. 1495 of 2009 for stay, does not survive and the same is disposed of as such.

[C.L.PANGARKAR, J]