IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9144 OF 2024

Chetan D. Shelke and Ors. .. Petitioners

Versus

Savannah Vasant Lawns Tower No 1 & Ors. .. Respondents

WITH

WRIT PETITION NO. 8647 OF 2024

Sheth Developers Private Limited .. Petitioner

Versus

Savannah Vasant Lawns Tower No.1 CHS Ltd. and Ors. .. Respondents

WITH

WRIT PETITION NO. 9411 OF 2024

Thane Municipal Corporation .. Petitioner

Versus

Savannah Vasant Lawns Tower No.1 CHS Ltd. and Ors. .. Respondents

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- Mr. Sharan Jagtiani, Senior Advocate a/w. Mr. Mayur Khandeparkar, Mr. Akshay Doctor, Mr. Prerak Talati and Ms. Anjali Sukumaran, Advocates i/by Jain Law Partners for Petitioners in Writ Petition No.9144 of 2024.
- Mr. Vineet Naik, Senior Advocate a/w. Mr. Samit Shukla, Ms. Saloni Shah and Mr. Mustafa Nulwala, Advocates i/by DSK Legal for Petitioner in Writ Petition No.8647 of 2024.
- Mr. Ram S. Apte, Senior Advocate i/by Mr. Narayan R. Bubna for Petitioner in Writ Petition No.9411 of 2024 and for Respondent No.9 in Writ Petition No.8647 of 2024 and Respondent No.19 Writ Petition No.9144 of 2024.
- Mr. Y. S. Jahagirdar, Senior Advocate a/w. Mr. R.S. Datar and Ms. Dhruti Datar, Advocates for Respondent Nos.1 to 7 in Writ Petition No.8647 of 2024.
- Mr. G.S. Godbole, Senior Advocate a/w. Mr. R.S. Datar and Ms. Dhruti Datar, Advocates for Respondent Nos.1 to 7 in Writ Petition No.9144 of 2024.

- Mr. R.S. Datar a/w. Ms. Dhruti Datar, Advocates for Respondent Nos.1 to 7 in Writ Petition No.9411 of 2024.
- Mr. Chetan Kapadia, Senior Advocate a/w. Mr. Yuvraj Singh, Mr. Samit Shukla, Ms. Saloni Shah and Mr. Mustafa Nulwala, Advocates i/by DSK Legal for Respondent No.8 in Writ Petition No.9144 of 2024.

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CORAM : MILIND N. JADHAV, J.
DATE : JANUARY 21, 2025.

JUDGMENT:

1. This is a bunch of three Writ Petitions challenging the impugned order dated 22.05.2024 passed by District Court, Thane in Miscellaneous Civil Appeal No.125 of 2023 allowing the Appeal filed by Respondent Nos.1 to 7 - Societies. By the said order District Court set aside the Exhibit "5" order dated 27.09.2023 passed by learned Trial Court and has temporarily restrained the Developer (Defendant No.1) from carrying out further construction and the Thane Municipal Corporation (for short "Corporation") from issuance of further sanction.

2. Writ Petition No.9144 of 2024 is filed by third parties / some individual flat purchasers (Defendant Nos.3 to 13 before the Trial Court) who have purchased flats in building No.8 in Vasant Lawns, Thane from the Developer by registered Agreements. Construction of their building is stayed by the impugned order. Hence they are aggrieved.

3. Writ Petition No.9411 of 2024 is filed by the Corporation which is the Planning and Sanctioning Authority (Defendant No.2 before Trial Court).

4. Writ Petition No.8647 of 2024 is filed by Sheth Developers Private Limited who is the Developer (Defendant No.1 before Trial Court).

5. Respondent Nos.1 to 7 – Societies filed Regular Civil Suit No.743 of 2022 in Trial Court seeking declaratory and injunctive reliefs against the Developer and Corporation with regard to a complex developed by the Developer since 2007 comprising of nine buildings known as 'Vasant Lawns' lying and situated at village Panchpakhadi, Thane.

6. Alongwith the Suit, Respondent Nos.1 to 7 – Societies filed Application below Exhibit "5" seeking temporary injunction, firstly against the Developer for restraining it from carrying out any further construction of building Nos.8 and 9 as per amended plans without prior consent of flat purchasers in Respondent Nos.1 to 7 – Societies and secondly against Corporation from granting further permissions and Occupation Certificates (for short "**OC**") for Building Nos.8 and 9. Respondent Nos.1 to 7 – Societies also prayed for directions against the Developer for removal of defects in construction and providing of amenities and services in the subject premises to Respondent Nos.1 to

7 – Societies.

7. Both sides have contested the proceedings vehemently. Trial Court has rejected the Exhibit "5" Application of Plaintiffs (Societies) whereas Appellate Court in Miscellaneous Civil Appeal has reversed and upset the order of Trial Court. After hearing the learned Advocates at length, I was informed that reconsideration or arbitration is ruled out and I was called upon to decide the Petitions.

8. Briefly stated, facts germane for adjudication of the present Petitions are as follows:-

8.1. By registered Development Agreements dated 01.10.2003 and 31.03.2009 readwith registered Deed of Modification dated 04.06.2009, the Developer (Defendant No.1) acquired development rights in respect of property bearing Survey Nos.52/1, 52/2, 53(pt.), 70/10(pt.), 70/11, 70/2(pt.), 70/3 (pt.), 71/1(pt.), 71/5, 72/1, 72/4(pt.), 72/6, 72/7, 72/8 and 72/10 located at village Panchpakhadi, Thane ("**subject property**") from Voltas Limited.

8.2. In 2005 Developer launched project under the name 'Vasant Lawns' on the subject property. The project was to be developed in a phase wise manner comprising of nine independent buildings.

8.3. On 19.10.2005 Corporation sanctioned the building plan for the said project vide VP No.2003/181/TMC/TDD/2791. On the same

date Developer received Commencement Certificate (for short '**CC**') for construction of Building Nos.1, 3, 4, 5, 6 and 7. In the original sanctioned plan of 2005, Corporation imposed a mandatory condition No.6 on the Developer to handover / surrender an aggregate / amalgamated amenity open space out of the subject property to the Corporation.

8.4. It is seen that prior to Developer acquiring development rights in the subject property, some portion was utilised for industrial use by Voltas Limited and subsequent to Developer acquiring development rights it was desirous of changing the user of the said portion from industrial user to residential user and hence as per the applicable Development Control Regulations (for short "**DCR**"), Developer was required to surrender the prescribed portion of land as applicable to the Planning Authority as amenity open space under condition No.6 in the original sanctioned building plan of 2005. As a consequence of this, since development was undertaken by a registered Deed of Declaration cum Rectification dated 06.02.2014, Developer surrendered the prescribed portion of land on which building No.9 was originally planned to be constructed to the Corporation being the Planning Authority.

8.5. Due to the above, Developer was required to relocate / shift building No.9 and hence the original sanctioned plan was amended by

Developer and Corporation sanctioned the amended plan on 29.12.2017 and later once again on 22.04.2022 and Developer was granted OC and CC for construction of building Nos.8 and 9.

8.6. Record shows that the original sanctioned plan of 2005 was modified / amended by the Developer with a view to utilise the entire development potential of the subject property intermittently on various occasions viz., on 07.07.2007, 23.06.2008, 10.07.2009, 23.06.2009, 12.11.2013, 17.11.2014, 29.12.2017, 07.07.2018 and 22.04.2022. During these 8 revisions when the original sanctioned plan was amended, not once did Respondent Nos. 1 to 7 societies or their members / flat purchasers file their objections nor resisted the amendment of the original sanctioned plan for all these years since 2007.

8.7. On 20.10.2022, Respondent Nos.1 to 7 – Societies filed Regular Civil Suit No.743 of 2022 alongwith Application under Order XXXIX Rule 1 and 2 readwith Section 151 of the C challenging amendment to the original sanctioned plan of 2005 in the year 2017 for the first time. In the Suit, Respondent Nos.1 to 7 – Societies filed Application below Exhibit “5” seeking temporary injunction. These dates are very crucial as at this interlocutory stage it would enable the Court to appreciate rival submissions.

8.8. On 27.09.2023 Trial Court rejected Application below

Exhibit “5”. Respondent Nos.1 to 7 – Societies challenged the order dated 27.09.2023 before the District Court in Miscellaneous Civil Appeal No.125 of 2023. By the impugned order dated 22.05.2024 the Appellate Court allowed the Appeal filed by Respondent Nos.1 to 7 – Societies and passed restraint orders against the Developer and the Corporation.

8.9. Hence, the present Writ Petitions.

9. Mr. Jagtiani, learned Senior Advocate appears for individual flat purchasers / third parties who have purchased flats in building No.8 which according to him is now practically complete. He would submit that the Respondent Nos.1 to 7 are Co-operative Housing Societies of flat purchasers in Building Nos.1 to 7 situated in Vasant Lawns Project. He would submit that members of Respondent Nos.1 to 7 - Societies purchased their flats as per the original sanctioned plan of the year 2005. He would draw my attention to the salient features of the original sanctioned plan of 2005 before making further submissions, which are as follows:-

(i) Building No.1 and Building Nos.4 to 8 as contemplated in the original sanctioned plan of 2005 were shown as stilt + podium + 1 floor each;

(ii) Building No.3 was shown as stilt + podium + 18 floors; and

(iii) Building Nos.2 and 9 were shown as proposed development.

9.1. He would submit that pursuant to the original sanctioned plan of 2005, there have been 8 revisions in the sanctioned plan from time to time between 2007 and 2022 and these revisions were undertaken, *inter alia*, for the purpose of utilising the entire potential for development of the entire plot area of the subject property to the maximum resultantly increasing the number of floors in each of the planned buildings. He would submit that as regards to building Nos.1 to 7, its layout as it stands after receipt of the OC is completely different than from what was contemplated in the original sanctioned plan of 2005 as the number of floors in each of their respective buildings were increased. He would submit that the *malafide* conduct of Respondent Nos.1 to 7 - Societies is evident from the fact that though Respondent Nos.1 to 7 - Societies contend in their Suit plaint that construction of the project should revert back to the position contemplated in the original sanctioned plan of 2005, that is not possible because flat purchasers / members of Respondent Nos.1 to 7 - Societies themselves are beneficiaries of all subsequent amendments to the original sanctioned plan approved by the Corporation and are in occupation / residing in the flats on the floors that were constructed as a result of the said amendments to the original sanctioned plan approved from time to time.

9.2. He would submit that in order to get around the fact that the Respondent Nos.1 to 7 - Societies themselves are also beneficiaries of the amendments to the original sanctioned plan from time to time they devised a novel and surreptitious way to determine an artificial dateline or cut-off date and have alleged that any subsequent amendment to the original sanctioned plan undertaken after this date i.e. 12.11.2013 would be deemed to be violative of the Maharashtra Ownership Flats Act, 1963 (for short "**MOFA**") disclosures. He would submit that the artificially alleged dateline of 12.11.2013 by the Societies is pleaded only to ensure that their members / flat purchasers occupying buildings of Respondent Nos.1 to 7 – Societies are rendered safe and at the same time exert pressure on the Developer for obvious gains and in the process condemn the new flat purchasers of building Nos. 8 and 9. He would submit that as recorded in paragraph No.39 of the impugned order Respondent Nos.1 to 7 - Societies have contradicted their own stand by artificially devising a dateline of 12.11.2013 since by then building Nos.1 to 7 were fully completed so as to insulate them i.e. flat purchasers therein.

9.3. He would submit that duplicity of Respondent Nos.1 to 7 - Societies is further exposed as in the case of Building No. 2, its plans were filed as late as in the year 2017 much after the artificially alleged dateline of 12.11.2013. Therefore, if the 2013 revised plan is indeed deemed to be the cut-off date as alleged and erroneously recorded in

the impugned order, it would mean that construction of Building No. 2 too ought to have been impugned by the Societies.

9.4. As regards to building No.8, he would submit that the important amendments made to the original sanctioned plan from time to time are summarized as under:-

(i) Plans dated 23.06.2008 and 26.03.2009 contemplated Building No.8 to comprise of stilt + podium + 20 floors and stilt + 20 floors respectively. He would submit that this 2008 Plan and 2009 Plan of Building No. 8 has not been challenged or objected to by the Societies;

(ii) Amended Plan dated 29.12.2017 ("2017 Plan") contemplated a minor re-alignment and relocation for Building No.8 and contemplated a configuration of lower and upper basement + stilt + podium + 4; and

(iii) On 22 April 2022, plans for Building No.8 is now as amended pursuant to which layout of Building No.8 was lower and upper basement + stilt + podium+ 1 to 32 floors. He would submit that even this plan of 2022 is not challenged by Respondent Nos.1 to 7 – Societies in the Suit which is filed.

9.5. He would submit that the selective conduct of Plaintiffs in

tolerating development convenient to them while impugning building No.8's plans is further demonstrable when one considers the situation of building No.2 i.e. Respondent No.2 - Society which is one of the Plaintiff. Building No.2 as per the artificially chosen 2013 dateline plan by Societies (Plaintiffs) was to be comprised of Stilt+Podium+24 Floors with an aggregate of 92 flats. However in 2017, sanctioned plan for building No.2 underwent revision in as much as while the number of floors remained the same, there were two extra flats which were added on the podium level of building No.2. He would argue that if Respondent Nos.1 to 7 - Societies' case is accepted as per the impugned order then it would amount to acceptance of the 2013 dateline and it would mean that all further development thereafter is illegal.

9.6. He would submit that the impugned order in Miscellaneous Civil Appeal is liable to be set aside because it interferes with the order of Trial Court dated 27.09.2023 refusing injunction which is passed in a valid exercise of discretion, without applying the test laid down in the decision of the Supreme Court in the case of ***Wander Ltd. Vs. Antox India (P) Ltd.***[1] which necessarily applies to the scope of interference available to the Appeal Court from an order of indiscretion. He would submit that the said decision has been followed by this Court in the case of ***Zainab Rafiullah Shaikh Vs. Puthenveedu***

1 1990 Supp SCC 727

Joseph Mathew and Ors.[2] and *Dipesh Mehta & Ors. Vs. Gerald Shirley & Ors.*[3].

9.7. He would submit that the Appellate Court has surprisingly upset the order passed by the Trial Court without even a bare observation or finding on the aspect of balance of convenience and delay and it has completely failed to consider the grave hardship and irreparable injury caused to the original Defendant Nos. 3 to 13 (flat purchasers in building No.8) by grant of injunction.

9.8. He would submit that the Appellate Court has completely overlooked the fact that balance of convenience lies in favour of individual flat purchasers i.e. Defendant Nos.3 to 13 as also other flat purchasers as construction of building No.8 commenced in the year 2006 and it is now practically completed. He would submit that there are 126 flat purchasers who have purchased flats in building No.8, each of whom is now adversely affected by the order of injunction granted by the Appellate Court. He would submit that when majority of the individual flat purchasers / third parties purchased their flats in building No.8, the 2017 sanctioned plan was in force and was implemented by the Developer without any challenge whatsoever from Respondent Nos.1 to 7 - Societies despite the fact that construction of Building No.8 was undertaken by the Developer in full swing in the

2 2024 SCC Online Bom 962
3 2022 SCC Online Bom 3453

very same layout where Respondent Nos.1 to 7 - Societies' members are residing.

9.9. He would submit that it is settled position of law that a Court which is considering an application for interim reliefs should exercise sound judicious discretion to meet the ends of justice which, *inter alia*, entailing the probable injuries that would be suffered by either parties by grant of injunction and Court is required to weigh the injury which is likely to be caused to the parties by grant of such injunction. In support of this proposition, he has drawn my attention to paragraph Nos.5 and 6 the decision of Supreme Court in the case of ***Dalpat Kumar & Anr. Vs. Prahlad Singh & Ors.***[4] which read thus:-

> *"**5.** Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is*

4 (1992) 1 SCC 719

refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.

6. *Undoubtedly, in a suit seeking to set aside the decree, the subject matter in the earlier suit, though became final, the Court would in an appropriate case grant ad interim injunction when the party seeks to set aside the decree on the ground of fraud pleaded in the suit or for want of jurisdiction in the Court which passed the decree. But the Court would be circumspect before granting the injunction and look to the conduct of the party, the probable injuries to either party and whether the plaintiff could be adequately compensated if injunction is refused. This case demonstrates (we are not expressing any opinion on the plea of fraud or their relative merits in the case or the validity of the decree impugned), suffice to state that the conduct of the respondent militates against the bona fides. At present there is a sale deed executed by the Court in favour of the first appellant. If ultimately the respondent succeeds at the trial, they can be adequately compensated by awarding damages for use and occupation from the date of dispossession till date of restitution. Repeatedly the civil court and the High Court refused injunction pending proceedings. For any acts of damage, if attempted to be made, to the property, or done, appropriate direction could be taken in the suit. If any alienation is made it would be subject to doctrine of lis pendens under Section 52 of the Transfer of Property Act. The High Court without adverting to any of these material circumstances held that balance of convenience lies in favour of granting injunction with the following observations, "keeping in mind the history, various facts which have been brought to my notice, and looking to the balance of convenience and irreparable loss, I think it will be in the interests of justice to allow these appeals and grant temporary injunction that the appellants may not be dispossessed from the suit property". The phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by men's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice. The facts are eloquent and speak for themselves. It is well nigh impossible to find from facts prima facie case and balance of convenience. The respondents can be adequately compensated on their success."*

9.10. Next, he has drawn my attention to the decision of the

Supreme Court in the case of ***Union of India and Ors. Vs. M/s. Raj Grow Impex LLP and Ors.***[5] and ***Films Rover International Ltd Vs. Cannon Film Sales Ltd.***[6] wherein in paragraph Nos.194 and 196 the Supreme Court has rendered the following observations with regard to passing of interim injunction and they read thus:-

> "***194.*** *In addition to the general principles for exercise of discretion, as discussed hereinbefore, a few features specific to the matters of interim relief need special mention. It is rather elementary that in the matters of grant of interim relief, satisfaction of the Court only about existence of prima facie case in favour of the suitor is not enough. The other elements i.e., balance of convenience and likelihood of irreparable injury, are not of empty formality and carry their own relevance; and while exercising its discretion in the matter of interim relief and adopting a particular course, the Court needs to weigh the risk of injustice, if ultimately the decision of main matter runs counter to the course being adopted at the time of granting or refusing the interim relief. We may usefully refer to the relevant principle stated in the decision of Chancery Division in Films Rover International Ltd. v. Cannon Film Sales Ltd. (1986) 3 All ER 772 as under:-*
>
> > *"....The principal dilemma about the grant of interlocutory injunctions. whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle."*
>
> ....
>
> ***196.*** *In keeping with the principles aforesaid, one of the simple questions to be adverted to at the threshold stage in the present cases was, as to whether the importers (writ petitioners) were likely to suffer irreparable injury in case the interim relief was denied and they were to ultimately succeed in the writ petitions. A direct answer to this question would have made it clear that their injury, if at all, would have been of some amount of loss of*

5 2021 SCC Online SC 429
6 (1986) 3 All ER 772

> *profit, which could always be measured in monetary terms and, usually, cannot be regarded as an irreparable one. Another simple but pertinent question would have been concerning the element of balance of convenience; and a simple answer to the same would have further shown that the inconvenience which the importers were going to suffer because of the notifications in question was far lesser than the inconvenience which the appellants were going to suffer (with ultimate impact on national interest) in case operation of the notifications was stayed and thereby, the markets of India were allowed to be flooded with excessive quantity of the said imported peas/pulses."*

9.11. Juxtaposing the above decisions of the Supreme Court with the facts in the present case, he would submit that perusal of the impugned order would reveal that despite having noted the legitimate grievances / arguments of individual flat purchasers / third parties, in building No.8, the Appellate Court has failed to consider the contentions in its reasoning and has passed the impugned order by simply ignoring the said contentions.

9.12. He would submit that in view of the above facts and circumstances and gross delay and laches on part of Respondent Nos.1 to 7 – Societies in maintaining challenge to the 2017 plan, they cannot be allowed to claim any equity in law and cannot be allowed to enjoy injunction in respect of building No.8 to the detriment of the 126 unsuspecting flat purchasers some of whom are before Court and Petitioners are bonafide purchasers for value on the basis of a prevalent sanctioned development plan. In this regard, reliance is placed by him on the decision of the Supreme Court in the case of

Mademsetty Satyanarayana Vs. G. Yelloji Rao & Ors.[7] and particularly paragraph Nos.9, 10 and 12 of the said decision, which read thus:-

> *"**9.** With this background let us look at the English text-books and decisions relied upon by the learned counsel for the appellant. In Halsbury's Laws of England, Vol. 36, at p. 324, it is stated:-*
> *"Where time is not originally of the essence of the contract, and has not been made so by due notice, delay by a party in performing his part of the contract, or in commencing or prosecuting the enforcement of his rights, may constitute such laches or acquiescence as will debar him from obtaining specific performance. The extent of delay which has this effect varies with circumstances, but as a rule must be capable of being construed as amounting to an abandonment of the contract. A much shorter period of delay, however, suffices if it is delay in declaring an option or exercising any other unilateral right; and if the other party has already given notice that he does not intend to perform the contract, the party aggrieved must take proceedings promptly if he desires to obtain specific performance."*
> *In Fry on Specific Performance, 6th Edn., at p. 517, it is said:-*
> *"Where one party to the contract has given notice to the other that he will not perform it, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar: so that in one case two years' delay in filing a bill after such notice, in another case one year's delay, and in a third (where the contract was for a lease of collieries) five months' delay was held to exclude the intervention of the Court."*
> *Learned counsel cited many English decisions in support of his argument that there shall be promptitude and diligence in enforcing a claim for specific performance after a repudiation of the contract by the other party and that mere continual claim without any active steps will not keep alive the right which would otherwise be defeated by laches: see Clegg V. Edmondson [(1857) 114 RR 336], Eads V. Williams [(1854) 43 ER Chan 671], Lehmann V. McArthur [(1968) LR 3 Ch AC 496], Watsoh V. Reid [(1830) 39 ER Chan 91], and Emile Erlanger V. New Sombrero Phosphate Company [(1878) LR 3 AC 1218]. But as stated earlier, the English principles based upon mere delay can have no application in India where the statute prescribes the tune for enforcing the claim for specific performance. But another class of cases which dealt with the doctrine of laches have some bearing in the Indian context. In Lindsay Petroleum Company V. Prosper Armstrong Hurd, Abram Farewell, and John Kemp [(1874) LR 5 PCA 221, 239-240] Sir Barnes Peacock defined the doctrine thus:-*
> *"Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might*

7 AIR 1965 SC 1405

fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."
This passage indicates that either waiver or conduct equivalent to waiver along with delay may be a ground for refusing to give a decree for specific performance. In Caesar Lamare V. Thomas Dixon [(1873) 6 HLC 414, 423] Lord Chelmsford said:-
"The conduct of the party applying for relief is always an important element for consideration."
The House of Lords in Emile Erlanger V. New Sombrero Phosphate Company [(1878) LR 3 AC 1218] approved the passage in Lindsay Petroleum Company v. Prosper Armstrong Hurd, Abram Farewell, and John Kemp [(1874) LR 5 PCA 221, 239-240] which we have extracted earlier.

10. *It is clear from these decisions that the conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver, may in certain circumstances preclude him from obtaining a decree for specific performance.*

.....

12. *The result of the aforesaid discussion of the case law may be briefly stated thus: While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression "waiver" in its legally accepted sense, namely, "waiver is contractual, and may constitute a cause of action: it is an agreement to release or not to assert a right"; see Dawson's Bank Ltd. V. Nippon Menkwa Kabushiki Kaisha [(1935) LR 62 1A 100, 108)]. It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."*

9.13. In addition to the above and in support of his above submissions, Mr. Jagtiani has also relied on the decision of this Court

in the case of ***Mr. Yadavalli Venkata Gopalam and Anr. Vs. M/s. Sai Siddhant Developers and Anr.***[8] wherein Court held that obligations under MOFA can be enforced under Section 19(3) of Real Estate (Regulation and Development) Act, 2016 (for short "**RERA**"). He emphasised that the bar of jurisdiction provided under Section 79 of RERA is absolute and adequate mechanism is provided under RERA for enforcing Developers / Promoters obligations.

9.14. Finally he would submit that the impugned order travels beyond the principal reliefs sought by Respondent Nos.1 to 7 – Societies in the Suit and hence it deserves to be quashed and set aside and this Court be pleased to sustain the order passed by the learned Trial Court.

10. Mr. Naik and Mr. Kapadia, both learned Senior Advocates appear for the Developer who is Petitioner in Writ Petition No.8647 of 2024 and Respondent No.8 in Writ Petition No.9144 of 2024 respectively. Mr. Naik, learned Senior Advocate has made the following submissions:-

10.1. He would submit that the Appellate Court in the impugned order has held that it is not a case of deficiency or non-maintenance of basic amenities, parking area, podium etc. but the material allegation is that the entire layout is substantially rectified and FSI upto three

8 Civil Appeal No. 662 of 2023 with Interim Application No. 14511 of 2023 decided on 04.11.2023

times came to be consumed than what was disclosed to Respondent Nos.1 to 7 – Societies. He would however submit that perusal of pleadings in the Suit plaint as well as Appeal Memo would make it evident that Respondent Nos.1 to 7 - Societies' case is, *inter alia,* that of deficiency or non-maintenance of basic amenities, parking area, podium etc. by the Developer being in contravention of Sections 7 and 7A of MOFA as Developer by changed location of building No.9 purportedly without prior consent of members of Respondent Nos.1 to 7 – Societies. He would submit that a direct answer to this case lies in the registered Agreement for Sale executed between the Developer and each of the flat purchasers/ members of Respondent Nos. 1 to 7 Societies. He would submit that Respondent Nos.1 to 7 - Societies were knowledgeable of the fact that Developer is entitled to load TDR on the subject property to construct the buildings to utilise its fullest potential and the same was being done from time to time by Developer by amending the original sanctioned plan of 2005 on eight different occasions upto 2022.

10.2. He would submit that the Appellate Court has held that as a result of changing the location of Building No.8 in the green area adjacent to Building No. 6 the RG area of the subject property has reduced. On this finding he would submit that the original sanctioned plan of 2005 reserved area admeasuring 9026.48 sq. mtrs. as RG, which has only been increased over the years as can be seen from the

2022 sanctioned plan wherein the RG Area is 9,319.99 sq. mtrs., which evidently is more than what was initially proposed. Next, he would submit that there is no restriction on relocation of a building on the earlier proposed RG area so long as the prescribed statutory RG area is not reduced than what was initially proposed and this is perfectly valid when amendment to an existing sanctioned plan is sanctioned by the Planning Authority.

10.3. He would submit that the Appellate Court erred in holding that Government Notification No. TPB/4397/2411/C No. 2369/07/UD-11 dated 23.11.2007 is applicable to the present matter at hand. He would argue that the 2007 Government Notification, *inter alia,* stipulates that whenever a Society exists on the plot and plot is not conveyed to the Society by the Developer, the benefit of the additional FSI / TDR of land to be conveyed to the Society shall not be granted to the Developer. He would submit that the said Government Notification is not applicable to the facts of the present case as the Developer has not utilised any additional FSI emanating from the plot that is required to be conveyed to Respondent Nos.1 to 7 - Societies and neither is the Developer utilizing any TDR emanating from the subject property. He would submit that in the present case the TDR being utilized is either emanating from adjacent plots of land from the larger property or has been purchased by the Developer from the market and it is in consonance with the law. Hence, the finding that

the alleged Notification will have application in the present case is erroneous.

10.4. Next, he would submit that it is trite law that it is imperative for a party to plead material facts in its pleadings and failure to do so would result in depriving the other party from its right to object to those material facts, which is in explicit violation of the principles of natural justice. He would submit that the only cause of action pleaded by Respondent Nos.1 to 7 – Societies in its Suit plaint is of relocation of building No.9 without prior consent of members / flat purchasers of Respondent Nos.1 to 7 - Societies as stipulated under Section 7 of MOFA. He would submit that it is not pleaded by Respondent Nos.1 to 7 - Societies that the Developer has not completely disclosed the details of the project and the Suit plaint does not even complain of the Developer constructing an undisclosed building in an area represented and disclosed as RG or the Developer failing to disclose that he will be developing 9 Buildings on the subject property. He would submit that Respondent Nos.1 to 7 - Societies have themselves admitted in pleadings the fact that the Developer is entitled to construct 9 buildings on the subject property as the Developer had disclosed to them. Hence he would submit that the Appellate Court has incorrectly recorded a finding in paragraph No.33 of the impugned order that Respondent Nos.1 to 7 - Societies are entitled to seek a restraint order even if they do not expressly plead in their Plaint that the Developer

has not completely disclosed the details of the project as per provisions of MOFA at the time of entering into Agreement for Sale with them and that it is sufficient if the Suit plaint complains of construction of an undisclosed building in an area initially represented and disclosed as RG, open space, which leads to committing breach of provisions of MOFA.

10.5. Next, he would submit that the Appellate Court has held that the Developer has misled and played mischief on the members of the Respondent Nos.1 to 7 - Societies by not showing building No.9 in the original sanctioned plan of 2005 and showing it for the first time in the 2013 sanctioned plan, however being silent on the aspect of the number of floors. He would submit that on perusal of the original sanctioned plan of 2005 and the revised 2007 sanctioned plan, it is clearly apparent that building No.9 was shown in both sanctioned plans. He would submit that the original sanctioned plan of 2005 and the 2007 revised sanctioned plan also discloses building No.2 as future expansion and the same has been subsequently been clarified by the 2009 revised sanctioned plan also wherein details of building No.2 were shown for the first time. He would submit that Respondent Nos.1 to 7 - Societies never objected to building No.2 being constructed which clearly demonstrates that it is not the case of the Respondent Nos.1 to 7 - Societies that the Developer has utilised available FSI than what was initially disclosed to them.

10.6. He would submit that the Appellate Court in paragraph No.38 of the impugned order returned an erroneous finding that Section 4 of MOFA and Form No. V require the Developer to mandatorily disclose the number of floors in the proposed building along with full FSI. He would submit that Form No. V does not require any such disclosure regarding disclosure of number of floors.

10.7. He would submit that the alleged cut-off dateline of 12.11.2013 cannot be considered as cut-off date for considering the plot potentiality as the Developer has constructed seven buildings in a phase-wise development for which the Developer loaded TDR on the subject property after obtaining informed consent of members of the Respondent Nos.1 to 7 - Societies and further for construction of building Nos.8 and 9 being pending for which the Developer loaded further FSI on the subject property after obtaining the informed consent of the members of the Respondent Nos.1 to 7 – Societies.

10.8. He would submit that the Appellate Court has in paragraph No.40 of the impugned order held that relocation of building Nos.8 and 9 has led to the Developer committing breach of the N.A. order dated 05.04.2006, however it has failed to appreciate the copy of Official Gazette dated 15.04.2017 notified by the Government of Maharashtra, whereby the Maharashtra Land Revenue Code, 1966 has been amended and Section 42B has been introduced which stipulates

that on payment of conversion tax, non-agricultural levy and where applicable, notice or premium, and other Government dues, the use of any land included in such area converted to the use shown in the form of allotment, reservation or direction in such development plan shall be deemed to have been made and no separate permission shall be required under Section 42 or Section 44 for use of such land for a use permissible under such development plan. He would submit that from 05.04.2006 the Revenue Authorities have been issuing statutory Demand Notice to the Developer thereby demanding the N.A. Tax from time to time and the same have been paid regularly by the Developer without delay / default.

10.9. He would submit that the Developer handed over the surrendered property to the Corporation in or around 2014, pursuant to which the Developer by the 2017 revised sanctioned plan clearly demonstrated that location of building No.9 was shifted and in this regard clause 1 of the Agreement for Sale with all members / flat purchasers of Respondent Nos. 1 to 7 Societies would apply. He would submit that the Developer vide clause 1 in the individual registered Agreements for Sale with each of the flat purchasers / members of Respondent Nos.1 to 7 - Societies disclosed that he may change the location of any of the buildings as it was a phase-wise development. He would submit that the need for changing location of building No.9 was due to operation of law as the surrendered property was handed

over to Corporation which made it imperative to relocate building No.9 elsewhere on the subject property by maintaining the statutory configuration of RG. He would submit that name of the Corporation is mutated in the revenue records for the said surrendered property and Corporation has already constructed a multi-level car parking and water tank on the surrendered property and therefore the same cannot be reversed according to the whims of the Respondent Nos. 1 to 7 Societies. He would contend that the Appellate Court has therefore erroneously held that the Developer did not disclose to the flat purchasers nor was it demonstrated that after handing over the surrendered property to the Corporation, the location of building No.9 would be shifted. He would submit that between 2014 and 2022 the Respondent Nos.1 to 7 Societies never raised any issue on this count and maintained a stoic silence.

10.10. He would submit that members of Respondent Nos.1 to 7 - Societies have accorded their informed consent to the Developer for, *inter alia,* utilising additional FSI, TDR and changing the location of any building on the subject property, as the Developer provided true and complete disclosure to those flat purchasers at the time of entering into their respective registered Agreements for Sale by categorically establishing that the Developer will be developing 9 buildings in a phase-wise manner by utilising the FSI, additional FSI and TDR on the subject property and after completion of the entire project the land

would be conveyed to the Apex Body of the 9 buildings.

10.11. He would argue that merely arguing about enhancement of FSI on the subject property would not amount to the same being a material fact and it is trite law that it is imperative for a party to precisely plead material facts as they are the facts which if established would give the party the relief sought for. He would submit that Respondent Nos.1 to 7 - Societies have nowhere in their pleadings pleaded that the Developer has enhanced FSI than what was initially disclosed and hence in the absence of material facts being pleaded, the Appellate Court could not have granted the relief as the same deprives the Developer of his right to deal with and respond to those material facts which are not pleaded and the same would amount to violation of principles of natural justice.

10.12. He would submit that in clauses 30, 33 and 35 of the registered Agreement for Sale with all members / flat purchasers of Respondent Nos. 1 to 7 - Societies, the Developer has explicitly set out that the subject property would be conveyed to the Apex Body which shall comprise of all Societies formed of the Tower Buildings, only after the subject property has been entirely developed. He would submit that pertinently there is no Apex Body in existence at present. He would submit that it is trite law that right to conveyance depends upon the terms stipulated in the registered Agreement for Sale, which in the

present case has not arisen as yet since the project / development of 9 buildings is not completed.

10.13. He would submit that Respondent Nos.1 to 7 - Societies have not sought for deemed conveyance either in their Suit or in the Appeal but the Appellate Court has gone beyond the purview of the pleadings and reliefs in the Suit and has erroneously granted liberty to Respondent Nos.1 to 7 - Societies to apply for deemed conveyance which is impermissible in law and has injuncted the Developer from taking any defences available to him in law and on facts. He would argue that the impugned order forecloses the Developer's legal right to defend a proceeding and such a thing cannot be done in law. He would argue that assuming for the sake of argument that even if Respondent Nos.1 to 7 - Societies seek deemed conveyance, they would fail to establish that the Developer has not completed the project and they cannot obtain benefit of a changed situation which would entitle them to deemed conveyance by splitting the subject property.

10.14. He would submit that the Appellate Court has wrongly held that the Developer has failed to substantiate / justify, *inter alia*, (i) revision of the layout in the sanctioned plan for 8 times; (ii) changing of location of Building Nos.8 and 9; and (iii) sharing the amenities meant for original flat buyers with enhanced number of flat buyers that too in the same plot area with increased members. He would submit

that perusal of the original sanctioned plan of 2005 establishes that the permissible tenements were 897, however as on date as a matter of fact the Developer is only constructing 808 tenements on the entire subject property i.e. much lesser number of tenements as determined in 2005 and therefore the issue of current members / flat purchaser sharing the amenities with enhanced number of flat buyers is fallacious and erroneous.

10.15. On the basis of his above submissions, Mr. Naik would vehemently submit that the impugned order be quashed and set aside thereby allowing the Developer to complete the balance construction of the project as it affects the rights of 126 flat purchasers and the Developer on the scale of balance of convenience.

11. Mr. Kapadia, learned Senior Advocate appearing for the Developer in Writ Petition No.9144 of 2024 would endorse and adopt each and every submission made by Mr. Naik and Mr. Jagtiani and for the sake of brevity they are not repeated and reiterated herein under. In addition thereto he has drawn my attention to a decision of this Court in the case of ***Manratna Developers, Mumbai Vs. Megh Ratan Co-operative Housing Society Ltd. Mumbai and Ors.***[9] and more specifically to paragraph Nos. 6 and 7 therein which delves upon the question as to whether consent of flat purchasers is required by the Developer qua interpretation of Section 7 and Section 7-A of MOFA.

9 2008 SCC OnLine Bom 1053

For ease of reference and convenience paragraph Nos. 6 and 7 are reproduced below:-

> *"**6.** 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. Kiran Builders Pvt. Ltd., reported in 1986 MU 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 legislature 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 lay out, after obtaining approval of the local authority in accordance with the building bye-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.*
>
> ***7.** Interpreting the relevant provisions of the MOFA, the Supreme Court in the case of Jayantilal Investments v. Madhuvihar Co-op. Housing Society, reported in 2007 (2) All MR 398, held in paragraph 15, thus:*
>
> *"15. …Consequently, reading section 7 and section 7-A, 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 7-A 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 7-A 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 layout allows construction of more buildings, subject to compliance of the building rules or building bye-laws or Development Control Regulations."

Thus, it is clear that the contention of the plaintiff that in the absence of the consent of flat purchasers that the developer/promoter cannot raise additional structure or building despite sanction of the modified plan by the local authority, is ill-founded."

11.1. This Court (Coram: Swatender Kumar, CJ and A.P. Deshpande, J.) in the above judgment has held that due to insertion of amended Section 7 (1)(ii) with Section 7-A of MOFA by Maharashtra Amendment Act 36 of 86 the legislature had made it clear that consent of flat purchasers was never the criteria applicable to concept of adding buildings by promoters. The reasons therefore are enumerated in the above referred paragraph No. 7. The present case is however on a much stronger footing since admittedly the entire development on the subject property is not yet completed. This was made known to all flat purchasers / members of Respondent Nos. 1 to 7 - Societies in their respective registered Agreement for Sale. Hence he would submit that contentions of the flat purchasers that their consent is mandatory in the present case for completing development on the subject property is therefore completely ill-founded.

12. Mr. Apte, learned Senior Advocate appears for the Corporation in all three Petitions. Corporation is the Planning Authority which has sanctioned the building plans in respect of development from 2005 to 2022 in the present case. At the outset, he would submit that the Suit filed by Respondent Nos.1 to 7 – Societies is not maintainable as the same is filed without complying with the requirement of issuance of statutory notice under Section 487 of the Maharashtra Municipal Corporation Act, 1949 (for short "**MMC Act**") to the Corporation.

12.1. He would submit that the Appellate Court has not considered the fact that the Suit is filed to challenge a permission granted by the Corporation to the Developer 5 years back i.e. on 29.12.2017 and while granting the same, there was no violation of any of the statutory provisions of the MMC Act, Maharashtra Regional and Town Planning Act, 1966 (for short "**MRTP Act**"), Maharashtra Land Revenue Code, 1966 and or DCR as applicable to the city of Thane by the Developer as alleged by the Respondent Nos.1 to 7 – Societies.

12.2. He would submit that the Appellate Court has ventured beyond the pleadings, prayers and material placed before it and given final findings at an interlocutory stage about the permissions issued and plans sanctioned by the Corporation as being illegal and directed inquiry against the Municipal Officers while hearing the appeal against

the interlocutory order.

12.3. He would submit that the Appellate Court while passing the impugned order has not considered the fact that the Corporation was not a party to the registered Agreement for Sale but it has held that the plans sanctioned by the Corporation for development were bad in law on the ground of absence of consent of flat purchasers and the informed consent in the Agreement was invalid.

12.4. He would submit that if at all the flat purchasers had any grievances then they ought to have approached the appropriate forum / civil Court under the provisions of RERA or MOFA as applicable.

12.5. He would submit that the impugned order directs an inquiry against the Municipal Officers without even delving into the facts as to which DCR was violated by the Corporation or if there was any lapse or dereliction of duty on the part of any Municipal Officer. He would submit that the Appellate Court has ignored the basic proposition that Municipal Officers are required to enforce compliance of the building regulations and not the Agreement for Sale between private parties.

12.6. He would submit that as per the provisions of Section 149 of the MRTP Act, there is a clear bar of jurisdiction in filing of the Suit as no sanctioned plan or permission or order passed by the Planning Authority or any notice issued by the Planning Authority can be

questioned in any Civil Suit and an appropriate and independent forum has been created by law to redress such grievances. He would submit that that in addition to the aforesaid, the Suit as filed is also clearly barred by the law of limitation.

12.7. In support of his above submissions, Mr. Apte has relied upon the decision of this Court in the case of ***Shree Sai Reality Vs. State of Maharashtra.***[10] wherein the Court held that Planning Authorities lack jurisdiction to adjudicate private property boundary disputes which fall within the purview of the Civil Courts and it has reaffirmed that the Planning Authority must act within their statutory mandate.

12.8. In view of his above submissions, he would urge the Court to quash and set aside the impugned order dated 22.05.2024 passed by the Appellate Court, Thane as the same suffers from manifest errors and is bad in law.

13. ***PER CONTRA***, Mr. Jahagirdar and Mr. Godbole learned Senior Advocates and Mr. Datar, learned Advocate have appeared for Respondent Nos.1 to 7 – Societies in the Writ Petitions.. Respondent Nos. 1 to 7 - Societies are Plaintiffs before the Trial Court. They have jointly made the following submissions:-

13.1. They would submit that in the facts of the present case and

10 AIR OnLine 2019 Bom 1720

the documents submitted by the Developer before the Appellate Court, certain glaring discrepancies and shocking facts have come to light namely, (i) that there is no mention of any revised plan after 2005 in the recitals of the Agreements executed till 2019/2020 between the Developer and all later flat purchasers of building Nos.1 to 7 (ii) that there is no disclosure of FSI potential as per MOFA to them (iii) that whether balance development potential remained after receipt of OC in 2013 for building Nos.1 to 7 except for building No. 2 (iv) that Developer has not given conveyance to the Societies as per MOFA and (v) that no details of the loan obtained by Developer on the subject property and buildings standing thereon after handing over of possession of flats is disclosed and hence based on the aforesaid revelations, the Appellate Court has ordered an inquiry against the Developer and the Municipal Officers.

13.2. On the issue of considering 12.11.2013 as the cut-off dateline for plot potentiality, they would submit that OC for 6 buildings was received on 12.11.2013 when according to them 99% FSI of the entire plot potential was already consumed and possession was given to the flat purchasers and on that date 85% of the project was completed, hence the question of loading additional FSI in the year 2017 did not arise. They would submit that if a cut-off date is not considered or taken into account then the Developer would keep on revising the plans and consuming the increased FSI by constructing

additional structures to the detriment of Respondent Nos.1 to 7 – Societies' members. Therefore, they would submit that the date on which most / maximum of the project was completed i.e. 12.11.2013 ought to be considered as the date on which the plot potentiality has to be decided and therefore FSI shown to have been balance on that date be considered as final as held by the Appellate Court.

13.3. They would submit that violation of MOFA provisions took place when Developer refused to register the Society as also give conveyance to Respondent Nos. 1 to 7. This is again a preposterous argument on the face of record. Admittedly conveyance was to be given to the Apex Body of the 9 buildings / societies after completion of project. It could not have been given within 4 months after registration of the Society in view of the facts and contractual obligations which were disclosed by the Developer since inception.

13.4. They would submit that if the date of 2005 when the original sanctioned plan was sanctioned is considered as the cut-off date then the entire project except building No.3 would have been constructed in violation of MOFA and hence the Developer cannot take advantage of his own misconduct and cause prejudice to members / flat purchasers of Respondent Nos.1 to 7 – Societies. They would submit that after completion of construction of building No.2, the FSI potential was almost exhausted and hence its construction cannot be compared or

equated with construction of building No.8 which was constructed without consent of the members of the Societies. Once again this is a preposterous argument. There is a Planning Authority, there are DCR and all statutory permissions were in place alongwith revised sanctioned plans.

13.5. They would submit that illegal mortgage created by Developer in respect of land and buildings of the Respondent Nos.1 to 7 – Societies is required to be redeemed and released by the Developer and the subject land should be made free from encumbrances before handing it over to the Societies by way of conveyance. This is once again a premature argument as the time for conveyance is not year arrived and can be raised in appropriate proceedings by the Societies after the entire development of 9 buildings is completed and only if the Developer refused to convey the property.

13.6. They would submit that OC should not be given to building No.8 as also construction of building Nos.8 and 9 should not be allowed to be proceeded with as the same are based on illegal FSI benefit availed by the Developer. They would submit that on perusal of documents annexed to Writ Petition No.9144 of 2024 it is clear that the Developer did not have the requisite sanction in respect of building No.8, however parties entered into Agreements in that respect which is prior to obtaining RERA registration and also approval from the

Corporation. They would therefore contend that the Developer without having FSI potential proposed to build building No.8, considering future FSI that may be available and sold the proposed flats which were not sanctioned at that relevant time and same were bought by flat purchasers being completely aware about the said facts.

13.7. They would submit that Petitioners in Writ Petition No.9144 of 2024 i.e. the individual flat purchasers of building No. 8 and the Developer have acted in collusion and connivance with each other. They would contend that the Municipal Corporation has acted in connivance with the Developer as it sanctioned the additional FSI many years after 2013 and that too almost twice of which was already consumed without consent of the members of building Nos. 1 to 7.

13.8. They would submit that members of building No.2 filed complaint before the Maharashtra Real Estate Regulatory Authority against the Developer for failure to handover possession of flats to them within the stipulated time, however by order dated 17.04.2018 the complaint was dismissed on the ground that building No.2 was not registered with RERA and hence Maharashtra Real Estate Regulatory Authority did not have jurisdiction to adjudicate the complaint. Hence they would contend that no remedy would lie before the Maharashtra Real Estate Regulatory Authority and that Civil Suit is the only remedy available to the Societies. In this context, they have placed reliance on

the decision of this Court in the case of ***Hubtown Solaris Premises Co-op Society Ltd. Vs. Municipal Corporation of Greater Mumbai and Ors.***[11]

13.9. They would submit that mandatory prerequisite conditions stipulated under Section 4 of the MOFA – Form V i.e. Model Agreement are violated by the Developer as he has neither disclosed the number of floors he intended to construct nor the FSI he intended to consume in the registered agreements. They would submit that the Developer did not disclose the mortgages raised on the Societies' buildings and subject plot since according to them the Developer has mortgaged all 7 buildings of Respondent Nos.1 to 7 – Societies and the land beneath them alongwith the adjoining land after handing over of the possession of the flats to the members of Respondent Nos.1 to 7 – Societies without their consent, thereby acting in complete contravention of the provisions of Section 9 of MOFA. They would argue that the Developer has not made true and full disclosure in the subsequent registered Agreements for Sale.

13.10. They would submit that Respondent Nos.1 to 7 – Societies by letters dated 28.12.2020 and 15.01.2021 requested the Developer for granting conveyance of the plot of land on which their buildings are standing, however the same was denied, thereby violating Rule 9 of MOFA Rules which states that the Developer is bound to give

11 2021 SCC Online Bom 14116

conveyance within 4 months from registration / formation of the Society. They would submit that the Developer did not co-operate with formation of the Apex Body and also got it de-registered.

13.11. They would submit that as per provisions of MOFA, Developer does not have any right over the additional FSI once possession is given to members and the Society is formed and only the Society is entitled to the increased FSI. They would submit that the same has been followed by this Court in its decision in the case of ***Madhuvihar CHS Ltd & Ors. Vs. M/s. Jayantilal Investments***[12].

13.12. They would submit that the FSI mentioned in all registered Agreements is with reference to the original sanctioned plan of 2005 while the actual FSI utilised by the Developer is more than what is stated in those Agreements and therefore consent of members of Respondent Nos.1 to 7 – Societies was mandatory for revision of the Development plans, however without consent of members, the Development plan has been revised 8 times. They would contend that building No.9 is under construction over the area shown as green space initially and hence consent of members of Respondent Nos.1 to 7 – Societies for any shift / relocation of building No.9 was mandatory. They would argue that prior consent was also necessary as all Buildings are connected at ground and podium level and hence if there is any revision in Development plan it reduces the undivided interest of

12 First Appeal No.786 of 2004 decided on 07.10.2010

individual flat purchasers in the common areas.

13.13. They would submit that the Developer has obtained blanket consent under the registered Agreements by clear misrepresentation as the Agreements only mention the original sanctioned plan of 2005 and nothing more. They would submit that location on which building No.9 is being constructed was earlier shown as a green area and owing to construction of the same the green area has been reduced.

13.14. They would next submit that the Developer has also suppressed the ULC order pertaining to the subject land on which the buildings are constructed and also there is an apparent error of calculation of surplus land which has not been disclosed by the Developer. They would submit that as per the original sanctioned plan of 2005, out of 35774.59 sq. mtrs., 28887.99 sq. mtrs. was allowed for residential use and for the purpose of amenities and the Developer has failed to comply with the conditions as specified in the NA order. They would submit that even the Title Certificate is improper as it merely mentions that certain portions have been earmarked as residential zone but it does not specify how much precise area is earmarked for the said purpose and therefore the same cannot be considered as true and correct.

13.15. Finally, they would submit that the injunction order dated 22.05.2024 has been correctly passed by the Appellate Court after

considering all aforementioned issues and hence this Court should uphold the same in the interest of members of Respondent Nos.1 to 7 – Societies.

13.16. I have heard Mr. Jagtiani, learned Senior Advocate appearing for the Petitioners in Writ Petition No.9144 of 2024; Mr. Naik, learned Senior Advocate for Petitioner in Writ Petition No.8647 of 2024; Mr. Apte, learned Senior Advocate for Petitioner – TMC in Writ Petition No.9411 of 2024 and for Respondent – TMC in Writ Petition No.8647 of 2024 and Writ Petition No.9144 of 2024; Mr. Jahagirdar, learned Senior Advocate for Respondent Nos.1 to 7 in Writ Petition No.8647 of 2024; Mr. Godbole, learned Senior Advocate for Respondent Nos.1 to 7 in Writ Petition No.9144 of 2024; Mr. Datar, learned Advocate for Respondent Nos.1 to 7 – Societies in Writ Petition No.9411 of 2024 and Mr. Kapadia, learned Senior Advocate for Respondent No.8 in Writ Petition No.9144 of 2024 and with their able assistance perused the record and pleadings of the present case. Submissions made by Advocates on behalf of the parties have received due consideration of this Court.

14. At this *prima facie* stage before me considering the Suit plaint filed by Plaintiffs i.e. Respondent Nos.1 to 7 – Societies, the following questions arise for consideration:-

(i) Whether the impugned order passed by the Appellate Court fails to consider the balance of equities in the present case?

(ii) Whether the artificial dateline dated 12.11.2013 considered by the Plaintiffs on the basis of the submissions made before me that development of the subject property is almost complete can be held to be accepted?

(iii) When this is the cause of action arisen for the Plaintiffs to file the Suit proceedings, if it is Plaintiffs' case as argued before me that the artificial dateline of 12.11.2013 be considered as the cut-off date for considering the plot potentiality in the present case?

(iv) What is right of the Developer for development of the subject plot as envisaged and put forth in the original sanctioned plan of 2005 and its subsequent 8 revisions thereafter upto 2022?

(v) Whether the Appellate Court was right in conferring interim relief which was infact not sought for by the Plaintiffs in the Suit proceedings for which there were no pleadings pleaded by the Plaintiffs?

15. The answer to the aforesaid questions would broadly determine the substantive rights of the parties at the interim stage. The subject matter of the present proceedings is with respect to 15 Survey Numbers situated at Village Panchpakhadi, Taluka and District Thane which is the subject property. It is an admitted position which cannot be overlooked nor it is denied that the Developer has been developing the subject property in a phase wise manner since the year 2005 under the nomenclature 'Vasant Lawns' consisting of 9 buildings. Till date, building Nos.1 to 7 have been fully constructed upon and handed over to the respective flat purchasers / members of Respondent Nos.1 to 7 – Societies. Societies have also been informed that building No.8 is fully constructed and very little work remains to be completed. Flats in this building have been sold 126 flat purchasers who are bonafide flat purchasers for value. Building No.9 has been constructed upto the plinth level. In so far as building Nos.1 to 7 are concerned, layout of these buildings as per the OC is that building No.1 comprises of stilt + podium + 22 floors, building No.2 comprises of stilt + podium + 24 floors, building No.3 comprises of stilt + podium + 19 floors, building No.4 comprises of stilt + podium + 19 floors, building No.5 comprises of stilt + podium + 20 floors, building No.6 comprises of stilt + podium + 20 floors and building No.7 comprises of stilt + podium + 20 floors. If this is the position with respect to the aforementioned 7 buildings, then contention of the Plaintiffs that construction of the

project to revert back to the position contemplated in the 2005 plan when members of the Societies are themselves beneficiaries of the subsequent revisions in the sanctioned plan thereafter cannot be countenanced. This is because as per the 2005 original sanctioned plan what was envisaged by the Developer was that building No.1 and building Nos.4 to 8 were shown as stilt + podium + 1 floor each, building No.3 was shown as stilt + podium + 18 floors and building Nos.2 to 9 were shown as a proposed development. When the Plaintiffs' members / flat purchasers have themselves being beneficiaries and have derived advantage from the 8 subsequent revisions in the original sanctioned plan from time to time, it is preposterous to argue that construction of the project on the subject property should revert back to the position contemplated in the 2005 original sanctioned plan.

16. As opposed to this and in order to overcome this submission of the Plaintiffs they have considered the artificial dateline or cut off dateline of 12.11.2013 and pleaded that subsequent amendments to the sanctioned plan thereafter are violative of MOFA disclosures. Plaintiffs have themselves admitted an erroneous situation in one of their own buildings namely building No.2 which has been sanctioned for construction of stilt + podium + 24 floors only pursuant to the revised sanctioned plan of 2017 when two additional apartments were added to the configuration of building No.2 as contemplated and

envisaged under the previous plans.

17. That apart, in so far as building Nos.8 and 9 are concerned, it is an admitted position on record that the sanctioned plan dated 23.06.2008 (2008 plan) and 26.03.2009 (2009 plan) clearly contemplated building No.8 to comprise of stilt + podium + 20 floors. Plaintiffs have conveniently not challenged the 2008 and 2009 plan neither objected to the same. It is only when on 22.04.2022 revised sanctioned plan for building No.8 was amended pursuant to which the layout of building No.8 was re-designed to include lower and upper basement stilt + podium + 32 floors. If there is a challenge in the Suit plaint with respect to the 2017 plan. If that be so then filing of the Suit plaint in October 2021 *prima facie* appears to be hit by delay and latches. There are no answers to these questions emanating from the pleadings nor from the learned Advocates appearing for Plaintiffs. Considering the submissions which have been recorded herein above and the trajectory of the Suit proceedings, the most crucial question therefore to be answered is with respect to the balance of convenience at the interim stage.

18. By virtue of the impugned order passed by the Appellate Court, *prima facie* I am of the opinion that the said order has miserably failed to consider the grave hardship and irreparable injury caused to the Developer and the flat purchasers of building No.8 namely the 126

flat purchasers. Any embargo if passed by the Civil Court needs to be considered on the touchstone of balance of convenience and irreparable injury caused to the parties if such an embargo is passed. What is crucial to be noted is the fact that development of building No.8 commenced as far back as in the year 2006 and it is absolutely on the verge of completion and in a position of obtaining the OC. Apart from the Developer it is 126 flat purchasers who have purchased apartments / flats in building No.8 who are adversely affected by the injunction order granted by the Appellate Court. The investment made by these flat purchasers either through their own savings or through bank loan is the degree of hardship that ought to have been considered. It is seen that there are 11 such flat purchasers who have filed Writ Petition No.9144 of 2024 before me. Though Writ Petition may have been filed by these 11 flat purchasers, what is seen is that they are representatives espousing the cause of all flat purchasers who are similarly placed. Out of these 11 flat purchasers before me one of the Petitioner has purchased his flat by a registered Agreement dated 22.04.2016 whereas the other remaining 10 flat purchasers have purchased their flats between 31.03.2020 and 31.03.2021. Petitioners namely Respondent Nos.1 to 7 – Societies before me have conveniently maintained a stoic silence all throughout and more specifically when the 2017 plan was very much in force and was implemented by the Developer without maintaining any challenge to the same and when

development of building No.8 was undertaken by the Developer on the very same layout where Respondent Nos.1 to 7 – Societies' buildings are standing.

19. However on reading of the Suit plaint a clear impression is given to this Court that Respondent Nos.1 to 7 are aggrieved by certain inadequate provisions of the amenities promised by the Developer which is one of the principal reason for filing the Suit proceedings. If that be the case, the question that arises before the Court is whether the Plaintiffs can hold the Developer and innocent flat purchasers for ransom by filing such Suit proceedings and obtain interim order from the Court to their detriment.

20. Whenever a Court is faced with such a situation, it has to be substantiate and satisfy itself before granting injunction and look at the conduct of the party, probable injury to either party and whether the Plaintiffs could be adequately compensated if injunction is refused. While considering the Application for injunction the phrases '*prima facie* case', 'balance of convenience' and 'irreparable loss' are not rhetoric phrases for incantation but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always is hedged with sound exercise of judicial discretion to meet the ends of justice.

21. The Supreme Court in the case of ***Dalpat Kumar & Anr. Vs. Prahlad Singh and Ors.***[13] in paragraph No.5 of the said judgment has commented upon the existence of the *prima face* right and infraction of the enjoyment of the property or the right as to whether the condition for the grant of temporary injunction or otherwise. What is crucial to be noted is that *prima facie* case is not to be confused with *prima facie* title which has to be established on evidence and on trial. Paragraph No.5 of the aforesaid judgment of the Supreme Court reads thus:-

> "*5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has*

13 (1992) 1SCC 719

to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

22. From the above it is seen that the fundamental principle required to be followed by the Court is that the Court should adopt whichever course appears to carry a lower risk of injustice if it turns out to have been wrong while granting interim injunction.

23. Before me is the case of the Developer who has been admittedly developing the subject property in a phase wise manner from 2008 onwards, the Agreements with some of the members of the Plaintiffs – Societies executed pursuant to 2005 original sanctioned plan clearly contemplate such development. Clause 1 of the said agreement clearly states that it is a phase-wise development for construction of 9 buildings which is ongoing until today. If that be the case, it is unfathomable for the Court to consider the *prima facie* case of the Plaintiffs to consider the artificial dateline of 12.11.2013 for the purpose of seeking injunctive relief in the Suit proceedings. I find that by virtue of the said injunctive relief not only the goodwill and reputation of the Developer would be at stake but it directly affects the innocent flat purchasers. There is no consideration towards this at all when the impugned order passed by the Appellate Court is read by me.

24. *Prima facie*, what is crucial to be noted is the fact that on the basis of the averments made in the Suit plaint, Plaintiffs have

themselves approached the Civil Court after gross delay and laches and the conduct of the Plaintiffs speaks for itself. In such a situation, granting injunction and halting further construction of building Nos.8 and 9 is not only detrimental to the development aspect but also transgresses the substantive rights of the parties namely innocent flat purchasers who have invested their hard earned money in purchasing the subject flats.

25. In the present case, it is seen that passing an embargo in respect of building No.8 which is practically completed in all respects in the facts of the present case is clearly detrimental to the interests of the flat purchasers and the Developer. It is a fact that there have been 8 revisions of the original sanctioned plan of 2005 between 2007 and 2022, which is in public domain and on record. Respondent Nos.1 to 7 Societies – Plaintiffs not objecting to any of the said revisions is a strong mitigating factor considered by this Court which has been conveniently lost sight of by the Appellate Court. The pleadings in the Suit plaint in paragraph No.20 that construction of the project should revert back to the position contemplated in the original sanctioned plan of 2005 after enjoying the benefit of the revised sanctioned plans is a clearly *malafide* case on the part of Plaintiffs. The artificially alleged dateline of 12.11.2013 is infact detrimental to the prospect of the Plaintiffs themselves which has been completely missed by the learned Appellate Court. Admittedly, in 2017 itself the sanctioned plan

of building No.2 underwent revision and two extra flats were added in the said building which would render them illegal as well.

26. What is crucial to be noted while reading the impugned order is the fact that though the order is extremely verbose, there is no observation and finding on the aspect of balance of convenience, hardship and irreparable injury if the injunction is granted to the aggrieved parties and most importantly on the issue of delay. By placing the embargo in respect of building No.8, the Appellate Court has virtually given its verdict even before trial at an interlocutory stage. There are 126 flat purchasers in building No.8 which is practically complete as informed across the bar and their entire future will therefore be in jeopardy. The Developer is in a position to apply for OC for the said building after completing the unfinished works therein. Thus the legitimate grievance of the legitimate flat purchasers, some of whom are before me at an interim stage deserve to be considered. The concern of the 126 flat purchasers of building No.8 cannot be ignored and on the contrary the flat purchasers in building Nos.1 to 7 cannot be allowed to claim any equity in law.

27. That apart, the legal issue with respect to the bar of jurisdiction under Section 79 of the RERA is clearly applicable *prima facie*. An adequate mechanism is provided under the RERA for enforcing the obligations promised by the Developer / Promoter in any

development. As seen from the Suit plaint, one of the principal grievance expressed by the Plaintiffs is that there is deficiency or non-maintenance of the amenities promised by the Developer.

28. It is further seen that grievance of the Plaintiffs regarding changing the location of building No.8 from its original location to another location and thereby altering or rather reducing the Green area / RG area is also *prima facie* unsustainable. As compared to the original RG Area of 9026.48 sq. mtrs. in the 2005 original sanctioned plan, the RG area in the 2022 sanctioned plan is 9319.99 sq. mtrs. The change of location is valid and permissible under the DCR. There is no impediment for effecting such a change. Needless to state that the RG area cannot be reduced and it has not been reduced in the present case. Hence that grievance of the Plaintiffs is not sustainable.

29. In so far as the issue relating to the embargo on the Municipal Officers is concerned, it is seen that the Corporation is the Planning Authority. The Planning Authority has followed the applicable DCR and the MRTP Act while sanctioning the revisions in the building plans. Challenge to such sanction granted by the Planning Authority cannot be maintained by way of filing a Civil Suit. Hence the issue of gross delay and laches is clearly applicable to the Plaintiffs' case before the Trial Court. The embargo placed by the Appellate Court directing inquiry against the Municipal Officers and declaring the revisions in

the original sanctioned plan of 2005 as illegal in the Miscellaneous Civil Appeal is not only absurd but also impermissible. *Prima facie,* it is seen that the Plaintiffs themselves have never prayed for any such thing or any such embargo or inquiry.

30. Next, the grievance of the Plaintiffs that by 2013 99% of the FSI of the entire plot potential was already consumed and possession was given to the flat purchasers and on that date 85% of the project was completed cannot be decided summarily merely on the basis of pleadings which is attempted to be done by the Appellate Court. This grievance of the Plaintiffs – Societies can be agitated by them in the Civil Suit but certainly not at the cost of bonafide purchasers / flat purchasers for value of building Nos.8 and 9 and the Developer. There is no doubt that the Developer will be obligated to convey the subject plot / property to the Apex Body of the Societies of the 9 buildings once the development is complete. That is a promise which the Developer has given to all members contained in their respective registered Sale Agreements.

31. If it is the Plaintiffs' case that construction of Building Nos.8 and 9 or for that matter any construction after the artificially chosen dateline of 12.11.2013 is illegal, the Plaintiffs will have to first prove the same in the Suit proceedings. This is not a case of illegal development. The development has been approved according to

revised sanctioned plans over the years which are in public domain. The development is permitted by the Planning Authority under the existential DCR. *Prima facie* therefore there is no substance in the case made out by the Plaintiffs so as to be entitled to any injunction whatsoever.

32. In view of my above observations and findings which are *prima facie* based on the record placed before me, the impugned order passed by the learned Appellate Court dated 22.05.2024 is not sustainable. The said order is an interlocutory order. It is quashed and set aside immediately. Resultantly the order dated 27.09.2023 passed by the learned Trial Court is upheld.

33. Considering that the Suit being RCS No.743 of 2022 is filed by the Plaintiffs in the year 2022, the said Suit is directed to be expedited before the Trial Court.

34. The Developer is permitted to complete construction of building No.8 as informed across the bar that the balance works will be completed within a period of 6 months and the Developer shall apply for OC. The Developer is permitted to do so.

35. All contentions of the parties are expressly kept open in the trial. It is directed that any expression of thought made in this order or the order passed by the learned Appellate Court in Miscellaneous Civil Appeal or the order passed by the learned Trial Court below Exhibit

"5" shall not influence the decision in the trial before the Trial Court.

36. The direction in the impugned order for initiation of inquiry against the Municipal Officers is quashed and set aside.

37. Resultantly all three Writ Petitions stand allowed in view of the aforesaid directions and stand disposed.

[MILIND N. JADHAV, J.]

38. After the above judgment is pronounced, Mr. Datar, learned Advocate appearing for Respondent Nos.1 to 7 – Societies prays for stay of the present judgment. In view of my observations and findings in the judgment, request made by Mr. Datar is rejected.

[MILIND N. JADHAV, J.]

Ajay

AJAY TRAMBAK UGALMUGALE

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