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Malad Kokil Co-Operative Housing Society Ltd. Vs The Modern Construction Co. Ltd. and Others
 Sundarvan S 4 Co-Operative Housing Society Ltd. Vs The Modern Construction Co. Ltd. 7 Rahimootulah House, Homji Street, Fort, Mumbai 400001, The Metropolitan Development Corporation, 7, Rahimootulah House, Homji Street, Fort, Mumbai 400001 and The Municipal Corporation of Greater Mumbai, Office At Mahapalika Building, Mahapalika Marg, Fort, Mumbai 400001

Notice of Motion No. 1359 of 2011 in Suit No. 1005 of 2011 Alongwith Appeal From Order No. 383 of 2012 in Notice of Motion No. 2953 of 2010 in L.C. Suit No. 2348 of 2010

Court: Bombay High Court

Date of Decision: Sept. 7, 2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€" Order 1 Rule 8#Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 â€" Section 10, 11, 16, 2, 3#Maharashtra Regional and Town Planning Act, 1966 â€" Section 149, 154, 31(1), 44, 45#Mumbai Municipal Corporation Act, 1888 â€" Section 56

Citation: (2013) 2 BomCR 414

Hon'ble Judges: B.R. Gavai, J

Bench: Single Bench

Advocate: D.D. Madan, assisted with Gaurav Joshi, Nisanth Sasidharan, Trupti Shetty, instructed by Liladhar and Co, for the Appellant; Pravin Samdani, Senior Advocte With Mr. Simil Purohit, Ms. Rati Patni, Ms. Helina Desai and Mr. Rahul Veera instructed by . M/s. Wadia Ghandy and Co. for Defendant Nos. 1 to 5, Mr. Janak Dwarakadas With Chirag Kamdar, Sandeep Dadwal, Prakash Mahadik and Sanjeev Hariakar for the Defendant No. 6 and Virag Tulzapurkar With Simil Purohit, Ms. Rati Patni, Ms. Helina Desai and Mr. Rahul Veera instructed by . M/s. Wadia Ghandy and Co. for Respondent Nos. 1 and 2 in Appeal for Order, for the Respondent

Judgement

B.R. Gavai, J.
Suit No. 1005/2011 has been filed by the plaintiff Society for a decree directing the defendants 1 and 2 or any other person

found to be the owner of the property to convey the suit property admeasuring about 10,208.40 sq. meters and for declaration that the

concessions/relaxations granted by the defendant no.7 on the Approval Report dated 5th December, 2009 are bad in law, malicious etc. The

plaintiffs have also prayed for cancelling the said approval report. The plaintiffs have also prayed for declaration that commencement certificate

dated 13th October, 2010 is null and void. The plaintiffs have also prayed for an injunction restraining the defendants from making any construction

in furtherance to the commencement certificate dated 13th October, 2010 alongwith the other ancillary reliefs. The plaintiffs have also taken out a

notice of motion for grant of certain interim-reliefs during the pendency of the suit. The plaintiffs had also moved the Court for grant of ad-interim

orders. This Court vide order dated 7th July, 2011 had granted ad-interim relief in favour of plaintiff society. The Appeal against order (AO),

arises out of the order passed by the learned Judge of the City Civil Court dated 18th April, 2011 thereby dismissing the notice of motion no.

2953/2011. The learned Single Judge of this Court vide order dated 7th July, 2011 which is a common order passed in the notice of motion in the

aforesaid Suit and C.A. (st) No. 14310/2011 in the A.O. has allowed the civil application and admitted appeal against order. In pursuance to the

orders passed by the Hon''ble Chief Justice both the matters are clubbed together, directed to be heard and decided together. As such the motion

as well as appeal are heard finally by me.

2. The plaintiffs in Suit No. 1005/2011 are hereinafter referred to as plaintiff-society, the appellants in AO No. 383/2012 as appellant-society. The

defendants 1-2 in Suit No. 1005/2011 who are respondents 1 and 2 in the AO No. 383/2012 are hereinafter referred to as developers.

3. The facts in brief giving rise to the present proceedings are as under:

The defendants 1 and 2 have developed buildings consisting of residential tenements and shops, total four in number. The purchasers of the units in

building nos. S-1, S-2 and S-3 have collectively formed Malad Kokil Co-operative Housing Society which is the plaintiff in the suit whereas the

purchasers of the unit in building no. S-4 have formed and registered Sundervan S-4 Cooperative Housing Society Limited which is defendant

no.6 in the suit and appellant in the AO. The buildings have been constructed over span of period between 1974 to 1989. The Occupation

Certificates in respect of the building no. S-1 has been granted on 26th February, 1975 for an area of 2271.13 sq. meters, in respect of building

no. S-2 on 26th November, 1975 for an area of 2536.84 sq. meters, in respect of building no. S-3 granted on 17th April, 1976 for an area of

2060.29 sq. meters whereas in respect of S-4 it is granted on 22nd October, 1996 for an area of 2976.51. The total occupants in the four buildings are 208. The plaintiff-society was registered on 9th November, 1982 whereas the appellant-society is registered on 24th May, 1993. It

is the contention of the plaintiffs that developers had initially constructed four floors i.e. ground + 3 on the area shown for construction of S-5

building in the plans which were disclosed to the flat takers. However, it is the plaintiff''s case that on 3rd September, 2010 some unknown

persons entered into the property and started demolishing the framework of the building. It is also the contention of the plaintiff''s that these

unknown persons had caused damage to the garden as well as the common passage and amenities belonging to the plaintiff-society. There has

been certain correspondence between the plaintiffs and defendants thereafter. It is the contention of the plaintiff-society that after they pursued the

matter under the Right to Information Act, they came to know about the Commencement Certificate granted in favour of the defendants by the

Corporation on 13th October, 2010 and the Approval Report dated 5th December, 2009. The plaintiffs noticed that the proposed development

by the developer was about 7722 sq. meters. According to plaintiffs since the entire FSI was almost exhausted, no such construction as permitted

under the Commencement Certificate could have been permitted. In these premises, the suit as aforesaid alongwith Notice of Motion has been

filed. As already discussed herein above the learned Single Judge has already granted an ad-interim relief on 7th July, 2011.

4. The another Society consisting of the purchasers of the units in building S-4 has filed the suit in the City Civil Court with almost identical

allegations. According to them in the agreements entered into between the members of the Society on one hand and the developer on the other

hand and the plans annexed alongwith said agreements, any proposed development by way of construction of S-5 building is not shown. The

plaintiffs have also taken out the notice of motion which was rejected by the City Civil Court. Being aggrieved thereby the appeal has been filed

which is already admitted and civil application for injunction granted by the learned Single Judge vide order dated 7th July, 2011.

5. I have heard Shri Madan, learned Senior Counsel for the plaintiffs, Shri Dwarkadas the learned Senior Counsel for the appellant and Shri

Samdhani, the learned Sr. Counsel appearing on behalf of defendants in the suit and Shri Tulzapurkar, the learned Sr. Counsel appearing on behalf

of respondents in the appeal.

6. Shri Madan, learned Senior Counsel submits that from the perusal of the agreement dated 23rd July, 1975 executed between the defendant-

developer and the purchasers, the representation that is made to the members of the plaintiff-society in respect of buildings S-1 to S-3, is that the

developer who has constructed ground + upper storeys in each of the aforesaid units which would also consist of shops on the ground floor of

various dimensions and residential flats above the ground floor. It is further submitted that representation was also made that insofar as building no.

S-4 is concerned, the same would be of ground + ten floors and building no. S-5 would consists of ground and one more floor subject to being sanctioned by the municipal corporation. A representation was also made that the layout would have 15 ft. wide paved paths, pedestrian path-way, car parking, children park, garden etc. The learned Counsel submits that after the building was complete and the occupants were put in possession thereof, the developers were duty bound to execute the conveyance in favour of the society upon such society being registered. The learned Counsel submits that one agreement was also entered into between the member of the plaintiff-society by the developers on 18th November, 1992. The learned Counsel submits that even in terms of the aforesaid agreement the developers were duty bound to execute the conveyance deed after the formation of the co-operative society. The learned Counsel submits that even in this agreement the amenities which were agreed to be given by the developer have been reiterated. The learned Counsel further submits that at the time of formation of the plaintiff-society on 18th September, 1981, the developers have given a specific undertaking that they shall not make any alterations in the structure of the building and will not construct any additional structure without the previous consent of the persons to whom the units have been sold out. It is further stated that they have also undertaken to convey the right, title and interest in the property within the period mentioned in the agreement executed u/s 4 of the Maharashtra Ownership Flats Act, 1963 (hereinafter referred to as MOFA) and if no such period is mentioned in the agreement after the registration of the said Society. The learned Counsel, therefore, submits that in view of this specific undertaking, the developers cannot make any additional constructions without the consent of the members of the Society. It is submitted that in any event in view of the undertaking and the statutory provisions, the developers were duty bound to execute the conveyance in favour of the plaintiff-society.

7. The learned Counsel further submits that the report as prepared by the Executive Engineer of the Corporation shows that the same is prepared so as to give undue favour to the developer. It is submitted that various concessions which have been granted in favour of the developer free of FSI are not at all permissible in law. It is further submitted that the powers exercised by the Commissioner under Regulations 64(b) of the Development Control Regulations for Greater Mumbai, 1991 (hereinafter referred to as DCR of 1991) permit relaxation in case of FSI only if it is otherwise permitted under the Regulations. It is submitted that said powers are to be exercised when party is in a position to establish a clearly demonstrable hardship and that too by ensuring that such relaxation will not affect the health, safety, fire safety, structural safety and public safety etc. of the inhabitants of the building and the members. The learned Counsel submits that the powers u/s 64(b) are to be exercised by after arriving

at the subjective satisfaction that the condition stipulated in Regulation 64(b) exist for invoking the said powers. It is submitted that in the present

case the Commissioner has mechanically signed the notes as prepared by the subordinates and, therefore, the relaxation granted u/s 64(b) is not at

all tenable in law.

8. The learned Counsel further submits that the Government orders issued u/s 154 of the Maharashtra Regional Town Planning Act (hereinafter

referred to as MRTP Act) are binding upon the Corporation. However, by giving an untenable reasoning that the plans were already sanctioned,

the officers of the Corporation have prepared a note stating therein that the said orders dated 23rd April, 2007 are not applicable to the facts of

the present case. It is submitted that the said order provides that where the developer intends to use TDR for further development in the project

wherein a part construction has been made and the Society is occupied by the members who have purchased the flats and inspite of that the

conveyance has not been executed in favour of the Society, the developer would not be entitled to load the TDR on the FSI already utilised for

construction of the part buildings which are occupied by the members of the Society and would only be entitled to load the TDR on the balance

FSI. Insofar as the contention of the defendant that in view of the earlier suit filed by some of the members of the plaintiff-society, the present suit is

not maintainable, the learned Counsel submits that the suit filed by the said members was not in a representative capacity. He submits that no leave

under Order 1 Rule 8 of CPC was granted. In any case it is submitted that suit filed by an individual cannot bind the Society though it may be true

vice versa.

9. The learned Counsel relies on the various following judgments in support of submissions on behalf of plaintiffs in the case of Madhuvihar

Cooperative Housing Society and Others Vs. Jayantilal Investments, A Registered partnership firm, The Municipal Corporation of Greater

Bombay and The Executive Engineer, Building Proposal (WS), Mr. Rajendra Thacker Vs. Municipal Corporation of Gr. Mumbai and Another, ,

Ikram Suleman Qureshi Vs. Mumbai Building Repairs and Reconstruction Board and Others, ; Sai Amrat Co-operative Housing Society Limited

and Amrat Co-operative Housing Society Limited Vs. Shri Chandru Tahilram Tolani, Brihanmumbai Mahanagar Palika, The Municipal

Commissioner of Greater Bombay and The Executive Engineer, ; Jayantilal Investments v/s. Madhuvihar Co-op. Hsg. Society & ors. In SLP No.

32247-32448 of 2010; Jayantilal Investments v/s. Madhuvihar Co-op. Hsg. Society & ors. In Rev. Petition (St.) No. 32516 of 2010; Jayantilal

Investments v/s. Madhuvihar Co-op. Hsg. Society & ors. in SLP No. 22654-22655 of 2011.

10. Shri Dwarkadas, the learned Counsel appearing on behalf of the appellant-society submits that the learned trial Judge has grossly erred in

dismissing the notice of motion. He submitted that the only ground on which the motion is rejected by the learned trial Court is purported settlement between the appellant and the developers. The learned Counsel submits that the learned trial Judge has totally misinterpreted the so called settlement dated 30th August, 2003. The learned Counsel submits that the said settlement has to be read in conjunction with various other documents including the communication addressed by the appellant-society which is at Exhibit J of Appeal from Order. The learned Counsel submits that the developer had not completed the entire work which he was required to do and as such the said works were required to be got done by the appellant-society. It is submitted that on account of this the developer was liable to pay huge amount to the appellant-Society. It is submitted that so called settlement which is relied on by the learned trial Court is only in respect of the aforesaid claims of the Society and it cannot be construed as a general consent whereby the appellant has permitted the developers to make any construction in the manner he so desires. The learned Counsel submits that the perusal of the various agreements of 1982 and 1984 would reveal that in most of the agreements there is no mention of the building S-5. It is submitted that insofar as some of the agreements are concerned though there is a mention regarding building S-5, the said structure is shown only as ground + one. It is further submitted that the plan which has been given by the developer along with the agreements and the plan obtained by the appellant from the Corporation do not show the existence of S-5 building. Shri Dwarkadas further submits that as a matter of fact in view of the statutory provisions, upon formation of appellant no.1 society the respondent-developer was bound to execute conveyance in favour of the appellant-society. It is submitted that as a matter of fact the developer had intimated the appellants that he desired to execute the conveyance. However, since there was no sub-division of plot coming to the share of plaintiff and appellant-society, the conveyance could not be executed. The learned Counsel submits that as a matter of fact the developer had also applied for sub-division as a step in furtherance of the execution of the conveyance. The learned Counsel submits that the developer cannot take advantage of his own wrong inasmuch as had the conveyance been executed, the right to load the TDR would have been available to the appellant-society and not the developer.

11. The learned Counsel relies on following judgments on behalf of appellants in the case of Jayantilal Investment v. Madhuvihar Coop. Hsg. Society Ltd. (supra); M/s. Manratna Developers v. Megh Ratan Co-op. Hsg. Society Ltd. (supra); Madhuvihar Co-op. Hsg. Society Ltd. v. Jayantilal Investment (supra); Grand Paradi Co-op. Hsg. Society Ltd. v. Mont Blanc Properties & Industries Pvt. Ltd. (supra); Jamuna Darshan Co-operative Housing Society Ltd. and Others Vs. J.M.C. and Meghani Builders and Others, ; M/s. Noopur Developers v. Himanshu V.

Ganatra, 2010 (2) AllMR 791; White Towers Co-op. Hsg. Society Ltd. Vs. S.K. Builders and Others, ; Bjranglal Eriwal and Others Vs.

Sagarmal Chunilal and Others, ; Neena Sudarshan Wadia (Smt.) Vs. Venus Enterprises,

12. Both Shri Madan as well as Shri Dwarkadas vehemently submits that the present case is squarely covered by the judgment of Apex Court in

the case of Jayantilal Investments v/s. Madhuvihar Co-operative Housing Society. It is submitted that in view of the said judgment if the entire

project is placed before the flat takers at the time of agreement than the promoter is not required to obtain prior consent of the flat takers as long

as builder puts up additional construction in accordance with the layout plan, building rules and DC Regulations. The learned Counsel submits that

the layout presented to the members of the plaintiffs do not show S-5 building and, therefore, the construction of the proposed building is not

permissible in law. The learned Counsel submits that at the most the layout shown to some of the members shows the building S-5 to be structure

of ground + one floor. It is, therefore, submitted that members of the plaintiff society were never put on notice that the plaintiff-society is likely to

construct the structure of 28 floors. The learned Counsel further submits that as interpreted by the Apex Court in the case of Jayantilal (supra) it is

obligatory on the part of the developer to make full disclosure to the flat taker at the time of entering into contract. It is submitted that the

construction which is now sought to be made is in total contrast with the project layout that was presented to the members of the plaintiff and

appellant societies at the time of entering into agreement.

13. Shri Samdhani, the learned Counsel appearing on behalf of defendant-developer on the contrary submits that in the present case the entire

layout of Sundarvan Co-operative Housing Society Limited alongwith sub-division was sanctioned on 19th August, 1979. The learned Counsel

submits that since in the entire lay out, 15% RG (recreational ground) area was already carved out, there was no necessity to provide any

additional RG area on the plots of the defendant-developer. The learned Counsel submits that the legislature has carved out a distinction between

the layout and a building plan. Learned Counsel, therefore, submits that there is a basic distinction between a building plan and a lay out plan. The

learned Counsel submits that since the construction of the buildings in which members of the defendant society are residing is prior to 1991, the

same would be governed by Development Control Regulations of 1967 (hereinafter referred to as DCR of 1967). The learned Counsel submits

that Regulation 39 of 1967 DC Regulations deals with layout or sub-rule. It is submitted that when a land under development admeasures 3000 sq.

feet or more, the 15% of the entire holding has to be reserved for recreational space. It is submitted that in view of these regulations sufficient land

had already been provided in the entire layout and as such no further RG area is required to be kept. The learned Counsel submits that all the flats and shops except two shops are sold prior to 1986 and as such the amended provisions of MOFA would not be applicable to the members of the

plaintiff-society. The learned Counsel submits that one member each from the S-1, S-2, S-3 had filed a suit in the City Civil Court in which an

application for interim-relief was also made. The learned Counsel submits that the application for interim-relief was rejected by the City Civil

Court. It is further submitted that appeal against order was also dismissed by this Court by a reasoned order. The learned Counsel submits that as

such the said finding operates as a res judicata and the present suit itself is not tenable. The learned Counsel submits that under the DCR of 1991

Regulation 21 deals with layout plan and Regulation 23 deals with recreation amenities. The learned Counsel submits that since under Regulation

23 the RG has now increased to 20%, 5% additional area has been provided by the developer.

14. Shri Samdhani, the learned Counsel further submits that since most of the amendments of Section 3 and 4 of MOFA were brought into effect

only in the year 1986 and since the tenements, shops were sold to the members of the plaintiff-society much prior to 1986, the said provisions will

not be applicable to the plaintiff Society. The learned Counsel submits that the Court will have to draw a distinction between a case falling u/s 7

and 7A. The learned Counsel submits that since the construction in question is in respect of an additional building and not an alteration or addition

in the structure of the building wherein the members of the plaintiff society resides, the case would fall u/s 7A and not under 7. The learned

Counsel, therefore, submits that in view of specific provisions of Section 7A, the consent of the plaintiff would not be required for construction of

another building. The learned Counsel submits that the said Act i.e. MOFA has to be read in totality. The learned Counsel submits that there is a

difference in respect of plan of the building and plan of a layout. The learned Counsel submits that applying the principle of textual and contextual

interpretation as laid down by the Apex Court in the case of Reserve Bank of India v/s. Peerless General Finance and Investment Co. Ltd. & ors.

{AIR 1987 SCC 1023}, the Court will have to draw a distinction between plan of a building and plan of a layout. The learned Counsel, therefore,

submits that applying the aforesaid principles, the consent of the members of the plaintiff Society will not be necessary for construction of an

additional building. The learned Counsel relying on the various clauses of the agreement entered between the plaintiff and flat purchasers and

Section 11 of the MOFA, submits that the conveyance in favour of the Society has to be executed only after all the five buildings in the layout are

complete. The learned Counsel submits that since the 5th building is not yet complete, the time to execute the conveyance is yet to arrive.

15. Shri Samdhani further submits that insofar as the Government order dated 23rd November, 2007 is concerned, the same would be applicable

only in case of the additional FSI being available on account of amalgamation of plots. It is, therefore, submitted that the said government order is not applicable to the facts of the present case inasmuch as the present case is not a case of amalgamation. The learned Counsel insofar as the

undertaking of the developer on which the plaintiff-appellant relies, submits that the said undertaking would apply only insofar as residents of S-4

are concerned and not insofar as residents of S-1 to S-3 are concerned inasmuch as at the time of undertaking the construction of S-1 to S-3 was

already complete and the flats already sold to the occupants. The learned Counsel submits that insofar as the residents of S-4 are concerned, in

view of the settlement between the developer and the defendant no.6-appellant society, there was a express consent for construction of the

additional building and as such the contention in that regard is without substance.

16. The learned Counsel relies on the following judgments on behalf of defendants 1 to 5; in the case of Jayantilal Investments Vs. Madhuvihar

Co-operative Housing Society and Others, ; The State of Orissa Vs. Sudhansu Sekhar Misra and Others, ; Reserve Bank of India Vs. Peerless

General Finance and Investment Co. Ltd. and Others, ; The Mohatta Nagar Co-operative Hsg. Soc. Ltd. Vs. Vishram Khimji and Sons and

Others, ; Mr. Sudhir Shetty v. Mr. Dharma V. Desle [Appeal No. 844/2003 in Arbitration Pet. No. 171/2003 (unreported)]; Manratna

Developers Vs. Megh Ratan Cooperative Housing Society Limited, Rushabh Rikhav Enterprises, Neelkanth Mansions Pvt. Ltd. and Municipal

Corporation of Greater Mumbai, ; Jamuna Darshan Co-op. Hsg. Soc. Ltd. v. JMC & Meghani Builders & ors., [NMS No. 2220/2007 in Suit

No. 3938/2001 dated 12th January 2009 (unreported]; Jamuna Darshan Co-op. Hsg. Soc. Ltd. v. JMC & Meghani Builders, [Appeal No.

253/2009 in NMS No. 2220/2007 in Suit No. 3938/2001 dated 22nd June 2009 DB (unreported]; Shailaja Kamalakar Limaye v. Nilkanth

Ganesh Pethe, 2010 (4) Mh. L.J. 160; Grand Paradi Co-op. Hsg. Society Ltd. v. Mont Blanc Properties & Industries Pvt. Ltd., [Appeal No.

599/2002 in NMS No. 94/2002 in Suit No. 99/2002 dated 20th April 2010 (unreported)]; Madhuvihar Cooperative Housing Society and Others

Vs. Jayantilal Investments, A Registered partnership firm, The Municipal Corporation of Greater Bombay and The Executive Engineer, Building

Proposal (WS), .

17. Shri Tulzapurkar, the learned Senior Counsel submits that since the construction ought to be made by the developer is not an alteration to the

building in which the plaintiffs are residing, the same would be covered by Section 7A and not 7 of MOFA. The learned Counsel, therefore,

submits that no permission of the members of the plaintiff or appellant-society is necessary for making construction of additional building. The

learned Counsel submits that perusal of various clauses of the agreements entered by the defendant-developer with the purchasers of the flats

would reveal that there is a specific provision in the agreement that the developers reserve the right to themselves to make additional construction so as to use full potential of the plot. The learned Counsel submits that since there is no contrary provision in the agreement, disentitling the

developer to the same, the plaintiffs cannot be heard to say that the developer cannot make additional construction as is sought to be made by way

of construction of building no. S-5. The learned Counsel submits that as a matter of fact the plan annexed with Commencement Certificate dated

21st January, 1976 in respect of building no. S-4 would itself reveal that the proposed S-5 building is shown in the plan and, therefore, the

members of the appellant-society were made sufficient disclosure regarding the proposed construction and as such their consent would not be

necessary for construction of building S-5. The learned Counsel relied on the judgment of the learned Single Judge of this Court in the case of

Fairview Co-operative Housing Society Ltd. Vs. Savinder S. Rekhi and Others, in support of the submission that if the consent is given by the

purchaser of the flat for additional construction in the agreement itself, there is no necessity to obtain a fresh consent. The learned Counsel further

relies on the judgment of learned Single Judge of this Court in the case of Ralph D''Souza & Ors. v/s. Danny D''souza 2006 (3) Bom.C.R. 326J.

The learned Counsel further submits that the challenge to an order passed under Regulation 64(b) cannot be entertained in the present suit in view

of the specific bar contained in provisions of Section 149 of the MRTP Act. The learned Counsel, therefore, submits that if the plaintiffs-appellants

want to challenge the same, it cannot be made by way of suit but only in the exercise of writ jurisdiction of this Court. The learned Counsel further

submits that reference in Regulation 64(b) to the term ''neighbouring'' has to be naturally construed as a neighbours outside the plot in question and

not the members of the plaintiff-appellant Society. The learned Counsel submits that since the members of the plaintiff-appellant Society are very

well aware regarding the proposed S-5 building, then by no stretch of imagination it could be held that the term neighbours in Regulation 64(b)

would mean to include the purchasers of the tenements in the building which are part of the same plot. The learned Counsel further submits that

plaintiffs have also not pleaded regarding the deficiencies which are likely to affect them on account of construction of building S-5. The learned

Counsel submits that insofar as appeal is concerned, from the perusal of the settlement between the parties, it would reveal that there is an

informed consent by the appellant-society giving permission to the developer to make any sort of development that he desires and, therefore,

contention in that regard is without substance. The learned Counsel submits that undertaking in question is given on 18th September, 1981. It is

submitted that by this time the construction of buildings S-1 to S-3 was already over and the purchasers of the tenements therein had occupied the

flats. It is, therefore, submitted that said undertaking would not be applicable insofar as the occupants of buildings S-1 to S-3 are concerned. The learned Counsel submits that in any case since the occupants of the building S-4 have given an informed consent by virtue of settlement, the

contention with regard to undertaking is without any substance.

18. The learned Counsel further submits that the Government order of 2007 would not apply to the facts of the present case inasmuch as the TDR

that is being used by the respondent-developer is not from the suit plot but has been purchased by the respondent-developer from somewhere else

and is only sought to be used in the suit plot.

19. Shri Tulzapurkar, the learned Senior Counsel relies on following judgments on behalf of respondents1 and 2; in the case of Fairview Co-

operative Housing Society Ltd. Vs. Savinder S. Rekhi and Others, ; Ralph D''souza and Others Vs. Danny D''souza and Others, ; Jamuna

Darshan Co-op. Hsg. Soc. Ltd. v. JMC & Meghani Builders, [NMS No. 2220/2007 in Suit No. 3938/2001 dated 21st September 2007

(unreported]; Panjuman Hassomal Advani Vs. Harpal Singh Abnashi Singh Sawhney and Others, .

20. Both Shri Samdhani and Shri Tulzapurkar vehemently submit that since all the earlier plans show that a building S-5 was likely to be

constructed on the area which is now being used for construction of the building as per 2010 plans, there was a sufficient disclosure to the

purchasers of the flat and as such there is sufficient compliance with the mandatory provisions of MOFA. The learned Counsel vehemently submit

that once in the layout it is shown that there is a proposed building, it hardly matters as to whether in the earlier plans the building shown is ground

+ one or ground + four or as to whether it is ground + 28 as shown in the present plan. The learned Counsel, therefore, submit that once the area

wherein the building is proposed was disclosed in the layout, no consent would be necessary if the height of the building is sought to be increased.

Shri Samdhani, the learned Counsel categorically states that building S-5 which is permitted under 2010 plans is on the same area which was

earmarked for S-5 building in the earlier plans and that there is no horizontal increase in the area. It is submitted that only height of the building has

increased in 2010 plans, as compared to the earlier plans. The learned Counsel further submits that the two Division Benches of this Court in the

case of Grand Paradi Co-op. Hsg. Society and Manrathna Developers have in unequivocal terms held that the consent of the flat takers is not

necessary for construction of an additional building. The learned Counsel submits that the Single Judge of this Court would be bound by the law as

laid by the Division Benches and, therefore, there should be no impediment in construction of the additional building as sought to be done by the

defendant-developer. The learned Counsel, therefore, submits that the motion and the appeal deserves to be dismissed.

21. With the assistance of the learned Counsel for the parties, I have perused the material on record, the relevant provisions and the judgments

cited.

22. The learned Counsel for the developer has placed on record various plans which were approved from time to time by the competent authority of the Corporation. First of such plans is sanctioned on 10th November, 1973. The said plan shows five buildings namely A-1, A-2, B-1, B-2 and C-1. In the said plan, the buildings are shown to have ground + 6 floors. It is pertinent to note that in the said plan the building C-1 which is now S-5 is shown in an open area adjacent to building B-2 (which is now S-4). The rest of the area abutting building C-1 is shown as open area. The next plan submitted on behalf of developer is also sanctioned on 10th November, 1973 in respect of building A-2, which also shows the same lay out. The 3rd plan submitted by the developer is sanctioned on 15th January, 1974 and is in respect of building B-1. The layout in the said plan is also identical with the earlier plans. However, it is to be noted that the agreements entered into between the purchasers were not on the basis of these sanctioned plans. It appears that subsequently again another plan was sanctioned on 20th January, 1976 wherein building A-1, A-2, B-1 and B-2 and C-1 have been shown. In the said plan, building C-1 is shown to be a proposed structure of ground + one floor. It could also be seen from the agreements entered between the developer and the purchasers in respect of building nos. S-1, S-2 and S-3 that what was stated in the agreement was that the vendor had desired to construct a further building as "unit S-4" consisting of ground and 10 upper storeys. It is further stated that the vendors were also desirous of constructing a 5th building of ground + one structure if the plans were sanctioned by the Corporation. It is to be noted that in the said layout which is annexed to the agreement, proposed building S-5 is shown in the small corner abutting the open area which is parallel to Swami Vivekanand Road. It thus appears that the agreements entered by the developer with the purchasers on the basis of the plans which were sanctioned on 10th January, 1976 wherein building C-1 (now S5) which was proposed in future was to consist of ground + one floor. The appellants have also placed on record a map which according to them is sanctioned by the Corporation on 5th April, 1983 in which the layout does not show existence of any proposed S-5 building. However, the developer relies on the plan of the same date wherein the future extension is shown. The said plan which is sanctioned on 23rd April, 2011 (hereinafter referred to as 2001 plan) shows the area of FSI consumed to be 93%. In the said plan of 2001, the proposed area of the building C-1 (now S-5) is shown to be 888.96 meters. It is also not in dispute that in the said plan the number of tenements proposed to be constructed were 18 in number and in fact the developers completed the construction of S-5 building as per plan sanctioned in 2001 including the brick work. It appears that on 7th August, 2010 the plans which are the subject matter of the present suit were sanctioned by the Corporation which provided for construction of basement + ground + parking + one

amenity floor + 22 floors for the residential premises. It could thus be seen that though S-5 building, which as per the 2001 plans was to have built

up area of 888.96 sq. meters, due to the impugned plans it will have a built up area of 7722 s.q meters. In this factual background, I am required

to consider the rival submissions on behalf of the parties.

23. For considering the controversy, in question, it would be necessary to refer to certain provisions of the MOFA. Clause ""m"" of Sub-section 2 of

Section 3 of the MOFA reads thus:

General liabilities of promoter-

(1)....

(2) A promoter, who constructs or intends to construct such block or building of flats, shall-

(a) to (l) ....

(m) when the flats are advertised for sale, disclose inter alia in the advertisement the following particulars, namely:

(I) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(ii) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the

purchaser of flat; and the intervals at which the installments thereof may be paid;

(iii) the nature, extent and description of the common areas and facilities; and

(iv) the nature, extent and description of limited common areas and facilities, if any.

24. Perusal of Section 4 of the MOFA would reveal that the promoter before he accepts any sum of money as advance payment or deposit, which

shall not be more than 20 percent of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken

such flats, and the agreement shall be registered under the Registration Act, 1908 (XVI of 1908); and such agreement shall be in the prescribed

form.

The unamended Section 7 of the relevant rules reads thus:

After the plans, and specifications of the buildings 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) any alterations in the structures described therein in respect of the flat or flats which are agreed to be taken, without the previous consent of that

person; or

(ii) any other alterations in the structure of the building (or construct any additional structures) without the previous consent of all the persons who

have agreed to take the flats.

(Emphasis supplied)

The words, ""or construct any additional structures"", were deleted by the amendment vide Maharashtra Act 36 of 1986. By the said amendment, Section 7A was added and it provides that the amendment to Section 7 would apply retrospectively and it provided that it shall be deemed to be

effective as if the said Clause (ii) as so substituted had been in force at all material times; and the expression ""or construct any additional

structures"", be deemed never to apply or to have applied in respect of the construction of any other additional buildings or structures constructed

or to be constructed under a scheme or project of development in the layout.

25. The relevant portion of Section 10 of the MOFA reads thus:

Promoter to take steps for formation of cooperative society or company - (1) As soon as a minimum number of persons required to form a

cooperative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for

registration of the organisation of persons who take the flats as a cooperative society or, as the case may be, as a company; and the promoter shall

join, in respect of the flats which have not been taken, in such application for membership of a Cooperative society or as the case may be of a

company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act.

Provided that, if the promoter fails within the prescribed period to submit an application to the Registrar for registration of society in the manner

provided in the Maharashtra Cooperative Societies Act, 1960 (Mah. XXIV of 1961), the Competent Authority may, upon receiving an

application from the persons who have taken flats from the said promoter, direct the District Deputy Registrar, Deputy Registrar or, as the case

may be, Assistant Registrar concerned, to register the society:

Provided further that, no such direction to register any society under the preceding proviso shall be given to the District Deputy Registrar, Deputy

Registrar or, as the case may be, Assistant Registrar, by the Competent Authority without first verifying authenticity of the applicants'' request and

giving the concerned promoter a reasonable opportunity of being heard.

26. The relevant portion of Section 11 of the MOFA reads thus:

Promoter to Convey title, etc., and execute documents according to agreement - (1) A promoter shall take all necessary steps to complete his title

and convey, to the organisation of persons, who take flats, which is registered either as a cooperative society or as a company as aforesaid, or to

an association of flat takers or apartment owners his right, title and interest in the land and building, and execute all relevant documents therefore in

accordance with the agreement executed u/s 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the

conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

27. Section 16 of the MOFA provides that the provisions of this Act, except where otherwise provided, shall be in addition to the provisions of

the Transfer of Property Act, 1882 (IV of 1882) and shall take effect notwithstanding anything to the contrary contained in any contract.

28. The relevant portion of Rule 9 reads thus:

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 the Cooperative society or the company is registered or, as the case may be, the

association of the flat takers is duly constituted.

29. The Clauses 3 and 4 of Form V, which is a model form of agreement to be entered into between promoter and purchaser of flat, are declared

to be statutory and mandatory by the legislature. The same are reproduced in the paragraph 17 of the judgment of the Apex Court, which is

reproduced hereinafter.

30. The Apex Court, in the case of Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, , had an occasion to

consider the aforesaid provisions of the MOFA. Their Lordship of the Apex Court have observed thus:

17. 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-a-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 Subsection (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.

18. 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.

19. 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.

31. Vide the aforesaid judgment the Apex Court had remitted the matter to this Court for hearing an appeal afresh which appeal was decided by

me on remand. After considering the aforesaid judgment of the Apex Court and the judgment of the Division Bench of this Court in the case of

White Towers Co-op. Hsg. Society Ltd. Vs. S.K. Builders and Others, and judgment of learned single Judge of this Court in the case of Megh

Ratan Co-operative Housing Society Ltd. Vs. Rushabh Rikhav Enterprises and Others, , I have observed in the case of Madhuvihar Co-op. Hsg.

Society (supra) as under:

37. The Apex Court, in the aforesaid judgment, in unequivocal terms, has held that 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. It has further been held that the obligation

remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. It has further been observed, that the obligation is strengthened

by insertion of Sub section (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36/86. The Apex Court has also held that as per

Clauses 3 and 4 of the Rules, which are declared to be statutory and mandatory by the Legislature, the promoter is not only obliged statutorily to

give the particulars of the land, amenities, facilities etc., but is also obliged to make full and true disclosure of the development potentiality of the

plot which is subject matter of the agreement. It has further been held that the promoter is not only required to make disclosure concerning the

inherent FSI, but is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with

additional FSI/floating FSI/TDR. In unequivocal terms, the Apex Court has held that 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. The Apex Court has held that the obligation remains unfettered because the concept of developability has to be harmoniously

read with the concept of registration of society and conveyance of title. It has been held that 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 layout plan, building rules and Development Control Regulations etc.

38. A Division Bench of this Court, in the case of White Towers Cooperative Housing Society Ltd. v. S.K. Builders and Ors. (cited supra), while

considering the judgment of the Apex Court, in the present case, has observed thus:

The Apex Court in Jayantilal Investments" case, has clearly observed in para 20, after taking into consideration the provisions of Clauses 3 and 4

of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964, that the said provisions 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 F.S.I., he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional F.S.I./floating FSI/T.D.R. 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. Having observed so in relation to the statutory provisions in Clauses 3 and 4 of the

said Rules, the Apex Court has further ruled that:

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.

Obviously, the flat takers stand assured that in case of any change to be made in the project, as was disclosed to the flat takers at the time of

entering into agreement, the same has to be by following the proper procedure and without disturbance of the rights accrued to the flat purchasers

in relation to the Flats and all benefits attached to the flats including in relation to the land on which the building having such flat is situated. Taking

into consideration the same, if a portion of the plot wherein the structure having the flat is situated is to be excluded and is to be amalgamated in the

neighbouring plot, and the project in this regard is not disclosed to the flat takers at the time of the agreement being entered with the flat takers, it

would be totally contrary to the decision of the Apex Court in Jayantilal Investments'' case. This aspect has not been considered by the learned

Single Judge while passing the impugned order.

39. The learned Single Judge of this Court had an occasion to consider the aforesaid judgment of the Apex Court, in the case of Megh Ratan Co-

operative Housing Society Ltd. Vs. Rushabh Rikhav Enterprises and Others, , wherein the learned Single Judge has observed thus:

The Supreme Court has held that Clause No. 4 of the model agreement prescribed under the MOF Act and MOF Rules, incorporates the

statutory obligation and a promoter is required to declare to the flat takers the floor space index available in respect of the land in square metres

and the floor space index which the promoter has utilised. In case, the promoter has utilised FSI of any other land or property as a floating F.S.I.

he is required to disclose the same to the flat takers.

As stated earlier, the defendant No. 1 had disclosed to the flat purchasers that the total F.S.I. proposed to be consumed as per the plan at Exh. ""J

was 2490.84 sq. mtres. Now the defendants propose to consume 4460 sq. mtrs. of the F.S.I. by utilising floating F.S.I. or T.D.R. of another

property to the extent of 1970 sq. mtrs. This was not disclosed to the flat purchasers nor their consent was not obtained for such additional

utilisation of the FSI. Prima facie, this could not have been done without consent of the flat takers.

40. It can, thus, be seen that it is settled position of law, as laid down by the Apex Court, that a prior consent of the flat owner would not be

required if the entire project is placed before the flat taker at the time of agreement and that the builder puts an additional construction in

accordance with the layout plan, building rules and Development Control Regulations. It is, thus, manifest that if the promoter wants to make

additional construction, which is not a part of the layout which was placed before flat taker at the time of agreement, the consent, as required u/s 7

of the MOFA, would be necessary.

32. It is thus clear that relying on the judgment of the Apex Court in the case of Jayantilal Investment it has been held that at the time of execution

of the agreement with the flat takers, promoters are statutorily obliged to place before the flat taker the entire project scheme be it one building

scheme or multiple number of building scheme. It has been further held by the Apex Court that obligations remains unfettered because the concept

of developability has to be harmoniously read with concept of registration of Society and conveyance of title. It has been held that once the entire

project has been placed before the plaintiff at the time of agreement then the promoter is not required to obtain prior consent of the flat takers as

long as builder makes additional construction in accordance with the lay out plans, building rules and DC Regulations etc. It has been held that if

the construction which is sought to be made was not a part of layout which was placed before the flat taker at the time of agreement, the consent

as required u/s 7 of the MOFA would be necessary.

33. In the present case the plaintiffs have placed on record one of model agreements which has been entered into between the developer and one

Tehmurash Patel in respect of buildings S-1, S-2 and S-3. It will be relevant to refer to recitals III, IV, V and VI of the said agreement which read

thus:

III. The Vendors are desirous of constructing building consisting of ground plus six upper storeys in each of the aforesaid units, which would

consist of shops on the ground floor of various dimensions and residential flats above the ground floors.

IV. The Vendors are desirous of constructing further buildings as Unit S/4 consisting of ground and ten upper storeys and Unit S/5 consisting of

ground and one upper storey upon plans in respect thereof being sanctioned by the Municipal Corporation of Greater Bombay.

V. The layout in respect of these amalgamated plots consists of 15 ft. wide paved paths, pedestrian path-way, car parking, children park, garden,

common toilet for ladies and gents in each of the aforesaid Units.

VI. The construction of the building relating to S/1 unit is in advanced stage of completion whereas construction of Units S/2 and S/3 has been

started.

It can thus clearly be seen that the representation that was made to the intending purchasers was that the developer was desirous of constructing a building as "unit S-4", which was to consist of ground and 10 floors. A further representation is made that the developer is also desirous of

constructing unit S-5 consisting of ground and one upper storey. As already discussed herein above from the perusal of the layout presented, the

said S-5 was shown on a small portion of open plot parallel to Swami Vivekanand Road. Insofar as the appellant-society is concerned, the

agreements with the members thereof are executed in the year 1982 and 1984. It will be relevant to refer to clause-IV of the agreement executed

by the developer with Vishnu Kumar Gupta and Manjuladevi Gupta in June 1982 which reads thus:

IV. The Vendors are desirous of constructing further buildings as Unit S/4 consisting of ground and ten upper storeys and Unit S/5 consisting of

ground and one upper storey upon plans in respect thereof being sanctioned by the Municipal Corporation of Greater Bombay.

It is thus clear that the representation given to the flat purchasers as in 1982 was that the building S-5 was to consist of ground + one floor. It is

pertinent to note that the layout which is annexed to the said agreement, does not show existence of any proposed building S-5, on the contrary,

the entire area parallel to Swami Vivekanand Road is shown open. Insofar as most of the agreements which were executed in the year 1984, there

is no mention of building S-5. It is to be noted that in clause-13 of one of such agreements entered between the developer and one Ramesh Bhatia,

the developer had only reserved his right to make additions or put up additional structures and storeys on the building being constructed. It is also

pertinent to note that the layout which is annexed to the said agreement also does not show existence of any proposed building S-5. As already

discussed herein above even in respect of the agreements with the members of the plaintiff Society, the proposed S-5 building is shown to be a

structure of ground + one storey. It appears that for the first time in the plans which were sanctioned from 23rd April, 2001, the building S-5 is

shown to have a structure of ground + four floors having a total built up area of 888.96 sq. meters. No doubt that three members residing in the S-

1, S-2 and S-3 had filed Suit No. 3093/2004 alongwith Notice of Motion No. 2635/2004 in the City Civil Court wherein the plans sanctioned on

23rd April, 2001 which was revalidated from time to time was the subject matter. In the said motion the learned Judge of the City Civil Court

finding that the balance FSI permitted the construction as per the sanctioned plans therein and further considering that since the distance of the

proposed construction from the existing building of the plaintiff range from approximately 13 meters to 26 meters and as such there was no

obstruction to the air and light of the existing buildings and that there was no violation of the DC Regulations dismissed the motion. In an appeal

against order carried to this Court being AO No. 876/2004, the learned Single Judge dismissed AO finding that apart from recreational ground

already maintained in as provided for the entire layout, the sanctioned plan of building S-5 indicated that 5% of open spaces could be maintained as recreational ground. However, the learned Judge made it clear that respondents shall not create building S-5 except in accordance with law and

sanctioned plan. It is thus clear that the proceedings before the learned City Civil Judge so also in appeal against order were pertaining to 2001

plan wherein building S-5 was to consist of ground + four floors having the total built up area of 888.96 sq. meters. In any case the said suit was

filed by individual members and not by the present plaintiff. In that view of the matter, I do not find that there is substance in the contention raised

on behalf of the developers that said finding would apply as res judicata and as such the present suit will not be maintainable.

34. As discussed herein above, as held by the Apex Court in the case of Jayantilal Investment, it is obligatory on the part of the promoter to make

full and complete disclosure of the development potentiality of the plot which is a subject matter of agreement. It has also been held that promoter

is not only required to make disclosure concerning inherent FSI but he is also required at the stage of the layout plan to declare whether plot in

question in future is being capable of loaded with additional FSI/floating FSI/TDR. As held by the Apex Court, at the time of execution of the

agreement promoter is statutorily obliged to place before the flat takers the entire project/scheme. It has been held by the Apex Court that once

the entire scheme 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

taker as long as the construction is in accordance with layout plan, building rules and DCR.

35. It will, therefore, have to be seen as to whether the impugned construction which the developer desires to construct is in accordance with the

full disclosure that he is required to make and as to whether it is in accordance with the layout plan which was presented to the flat purchasers at

the time of execution of the agreement. As already discussed herein above, the disclosure that the developer made to the members of the plaintiff-

society regarding the proposed S-5 building, which also was to be constructed if permitted by the Corporation, was to have ground + one floor.

The same was located in one corner of the open plot abutting S-4 building. Insofar as the members of the appellant-society is concerned, in the

agreement which have been entered into in 1982, there is a reference to S-5 building of ground + one floor. Insofar as members who have entered

into agreement in 1984, there is no mention in so far as S-5 building is concerned. It is pertinent to note that in neither of the layouts annexed to

1982 agreement or 1984 agreement the proposed S-5 building is shown. On the contrary the area which is parallel to S.V. Road on one side and

is surrounded by paved pathway on all other sides is shown as an open area. It is thus clear that the lay out placed before the flat takers either

does not show S-5 building or if it shows S-5 building, the same is shown to consist of ground + one floor. In my considered view, therefore, in

view of the law laid down by the Apex Court in Jayantilal Investment, since the construction which is sought to be made is not in accordance with layout plan presented to the flat takers, the same cannot be permitted unless there is a consent of the members of the plaintiffs and the appellant-

society.

36. I am unable to accept the contention on behalf of the developer that if in the layout an area is earmarked for proposed construction, it hardly

matters if the layout shows a building of 1+1 floor and the construction is in fact of four storeys, 10 storeys or 28 storeys. In my view the said

argument is heard to be rejected. If such an argument is accepted, it would frustrate the very purpose of beneficial legislation like MOFA.

37. The very purpose that the entire layout should be presented to the flat purchasers and that there should be full disclosure made to him is with

the purpose that he should be aware as to what is the entire layout of the scheme in which he is going to purchase the property. Suppose the

original layout shows only the proposed building of ground + one, the flat taker would purchase the same with the knowledge that only few more

persons are likely to join the Society and there would not be much effect on the facilities, amenities etc. provided to the members of the Society.

However, if a structure of ground + one is converted in a towering structure of 28 storeys, the entire scenario would change. The number of

additional members that would reside on the said plot would increase by substantial number, thereby putting an additional load on the

infrastructure, amenities, facilities etc. available on the said plot. In any case, if this is permitted, the very purpose of requiring a developer to make

full and complete disclosure would stand frustrated. I am, therefore, unable to accept the contention of the learned Counsel for the developers in

that regard.

38. That leaves to the next question as to whether in view of various clauses in the agreements to which reference has been made by the learned

Counsel for the developers, there has been a consent by the flat purchasers for the additional construction or not?

39. After considering the various judgments on the issue, I have observed in the case of Madhuvihar Co-operative Hsg. Society (cited supra).

46. Thus, there is consistent view of this Court, that the blanket consent or authority obtained by the promoter, at the time of entering into

agreement of sale or at the time of handing over possession of the flat, is not consent within the meaning of Section 7(1) of the MOFA, inasmuch

as, such a consent would have effect of nullifying the benevolent purpose of beneficial legislation.

47. It is, thus, clear that it is a consistent view of this Court, that the consent as contemplated u/s 7(1) of the MOFA has to be an informed consent

which is to be obtained upon a full disclosure by the developer of the entire project and that a blanket consent or authority obtained by the

promoter at the time of entering into agreement of sale would not be a consent contemplated under the provisions of the MOFA. I am in respectful

agreement with the consistent view. The interpretation placed by the learned Single Judges of this Court is in consonance with the benevolent provisions of the MOFA which have been enacted for protecting flat takers.

It is thus clear that in unequivocal terms, it has been held that a blanket consent or authority obtained by the promoter at the time of entering into an

agreement of sale is not a consent within the meaning of Section 7 of the MOFA. It has to be an informed consent which is to be obtained on full

disclosure by the developer of the entire project. In that view of the matter, the contention in that regard is also liable to be rejected.

40. Insofar as the judgments cited by the learned Counsel for the developers in the case of Mohatta Nagar Co-op. Hsg. Society Ltd. v. M/s.

Vishram Khimji & Son, 1944 (1) Bom.C.R. 444; Mr. Sudhir Shetty v. Mr. Dharma V. Desle (Appeal No. 844/2003 in Arbitration Petition No.

171/2003) and Panjumal Ghassomal Advani v. Harpal Singh Abnashi Singh Sawhney, AIR 1975 Bom. 120 are concerned, all these judgments

are delivered by the learned Division Benches or Single Judges prior to the pronouncement of law by the Apex Court in the case of Jayantilal

Investment and as such it would not be necessary to refer to the said judgments.

41. Insofar as the reliance placed by the learned Counsel for the developers on the judgment of the Division Bench of this Court in the case of

Grand Paradi Co-op. Hsg. Society Ltd. & ors. v. Mont Blanc Properties & Industreis Pvt. Ltd. and anr. (Appeal No. 599/2002 in NM No.

94/2002 in Suit No. 99/2002) is concerned, in my view the said judgment would rather support the case of the plaintiffs-appellants rather than the

developer. The Division Bench observes thus:-

10. It is thus clear that the builder is always entitled to raise additional structures if he discloses the additional structures in the layout plan itself at

the time when he sales the flats. No consent of the flat owners is necessary for raising additional structures. But if the additional structures are not

disclosed in the layout plan then previous consent of the flat owners is necessary. Sofar as the present case is concerned, we find that the members

of the appellants/plaintiff no.1 society have clearly given their clear consent to defendant No. 1 to raise additional structures.....................

It is thus clear that the Division Bench has held that the builder is always entitled to raise additional structure if he discloses that additional structure

in the layout plan itself at the time of registration of plan. In such a case consent of the flat owners is not necessary for raising additional structure.

However, the Division Bench has clearly held that if the additional structures are not disclosed in the layout plan then the previous consent of the

flat owners is necessary. In the said case upon perusal of the facts as appearing in that matter, the Division Bench has held that the plaintiff no.1

Society has clearly given their consent to the defendant no.1 to raise additional structure. However, in the facts of the present case it could clearly

be seen that in the agreements entered into by the defendant with the members of the plaintiff or appellant-society, either the structure S-5 is not shown in the layout or if shown it is not more than ground + one storey. As such the said judgment will not be applicable to the facts of the present

case.

42. Insofar as judgment of the Division Bench in the case of Manratna Developers is concerned, in the facts of the said case the Division Bench

came to a finding that upon perusal of material on record it could not be said that the promoter/developer had not made true and full disclosure to

the flat takers. It is further to be noted in the said case the Division Bench further found that amenities in the form of recreation ground are, in no

way, reduced. As such finding that no prima-facie case was made out by the plaintiff and that the test of balance of convenience was in favour of

the defendant, the Division Bench interfered with the order passed by the learned Single Judge. Therefore, in my respectful view the said judgment

will also not be applicable to the facts of the present case, as facts of the present case clearly go to show that construction as sought to be made is

totally contrary to the law laid down by the Apex Court in the case of Jayantilal Investment (cited supra).

43. Insofar as the judgment of the learned Single Judge in the case of Fairview Co-operative Housing Society Ltd. is concerned, the said judgment

does not refer to the law laid down by the Apex Court in the case of Jayantilal Investment & as such in my view the reliance thereon would not be

of any assistance to the case of the developers.

44. Insofar as the judgment of the learned Single Judge of this Court in the case of Jamuna Darshan Co-operative Housing Society Ltd. and

Others Vs. J.M.C. and Meghani Builders and Others, is concerned, the learned Single Judge has attempted to distinguish the judgment of the

Apex Court in the case of Jayantilal Investment (cited supra). It will be relevant to refer to para-43 of the judgment which reads thus:-

43. It is in this light that the order passed by the learned Single Judge was reversed by the Division Bench. The factual position is more or less

identical. It is not the case before me that the developer did not disclose the details of the FSI at the time when the agreement was entered into

with the flat purchasers. On the other hand, the argument is that the layout plans did not disclose the proposed building. That argument cannot be

accepted. If that is accepted then the Division Bench ruling and stipulations in the agreement will have to be given a complete go-by. That is not

permissible in law so also on facts. That apart, the layout plans were attached to the agreement for sale executed with the members of the flat

purchasers of the Plaintiff No. 1 society and it is the specific case of the 1st Defendant that it showed the proposed construction. The 1st

Defendant has made a serious grievance that the Plaintiff has annexed only the agreements leaving out the layout plan which is attached thereto.

The layout plan has been produced before me during the course of the arguments and on perusal there of prima facie the 1st Defendants appear to

be right in their contention.

45. It can thus be seen in the facts of the said case, learned Single Judge upon perusal of the layout plan which was produced before him has found

substance in the contention of defendant-developer that in the layout plan proposed construction was shown. As such the said judgment will not be

applicable to the facts of the present case.

46. Insofar as judgment in the case of Shailaja Kamlakar Limaye v Nilkanth Ganesh Pethe, (2010) 4 Mh.L.J. 160, the Division Bench of this

Court has observed thus:-

Any larger and wider controversy as to whether the ratio of the judgment of the Hon''ble Supreme Court in the case of Jayantilal (supra) has been

correctly understood and applied in the case of Jamuna Darshan Co-operative Housing Society Limited and others (supra) by this Court need not

be considered in the peculiar facts of this case. Finding that there were clear clauses in the agreement permitting the construction of building No. 1

at site and the plans having already been approved in that behalf so also the construction on the own showing of the plaintiffs having commenced,

then, we do not find that the learned Judge was in error in refusing the interim reliefs.

It is thus clear that the Division Bench has not found it necessary to go into the question as to whether the ratio of the judgment of the Apex Court

in the case of Jayantilal Investment has been correctly understood and applied in the case of Jamuna Darshan Co-op. Housing Society or not. It

has been held that in the facts and circumstances of the case no error was found with the reasoning given by the learned Judge in refusing the

interim-relief. As such the said judgment would also not be applicable to the facts of the present case.

47. Insofar as the reliance placed by Shri Samdhani on the judgments of the Apex Court in the case of The State of Orissa Vs. Sudhansu Sekhar

Misra and Others, and Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and Others, in support of the proposition

that the provisions of MOFA have to be interpreted textually and contextually is concerned, there cannot be any quarrel with the proposition of

law as advanced. However, when the Apex Court has interpreted the provisions of law in question i.e. MOFA, in my considered view it is not

open for this Court to venture into again attempting to interpret the said provisions. As a Judge of High Court I am bound to follow the

interpretation on the provisions of law as interpreted by the Apex Court.

48. That leaves me to the next question regarding the powers exercised by the Corporation u/s 64(b) of the 1991 DC Regulations. A preliminary

objection has been raised on behalf of the learned Counsel for the developer that in view of the provisions of Section 149 of the MRTP Act since

the orders passed therein have been given finality, the suit would not be maintainable. In this respect it would be appropriate to refer to the decision

of the Division Bench of this Court. In the case of Raja Bahadur Motilal and Another Vs. State of Maharashtra and Others, , wherein the Bench has observed thus:-

12. What is necessary u/s 149 to acquire finality and invite the bar of civil suit is, it should be an order passed or direction issued by the State

Government or it should be an order passed or notice issued by an Regional Board, Planning Authority or development Authority under this Act. It

is provided by this section that nos uch order shall be questioned in any suit or in any legal proceedings. It is obvious therefore that a suit or legal

proceedings for quashing a deemed permission u/s 45(5) is maintainable. Even otherwise u/s 149 what is barred is questioning of an order made

under the Act in the civil suit. It does not bar any suit whereby a party to it can be prevented from acting on an action and order made under the

Act. The bar spelt out by section 149 is therefore very limited.

49. It is thus clear that in view of the law laid down by the Division Bench of this Court, the provisions of Section 149 would not bar any suit

whereby a party can be prevented from acting on an action and order made under the Act. In that view of the matter, I find that contention in that

regard is without substance.

50. In this regard it would also be relevant to refer to Regulations 64(b) of 1991 Regulations.

64. Discretionary powers.-

(a)..... ....

(b) In specific cases where a clearly demonstrable hardship is caused, the Commissioner may for reasons to be recorded in writing, by special

permission permit any of the dimensions prescribed by these Regulations to be modified, except those relating to floor space indices unless

otherwise permitted under these Regulations, provided that the relaxation will not affect the health, safety, fire safety, structural safety and public

safety of the inhabitants of the building and the neighbourhood.

It could thus clearly be seen that in specific cases where a clearly demonstrable hardship is caused, the Commissioner for reasons to be recorded

therein by special permission may permit any of the dimensions prescribed by the Regulations to be modified except those relating to floor space

indices unless otherwise permitted under the Regulations. However, while doing so, it has to be ensured that relaxation will not effect the health,

safety, fire safety, structural safety and public safety of the inhabitants of the building and the neighbourhood. The Division Bench of this Court in

the case of Mr. Rajendra Thacker Vs. Municipal Corporation of Gr. Mumbai and Another, had an occasion to consider the scope by Regulation

64(b) of the 1991 Regulations. The Division Bench observed thus in para 13 as under:

13. However, what we find is that the manner in which such powers should be exercised and the limitations on the exercise of such powers are

contained in Section 46 of the M.R.T.P. Act, 1966, read with reg. 64(b) of the Development Control Regulations for Greater Mumbai, 1991, These two provisions are to be read together and harmoniously. When the Municipal Commissioner is considering an application for permission to

retain an unauthorised development, he is required by Section 46 to have ""due regard to"" to the provisions of any draft or final plan or proposal

published under the M.R.T.P. Act, 1966. It is an admitted position before us that the Development Control Regulations for Greater Mumbai, 1991

are a part of such plan. We accept that the words ""shall have due regard to"" would not mean ""shall only have regard to"" but in our view, they

cannot be construed to mean ""shall have disregard to"". Even accepting that the Development Control Regulations for Greater Mumbai, 1991 are in

the nature of guidelines, such guidelines cannot be disregarded or violated. The D. C. Regulations are made in details to rule out any ambiguity.

They have been sanctioned by the State Government u/s 31(1) of the M.R.T.P. Act. Obviously the express provisions therein are meant to be

followed. The exercise of powers by the Municipal Commissioner will therefore, be constrained by the limitations contained in reg. 64(b) whenever

the power exercised is under the said provisions. The power to give concessions by way of relaxation under reg. 64(b) can only be done in

specific cases where a clearly demonstrable hardship is caused as provided thereunder. This hardship is not only the self created hardship of the

builders/developers/architects but the Commissioner is also required to take into account the hardship which may be caused by the proposed

modification to other directly affected persons such as residents, purchasers and neighbours. While exercising his powers, if any of these persons

make a representation, the Commissioner would be duty bound to take into account such representation. Besides, what can be modified/relaxed

u/s 64(b) are only ""dimensions prescribed by these Regulations"". By the term dimension what is meant is length, breadth, height, area and volume.

The order passed must indicate that the Commissioner applied his mind to the existence of demonstrable hardship. It must also indicate that the

Commissioner had applied his mind to ensure that the grant of such modification/relaxation will not affect the health, safety, fire safety, structural

safety of the inhabitants of the building or neighbourhood. Since Section 64(b) requires that the order of the Commissioner granting

modification/relaxation should be passed for reasons to be recorded in writing by special permission, the Municipal Commissioner cannot delegate

these powers in view of the constraints on his powers of delegation contained in reg. 63 of the Development Control Regulations for Greater

Mumbai, 1991. In our view, the provisions of Section 56 of the Mumbai Municipal Corporation Act, 1888 cannot be relied upon to contend that

the Municipal Commissioner can delegate his powers u/s 64(b) notwithstanding the constraints on delegation as contained in Regulation 63 of the

Development Control Regulations For Greater Mumbai, 1991, The powers and duties of the Commissioner which the Commissioner can depute to the Director (Engineering Services and Project) are the powers which he exercises under the Mumbai Municipal Corporation Act, 1888 and not

the powers conferred upon him by the M.R.T.P. Act, 1966. The delegation of powers and duties to be performed by the Municipal Commissioner

under the M.R.T.P. Act, 1966, in every case where he has to give ""special permission"", is expressly prohibited by reg. 63 of the Development

Control Regulations for Greater Mumbai, 1991. The Municipal Commissioner is required to give due regard to these aspects while deciding an

application for retention u/s 53(3) read with Sections 44, 45 & Section 46 of the said Act.

51. It can, thus, clearly be seen that division Bench in unequivocal terms has held that to give concessions by way of relaxation under Regulation

64(b), can only be done in a specific case where a clearly demonstrable hardship is caused. It has been held that the hardship referred to under

Regulation 64(b) is not only a self created hardship of a builder, developer or architects but the Commissioner is also required to take into account

the hardship which may be caused by the proposed modification to other directly affected persons such as residents, purchasers and others. The

Division Bench has further held that order passed must indicate that the Commissioner has applied his mind to the existence of the demonstrable

hardship. It further states that the order must also indicate that the Commissioner has applied his mind to ensure that the grant of such modification

relaxation will not effect, health, safety etc. of the occupants of the building or neighborhood. In this background, the office note as prepared by the

concerned officer of the Corporation would make an interesting reading.

52. The perusal of the said noting would create a doubt as to whether the same has been drafted by an independent officer of the Corporation or

has been drafted by someone whose only interest was to protect the interest of the developer. Whereas the provisions of 64(b) would provide that

though any modification is permitted in respect of dimensions, the same would not be permissible with respect to floor space indices unless

otherwise permitted under the Regulations. However, the report prepared would reveal that various concessions in respect of FSI have been

granted. The only reason given regarding hardship is that unless the relaxation is granted, it is not possible to exploit utilization of TDR except in the

building concerned. It also shows that the Architect has submitted that due to planning constraints, it is not possible to provide adequate open

space as per DC Regulations, 1991 and, therefore, request to condone the same is made. The other reason given is that the Architect has stated

that proposal becomes economically viable only after utilization of TDR. This reasoning is totally contrary to the law laid down by the Division

Bench, wherein it has been held that the self created hardship by a builder is not a ground for exercising powers under Regulation 64(b). Various

deficiencies in the open spaces to be kept on all sides have been relaxed. The area for the fitness centre, society office, servant''s toilet, MTNL

EPBAX, electric meter, letter box, building maintenance system room, drivers cum security rest room, DC set room, AC for compressor, free of

FSI have been granted. At the cost of repetition, it is to be noted that though Regulation 64(b) specifically provides that no modification in respect

of floor space indices should be granted unless otherwise permitted in these Regulations, the relaxation as aforesaid have been granted without

pointing out any specific provisions under the Regulations which would permit the same. It is to be noted that the said proposal prepared by the

Executive Engineer Building Proposal (D Ward) has been mechanically signed by the various authorities including the Municipal Commissioner.

Contrary to the decision of the Division Bench, no reasons of whatsoever nature have been given by the Municipal Commissioner for passing the

order. The Division Bench in unequivocal terms has held that it is obligatory on the part of the Municipal Commissioner to record reasons while

exercising the powers under regulation 64(b) and also give reasons as to why the relaxation is granted and as to how it does not affect the health,

safety etc. of the building and neighborhood. The perusal of the impugned report would show that the same is prepared by Executive Engineer and

has been endorsed by various authorities including the Municipal Commissioner. As already held by the Division Bench, Municipal Commissioner

prior to invoking powers under Regulation 64(b) is required to arrive at the subjective satisfaction that the condition as stipulated in Regulation 64

exists. It is thus clear that the subjective satisfaction has to be of the Commissioner and not of any other office. For exercising the power the

Commissioner ought to have passed a separate order pointing out therein as to why he has arrived at subjective satisfaction that conditions

necessary for invoking powers u/s 64(b) exists. In any case even the impugned report also lacks the reasonings which are necessary for invoking

the powers under Regulation 64(b). There is not even a whisper regarding the inconvenience etc. that would be caused to the members of the

plaintiff and appellant. The concession regarding the relaxation is being granted only on the ground that otherwise the project would become

economically unviable. It appears that the authorities have acted under a notion that they are only there to protect the interest of the

builder/developer and not the other citizens. In my considered view, at least prima-facie, the concession or relaxation granted by the defendant

no.7 Corporation vide report/order dated 5th December, 2009 and consequent building permission and commencement certificate granted are not

sustainable in law.

53. In so far as contention of Shri Samdani that there is clear distinction between the building plan and the layout plan is concerned, I find that said

contention to be well merited. Regulation 21 of the DC Regulations of 1991 require the layout to be submitted when more than one building is

proposed on any land and when development or redevelopment of any tract of land includes its division or sub-division into plots and when the land under development admeasures 1000 sq.m. Or more in a residential or commercial or in any industrial zone. The very purpose of the layout

plan is that intending purchaser knows the complete layout of the property in which he is purchasing the flat. In the present case, as I have already

discussed hereinabove the construction sought to be made is not in consonance with the layout presented to the flat purchasers at the time of the

agreement.

54. Insofar as the contention by the learned Counsel for the developer that the Government Order dated 23rd November, 2007 are not applicable

to the facts of the present case is concerned, said contention is also without any substance. It is the contention of the learned Counsel that the said

Government Orders, which are issued u/s 154, are only applicable in case of amalgamation of plots and not when the TDR is purchased from

somewhere else and loaded on the plot of a developer. I find that the said contention is based on a total misreading of the orders dated 23rd

November, 2007. The said order provides that the concept of TDR has been incorporated in Development Control Regulations of the most of the

cities which states that in lieu of grant of compensation for acquisition of reserved lands, a TDR should be given. It further states that there is also a

provision of granting TDR for slum rehabilitation scheme. It further states that insofar as Mumbai Municipal Corporation is concerned, the TDR is

also available in respect of heritage buildings. It further states that TDR which is generated can be utilised by the land owner/developer himself or

transferred to others. It states that, it has come to the notice of the Government that some developers at the time of getting plan sanctioned from

the Planning Authority, do not include the TDR. It further states that after some construction is complete and Co-operative Society established, the

developer do not execute the conveyance deed in favour of the Society. Thereafter, the developers seek permission for amalgamation of open

plots in the "neighbourhood" and without obtaining the permission of the Co-operative Society or the other land owners make an attempt to utilise

the TDR even in respect of the area of the land on which construction is complete and construct multi storey buildings. It further states that,

therefore, the individual rights of the persons are affected. It will be relevant to refer to the operative part of the said order issued u/s 154. It clearly

states that while giving permission for construction by utilizing the TDR, if the developer has not executed conveyance deed in favour of a co-

operative society of the occupants residing in the building constructed on the land, the TDR potential in respect of such part of the land on which

construction is made should not be permitted to be used by the developer while giving permission for development of the remaining plot or

amalgamated plot. It further states that in such cases the permission to use TDR should be given only in sofar as the open land available on the plot.

I find that applying the principle of contextual and textual interpretation, as argued by Shri Samdhani, the contention that said Government order is applicable only in case of amalgamation will have to be rejected. Reading the order in entirety, it would reveal that said order has been issued with

an object that a builder should not be permitted to use TDR potential of an area of a land on which the building is constructed and a Co-operative

Society formed, however, the developer has not conveyed the said land along with building to the Society.

55. The another contention of learned counsel appearing for the developers that the TDR is not in respect of the suit plot and the same is

purchased from some other property and, therefore, no prejudice is caused to the plaintiff/ appellant is also without any substance. Though the

TDR sought to be loaded is in respect of some other property, it cannot be forgotten that insofar as TDR potentiality is concerned, the suit plot is a

relevant factor. It cannot be forgotten that the TDR loaded cannot be more than inherent FSI available on the suit plot. It is not in dispute that the

only remaining inherent FSI available on the suit plot is 0.7% inasmuch as 0.93% has already been utilised. Had the developers executed

conveyance in favour of the plaintiff and the appellant to comply with statutory obligations, the TDR potential in respect of land on which buildings

of plaintiff and defendants are already constructed would have been available to the plaintiff/ appellant. Under the impugned plan the developers

are using TDR potential which could have been otherwise available to the plaintiff/ appellant society. In that view of the matter, the contention in

that regard is rejected.

56. So far as next contention of learned counsel for the respondents that in view of settlement dated 30th August 2003 there is an express consent

by the appellant for carrying out any sort of developments as desired by the developer is concerned, I am unable to accept this contention. The

letter dated 30th August 2003 has to be read in the context of the constant demands made by the appellant- society, as would be evident from

various letters including one which is at Exh. J to the appeal paper book, which states that the appellant had spent huge amount on various works

which were required to be completed by the developer which, in fact, have not been completed by the developer. The combined reading of Exh. J

with letter dated 30th August 2003 would reveal that the payment of Rs. 18 lakh is in respect of these claims of the appellant- society. The learned

counsel for the defendants has strenuously contended that clause (2) of the said letter dated 30th August 2003 (page 103) would mean to be

informed consent for all construction activities to be carried out by the developer. The said clause read thus:

Moreover, the society also undertakes to perform the following as the part performance of this settlement.

1) ....

2) You will not object to relocation of any reservations and to activities related to developments of any kind on Plot No. 21 & 22.

3).........................

I am of the considered view that if the contention of developer in this regard is to be accepted, the same would be doing violence to the provisions of MOFA as interpreted by the Apex Court in the case of Jayantilal Investments v. Madhuvihar Coop. Housing Society (supra), which

interpretation has been relied on by me while delivering the judgment in the case of Madhuvihar Co-op. Housing Society & Ors. v. Jayantilal

Investments (supra). In any case, at the most the said consent could be said to be binding on the appellant only in so far as plan of 2001 is

concerned, wherein building was to consist of ground+4 floors. The same cannot be construed as informed consent for building consisting of 28

floors.

57. That leaves me to the next question as to whether the undertaking given by the developer to the authorities while registration of the plaintiff''

society is applicable to the facts of the present case or not. It is to be noted that the said undertaking is of 18th September 1981 given at the time

when the plaintiff- society had applied for registration. Clause (9) and clause (13) of the said undertaking read thus:

9. that we have not made and will not take any alterations in the structure of the building or have not constructed and will not construct any

additional structure, without the previous consent of all the persons to whom units have been sold out, until the property is conveyed in the name of

the society, after is registration.

13. that we undertake to convey the right, title and interest in the property without making any reservation in our favour whatsoever within the

period mentioned in the agreement executed u/s 4 of the Maharashtra Ownership Flats (Regulation of promotion of Construction Sale,

Management and Transfer) Act, 1963 and if no such period is mentioned in the agreement reformed to above, there after Registration of the

Society, and to pass on documents of registration to the Society.

58. It is to be noted that the plaintiff- society was registered on 9th November 1982. It would, thus, be clear that the developer has given a clear

undertaking that they have not made and will not make any alterations in the structure of the building and will not construct any additional structure

without the previous consent of all the persons to whom units have been sold out, until the property is conveyed in the name of the society after its

registration. The developer has also undertaken to convey the right title and interest in the property without making any reservation within the

period mentioned in the agreement executed u/s 4 of MOFA and if no such period is mentioned in the agreement upon registration of the society. It

can, thus, be seen that after the registration of the plaintiff and appellant societies, the developer was duty bound to execute the conveyance in their

favour. Though it is tried to be urged on behalf of the developer that time to execute conveyance would be only after the entire project is complete

i.e. after the completion of building S-5 and, as such, time to execute conveyance is yet to arrive at, I am unable to accept this contention. If the

developer does not complete the project for decades together, does it mean that the statutory rights available to the society to get the conveyance executed would stand defeated. It is further to be noted that the advocate on behalf of the developer, on 11th March 1993 has communicated to

the advocate for the appellant that the conveyance could not be executed since there was no sub-division of the property falling to the share of the

plaintiff-society and the appellant-society and it has further been stated that the developer was willing to execute the conveyance jointly in favour of

both the societies. Not only that but the developer has also applied for sub-division of plot on 8th February 2000. However, it appears that the

developer has not pursued the matter thereafter. In this view of the matter, I find that the contention that the time to execute the conveyance is yet

to arrive is without any substance. The plaintiff- society was registered on 9th November 1982 whereas the appellant- society was registered on

24th May 1993. In that view of the matter, the developer was duty bound to execute the conveyance within a period of four months from the date

of registration of the societies. It will also be relevant to note that clause-4 of the statutory agreement in Form V which was in existence between

the period from 12th January 1990 to 6th March 1997 included the following portion:

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.

It is to be noted that the appellant- society was registered on 24th May 1993. The right to get conveyance executed in favour of the appellant

accrued within the period of four months from 24th May 1993 i.e. the date of registration. It can, thus, be seen that the aforesaid portion of clause-

4 was very much in existence when the right to get conveyance executed in favour of the appellant accrued and, as such, after the registration of

the society, the residual FSI would have been available to the society in respect of the land on which the building was constructed.

59. It is sought to be urged on behalf of the developer that in so far as prayer clause (h) of the notice of motion is concerned, it is seeking injunction

in the mandatory nature which cannot be granted unless an exceptional case is made out by the plaintiff. In so far as prayer clause (h) is concerned,

it seeks relief thereby directing the developer to remove its machinery etc. from the site on which the construction is being made. I find that in the

sanctioned plans of 2001 and 2010 the part of the plot abutting which the construction is sought to be made is shown as additional 5% of the area.

Undisputedly, the members of the plaintiff and appellant societies are also entitled to use the said R.G. area. In that view of the matter I find that

prayer clause (h) needs to be granted in part thereby directing the developer to remove machinery etc. from the 5% area reserved for R.G. and

remove fencing from that. In the totality of the circumstances, I find that the plaintiff has made out prima facie case for grant of injunction as prayed

for in the motion.

60. I find that even the test of balance of convenience and irreparable injury tilts in favour of the plaintiff rather than the defendants. If the injunction

as sought is not granted, the defendants would construct the building of 28 floors which he could not have constructed without the prior consent of the plaintiff and the appellant in view of law laid down by the Apex Court. At the same time it would amount to taking away the rights which the flat owners are given under the beneficial statute i.e. MOFA. If the construction of the building is permitted and if the Court, at the stage of hearing of the suit, comes to the conclusion that the construction was not permissible in law, it would lead to multiplicity of litigations. In the event the defendant- developer is in a position to establish that on account of proceedings he has sustained any damages, the same can always be compensated in monetary terms and decree in that regard can always be passed. I am, therefore, of the considered view that an injunction restraining the defendant-developers from carrying out construction in accordance with the commencement certificate of 2010 needs to be granted.

However, at the same time since the City Civil Court has refused to grant an injunction on the basis of plan of 2001 and which order was upheld by this Court in appeal against the order, I find that the developer can be permitted to proceed with the construction as per 2001 plan. One more reason for permitting the developer to proceed in accordance with 2001 plan is that except three individual members of the plaintiff-society neither the plaintiff nor the appellant herein have challenged the plan of 2001. Not only that they had permitted the construction to be completed upto fourth floor which was subsequently demolished by the developer to make construction as per 2010 plan. In so far as appeal is concerned, I find that the learned trial Judge has totally misapplied the principles in the matter of grant of injunction. The learned Judge has not considered the principles of prima facie case and balance of convenience and irreparable injury in the correct perspective. The only reason given by the learned trial Judge for dismissing the motion is that in view of the settlement between the appellant-society and the developer in the year 2003, there is an implied consent for construction of the additional structure. For the reasons given herein above I find that reasoning given is totally unsustainable.

As such, I find that the appeal needs to be allowed and the motion taken out by the appellant-plaintiff in the City Civil Court deserves to be allowed. Hence the following order:

ORDER IN NOTICE OF MOTION NO. 1359/2011

1. The Motion is made absolute in terms of prayer clauses (a),(b),(c), (d), and (e). Insofar as prayer clause (h) is concerned, it is directed that the Defendants shall remove the fencing from the area which is provided for additional recreational ground under the 2010 plans and clear all the machinery, material etc from the area provided in the plans for the additional recreational ground.

ORDER IN APPEAL FROM ORDER NO. 383//2012

2. Appeal from Order is allowed. The impugned judgment and order passed by the learned City Civil Court,- dated 18th April, 2011 is hereby

quashed and set aside.

3. Notice of Motion No. 2953/2010 in L. C. Suit No. 2348 of 2010 filed in the City Civil Court at Bombay is made absolute in terms of prayer

clause (a).

COMMON ORDER IN NM NO. 1359/2011 AND AO NO.383/2012

4. However, it is made clear that the aforesaid order passed in the Notice of Motion as well as the Appeal from Order would not come in the way

of the Defendant developer in constructing the building as per the plan sanctioned by the Corporation dated 23rd April, 2001.