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2024:BHC-OS:5801

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO. 3069 OF 2021
IN
SUIT NO. 771 OF 2018

Sheth Developers Private Limited …Applicant/
Defendant No. 8

In the matter between

Venus Vasant Valley Co-operative Housing Society Limited …Plaintiff

Versus

Sheth Shelters Private Limited & Ors. …Defendants

WITH
NOTICE OF MOTION NO. 1361 OF 2018
IN
SUIT NO. 771 OF 2018

Venus Vasant Valley Cooperative Housing Society Ltd. …Applicant/
Plaintiff

Versus

Sheth Shelters Private Limited & Ors. …Defendants

WITH
NOTICE OF MOTION NO. 1339 OF 2018
IN
SUIT NO. 771 OF 2018

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Venus Vasant Valley Cooperative Housing Society Ltd. …Applicant/ Plaintiff

Versus

Sheth Shelters Private Limited & Ors. …Defendants

Mr. Sharan Jagtiani, Senior Counsel a/w Mr. Priyank Kapadia, Mr. Kaustubh Patil, Mr. Amogh Singh and Roshan Sawant i/by Kaustubh Patil for the Plaintiff.

Mr. Karl Tamboly with Mr. Vatsal Shah and Mr. Yunus Vakharia for the Defendant No.1.

Mr. Pankaj D. Jain a/w Mr. Tanmay Sangani a/w Ms. Tejashree Kamble a/w Mr. Vishal R. Jaiswal for Defendant No.7.

Mr. Virag Tulzapurkar, Senior Counsel, Mr. Simil Purohit, Ms. Jasmine Kachalia, Deepu Jojo, Mr. Viren Mandhle, Mr. Sahil Singh i/by Wadia Ghandy & Co. for Defendant No.8.

Ms. K.H. Mastakar, for Defendant Nos. 11 to 13 – BMC.

CORAM : R.I. CHAGLA J

Reserved on : 19th December 2023

Pronounced on : 5th April 2024

JUDGMENT :

1. Notice of Motion No. 1361 of 2018 and Notice of Motion No. 1339 of 2018 have been taken out by the Plaintiff in the above Suit *inter alias* seeking confirmation of the *ad-interim*

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orders passed therein. The Interim Application No. 3069 of 2021 has been taken out by Defendant No. 8 in the above Suit seeking vacation of *ad-interim* orders dated 6th February 2018 and 23rd February 2018 passed by this Court in Notice of Motion No. 1361 of 2018 as well as vacation of the order dated 11th July 2018 passed by this Court in Notice of Motion No. 1339 of 2018.

2. By the order dated 6th February 2018, this Court had passed *status quo* order in respect of the suit building as of the date of the said order and accordingly, the Defendants were to maintain *status quo*. By the order dated 23rd February 2018, this Court had restrained Defendant No. 1 from selling any further flats and/or creating any third party rights in the subject project, over and above 37 allotment letters issued without seeking prior permissible of this Court. Further, the Defendant No. 1 was directed not to load any TDR for a period of six weeks and no equities shall be claimed by the Defendant No. 1 in respect of any further construction carried out by the Defendant No. 1. By the third *ad-interim* order dated 11th July 2018, *ad-interim* relief had been granted in terms of prayer clause (c) of the Notice of Motion

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No. 1339 of 2018, which reads thus:-

> "*(c) : that pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to restrain the Defendant No.1 and/or their servants, agents and assigns or any one claiming through or under them by an order of temporary injunction from obstructing the entry of the Plaintiffs' Society members in the RG1, RG2, RG3 and RG4 areas on the Suit land as shown in the layout plan dated 20th November, 1997 annexed as Exhibit E and Exhibit E-1 to the Plaint; as disclosed in the layout plan dated 20th November, 1997 annexed as Exhibit E to the Plaint;*"

3. The above Interim Application as well as the Notices of Motion were heard together and arguments were made by the Counsel for the parties in the Interim Application, as agreed upon, in view of vacation being sought of the aforementioned *ad-interim* orders. It is necessary to advert to the relevant facts, which are material for deciding the present Interim Application and the Notices of Motion.

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a) The larger property has been defined as CTS Nos. 104A to 104J admeasuring 68,373.20 sq.meters, Village Dindoshi, Taluka Borivali. Whereas the Suit land is defined as CTS No. 104A admeasuring 14,383.40 sq.meter. Village Dindoshi, Taluka Borivali.

b) Defendant Nos. 2 to 6 in their capacity as owners of the Larger Property, got a Layout Plan of 1st July 1992 sanctioned from the Municipal Corporation of Greater Mumbai (for short "**MCGM**").

c) Articles of Agreement were entered into between the Defendant Nos. 2 to 6 (as 'Owners', of the one part) and Defendant No. 1 (as 'Managers' of the other part) on 14th April 1993. It is pertinent to note that in Clause 13 of the Articles of Agreement, it is provided that "*As at present envisaged Floor Space Index (FSI) capable of*

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generating about 6 lacs sq.ft (built up) area will be available for construction in four Buildings being Buildings Nos. 1, 2, 3 and 4 on Plot A and in 3 Buildings (being Building Nos. 1, 7 and 8 on Plot B)."

d) Thereafter, on 14th January 1994 layout plan was sanctioned of the larger property.

e) On 6th July 1994, Commencement Certificate was issued by the MCGM in respect of Building No. 2 (i.e. Defendant No. 7's building "Vasant Valley Aster").

f) Plans were submitted by Defendant No. 1 to the MCGM for approval of the proposed layout on 10th July 1997. The plans were approved by the MCGM on 20th November 1997.

g) In the interregnum, i.e. after Defendant No. 1

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submitted plans on 10th July 1997 and before these plans were approved on 20th November 1997, Appendix VII B was introduced in the DCR, 1991 which stipulated that under Government order dated 15th October 1997, the modifications were brought into effect and the said modifications were sanctioned. The said Government order has been relied upon by the Defendant No. 8 for it made available TDR under Appendix VII B and thus, it is the contention of Defendant No. 8 that Defendant No. 8 could load TDR on the Larger Property. It is subject to maximum of 2 FSI as allowed under the applicable law. The Defendant No. 8 could use the inherent plot potential of the Suit Land along with TDR, subject to maximum of 2 FSI, as allowed under the applicable law.

h) The layout Plan of 20th November 1997 was sanctioned by the MCGM along with approval

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letter.

i) Defendant No. 1 entered into an Agreement for Sale with prospective buyers i.e. members of Plaintiff and Defendant No. 7 Societies on 30th November 2001. In Recital 11 of the Agreement for Sale, it is mentioned that the envisaged FSI capable of generation is about 6 lacs sq. ft. (built-up) area for construction of 4 buildings being building Nos. 1, 2, 3, and 4 on Plot 104A and in 3 buildings (being Building Nos. 1, 7 and 8 on Plot 104B). Further, in Clause 17 of the Agreement for Sale, it was provided that until execution of the Conveyance, the Developers shall have full right, if so permitted by the Concerned Authorities to make additions to the said buildings, and such additions (additional construction) shall be the property of the Developers. Under Clause 18 of the Agreement for Sale, the Purchaser shall not interfere with the rights of the Developers by

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raising any disputes or Court Injunctions under Section 7 of the Maharashtra Ownership Flats Act and/or under any other provision or any other applicable law. Under Clause 22 of the Agreement for Sale, the said building was defined to mean building Nos. 2 and 3 on Plot A and Wing A of building No. 1 and Building No. 7 on Plot B and the land surrounding thereto as determined by the Developers shall be conveyed to a Co-operative Housing Society Limited that may be registered by the Registrar of Co-operative Societies under any other name. Further, the said Society shall be registered only after the said Larger Property is fully developed and all the Flats, Shops and other premises in the said Buildings as also the other structures that may be constructed thereon has sold and disposed of. This is further reiterated in Clause 23 of the Agreement for Sale.

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j) By letter dated 26th June 2002 addressed by the Defendant Nos. 1 to 7, the list of parking spaces allotted by Defendant No. 1 was provided. Defendant No. 1 had allotted parking spaces in RG3 and RG4 areas which are 58 in number.

k) Occupation Certificate for Defendant No. 7 building was issued on 7th May 2003.

l) The Plaintiff society was registered with 32 members on 23rd October 2003.

m) Layout plan was sanctioned for the Larger Property on 7th August 2004.

n) Defendant No. 7 apprehending change in layout by Defendant No. 1 filed L.C. Suit No. 4981 of 2006 against the MCGM and Defendant Nos. 1 to 6 seeking an injunction restraining construction of building No. 4 contrary to the disclosed 20th

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November 1997 layout. The Suit was dismissed for want of prosecution on 30th August 2012.

o) The Occupation Certificate for Plaintiff building (building No. 3 of Plot 104A) was issued on 26th March 2007. Building No. 3 comprises of Basement plus stilt plus 8 residential floors.

p) Layout plan was sanctioned for the Larger Property on 10th April 2007. In the layout plan, Building No. 4 is shown as stilt plus 14 floors.

q) The Government of Maharashtra issued order under Section 154 on 23rd November 2007, whereby TDR use was restricted to the proportionate vacant land area only.

r) The Defendant No. 8 addressed a letter to the Chairman/Secretary of the Plaintiff for its no objection to construct Building No. 4 (proposed

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34 storeys) on 7th September 2008.

s) On 11 September 2008, the Plaintiff asked Defendant No. 8 for copies of all layout plans; clear description of mandatory facilities and details of original plus additional FSI for considering the request dated 7th September 2008.

t) One of the members of Defendant No. 7 filed Writ Petition No. 1363 of 2009 before this Court against Defendants No. 1 to 6 and the MCGM challenging amended layout plans dated 10th April 2007.

u) The Writ Petition by an Order dated 9th August 2010 was disposed of by this Court as the Petitioner at the behest of the single member of the society was not entertained.

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v) Layout plan was sanctioned for the Larger Property on 25th September 2009. In the said layout plan, Building No. 4 is shown as stilt plus 21 floors. Consent was sought prior to approval of the layout plan.

w) Articles of Agreement were entered into between the owners - Defendant No. 2 to Defendant No. 6 and the developer - Defendant No. 8 for development of building Nos. 1 and 4 on 6th January 2010.

x) In Clause 4 of the Articles of Agreement, it is *inter alia* provided that the Building No. 4 is residential building, comprising of two basements, stilt, one podium, 24 upper floors (approximately) by consuming FSI in the form of TDR from outside properties admeasuring 8240 sq. mtrs. It has further been agreed between the parties that all FSI whether in the form of FSI from Layout or FSI

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in the form of TDR in respect of the said Building No. 4 shall be purchased/procured by the Owners at their own costs and expense and be made available to the Developers on the terms and conditions and under the arrangement stated therein. In clause 6, it was further agreed by the owners that after consultation with the Developers, the plans in respect of Building No.4 shall be prepaired. Thereafter, the owners shall at their own cost and expense purchase TDR FSI admeasuring 8240 sq.mtrs. from outside properties and procure 10D and Commencement Certificate upto plinth and further Commencement Certificate for the said building No.4 within three months from execution of the Agreement.

y) On 24th August 2010, Occupation Certificate for Defendant No. 1 - Building No. 1 “Sheth House” was issued.

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z) IOD issued for the proposed Building No. 4 on 6th December 2010.

aa) The plans were sanctioned showing the location and plinth area of Building No. 4.

bb) First Commencement Certificate was issued by the MCGM for Building No. 4 on 25th February 2011.

cc) Defendant No. 1 attempted commencement of construction of Building No. 4 in February 2011.

dd) The Plaintiff addressed complaints to the MCGM with respect to alleged illegality of construction and damage to the access road by Defendant No. 1. The MCGM issued a stop work notice under Section 354A of the Mumbai Municipal Corporation Act, 1888 ("**MMC Act**") on 29th December 2011.

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ee) Fungible FSI was introduced by the Regulation 35(4) on 6th January 2012, which granted further FSI upto 35% on payment of premium to the MCGM.

ff) L.C. Suit No. 4981 of 2006 was filed by Defendant No. 7 against the MCGM and Defendant No. 1 to Defendant No. 6 was dismissed for non-prosecution on 30th August 2012. An AO has been filed from the dismissal order before this Court in 2017.

gg) The MCGM withdraw the stop work notice under Section 354A of the MMC Act on 27th February 2013.

hh) The Defendant No. 7 had filed an application under Section 5A and 11 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer)

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Act, 1963 ("**MOFA**") i.e. Application No. 145 of 2013 before the Competent Authority-District Deputy Registrar of Co-operative Societies for conveyance of suit land in favour of Plaintiff and Defendant No. 7 in the year 2013. The Application was disposed of on 4th May 2016 without going into merits of the matter.

ii) The building plans for Building No. 4 were sanctioned by the MCGM upto fourth level podium (Sheet 2) by approval letter on 28th August 2014. The plan utilizes Fungible FSI of the said plot. The Podium plans have not shown any RG 1 provided on the said podium. The Layout Plan of Building No.4 (Sheet 1) as approved by MCGM shows that the parking spaces for Building No. 4 are on RG 2.

jj) The EE (BP) WS P Ward addressed a letter on 4th March 2015 to the Designated Officer in relation

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to unlawful construction by Defendants No. 2 – 6 in respect of Building No. 4.

kk) MCGM issued a stop work notice further to the letter dated 24th March 2015. It is pertinent to note that the stop work notice was withdrawn in May 2017.

ll) Rectification Deed was executed on 14th March 2017 between the owners (Defendant No. 2-Defendant No. 6) and Defendant No. 8 rectifying the said Articles of Agreements. The Rectification Deed records at Recital (F) that the floors of the said Building No. 4 increases from 24 floors to 33 upper floors and the proceeds from sale of flats using additional FSI will be shared 50:50.

mm) The MCGM issued a non-speaking order dated 9th May 2017 withdrawing the stop work notice dated 24th March 2017.

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nn) Thereafter, disputes arose between the Plaintiff and Defendant No. 1 with regard to the alleged encroachment upon 60% of RG2 area in September 2017. Further, Defendant No. 1 attempted to recommence construction of proposed Building No. 4 around June – July 2017.

oo) A Public Notice was issued in respect of area of 1316.92 sq. mtrs of Plot A on 16th and 20th September 2017.

pp) Thereafter, a second Deed of Rectification was executed between the Defendant No. 2-Defendant No. 6 and Defendant No. 8 by which area of building No. 1 was rectified from 1631 sq.meter. to 1316.92 sq.meter.

qq) The Plaintiff filed the present Suit on 2nd February 2018.

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rr) This Court on 6th February 2018 passed the *status quo* order in Notice of Motion No. 1361 of 2018.

ss) Thereafter, on 23rd February 2018, this Court passed the order in Notice of Motion No. 1361 of 2018.

tt) On 2nd May 2018, Mr. Amol Shetgiri from Shetgiri and Associates was appointed by this Court as an independent Architect to visit the suit premises on 12th May 2018 at 12.00 noon and submit his report to this Court on 14 May 2018 with regard to encroachments, if any, and change in boundaries of RG1 area, RG2 area, RG3 area, as shown in the sanctioned layout plan dated 20th November 1997.

uu) Pursuant to this order, Mr. Shetgiri has submitted the Report on 5th June 2018. It is contended by

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the Plaintiff on the basis of this Report that there is no access between part of RG provided at level of building No. 3 and part of RG at podium of building No. 1. Because of this, access of this RG area certainly gets reduced. There are also contentions made regarding RG2, RG3, RG4, which show alterations from the plans.

vv) This Court by the aforesaid *ad-interim* order dated 11th July 2018 granted *ad-interim* relief in terms of prayer clause (c) of Notice of Motion No. 1339 of 2018.

4. Mr. Virag Tulzapurkar, the learned Senior Counsel appearing for Defendant No. 8 has made submissions in support of the above Interim Application for vacation of the *ad-interim* orders passed in the Notices of Motion taken out by the Plaintiff. He has submitted that the entitlement of Defendant No. 1/8 to construct on the larger plot was even as per the Plaintiff's own case, an available FSI of 1 on the suit land as per Regulation 32 of the

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Development Control Regulations, 1991 ("**DCR, 1991**"). Further, TDR of 1 on the suit land, as per Notification dated 15th October 1997 of the Government of Maharashtra ("**1997 TDR Notification**") provided that construction upto 1 additional FSI is permissible through loading of Slum TDR on a receiving Plot. The position that FSI of 12,143.88 square meters and also TDR being available on the Suit Plot A in 1997 has been categorically admitted in the Report dated 19th May 2022 of T-Square Architects and Designs appointed by the Plaintiff.

5. Mr. Tulzapurkar has submitted that in view of the Plaintiff's own case that the Defendant No. 1/8 is entitled to at least construct 26,430.80 square meters on the suit land, since this FSI/TDR was available in 1997. Defendant No. 1/ 8 has only obtained approvals in phases from time to time as per the construction undertaken on the Suit Land. He has submitted that from the FSI/TDR of 26,430.80 square meters which was available in 1997, a total FSI/TDR of 18,079.17 square meters for building Nos. 1-3 (which includes Plaintiff's building no. 3) was utilized. TDR of 513.96 square meters was utilized for building No. 4 in

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2014 prior to aforesaid *ad-interim* orders of this Court. TDR of 3600 square meters has also been utilized for Building No. 3. The Plaintiff has received and enjoyed this benefit.

6. Mr. Tulzapurkar has submitted that the Defendant No. 8 is utilising the balance FSI of 8346.92 square meters (available in 1997) for construction of Building No. 4. Defendant No. 8 has till date constructed Building No. 4 upto stilt plus 4 upper floors by utilising FSI/TDR of 513.96 square meters.

7. Mr. Tulzapurkar has submitted that Defendant No. 8 also propose to utilise Fungible FSI of 2923.25 square meters, which is available over and above the prevalent FSI under DCR, 1991. He has noted that this is not any additional FSI, but "Compensatory" FSI introduced in 2012 as certain free of FSI areas such as balcony, flower bed etc., which were available prior to 2012 were substituted by Compensatory Fungible FSI.

8. Mr. Tulzapurkar has submitted that the balance FSI of 8346.92 square metres to be utilized for construction of building

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No. 4 is well within the FSI/TDR that Defendant No. 8 was entitled to, as on the date of the 1997 layout plan itself. Accordingly, Defendant No. 8 proposes to construct Building No. 4 of ground, stilt, 4 podiums, plus 33 upper floors by utilisation of FSI of 8346.92 square metres along with Fungible FSI of of 2923.25 square meters aggregating to 11,270.17 square meters.

9. Mr. Tulzapurkar has submitted that the Plaintiff's entire contention relating to non-disclosure of development potential of the suit land is entirely misconceived and untenable. The suit land forms part of a Larger Property which is nominally subdivided into various subplots including the Suit Plot i.e., CTS 104 A (Plot A) and Plot bearing CTS No. 104 B (Plot B) to 104 J.

10. Mr. Tulzapurkar has submitted that under recital 11 of the Agreement for Sale executed with the members of Plaintiff's Society for their respective units, it has been categorically disclosed to the Plaintiffs that 6,00,000 square feet of FSI shall be used for construction of Building Nos. 1 to 4 on the Suit Land and Building Nos. 1, 7 and 8 on Plot B i.e. CTS 104 B.

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11. Mr. Tulzapurkar has submitted that as on the date of execution of the Agreements for Sale, the members of the Plaintiff were duly and specifically informed of the total development potential of the suit land, on which the Developer intended to construct. Further, the Defendant No. 1/8 has disclosed in the Agreement for Sale that the development would be carried out in phase-wise manner.

12. Mr. Tulzapurkar has submitted that under Clause 4 of the Model form of a MOFA Agreement, the Developer is obliged to disclose and declare, *"that the Floor Space Index available in respect of the subject land is … square metres only and that no part of the said floor space Index has been utilized by the Promoter elsewhere..."* He has submitted that it is a settled position of law that Clause 3 and Clause 4 of the Form V of MOFA are mandatory and Defendant No. 8 has duly complied with the same by making specific disclosures regarding construction of 55,762.08 square metres on the Suit Land/Plot A and Plot B.

13. Mr. Tulzapurkar has submitted that the

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Defendant No. 8 is not required to obtain consents every time it amends the plan and loads FSI as long as the same development potential is within the specific disclosure under the subject Agreement for Sale.

14. Mr. Tulzapurkar has submitted that the contention of the Plaintiff is that the 1997 TDR Notification was brought into force on 15th October 1997. Further, the 1997 layout plan was submitted on 10th July 1997 and approved on 20th November 1997. Thus, the 1997 layout plan could never have foreseen or included utilisation of TDR. Therefore, Defendant No. 8's contention that the 1997 layout plan included TDR is incorrect. He has submitted that this contention of the Plaintiff is entirely misconceived. The Plaintiff has failed to take into account the notifications, resolutions and memorandums issued by the Government prior to the 1997 TDR Notification with respect to TDR and its utilisation, which have been recited in the 1997 TDR Notification itself. He has referred to these relevant notifications, resolutions and memorandums issued by the Government prior to the 1997 TDR Notification with respect to TDR and its utilisation.

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He has submitted that the modification to the DCR for TDR was contemplated from 25th April 1996 and brought into effect from 15th October 1996.

15. Mr. Tulzapurkar has submitted that even as per Section 46 of the MRTP Act, the MCGM, being the planning authority under the MRTP Act, while sanctioning 1997 layout plan had due regard to the proposed modification of DCR, 1991, which was proposed from 1996 and brought into effect from 15th October 1996.

16. Mr. Tulzapurkar has submitted that TDR available has also been utilized for Building No. 3 (Plaintiff's building) of 3600 square meters and also for Building No. 1 of 2340 square meters. Hence, the utilisation of TDR in the layout has been accepted and, on that basis, Plaintiff's own building was constructed. Defendant No. 8 is, therefore, entitled to utilise TDR for Building No. 4 as well.

17. Mr. Tulzapurkar has submitted that the reliance

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placed by the Plaintiff on 2007 Order, which provides that if a building is completed, and subsequently TDR becomes available, the developer cannot utilise TDR in respect of building which is completed is misplaced. He has submitted that the TDR in the present case was available at the inception itself and had not become available subsequently and which fact had been disclosed to the purchasers including the Plaintiff.

18. Mr. Tulzapurkar has submitted that when the Agreement for Sale were executed, the developer had disclosed the entire developable potential i.e. 6,00,000 square feet. Defendant No. 8 is not consuming any FSI in excess of 6,00,000 square feet. He has submitted that the aforementioned 2007 Order is applicable only to buildings / project(s) where TDR potential has neither been disclosed nor been utilised prior to completion of construction of building(s) and formation of Society and where the Society had become entitled to the conveyance.

19. Mr. Tulzapurkar has submitted that the provisions of the MOFA read with Form V require the disclosure to

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be made in the MOFA Agreement entered into between the flat purchasers and the developer. In the present case, such specific disclosure on FSI has been made in the Agreement for Sale.

20. Mr. Tulzapurkar has submitted that the Plaintiff is seeking to bind the parties to a layout plan which is untenable, as the layout plan can never include entire developable potential of the land. The phase-wise development includes the right of a Developer to construct the building and purchase of TDR / FSI as and when the construction takes place, in a phase wise manner. It is for this reason that MOFA requires disclosure in the MOFA Agreement as contemplated in Form V – Clauses 3 and 4.

21. Mr. Tulzapurkar has submitted that what the Developer requires to disclose is the entire developable potentiality of the land and whether the Developer restricts as in the present case, its right to 6,00,000 square feet, then the provisions of MOFA and the law lay down that the developer would be entitled to exploit only 6,00,000 square feet. This is the very purpose and purport of the various judgments cited by the Plaintiff.

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22. Mr. Tulzapurkar has submitted that the Plaintiff has failed to recognise the difference between Section 7 and 7A of MOFA. He has submitted that the issue of consent would arise only under the provisions of Section 7 of MOFA, which governs addition, alteration to a structure. Whereas, the instant case is governed by Section 7A of MOFA, which pertains to construction of additional structures. Once the developer has disclosed the extent of FSI that he would consume and also the number of buildings that are proposed, then to carry out and complete the construction in terms of the disclosure made, does not require any consent from the flat purchaser for undertaking such construction.

23. Mr. Tulzapurkar has submitted that the Plaintiff has brought up a new theory of non-disclosure of "source of FSI" and that Defendant No. 8 has merely put in a random figure of 6,00,000 square feet. He has submitted that this contention is not supported by the provisions of MOFA. Neither MOFA nor Form V mandate the Developer to disclose the "source of FSI". The source of FSI would depend on the FSI purchased at the time of its utilisation.

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24. Mr. Tulzapurkar has submitted that Section 7A of MOFA requires disclosure of the development potential under the Agreement for Sale and does not require disclosure of number of floors, as per the planning approvals. Increase in floors will not affect/prejudice the Plaintiff in any manner since no alteration, variation or change will be carried out in Plaintiff's building. He has relied upon the decisions of this Court in **Ralph D'Souza & Ors. Vs. Danny D'Souza & Ors.**[1] and **M/s Sancheti Properties Vs. Eve's Garden B1 Co-operative Housing Society Ltd. & Ors.**[2] in this context. He has submitted that as on date of the Agreement for Sale, FSI/TDR was available and was duly disclosed and thus, Defendant No. 8 is entitled to construct Building No. 4 till 33 floors.

25. Mr. Tulzapurkar has relied upon the decision of the Supreme Court in **Jayantilal Investments Vs. Madhuvihar Coop Housing Society and others**[3], wherein the Supreme Court had considered Clauses 3 and 4 of Form V of MOFA. He has submitted

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1 2006(3) Mh.L.J. 497 at paras 5 and 6

2 Jt. dtd. 29.11.2021 in WP/6998/21 at paras 32 to 34

3 (2007) 9 SCC 220

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that the Supreme Court in the said decision whilst interpreting Clauses 3 and 4 of Form V of MOFA held that (i) Clauses 3 and 4 are statutory and mandatory; (ii) Promoter is obliged to make full and true disclosure of the land, amenities and facilities and "the development potentiality of the plot" which is the subject matter of the agreement; and (iii) the Developer is required to disclose inherent FSI and also whether the plot in question is capable of being loaded with additional FSI / TDR. He has submitted that the Supreme Court while interpreting Clauses 3 and 4 did not mandate that the Developer is required to disclose the source of FSI. This contention of Plaintiff is contrary to the interpretation of the Supreme Court.

26. Mr. Tulzapurkar has submitted that the Developer is required to disclose the developable potentiality of the plot (inherent FSI / floating TDR) to be used on the plot. It does not require the Developer to mention the number of floors that are to be constructed, as the number of floors to be constructed are always subject to building permission and Development Control Regulations.

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27. Mr. Tulzapurkar has submitted that in **Jayantilal Investments** (supra), the Supreme Court has held that once the entire scheme is presented to the purchasers, there is no requirement of consent, and the construction can be undertaken in accordance with building rules and development control regulations.

28. Mr. Tulzapurkar has submitted that in the present case, Defendant No. 8 disclosed the amount of FSI desired to consume i.e. 6,00,000 square feet and also disclosed where the building would be located.

29. Mr. Tulzapurkar has then dealt with the decision of this Court in **Malad Kokil Co-operative Housing Society Ltd. Vs. Modern Construction Co. Ltd.**[4], which had been relied upon by the Plaintiff to contend that since the 1997 layout plan discloses ground plus 14 floors only, the Defendant No.8 therefore be restricted to exploit, at best, a structure of only ground plus 14 floors. He has submitted that the reliance placed by the Plaintiff on

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4 **2003 (5) MhLJ 23**

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the said decision is erroneous.

30. Mr. Tulzapurkar has submitted that the Judgment in **Malad Kokil Co-operative Housing Society Ltd.** (supra) was based on additional FSI being available due to change of law. In the present case, Defendant No. 8 is not exploiting any additional FSI due to change of law. Further, in the case of **Malad Kokil Co-operative Housing Society Ltd.** (supra), the construction of the building was under the provisions of DCR, 1967. The flat purchaser's agreements in the case of **Malad Kokil Co-operative Housing Society Ltd.** (supra) envisaged the exploitation of the then development potential of the plot available under DCR, 1967. In furtherance thereof, the Developer had completed the construction of the buildings by exhausting the entire FSI and formed the co-operative housing societies. At the time of entering into flat purchasers agreements, the Developer had represented that it would construct an additional structure of ground plus 4 storeys upon which the entire developable potential of the plot would be exhausted. Further, even after exhausting the entire FSI of the plot, the Developer failed to convey the property. Then, in view of

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change of law in the year 1991 and the DCR, 1991 coming into force, and in view of TDR being available, the Developer proposed to construct the additional structure by utilising the entire TDR of the plot that became available on account of change in law and submitting plan to construct the building of Ground +22 floors. It was in this context that the Court held that the Developer could construct only what was represented i.e., ground plus 4 floors, as the construction of the building of ground plus 4 floors would exhaust the developable potential of land as was available under the 1967 DCR.

31. Mr. Tulzapurkar has submitted that the Plaintiff cannot be permitted to approbate and reprobate. It is the contention of the Plaintiff that since Defendant No. 8 has not disclosed source of TDR, Defendant No. 8 is not entitled to consume TDR. He has submitted that this argument of the Plaintiff is contradictory since TDR became available with effect from 15th October 1996. The Defendant No. 8 purchased TDR and utilised the same for construction of the Plaintiff's Building No. 3. Similarly, Defendant No. 8 purchased TDR and constructed

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Building No. 1. If the submission of Plaintiff is accepted, Building No.1 and Building No.3 would be required to be demolished to the extent of 5940 square meters. The Plaintiff by not challenging the utilisation of TDR for construction of Building Nos. 1 and 3 has accepted the entitlement of Defendant No. 8 to use the TDR even when its "source was not disclosed". Thus, the Plaintiff cannot contend contrary thereto.

32. Mr. Tulzapurkar has submitted that the reliance by the Plaintiff on the Agreement dated 14th April 1993 executed between Defendant Nos. 2 to 6 and Defendant No. 1 in contending that the said Agreement granted the Defendant No. 1 the right to consume 6,00,000 square feet FSI, which could only include the basic FSI of the plot (as the concept of TDR was only available in the year 1997) is misconceived. He has submitted that the Agreement dated 14th April 1993 is executed between the owners of the property (Defendant Nos 2 to 6) and the Developer (Defendant No. 1). It is an internal, commercial contract between the two parties. The Agreement dated 14th April 1993 is not a disclosure mandated under Clauses 3 and 4 of Form V of MOFA or

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under Section 3 of MOFA. A reading of Agreement dated 14th April 1993 at best shows that the owners have granted the Developer the right to consume 6,00,000 square feet FSI. It does not say that 6,00,000 square feet of FSI is the developable potential of the plot.

33. Mr. Tulzapurkar has submitted that in the Agreement for Sale executed with the flat purchasers, both, the owners i.e. Defendant Nos. 2 – 6 and Developer i.e. Defendant No.1, are parties along with flat purchasers. In the Agreement for Sale, the owners as well as the Developer have represented to the flat purchasers that the Developer is entitled to utilize 6,00,000 square feet FSI on Plot A and Plot B. The Agreement dated 14th April 1993 stood subsumed in the Agreement for Sale with the flat purchasers. Under the Agreement for Sale, Defendant Nos. 2 – 6 have granted the Developer the right to exploit 6,00,000 square feet of the developable potential of the land which at the relevant time included FSI + TDR. Further, the subsequent Agreement dated 6th January 2010 entered into between Defendant No. 8 and Defendant No. 1 has no bearing on the entitlement of

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Defendant No. 8 to exploit the developable potential. The Plaintiff and Defendants are bound by the terms of the MOFA Agreement. Any private arrangement between the owners and the developers does not alter the terms of the MOFA Agreements.

34. Mr. Tulzapurkar has submitted that the Plaintiff is misconstruing the letter dated 7th September 2008 as an admission on part of Defendant No. 8 that consent of the flat purchasers is required for constructing Building No. 4. This letter was addressed as a matter of goodwill and the same cannot be read as an admission, particularly when the law does not require the Plaintiff's consent. He has submitted that consent of flat purchasers is only required under Section 7 of the MOFA Act, when an addition or alteration is being made to the existing structure. However, consent of flat purchasers is not required under Section 7A of MOFA Act as in the present case, the Defendant No. 8 has disclosed that they would be carrying out a phase-wise development. Thus, if in law consent is not required, merely because a letter dated 7th September 2008 was issued by Defendant No. 8, the same cannot impair or take away the right

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and entitlement of Defendant No. 8 which it is otherwise entitled to. The said letter cannot be construed as an estoppel. There cannot be an estoppel against law, particularly, in view of Section 7A of MOFA not requiring consent of the flat purchasers.

35. Mr. Tulzapurkar has submitted that insofar as the RG areas are concerned, as per Regulation 23 of DCR, 1991 in the layout having an area of 10,000 sq.meters, 25% of the layout shall be kept as an open space/RG. In the present case, the suit land admeasures 14286.92 sq.meters and 25% admeasures 3571.73 sq.meters. As per DCR, 1991, the RG required is, therefore, 3571.73 sq.meters.

36. Mr. Tulzapurkar has submitted that the Defendant No. 1/8 has physically provided on site on the suit land, a total RG of 3578.02 sq.meters, in accordance with the layout plan of 25th September 2009, comprising RG1 of 2104.66 square meters, RG2 of 556.80 square meters, RG3 of 571.56 square meters and RG4 of 345 square meters. Thus, Defendant No. 1/ 8 has provided RG on the suit land, of 3578.02 square meters which

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is more than the required RG under DCR and is also in accordance with the layout plan of 25th September 2009.

37. Mr. Tulzapurkar has submitted that Regulation 27 of the Development Control and Promotion Regulation, 2034 ("**DCPR, 2034**") also provides that for a layout having an area of above 10,000 square meters, 25% of the layout shall be kept as an open space/RG and which under Regulation 27 can be provided on the podium.

38. Mr. Tulzapurkar has submitted that the MCGM vide circular dated 8th July 2019 has clarified that as per Regulation 27 of DCPR 2034, at least 50% of the RG area shall be unpaved on mother earth and the rest may be paved. In the present case, RG to the extent of only 6 metres out of 3578.02 square meters is paved and therefore, Defendant No.8 has complied with the provisions of DCPR, 2034.

39. Mr. Tulzapurkar has submitted that without prejudice and without admitting, since the Plaintiff claimed RG on

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the suit land as per 1997 Plan, which is 3690.72 square meters, there would be a slight difference of 112.7 square meters, which Defendant No. 8 is willing to provide on the podium of Building No. 4. This 112.7 square metres is, in any event, more than the required RG of 3571.75 square metres. Further, RG on podium is permissible under DCPR, 2034.

40. Mr. Tulzapurkar has submitted that the Division Bench of this Court in **Sudhir Shetty and Another Vs. Dharma V. Desle**[5], held that relocation of RG is permissible. He has relied upon paragraph 6 of the said decision in this context. Thus, relocation of RG area to the podium of building No. 4 is permissible in law.

41. Mr. Tulzapurkar has submitted that Defendant No. 8 seeks modification of order dated 11th July 2018 passed in Notice of Motion No. 1339 of 2018, which had granted *ad-interim* relief in terms of prayer clause (c) of the Notice of Motion. He has submitted that without prejudice and in the alternative, if this

5 **Jt. dtd 2.12.2003 in Appeal No. 843 of 2003**

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Court is of the view that this difference in RG of 112.7 square meters cannot be provided on the podium and the aforesaid prayer cannot be granted, then the Defendant No. 8 will provide this RG of 112.7 square meters adjacent to RG -2 at the same level. This will lead to severe planning constraints and challenges. However, Defendant No. 8 will abide by the orders of the Court in this regard.

42. Mr. Tulzapurkar has submitted that there is no merit in the contention of the Plaintiff that the parts of the RG are used for car parking which Defendant No. 1 has sold to the members of Defendant No. 7. No parking has been allotted and/or sold on any of the RG areas. The members of Plaintiff and Defendant No. 7 Society have unlawfully parked cars on the RG areas without the consent and knowledge of Defendant No. 8 or Defendant No. 1 and therefore, the same is not attributable to Defendant No. 8 or Defendant No. 1 in any manner whatsoever.

43. Mr. Tulzapurkar has submitted that it has been provided in the Agreement for Sale that the conveyance of the suit

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land in respect of such co-operative societies or societies shall be executed only after the suit land/Plot A & Plot B is fully developed. This has been provided in Clauses 17, 22, 23 and 39 of the Agreement for Sale executed with the members of the Plaintiff Society. Therefore, the Plaintiff Society is not entitled to seek any conveyance or transfer of title till Building No. 4 is fully constructed.

44. Mr. Tulzapurkar has submitted that if the development is carried out in a phase-wise manner, the question of granting conveyance to the Plaintiff society prior to the development being completed, does not arise. Assuming that the developer is obligated to execute conveyance after the formation of the Society, then such conveyance would have to be governed as per the terms of MOFA Agreement for Sale. He has in this context, relied upon the decision of this Court in **Harsharansingh Pratapsingh Gujral & Ors. V. Lokhandwala Builders Ltd. & Ors.**[6]. It has been held that the rights of the flat purchasers' flow from the MOFA Agreements which had been executed between the parties.

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6 **1997 SCC Online Bom 512**

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45. Mr. Tulzapurkar has submitted that the Agreement recorded that the suit property was to be developed in a phase wise manner and that the flat purchaser had agreed that the Developer would have absolute discretion to amend / alter the building plan and amalgamate the suit property with any other property. The conveyance would be executed only once the suit plot is fully developed. Based on the covenants of the MOFA Agreement, it was held in the said decision that until conveyance of the suit plot is executed in favour of the flat purchasers, they have no right, title or interest and therefore, the ownership continues to vest in the Developers. He has in this context, relied upon paragraphs 9 and 10 of the said decision.

46. Mr. Tulzapurkar has also relied upon the decision of this Court in **Tushar Jivram Chauhan & Anr. V. State of Maharashtra & Ors.**[7]. In the said decision , this Court has held that the parties are bound by the agreement / contract before applying for conveyance / deemed conveyance / unilateral conveyance. It was held that the Competent Authority is under obligation to see

7 **2015(4) Mh.L.J.867 at paras 18 and 19**

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that the deemed conveyance / unilateral conveyance must be confirmed on the basis of the written agreement of the parties before passing orders granting deemed conveyance / unilateral conveyance.

47. Mr. Tulzapurkar has also relied upon the decision of this Court in **Mazda Construction Company & Ors. Vs. Sultanabad Darshan CHS. Ltd. & Ors.**[8], wherein this Court held that the Competent Authority ought to take into account the entitlement of the parties in terms of an agreement and if an agreement contains a stipulation in relation to the execution of a conveyance, of the land and building, then such a stipulation is binding on the parties. Flat purchasers cannot claim something which is beyond their agreement with the promoters. He has relied upon paragraph 21 of the said decision in this context.

48. Mr. Tulzapurkar has also relied upon the decision of this Court in **Marathon Next Gen Realty Limited & Anr. V. The Competent Authority & Ors.**[9], which placed reliance upon the

8 **2012 SCC Online Bom 1266**

9 **2015 SCC Online Bom 4889**

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decisions in **Tushar Jivram Chauhan** (supra) and **Mazda Construction Company** (supra) and since the Developer / Owner / Petitioner's project on the suit land was still ongoing, quashed and set aside the order granting Deemed Conveyance.

49. Mr. Tulzapurkar has also relied upon the decision of the Division Bench of this Court in **Shailaja Limaye & Ors v. Nilkanth Pethe & Ors.**[10], wherein this Court has held that even if the obligation of the Developer to convey land had arisen, the same does not prohibit the Developer from constructing a building. He has relied upon paragraphs 42, 43 and 44 of the decision in this context.

50. Mr. Tulzapurkar has submitted that the Plaintiff has not challenged the Agreement for Sale or any of its terms. The Plaintiff having accepted the terms of Agreement for Sale is therefore, bound by same. The Plaintiff has not sought any conveyance from Defendant No. 8, till date.

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10 **(2010) 4 Mah LJ 160**

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51. Mr. Tulzapurkar has submitted that the Defendant No. 7 Society has sought deemed conveyance of the suit land vide Application No. 145 of 2013 filed before the District Deputy Registrar, Co-operative Housing Societies, which has been disposed of vide order dated 16th May 2016. The said order has not been challenged by Defendant No. 7 Society till date. Thus, the question of the Plaintiff now seeking to stall the development on the premise that the Society has been formed cannot be countenanced.

52. Mr. Tulzapurkar has submitted that Defendant No. 8 is ready and willing to grant conveyance of the entire land to the apex body that may be formed after completion of Building No.4.

53. Mr. Tulzapurkar has submitted that there have been contentions on behalf of the Plaintiff that the entry to building No. 4 is not from 12 meter wide road. He has submitted that Regulation 17 (4) of DCR, 1991 provides that where a plot or building abuts / fronts a means of access, the width of the access

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shall be as specified in Regulation 22 of DCR, 1991. Under Regulation 22 of DCR 1991, it provides that 'plots' which do not abut a street shall abut/front means of an access, the width as stated therein. Hence, the width of the road provided in such cases would be computed based on the area of the whole plot (i.e., Plot-A in the present case) and not to individual buildings constructed thereon. He has submitted that the Defendant No. 8 is in compliance with the provisions of Regulation 22 of DCR, 1991 since a 12 meter wide internal access road is provided as a means of access to Plot A with Building Nos. 4 and 2. Thus, Defendant No. 8 has complied with the provisions of Regulation 17 (2) of DCR, 1991 based on which the MCGM vide letter dated 21st July 2014 has issued 'High Rise Approval' for Building No. 4. The allegation that the ramp to the Building No. 4 is from a 6.5-meter road is unsubstantiated and clearly an afterthought.

54. Mr. Tulzapurkar has submitted that the Defendant No. 1/8 has obtained high rise committee approval in 2014 and hence, Regulation 43 of DCPR, 2034 is not applicable. However, in any event, even if applicable, Defendant No. 8 is in

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compliance with Regulation 43 of DCPR, 2034, which states restrictions of height will not be applicable if plot abuts road of 12 meters and front marginal open space of 12 meters is provided. It is further stated that open spaces on other sides are to be made available for fire safety. Defendant No. 8 has complied with Regulation 43 of DCPR, 2034.

55. Mr. Tulzapurkar has submitted that the Chief Fire Officer, MCGM, vide CFO NOC dated 18th June 2014 granted no objection for construction of the subject building of height of 127.7 meters i.e. up to 33rd floors. The open spaces on other sides of building No. 4 are as per fire protection requirements under Regulation 47 of DCPR, 2034.

56. Mr. Tulzapurkar has submitted that the issue raised by the Plaintiff with respect to the property tax payable for the clubhouse and swimming pool on the Plot A is pending. The Plaintiff has raised this issue as an afterthought to prejudice the development of Building No. 4 and delay the adjudication of the present proceedings. Defendant No. 1/ 8 have been corresponding

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and coordinating with MCGM to resolve this issue. Defendant No. 8 has in the affidavit stated that without prejudice, and subject to the rights and remedies available in law to Defendant No. 1 /8, the property taxes lawfully levied during the period of construction of clubhouse and swimming pool till handing over to the societies will be paid by Defendant No. 1/8.

57. Mr. Tulzapurkar has accordingly, submitted that there is no merit in the contention of the Plaintiff in the Notice of Motion to restrain the Defendant No. 1 and/or Defendant No. 8 from constructing the building No. 4 which construction is carried out in accordance with law. He has accordingly, sought for vacation of the aforementioned *ad-interim* orders, which have been passed in the Notices of Motion taken out by the Plaintiff in the above Suit.

58. Mr. Sharan Jagtiani, the learned Senior Counsel appearing for the Defendant No. 8 has submitted that what is required to be considered in the present case, is the intent of MOFA. He has in this context relied upon the decision of the

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learned Single Judge of this Court in **Eternia Cooperative Housing Society Ltd. & Ors. v. Lakeview Developers & Ors.**[11] at paragraphs 6, 44 – 46.

59. Mr. Jagtiani has submitted that it has been held by this Court in **Ravindra Mutenja & Ors. Vs. Bhavan Corporation & Ors.**[12]; **Madhuvihar Co-operative Housing Society, Mumbai and Ors. Vs. Jayantilal Investments, Mumbai & Ors.**[13] **quoting Bajranglal Eriwal Vs. Sagarmal Chunilal**[14] at paragraphs 43, 44 and **Malad Kokil CHSL Vs. The Modern Construction Co. Ltd.**[15], at paragraph 40, that blanket consent as represented by the general and one sided clauses of a MOFA Flat Purchase Agreement are not valid consents and they do not constitute specific consent to a particular addition to be made to a layout. Such clauses of blanket consent have been consistently rejected as constituting any consent for the Developer being entitled to carry out further construction.

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11 **2015 SCC OnLine Bom 723**

12 **2003 (5) Mh.L.J. 23**

13 **2011 (1) Mh.L.J. 641**

14 **2008 (5) Mh. L.J. 571**

15 **2012 SCC OnLine 1310**

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60. Mr. Jagtiani has submitted that the consent of the flat purchaser cannot be implied consent or consent from acquiescence. He has in this context relied upon **Jayantilal Investments** (supra) which cities **Neena Sudarshan Wadia Vs. Venus Enterprises**[16]. He has also relied upon **Dosti Corporation Vs. Sea Flama Co-operative Housing Society Ltd.**[17] at Paragraphs 35, 80 – 88.

61. Mr. Jagtiani has submitted that it is not open to the builder / developer to insert clauses in the agreement with flat purchasers stating that conveyance will be executed only after the entire property is developed or full payment is received. The contention of the builder that formation of society and conveyance can take place after entire property is developed or full payment is received is contrary to Sections 10 and 11 of MOFA. He has in this context, relied upon the decision of the Supreme Court in **Jayantilal Investments** (supra) at paragraphs 11, 12, 13 and 20. He has also relied upon this Court's decision in **Jayantilal Investments** (supra). Further, reliance is placed on **Mayfair Housing Private**

16 **2012 SCC OnLine 1310**

17 **2016 (5) Mh.L.J. 102**

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Limited Vs. State of Maharashtra & Ors.[18]; **Prem Construction Company Vs. District Deputy Registrar, Co-operative Societies & Ors.**[19] at paragraphs 3-5; **Eternia Cooperative Housing Society Ltd.** (supra) at paragraphs 36, 85; **Lakeview Developers Vs. Eternia Cooperative Housing Society Ltd. & Ors. (DB)**[20] at paragraph 57.

62. Mr. Jagtiani has submitted that the statutory rights of a flat purchaser are contained in Sections 7 and 7A in relation to additions or changes made to the building in which he has purchased a flat. They are also contained in Clauses 3 and 4 and the Model Form Agreement which are declared to be statutory and mandatory in the decision of **Jayantilal Investments** (supra) at paragraph 37. It is the obligation of the Developer / promoters to make a full and complete disclosure of the development proposed on the layout. The Developer is obliged to disclose and place before the purchasers the entire project / scheme of development on the proposed layout, be it one building scheme or multiple number of building schemes.

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18 **Division Bench Order dtd. 3.05.2019 in OS WP 2834/2018**

19 **Order dtd 19.06.2017 in OS WP 2745/2016**

20 **2015 SCC OnLine Bom 3824**

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63. Mr. Jagtiani has submitted that the contention of Defendant No. 8 is that the construction sought to be made by the Developer is not an alteration to the building in which the plaintiffs are residing, and hence, the same would be covered by Section 7-A and not 7 of MOFA. He has to counter this contention, placed reliance upon **Malad Kokil Co-operative Housing Society Ltd.** (supra) at paragraphs 15, 18, 37 and 38. Further, it has been held by the Supreme Court in **Jayantilal Investments** (supra) at paragraph 17 and this Court's decision in **Jayantilal Investments** (supra) at paragraph 37 that the obligation of the promoter under MOFA is to make true and full disclosure to the flat takers which remains unfettered even after the inclusion of Section 7-A in MOFA.

64. Mr. Jagtiani has submitted that the Developer as part of this disclosure is obliged to disclose the inherent FSI available to it for further development. The Developer is also obliged to specifically disclose that the FSI/TDR/floating FSI is capable of being loaded on the layout and which is proposed to be utilised for further development. He has in this context, relied

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upon the decision of the Supreme Court in **Jayantilal Investments** (supra), at paragraphs 17 and 18 as well as the decision of this Court in **Jayantilal Investments** (supra) at paragraphs 37, 38 and 40 and in **Malad Kokil** (supra) at paragraphs 31, 35.

65. Mr. Jagtiani has submitted that when total FSI disclosed did not include TDR, it was held in the decision of this Court in **Jayantilal Investments** (supra) at paragraphs 39 and 40 and in **Lakeview Developers** (supra) paragraphs 41, 53 that the Developer is not entitled to utilise floating FSI / TDR of another property which was not disclosed.

66. Mr. Jagtiani has submitted that if disclosed FSI is exhausted, even the construction of a disclosed building can be restrained. This has been held by this Court in **ACME Enterprises and Anr. Vs. Deputy Registrar, Co-operative Societies & Ors.**[21] at paragraph 24. Further, if the entire scheme including the information about TDR / FSI is not disclosed then the promoter loses his right to use the residual FSI. This has been held by this

21 **Order dated 7.08.2023 in Interim Application (L) No. 15697 of 2023**

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Court in **Noopur Developers Vs. Himanshu V. Ganatra & Ors.**[22] at page 709.

67. Mr. Jagtiani has submitted that once OC has been obtained and possession of flats in the existing building has been handed over to flat purchasers, unless there is a specific reservation of FSI or TDR, by making the disclosures as above of the entire layout, the future FSI or TDR for further development would be the entitlement of the purchasers. This would be the case whether or not the Society has been formed or whether or not the property has been conveyed. Builder cannot contend right to continue development, if he fails to form society or convey property to flat purchasers. This would be an instance of a party in breach seeking to benefit from his own wrong and making premium from his default which would constitute an abuse of legal process. Developer cannot claim right to use additional FSI which becomes available due to subsequent events. In any event, once the OC has been obtained and the Society has been formed, then unless there is a specific reservation of FSI/TDR through specific

22 **2010 (7) Mh.L.J. 694**

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disclosures of the entire layout with reference to available FSI and TDR, any changes in law allowing for more development potential would not be available to the Developer. This has been held by this Court in **Dosti Corporation** (supra).

68. Mr. Jagtiani has submitted that the Developer cannot simply disclose that he may avail of further FSI and construct; he must further disclose how he proposes to use such FSI, whether on any existing buildings/s, and if so, which building/s or whether in any other location of the layout plan. He must seek the consent of the purchasers for such use, if such use does not form part of the existing project disclosed in the layout plan. Only in that case, the consent of the flat purchasers would be an informed consent. He has in this context relied upon the decision of this Court in **Vitthal Laxman Patil Va. Kores (India) Ltd.**[23] at paragraph 16.

69. Mr. Jagtiani has submitted that the flat purchasers are deprived of valuable rights if the Developer is

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23 **2019 (3) Mh.L.J. 857**

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allowed to constantly shift the goal-posts and achieve some sort of developmental transmogrification, where FSI entirely used is now shown as available, and TDR never deployed is now claimed to have been used. This has been held by this Court in **Lakeview Developers** (supra) at paragraph 77.

70. Mr. Jagtiani has submitted that assuming that TDR is capable of being loaded on a layout – keeping apart the aspect of disclosure – even then under the 23rd November 2007 Government Order, the FSI already utilised for constructing the existing buildings and which are to be conveyed to those societies cannot be considered for determining the amount of TDR to be loaded. In other words, the inherent FSI of the entire layout less the FSI consumed, i.e, the remaining FSI alone can be used to calculate the TDR that can be loaded in the ratio of 1:1. He has placed reliance on the decision of this Court in **Malad Kokil** (supra) at paragraph 55 in this context.

71. Mr. Jagtiani has submitted that even if a building is disclosed in the layout, that by itself will not entitle the

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Developer to construct (even up to the height disclosed) by using fungible FSI or TDR or some other development potential that was not indicated or disclosed in the sanctioned layout or in the agreement. Alternatively, if a building has been disclosed of being up to a particular height only, then notwithstanding the development potential available on the layout, the construction of that building cannot exceed the height disclosed. He has relied upon the decision of this Court in **Malad Kokil** (supra) at paragraph 38 in this context.

72. Further, Mr. Jagtiani has submitted that the flat purchasers in any building of the layout are entitled to the benefit of RG located anywhere in the layout and therefore any change in the RG, including its relocation, cannot be permitted without consent. Any further construction on a layout cannot be permitted, if it would cause any change to the RG areas as shown on the layout. He has relied upon the decision of this Court in **Vitthal Laxman Patil** (supra) at paragraph 13 in this context.

73. Mr. Jagtiani has submitted that this Court in

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Jayantilal Investments (supra) at paragraph 33 has held that the rationale for making a full disclosure of the layout or seeking informed consent for any additional construction is that if the Developer were to be allowed to do it unilaterally, it would add to the number of occupants in a layout, depriving the members of the society the amenities they were already provided.

74. Mr. Jagtiani has submitted that the built up area disclosed in the 1997 Layout Plan has already been exhausted in construction of Building Nos. 1, 2, and 3. He has submitted that the 1997 layout plan mentions the gross plot area of CTS 104-A (suit plot) as 14,286.92 sq.meter. After deductions, the net plot area is 12,143.88 sq.meter. The FSI sanctioned is stated as ONE. The Built Up Area of CTS 104-A stated on the sanctioned layout plan of 1997 as 12,143.88 sq.meter. Defendant No. 8 has admitted that 18,079.17 sq.meter. has been utilized for (in excess of the disclosed 12,143.88, sq.mts) construction of Building Nos. 1, 2, and 3. Thus, the area admittedly utilised is far exceeding the Built Up Area disclosed in the 1997 layout plan. The construction of Building Nos. 1 to 3 is itself in excess of the disclosed FSI and Built

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Up Area as per the 20th November 1997 sanctioned layout plan. On this ground alone, the Plaintiff is entitled to an order of injunction restraining further construction.

75. Mr. Jagtiani has submitted that the reliance placed by Defendant No. 8 on 15th October 1997 Notification (allowing TDR of ONE) is misconceived, disingenuous and an afterthought and in any case, the *post facto* reliance on this Notification after disclosures were made to flat purchasers do not meet with the requirements of MOFA.

76. Mr. Jagtiani has submitted that the object of disclosure under Sections 3 and 4 of MOFA is that purchasers are made aware of the layout in which they are purchasing flats and this must be a point in time after which the development is frozen. He has placed reliance on the decision of this Court - Single Judge in **Lakeview Developers** (supra) at paragraphs 69 and 70 read with the Division Bench decision in **Lakeview Developers** (supra) at paragraph 51. He has further placed reliance on the Supreme Court decision in **Jayantilal Investments** (supra) at paragraphs 17

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and 18 in this context. He has submitted that the construction in excess of the disclosed Built Up Area without purchaser's consent is a gross violation of Section 7 of MOFA.

77. Mr. Jagtiani has submitted that from the material on record, it is clear that the Defendant No. 8's case that TDR as contemplated under Regulation 34 of DCR, 1991 read with Appendix VII (B) Clause 13 was 'duly disclosed' to purchasers is entirely belied.

78. Mr. Jagtiani has submitted that the Defendant No. 8 is attempting to utilize change in law benefits and undisclosed TDR to construct Building No. 4 which is wholly contrary to the disclosed sanctioned layout dated 20th November 1997. He has submitted that in any event, the mandatory conditions specified in the Notification dated 15th October 1997 for utilization of TDR of ONE has not been met.

79. Mr. Jagtiani has submitted that the Developer is not entitled to utilize the TDR given that it had disclosed

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utilization of only 12,143.22 sq.meter. of Built Up Area in the layout plan. Any further Built Up Area utilization will result in a more congested layout, beyond what the flat purchasers contemplated. He has in this context, has relied upon the decision in **Malad Kokil** (supra) at paragraphs 35 – 38.

80. Mr. Jagtiani has submitted that the contention of the Defendant No. 8 that TDR have been utilized to complete the Plaintiff's building and the Plaintiff cannot be heard to complain if TDR is utilized for construction of Building No.4 is erroneous and misconceived. He has submitted that this contention is a blatant distortion and an attempt on the part of the Defendant No. 8 to profiteer from its own default. At no point in time did Defendant No. 1/8 inform or disclose to the Plaintiff Society members that TDR in addition to the disclosed Built Up Area of 12,143.22 sq.meter. will be utilized to complete construction of Buildings shown on the Layout Plan. He has submitted that what is revealed from the 2007 sanctioned plan read with the MCGM's internal letter dated 13th September 2000 is that the Defendant No. 8 had deliberately made a false statement to this Court that TDR had

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been availed under the 15th October 1997 Notification whereas the truth of the matter is that TDR had been received under DCR 34 prior to its amendment by the 15th October 1997 Notification. He has submitted that under Appendix VII, Clause 14 of DCR 34, the FSI of a receiving plot shall be allowed to be exceeded by not more than 0.4 in respect of a DR available for the reserved plot as in this Appendix and upto a further 0.4 in respect of a DR available in respect of land surrendered for road widening of construction of new roads according to sub-regulation (1) of Regulation 33. The 2007 sanctioned layout plan shows that TDR of 10,105.7 sq.meter. has been utilized in Plot A and Plot B. This TDR has been received under Appendix VII, Clause 14 of DCR 34 as it existed prior to the amendment of 15th October 1997.

81. Mr. Jagtiani has submitted that the TDR of 10,105.7 sq.meter. is generated on account of handover of two reservations i.e. Recreation Ground (RG) and Playground admeasuring 7,895.2 sq.meter. and 2,210 sq.meter. totalling 10,105.7 sq.meter. which is the same figure that is revealed from the 2007 Sanctioned Plan. This means that TDR as utilized by

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Defendant No. 1 in constructing Building Nos. 1 to 3 was in terms of a policy prior to 15th October 1997. Thus, on the Defendants' own case as can be seen from the Defendant No. 1's Affidavit on utilization of TDR based on 15th October 1997 Notification is entirely an afterthought and misconceived. Use of TDR received under the earlier policy is suppressed by Defendant No. 1 and an attempt is made to show that TDR of ONE was available as on date of sanction of the 20th November 1997 Layout Plan.

82. Mr. Jagtiani has submitted that whatever may be the source of TDR, it is illegal for Defendant No. 1 to utilize TDR without a full disclosure in this regard being made to the Plaintiff's members. He has relied upon the decision of the Supreme Court in **Jayantilal Investments** (supra) at paragraphs 17 and 18 as well as the aforementioned decisions on disclosure.

83. Mr. Jagtiani has submitted that even assuming that TDR can be utilized, the Government Order dated 23rd November 2007 provides that while giving permission for construction by utilizing TDR, if the Developer has not executed

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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 provides that in such cases the permission to use TDR should be given only insofar as the open land available on the plot. The submissions to the contrary has been made by Defendant No. 8 which are similar to those made by Defendants in **Malad Kokil** (supra) at paragraph 55.

84. Mr. Jagtiani has submitted that a society is to be formed within four months from the date on which the minimum number of persons (60%) required to form such organisation have taken flats. This is provided in Rule 8 of the MOF Rules, 1964. Further, Rule 9 provides that if no period for execution of a conveyance is agreed upon, the promoter shall, subject to his right to dispose of the remaining flats, execute the conveyance within four months from the date on which the society is registered.

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85. Mr. Jagtiani has submitted that in the facts and circumstances of the present case, the Plaintiff Society was registered on 23rd October 2003. He has submitted that Clause 23 of the MOFA Agreement, which provides that only upon construction of the buildings in Plot A and Plot B being completed, the conveyance shall be executed, is contrary to MOFA being open ended and may potentially delay the conveyance indefinitely. He has submitted that the Developer having failed to execute the conveyance, during the time period prescribed, cannot utilize TDR proportionate to the area to be conveyed to the Plaintiff and Defendant No. 7 societies. He has relied upon the decision of the Supreme Court in **Jayantilal Investments** (supra), wherein the submissions of the Developer and society were recorded in paragraph 11 and in paragraph 12 respectively. The submission of the Solicitor General was recorded in paragraph 13. Upon consideration of these submissions, the Supreme Court in paragraph 20 remanded this issue to this Court. He has placed reliance upon the decision of this Court in **Jayantilal Investments** (supra) at paragraphs 41, 50 and 58 (finding).

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86. Mr. Jagtiani has submitted that Defendant No. 1/8's reliance on Recital 11 of the MOFA Agreement, which states that envisaged FSI is capable of generating 6,00,000 sq. ft. (Built-Up) for construction of four buildings namely Building Nos. 1, 2, 3, and 4 on Plot A and Building No. 1, 7, and 8 on Plot B is entirely misconceived. He has submitted that a general or exaggerated figure stated in the MOFA Agreement, which is not correlated to actual development potential available under extant town planning law at the time of making of such disclosure is not valid. He has submitted that inherent FSI, future development potential capable of being loaded with additional FSI / floating FSI / TDR is required to be disclosed. The aforementioned decisions cited by the Plaintiff hold that only if such disclosure is properly made, then the consent of purchasers is not necessary.

87. Mr. Jagtiani has submitted that in the facts and circumstances of the present case, there is no explanation as to how built up area of 6,00,000 sq. ft. is available to the Developer on 20th November 1997. He has submitted that the suggestion that Building Nos. 1 – 4 on Plot A and Building Nos. 1, 7, and 8 on

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Plot B will consume 6,00,000 sq. ft. when the layout as a whole can only generate FSI of 4,77,833.63 sq. ft. itself shows that the figure of 6,00,000 sq. ft. is grossly exaggerated and must yield to a specific disclosure available in the sanctioned layout plan shown to purchasers.

88. Mr. Jagtiani has submitted that even assuming that FSI / TDR is available or was adequately disclosed, the construction of Building No. 4 cannot exceed 14 floors as is stated on the Sanctioned Layout Plan dated 20th November 1997. He has submitted that this submission is strictly in the alternative and without prejudice to the submission that on utilization of inherent FSI, additional FSI / TDR / Fungible FSI (which is not disclosed) cannot be loaded on the plot without written consent of the flat purchasers.

89. Mr. Jagtiani has submitted that the balance of convenience is entirely in favour of the Plaintiff. The Plaintiff's members purchased flats on the expressed disclosure of a given density. Building No. 4, originally contemplated as a 14 storeyed

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structure, is now proposed to be a towering 33 floor structure. To construct this, admittedly the Defendants propose to utilize TDR and fungible FSI which was not available at the time, when the plans were sanctioned. Thus, use of fungible FSI is a gross violation of law. In law, FSI benefit on account of change in law ensures to the benefit of the society.

90. Mr. Jagtiani has submitted that RG area to be provided as per the scheme of MOFA is not only the minimum RG required by the Development Control Regulations, but what has been promised and shown to the flat purchasers in the layout plan. He has referred to the 1997 layout, where RG is shown as 3690.72 sq.mtrs. However, in the 2009 the layout plan, the same is reduced to 3578.02 i.e. 112.7 sq. mtrs. This is contrary to the scheme of disclosure as stipulated by Sections 3 and 4 of MOFA Act read with Form V. This aspect has been specifically considered by the learned Single Judge of this Court in **Vitthal Laxman Patil** (supra) at paragraph 3 read with paragraphs 11 and 13. It has been held that if the Developer is going to take away the RG area whether compulsory RG or additional RG and put up a construction

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thereon, then prior informed consent is required.

91. Mr. Jagtiani has submitted that without prejudice proposal of Defendant No. 8 to provide the balance RG in the podium of Building No.4 is completely untenable and contrary to the decisions of the Supreme Court and this Court. This demonstrates that the Defendant No. 1/8 have attempted to construct Building No. 4 knowing full well that the construction as contemplated or proposed by these Defendants is not possible given the plot size of the layout and will result in substantial depletion of the promised RG spaces. He has submitted that the Defendant No. 8 has time and again increased the plinth area of the said Building No. 4 to encroach upon the RG2. This can be seen from the 2010 plans and comparing the same with the 2014 plan. Thus, it is due to Defendant No. 8's own doing that the RG areas are being encroached upon.

92. Mr. Jagtiani has submitted that RG as provided on site, apart from being deficient in area, is also not in conformity with the 1997 Layout plan. Parts of the RG is being used for car

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parking which Defendant No. 1 itself has sold to members of Defendant No. 7. He has placed reliance upon the Report of Shetgiri and Associates, which had been submitted to this Court. He has submitted that the RG areas as promised and sanctioned in the 1997 layout plan need to be restored to and the same cannot be modified without the express consent of the flat purchasers. Unless such restoration takes place, the question of considering grant of consent cannot arise and the Plaintiff is entitled to prevent construction of Building No. 4 given that the RG spaces as currently provided are deficient and unusable which problem gets exacerbated if construction is permitted.

93. Mr. Jagtiani has submitted that the 2014 building plan for Building No. 4 is in violation of the Development Control Regulations as regards High Rise Building. He has submitted that Building No. 4 as proposed in the 2014 plans is shown to have entry from 6.5 mtrs road and exit on 7.5 mtrs road. It does not have access from 12 mtr wide road. Under Regulation 17(2) of DCR, 1991, a multi-storeyed high rise building ought to have access from road not less than 9 mtrs wide.

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94. Mr. Jagtiani has submitted that Developer has to opt either to follow DCPR, 2034 or DCR, 1991 and cannot take advantages of both DCRs.

95. Mr. Jagtiani has submitted that Defendant No. 1/8 cannot be permitted to undertake any construction activity without payment of outstanding property taxes on the suit land.

96. Mr. Jagtiani has thereafter, dealt with the decisions relied upon by Mr. Tulzapurkar on behalf of Defendant No. 8. He has submitted that the judgment in **Janhit Manch Through Its President Bhagvanji Raiyani and Anr. Vs. The State of Maharashtra and Ors**[24], which had been relied upon on behalf of Defendant No. 8 in support of the contention that since TDR is nothing but additional FSI, a separate disclosure of the use of TDR on a layout is not required and that the developer is entitled to use TDR which is nothing but increased FSI is entirely misplaced. He has submitted that the Supreme Court in **Janhit Manch** (supra) does not state and is not an authority for the proposition that TDR

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24 **(2019) 2 SCC 505**

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is not required to be separately disclosed to flat purchasers.

97. Mr. Jagtiani has then referred to the decision of this Court in **Kalpita Englave CHSL VS. Kiran Builders Pvt.Ltd.**[25], which was relied upon by Mr. Tulzapurkar in order to submit that Section 7 of MOFA is interpreted to mean that promoter is prohibited from making any construction once the promoter hands over the flats to the purchasers. It is submitted that in order to overcome the interpretation put by the Court, Section 7A was enacted to explain what the legislature actually intended. The amendment makes it clear that consent of the flat purchasers was never applicable to the construction of additional building by the promoter. He has submitted that the above submission on behalf of Defendant No. 8 has been made by the Developers in various decisions relied upon by Mr. Jagtiani including **Jayantilal Investments** (supra) and the same has been rejected.

98. Mr. Jagtiani has submitted that in **Jayantilal Investments** (supra), it was held that the obligation of the

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25 **1985 SCC OnLine Bom 196**

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promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7A in MOFA.

99. Mr. Jagtiani has submitted that the reliance upon decision of this Court in **Ralph D'Souza** (supra) by the Defendant No. 8 in support of the proposition that the rigours of disclosure mandated in Section 7 of MOFA do not apply to the construction of new buildings and that consent is only required if additions and alterations are made in the same building in which the flat purchasers have taken flats is misplaced. This decision which was delivered on 21st February 2006 i.e. prior to the decision of the Supreme Court in **Jayantilal Investments** (supra) which was delivered on 10th January 2007 and various other decisions which has been relied upon by Mr. Jagtiani. He has submitted that the decisions hold that the duty of disclosure is founded in Sections 3 and 4 of MOFA which is not diluted by the introduction of Section 7A and is in fact strengthened by insertion of Sub-Section (1-A) in Section 4 of MOFA by the Maharashtra Amendment Act 36 of 1986. The judgment of this Court in **Ralph**

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D'Souza (supra) has been cited and distinguished in the later decisions including in **Jayantilal Investments** (supra) and the duty of disclosure even in respect of buildings forming part of the same layout is affirmed.

100. Mr. Jagtiani has submitted that the decision of this Court in **Manratna Developers Vs. Megh Ratan CHSL**[26] has been relied upon by Mr. Tulzapurkar for the propositions that where the development of a layout is in a phased manner, then consent will not be required for such development involving construction of additional buildings He has submitted that it has been held in **Lakeview Developers** (supra) that **Manratna Developers** (supra) does not have precedential value. Further, in **Dosti Corporation** (supra) at paragraph 85, the judgment in **Manratna Developers** (supra) has been distinguished on the basis that the entire FSI of 2.5 was utilized as then available under DCR. Thus, **Manratna Developers** (supra) has no application to the present case.

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26 **2009(2) Mh.L.J. 115**

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101. Mr. Jagtiani has submitted that the judgment in **Mazda Construction Company** (supra) has been relied upon by Mr. Tulzapurkar for the proposition that a conveyance has to be in terms of the agreement entered into between the Developer and the flat purchaser. The reliance placed in the said decision is entirely misplaced. It is held therein that conveyance is to be executed as per the agreement which has to be read harmoniously with other judgments which hold that open ended clauses for conveyance are not enforceable.

102. Mr. Jagtiani has submitted that the judgment in **Hubtown Solaris Premises CSL Vs. MCGM & Ors.**[27], relied upon by Mr. Tulzapurkar for the proposition that conveyance cannot be granted unless the project is completed, does not consider a coordinate bench judgment in **Prem Construction Company** (supra) and **Dosti Corporation** (supra). It was held in **Hubtown Solaris** (supra) that conveyance cannot be executed as the same has to be executed between SRA, Developer, and the Society after the construction is complete. However, in the present case,

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27 **Order dtd 3.05.2021 in IAL/3846/20**

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property is privately owned by Defendant No. 2 – Defendant No. 6 and there is no requirement for the MCGM to be joined in the conveyance. He has relied upon **Lakeview Developers** (supra) at paragraph 55.

103. Mr. Jagtiani has submitted that **M/s Sancheti Properties** (supra) relied upon by Mr. Tulzapurkar is also distinguishable on facts. The said decision records that the consent of flat purchasers for amalgamation of plots and construction of a new building is clearly reflected in the agreement for sale. That such consent was informed based on a reading of various clauses of the agreement.

104. Mr. Jagtiani has also submitted that the decision in **Mr. Sudhir Shetty** (supra) relied upon by Mr. Tulzapurkar for the proposition that RG areas can be shifted within the layout which shifting does not require consent of flat purchasers is distinguishable in the facts of the present case. In that case, the Developer had disclosed RG1 and RG2 having requisite areas and that Subsequently RGs were amalgamated as one composite RG

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area retaining the RG area as disclosed. It was in this context held that shifting of RG would not require consent as the area for RG has been maintained. However, in the facts of the present case, Shetgiri Report confirms that not only is the RG area substantially reduced, but the RG as provided is also fractured into several unusable patches of RG. He has submitted that **Sudhir Shetty** (supra) has been considered in **Malad Kokil** (supra) at paragraph 41 and distinguished on the ground that the judgment was passed prior to the decision of the Supreme Court in **Jayantilal Investments** (supra).

105. Mr. Jagtiani has accordingly, submitted that the *ad-interim* orders passed in the Notices of Motion are required to be confirmed and Interim Application filed by the Defendant No. 8 is required to be dismissed as having no merit.

106. Mr. Pankaj Jain, the learned Counsel appearing for the Defendant No. 7 has submitted that the Defendant No. 7 is the owner of building No. 2 and which building was developed by Defendant No. 1. Defendant No. 1 built the building on the suit

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land as per the layout plan dated 20th November 1997. The Defendant No. 7 was registered as Co-operative Housing Society in the year 1999-2000. He has submitted that the Plaintiff has sought frivolous, baseless and malicious reliefs against the Defendant No. 7 in respect of club house and car parking in total contravention of law.

107. Mr. Jain has submitted that Defendant No.7 is in agreement with the contention of the Plaintiff that Defendant No. 1 has deliberately failed to carry out conveyance of the land both to the Plaintiff as well as Defendant No. 7. Further, Defendant No. 1 ought to have conveyed the land along with building in favour of the Plaintiff and Defendant No. 7. He has submitted that the Plaintiff society and Defendant No. 7 society although situated on the said suit land, they are different structures and hence, they are subject to two separate conveyances and not one joint conveyance as urged by the Plaintiff.

108. Mr. Jain has submitted that the Plaintiff has approached this Court with unclean hands and are trying to usurp

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the recreational areas that were never originally intended for them as per any sanctioned plans or layouts. He has submitted that RG1 comprised of a club house and it was represented by the Defendant No. 1 that Defendant No. 7's members shall be using the said club house. However, after Plaintiff's building No. 3 came into existence, the Developer i.e. Defendant No. 1 requested the Defendant No. 7 to jointly use the club house.

109. Mr. Jain has submitted that upon construction of the building No. 2, Defendant No. 1 has sold 58 car parking to the members of Defendant No. 7 on podium and car parking slots based on agreements and hence, the car parking area on podium belongs exclusively to Defendant No. 7.

110. Mr. Jain has submitted that the Plaintiff is wrongly and maliciously trying to usurp the parking area allotted to Defendant No. 7 by trying to portray that there was a proposed joint conveyance of the suit land, rather than being conveyed their own society and building.

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111. Mr. Jain has submitted that the Plaintiff has falsely and malafidely alleged that the parking spots have been sold by Defendant No. 1 to members of building No. 2 – the Defendant No. 7 society illegally. However, the true and correct fact is that Defendant No. 7 is lawful owner of the parking spaces sold to them and have entered into agreements to that effect with the developer.

112. Mr. Jain has submitted that it is the Plaintiff's own admission that the Defendant No. 1 has allotted parking space in the podium to members of Defendant No. 7. The Defendant No. 8 has falsely made the statement before this Court in Note 2, which had been submitted to this Court that Defendant No. 8/1 had not sold any car parking on RG areas on plot A and that the members of the Plaintiff society and the Defendant No. 7 are unlawfully parking their cars without consent and knowledge of Defendant No. 8/1 in any manner whatsoever. He has submitted that this is inaccurate and contrary to the Defendant No. 1's letter to Defendant No. 7 by which Defendant No. 1 has not only sold the parkings, but also allotted the parkings in the podium to the

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members of Defendant No.7.

113. Mr. Jain has accordingly, submitted that the Defendant No. 1 has legally and lawfully sold the parking spots to the members of Defendant No. 7 in the podium as per the agreements executed for the same. Hence, the contention of the Plaintiff that the members of Defendant No. 7 are parking their cars unlawfully on the podium or on open spaces is false and mischievous.

114. Mr. Jain has submitted that the Defendant No. 7 has unfettered and unrestricted rights to use the club house and that the Plaintiff has no right to use the club house and the club house be handed over to Defendant N. 7.

115. Having considered the submissions, the issue which arises for determination is whether adequate disclosure of the development potential of the suit land has been made in conformity with the mandatory requirements under Clause 3 and Clause 4 of Form V of MOFA. It is the contention of Defendant No.

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8 that Clause 3 and Clause 4 of MOFA has been duly complied with by making specific disclosure regarding construction of 55,762.08 square metres, which is equivalent to 6,00,000 square feet on the suit land/Plot A and Plot B in the MOFA Agreement. Under Recital 11 of the MOFA Agreement executed with the members of Plaintiff's Society for their respective units, it has been categorically disclosed to the Plaintiff that 6,00,000 square feet of FSI equivalent to 55,762.08 square metres shall be used for construction of Building Nos. 1 to 4 on Plot A and Building Nos. 1, 7 and 8 on Plot B i.e. CTS 104 B on the suit land. The present dispute concerns the building No. 4 and as to whether adequate disclosure was made to the Plaintiff who are the owners of building No. 3 when the members of the Plaintiff society had entered into the MOFA Agreement/Agreement for Sale.

116. It would be pertinent to refer to the decision of the Supreme Court in **Jayantilal Investments** (supra), wherein Clauses 3 and 4 of Form V of MOFA came up consideration. Paragraphs 17 and 18 of the Judgment reads as under:

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"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 layout plan on the one hand vis-à-vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1-A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986. 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

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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 Form V 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 local authority concerned at the time of sanctioning the said plans or thereafter and shall, before handing over possession of the flat to the flat purchaser, obtain from the local authority concerned 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 utilised by the promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the promoter elsewhere, then the promoter shall furnish to the flat purchaser all the detailed particulars in respect of such utilisation of said floor space index by him. In case while developing the said land the promoter has utilised 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 FAR (FSI) 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 FAR (FSI), shall be available to the society."*

(emphasis supplied)

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> *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 layout 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."*

117. Thus, it can be seen from the aforementioned decision in **Jayantilal Investments** (supra) that Clauses 3 and 4 were held to be statutory and mandatory. Further, full and true disclosure of the land, amenities and facilities and "the development potentiality of the plot" was required to be made by

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the promoter/developer and which plot is the subject matter of the Agreement. Further, the developer was to disclose the inherent FSI and whether the plot in question was capable of being loaded with additional floating FSI / TDR. However, the Supreme Court in the said decision did not hold that the Developer is required to disclose the source of FSI. Further, the developer though required to disclose the development potentiality of the plot, was not obligated to mention the number of floors that are to be constructed as this would be subject to building permission and Development Control Regulations. Further, the Supreme Court in considering Clauses 3 and 4 of Form V of MOFA has held that the condition of true and full disclosure flows from the obligation cast on the promoter vide Sections 3 and 4 of the MOFA and Form V, which is the prescribed form of agreement. The obligation remain unfettered because the concept of developability has to be harmoniously read with concept of registration of Society and conveyance of title, and 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 flat takers as long as the builder puts up additional construction in accordance with the layout plan,

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building rules and Development Control Regulations.

118. In the present case, the contention of the Plaintiff is that there has been non-disclosure as to the development potential of the layout, as TDR was neither available nor loaded under the 1997 layout plan.

119. Mr. Jagtiani on behalf of the Plaintiff has referred to the aforementioned decisions including the decision of this Court in **Malad Kokil** (supra), which has held that blanket consent as represented by the general and one sided clauses of the MOFA Agreement are not valid consent and they do not constitute specific consent to a particular addition to be made to a layout. Such clauses of blanket consent have been consistently rejected as constituting any consent for the developer being entitled to carry out further construction. Further, this Court in **Jayantilal Investments** (supra) has held that consent cannot be implied consent or consent from acquiescence and that the Developer/Promoter's obligation is to make a full and complete disclosure of the development proposed on the layout. The

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Developer is obliged to disclose and place before the purchasers the entire project / scheme of development on the proposed layout in conformity with Clauses 3 and 4 of the Model Form Agreement . Further, such obligation to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7A in MOFA. These decisions relied upon by Mr. Jagtiani are in cases where the layout plan itself had made inadequate disclosure and the MOFA flat purchase Agreements had not provided any disclosures as contemplated under Clauses 3 and 4 of the Model Form Agreement. However, in the present case, it can be seen from the Agreement for Sale and in particular Clause 11 thereof, that the disclosure had been made by the Developer as under :-

> "*As at present envisaged Floor Space Index (FSI) capable of generating about 6 lacs sq. ft. (built -up) area will be available for construction in four Buildings being Building Nos 1, 2 ,3 and 4 on Plot A and in 3 Buildings (being Buildings Nos 1, 7 and 8 on Plot B)"*

120. Thus, in the Agreement for Sale/MOFA Agreement, there was a disclosure of the development potential

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and it would not be appropriate merely to consider the 1997 layout plan, without considering the MOFA Agreement and the specific disclosure made therein.

121. Further, it is necessary to consider whether the disclosure of development potential in Recital 11 of the MOFA Agreement contemplated TDR and whether TDR itself was to be loaded as per law, when the layout plan was sanctioned by the MCGM. It is necessary in this context to refer to the Notification dated 15th October 1997 (1997 TDR Notification) of the Government of Maharashtra which introduced Appendix VII (B) Clause 8, 10, 11 read with Clause 13 of the said Notification. This provided for construction upto 1 additional FSI through loading of slum TDR on a receiving Plot. The 1997 TDR Notification had been preceded by notifications, resolutions and memorandums issued by the Government with respect to TDR and its utilisation, reference of which is made in the 1997 TDR Notification. The Notifications include a modification to the DCR for TDR which was published on 25th April 1996 vide Notice in the Maharashtra Government Gazette for inviting suggestions/objections. Further,

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on 20th July 1996, the Slum Rehabilitation Authority approved the proposal for modification with some amendments and submitted the revised modification to the State Government for final sanction on 25th July 1996. The Government of Maharashtra published the revised modification as submitted by the Slum Rehabilitation Authority in the official Gazette for inviting suggestions / objections on 28th August 1996. The Government of Maharashtra brought the revised modification into operation with effect 15th October 1996 till the final sanction was accorded by the State Government. Thus, on 15th October 1996 revised modification for TDR was brought into operation. It is on 15th October 1997 that the Government of Maharashtra sanctioned the revised modification and amended DCR, 1991 to introduce Appendix VII-B pertaining to TDR. Thus, the modification for TDR having been brought into operation on 15th October 1996 and thus, was very much contemplated when the layout plan was issued in 1997 and sanctioned by the MCGM on 20th November 1997.

122. It has been held by the Supreme Court in **Janhit Manch** (supra) that the alternate mode of compensation, given to

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private land owners who have transferred a portion of their land to the Government as and when the Government has required such private land to build or expand public utilities, instead of payment of money is TDR, which is nothing but a development potential, i.e. in terms of increased Floor Space Index ("**FSI**") awarded in lieu of area of land given, conferred in the form of Development Rights Certificate ("**DRC**") by the Government. Thus, it can be seen from this decision that TDR is part of the development potential in terms of increased FSI and when in the present case, the disclosure made in the Agreement for Sale at Recital 11 of the FSI capable of being generated i.e. 6,00,000 sq. ft. (Built-Up Area) available for constructing the Buildings including Building No. 4 on Plot A and the Buildings on Plot B on the suit land, this would necessarily take TDR into contemplation. The TDR was permissible when the 1997 layout plan was issued and received sanction by the MCGM.

123. It is relevant to note that the Defendant No. 8 has utilised FSI and TDR of 18,079.17 square meters for building Nos. 1-3. Further, TDR of 513.96 square meters was utilized for building No. 4 in 2014 prior to the *ad-interim* order passed by this

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Court, which had imposed *status quo* on such construction. Further, it is necessary to note that TDR of 3600 square meters had been utilized for Building No. 3, which is the Plaintiff's building as has been admitted in the Report dated 19th May 2022 of T-Square Architects and Designs appointed by the Plaintiff. Thus, I do not find merit in the contention on behalf of the Plaintiff that they were unaware of TDR being proposed to be utilized by the Defendant No. 1/8 when the Agreements for Sale/MOFA Agreements were entered into with them. Further, the Plaintiff was aware of the development potentiality which included FSI and increased FSI by way of TDR from the 1997 plan sanctioned by the MCGM on 20th November 1997.

124. I thus, find that there has been adequate disclosure made by Defendant No. 8 in conformity with Clauses 3 and 4 of Form V of MOFA. Another relevant factor is that the development potentiality of the suit land, which has been disclosed by Defendant No. 8 as capable of generating 6,00,000 sq.ft area for construction of the Buildings including building No. 4 on the suit land will not be exceeded by Defendant No. 8 in constructing

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Building No. 4. The mere fact of the 1997 layout plan showing Building No. 4 as stilt plus 14 floors cannot dilute the disclosure made in Recital 11 of MOFA Agreement/Agreement for Sale which shows the aforementioned development potentiality of the suit land.

125. I find much merit in the submission of Mr. Tulzapurkar on behalf of Defendant No. 8 that Section 7A of MOFA requires disclosure of the development potential in the Agreement for Sale and does not require disclosure of number of floors, as the same is subject to planning approvals. The increase in floors within the development potential would not prejudice the Plaintiff in any manner. Further, no alteration, variation or change has been carried out in Plaintiff's building. Thus, there is no reason why Defendant No. 8 is not entitled to construct the building No. 4 till 33 floors, considering that Defendant No. 8 is meeting the development potential and is in no manner exceeding the same.

126. I find that the decision relied upon by Mr. Jagtiani namely **Malad Kokil** (supra) is distinguishable on facts

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considering that in that case the additional FSI became available due to change of law. In the present case, Defendant No. 8 is not exploiting any additional FSI due to change of law. Further, in that case, this Court had held that the Developer had represented that they would construct ground plus 4 floors and exhaust the developable potential of the land as available under the 1967 DCR. However, due to change in law, despite the Developer having already exploited the entire developable potentiality of the plot, by not executing the conveyance, sought to take advantage of additional FSI and submitted plan to construct the building of Ground + 22 floors. In the present case, I find that the Developer has made the adequate disclosure of the developable potentiality of the suit land and that is as per the requirement of extant law on the date of sanctioning of the 1997 layout plan and thus, there is no advantage being taken by the Developer of any change of law by constructing a building beyond the developable potentiality.

127. The Plaintiff has not challenged the utilization of TDR for construction of building No. 1 and its own building No. 3 which shows that the Plaintiff has accepted the entitlement of

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Defendant No. 8 to use the TDR even when its "source is not disclosed".

128. It is settled law that where the entire scheme is disclosed to the purchasers under the Agreement for Sale, there is no separate requirement of consent for the construction of a building under that scheme under Section 7A of MOFA. The judgments of the Supreme Court in **Hubtown Solaris** (supra) and **Jayantilal Investments** (supra) are apposite.

129. I do not find merit in the submission of Mr. Jagtiani that the mere mentioning of FSI of 6,00,000 sq.ft. being allowed to be consumed by Defendant No. 1 in the Agreement between Defendant No. 1 and Defendant Nos. 2 to 6 which Agreement is dated 14th April 1993 would imply that 6,00,000 sq.ft. FSI mentioned in the subsequent Agreement for Sale could never include TDR as on the date of the prior Agreement, there was no concept such as TDR. The said Agreement is commercial contract between Defendant Nos. 2 to 6 and Defendant No. 1 and cannot amount to disclosure mandated under Clauses 3 and 4 of

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Form V of MOFA or under Section 3 of MOFA. A mere fact that both the Agreements i.e. Agreement for Sale and the earlier Agreement referred to 6,00,000 sq.ft. FSI does not mean that 6,00,000 sq.ft. FSI cannot include TDR. Further, in the earlier Agreement, it is not mentioned that 6,00,000 sq.ft. of FSI is the development potential of the plot. This term has been expressly mentioned in the Agreement for Sale and which at the relevant point of time i.e. sanction of the layout plan in 1997, TDR was brought into effect by way of modification of the DCR and thus, very much contemplated.

130. I further find no merit in the submission on behalf of the Plaintiff that the letter dated 7th September 2008 addressed by Defendant No. 8 constitutes an admission that consent of the flat purchasers were required for constructing Building No. 4. The consent of flat purchasers of building No. 3 for constructing building No. 4 was not required and/or contemplated under Section 7A of the MOFA, which is the relevant provision and particularly, where Defendant No. 8 has disclosed the carrying out of phase-wise development and mentioned the buildings being

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developed. I find much merit in the submission of Mr. Tulzapurkar that the said letter was addressed as a matter of goodwill and the same cannot be read as an admission, particularly, when the law does not require the Plaintiff's consent.

131. With regard to the submissions on the RG areas, I find that the Defendant No. 1/8 has provided on the suit land, a total RG of 3578.02 sq.meters, in accordance with the layout plan of 25th September 2009, comprising RG1 of 2104.66 square meters, RG2 of 556.80 square meters, RG3 of 571.56 square meters and RG4 of 345 square meters. Under Regulation 23 of DCR, 1991 in the layout having an area of 10,000 sq.meters, 25% of the layout shall be kept as an open space/RG, which in the present case is relevant as the suit land admeasures 14286.92 sq.meters and 25% of the same admeasures 3571.73 sq.meters. Thus, the RG required in the present case is 3571.73 sq.meters. and total RG, which has been physically provided by the Defendant No. 1/8 is in excess of that area. Although in the 1997 Plan, it is provided that the RG area would be of 3690.72 square meters, the Defendant No. 8 has expressed its willingness to

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provide the difference of 112.7 square meters of the podium of building No. 4, which is permissible under DCPR, 2034. I find no reason why the Defendant No. 8 should not be allowed to provide the RG of 112.7 square metres of the podium as very small open space is left for construction of Building No. 4 and it is technically difficult to provide Balance RG area elsewhere. Further, the Division Bench of this Court in **Sudhir Shetty** (supra) has also held that relocation of RG is permissible.

132. I do not find merit in the submissions on behalf of Defendant No. 7 that there has been sale of parking on RG areas which is completely unsubstantiated and without any proof. It is apparent from the Report of Shetgiri called for by this Court that the parkings in the layout are located in the basement and near the stilt area. Although Defendant No. 8 has allotted certain parking on “open spaces” this do not include RG areas.

133. With regard to the submissions on conveyance and execution of conveyance, it has been agreed between the parties in the Agreement for Sale and in particular in Clauses 17,

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22, 23 and 39 of the Agreement for Sale that a conveyance or transfer of title of the land to the Plaintiff society will be only after all construction as the said land is completed and not till then. I do not find merit in the contention on behalf of the Plaintiff that formation of the society and conveyance taking place after the entire property is developed or full payment is received is contrary to Sections 10 and 11 of MOFA. I also do not find merit in the contention of the Plaintiff that Defendant No. 8 having failed to execute the conveyance, cannot utilize the TDR proportionate to the area to be conveyed to the Plaintiff and Defendant No. 7 Society. Under Section 7A of MOFA, Defendant No. 8 is permitted to carry out phase-wise development. Section 11 of MOFA provides that a promoter is to convey its right in the land and building "in accordance with the agreement executed under Section 4 and if no period for the execution of conveyance is agreed upon, he shall be executed the conveyance within the prescribed period." Thus, the Agreement for Sale clearly provided for conveyance of title was to be conveyed after the entire property is developed.

134. This Court in **Harsharansingh Pratapsingh Gujral**

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(supra) has held that the rights of the flat purchasers' flow from the MOFA Agreement which has been executed between the parties. The subject MOFA Agreement recorded that the suit property was to be developed in a phase-wise manner and that conveyance shall be executed only once, the entire suit plot is fully developed. Further, there are other decisions which have been relied upon by Mr. Tulzapurkar to the similar effect. Hence, I find no reason to depart from the view taken by this Court.

135. There are other contentions raised on behalf of the Plaintiff including that the Defendant No. 8 has to opt to follow either the DCPR, 2034 or DCR, 1991. I do not find any merit in this contention. I find that Defendant No. 8 has complied with the Regulations viz. Regulation 9(6)(a) of the DCPR, 2034 which provides that the building can be constructed under the DCR, 1991, if the permission is valid (in terms of its period) or the development can be undertaken under DCPR, 2034, at the option of the owner. Under Regulation 9(6)(b), in case of approved layouts, further development is to be carried out in accordance with DCPR, 2034. I find that Defendant Nos. 1/8 have complied

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with the requirements of DCPR, 2034 and in particularly, Regulation 43 thereof, namely, restrictions of height will not be applicable if plot abuts road of 12 meters and front marginal open space of 12 meters is provided. I find much merit in the submission of Mr. Tulzapurkar that this requirement is required to be considered by taking into account the open spaces with regard to the entire approved whole plot and not merely building No. 4. Further, the Chief Fire Officer, MCGM, vide CFO NOC dated 18th June 2014 has granted NOC for construction of the subject building of height of 127.7 meters i.e. up to 33 floors.

136. I further find no merit in the contention with regard to Defendant No. 1/8 not being permitted to undertake construction activity without payment of outstanding property taxes on the suit lands.

137. I find that this issue of property taxes in respect of the clubhouse and swimming pool on the Plot A is pending and Defendant No. 1/8 have been resolving the issue with MCGM. Further, Defendant No. 8 has stated that without prejudice and

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subject to rights and remedies available in law with Defendant No.1/8, the property taxes lawfully levied during the period of construction of clubhouse and swimming pool will be paid by Defendant No. 1/8.

138. Further, I do not find any merit in the contention on behalf of Plaintiff that 2007 Order of the State Government is applicable in the present case. The 2007 Order was issued only to protect the society in case whether the buildings which are contemplated have already been constructed and conveyance has become due. Further, the 2007 Order is applicable only to buildings / project/(s) where TDR potential has neither been disclosed nor been utilised prior to completion of construction of building/(s) and formation of Society and where the Society had become entitled to the conveyance.

139. In the present case where there has been as held above, adequate disclosure of the TDR potential being utilized and that in fact, prior to 2007 order, TDR 3600 sq.meters has already been utilised for construction of the building No. 3 and in layout

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plan dated 19th April 2007, TDR of 4005 sq.meters is reflected as sanctioned, and hence, the 2007 order is inapplicable in the present case.

140. I thus, find no merit in the case of Plaintiff for stay of construction of building No. 4 and thus, it would be appropriate to grant the relief sought for in the Interim Application No. 3069 of 2021 by vacating the orders dated 6th February 2018 and 23rd February 2018 passed in Notice of Motion No. 1361 of 2018, vacating the order dated 11th July 2018 passed in Notice of Motion No. 1339 of 2018. Hence, the following order is passed.:-

(i) Orders dated 6th February 2018 and 23rd February 2018 passed in Notice of Motion No. 1361 of 2018 filed in the captioned Suit are vacated.

(ii) Order dated 11th July 2018 passed in Notice of Motion No. 1339 of 2018 filed in the captioned Suit is vacated.

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(iii) Interim Application No. 3069 of 2021 is accordingly disposed of.

(iv) In view of this order, Notice of Motion No. 1339 of 2018 and Notice of Motion No. 1361 of 2018 are disposed of.

(v) There shall be no order as to costs.

[R.I. CHAGLA J.]

141. At this stage, Mr. Priyank Kapadia, the learned Counsel appearing for the Plaintiff has sought a stay of the judgment pronounced today.

142. Considering that *ad-interim* relief had been granted in Notice of Motion No. 1361 of 2018 and Notice of Motion No. 1339 of 2018, which has been in operation till today and has been vacated by this Judgment, for a period of four weeks there shall be stay on construction of building No. 4.

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143. It is clarified that this will not in any manner prevent the Defendant No. 8 from applying for sanction of plans for construction of Building No. 4.

[R.I. CHAGLA J.]

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