

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 99 OF 2007

1. Shri Devidas Vishwanath Marathe,
(Now deceased) through his legal
representatives Miss Amaga Devidas Marathe,
aged about 4 years, by her mother and
next friend, Smt. Shubhade Devidas Marathe,
both residing at Akashdarshan,
Behind Canara Bank, Ponda, Goa.
2. Smt. Subhada Devidas Marathe,
both residing at flat no. F-6,
First Floor, Akashdarshan,
Ponda, Goa.
3. Shri Chandrakant V. Prabhu,
Residing at Flat no. S-2,
Second Floor, Akashdarshan
Ponda, Goa.
4. Shri Bhalchandra Krishna Navathe,
5. Smt. Vijaya Bhalchandra Navathe,
both residing at Flat No. s-5, second floor,
Akashdarshan, Ponda, Goa.
6. Shri Ganapati Janardhan Shet,
Taulikar, residing at flat no.
S-4, Second Floor, Akashdarshan,
Ponda, Goa.
7. Shri George Kutty V. Issac,
Residing at Flat no. F-5, first
Floor, Akashdarshan, Ponda, Goa.
8. Shri Vishnuprakash B. Panakar,
Residing at Flat No. F-5, First
Floor, Akashdarshan, Ponda, Goa.
9. Shri Shripad Krishna Gaonkar,
carrying on business at Shop
No. G-12, Ground Floor,
Akashdarshan, Ponda, Goa.
10. Shri Santosh Shripad Gaonkar,

residing at Flat No. S-6, Second-floor
Akashdarshan, Ponda, Goa.

..... Appellants
(Original Plaintiffs Nos. 1 to 10)

V e r s u s

1. M/s Kurtarkar Real Estates,
A duly registered Partnership Firm,
Having its office at Kurtarkar
Tower, Malbhat, Margao, Goa.
And a Branch Office at Akashdarshan,
Ponda, Goa, through its Partners,
Dilip Dharma Kurtarkar.

.....Respondent no. 1
(Original Plaintiffs Nos. 1 to 10)

2. Shri Faustinho Almeida alias
Faustino Illario de Matos,
Sequeira Almeida,
3. Smt. Maria Engracia de
Piedade Souza Almeida alias
Shanti Souza Almeida, Both
husband and wife, Residing at
Dona paula, Tiswadi, Goa.
4. Smt. Maria de Lourdes de
Matos Sequeira Almeida,
5. Shri Antonio Libano dos Anjos
Crasto, both husband and wife,
residing in Bombay.
6. Smt. Maria Virginia Fatima de
Matos Sequeira e Almeida,
7. Shri Jose Joao Ildinho Belarmino
de Souza, both husband and wife,
residing at Panaji, Goa.
8. Smt. Maria Luisa Matos
Sequeira Almeida,
9. Shri Raymonnd Santimano,
both husband and wife, residing
in Bombay, (respondent no. 4
to 9 represented by their duly

constituted attorney Dr. Ronualdo Antonio de Jesus Almeida, residing near Vaidya Hospital, Panaji, Goa.

10. Shri V. M. Valson, residing at Flat No. S-3, Second Floor, Akashdarshan, Ponda, Goa. (Dismissed)
11. Shri Nitin K. Chiplunkar,
12. Smt. Madhuri Nitin Chiplunkar, both husband and wife, residing at Flat no. T-1, third floor, Akashdarshan, Ponda, Goa.
13. Shri Jerome Braganza, residing at Flat T-2, third floor, Akashdarshan, Ponda, Goa.
14. Shri Llewellyn Richard Marsh,
15. Smt. Angela Llewellyn Marsh, both husband and wife, residing at Block B-2, Mannika, Sombriothy, Khapaband, Ponda, Goa.
16. Smt. Janaki Jagannath Kale, residing at Virar, West Bombay, (Dismissed)
17. Shri Keshav Narayan Shanbhag, residing at C-17, Baba Nagar, St. Peter Road, Bandra, Bombay – 50.

..... Respondents

Mr. M. B. D' Costa, Senior Counsel with Ms. Sonia Chodankar, Advocate for the Appellants.

Mr. J. E. Coelho Pereira, Senior Advocate with Mr. V. Korgaonkar, Advocate for the Respondent no. 1.

Coram :- F. M. REIS, J

Date : 13th February, 2015.

ORAL JUDGMENT

Heard Shri M. B. D' Costa, learned Senior Counsel appearing for the Appellants and Shri J. E. Coelho Pereira, learned Senior Counsel appearing for the Respondent no. 1.

2. The above Appeal came to be admitted by an Order dated 17.06.2009, on the following substantial questions of law :

- (i) Whether change in the zoning from residential to commercial entitled the owner/developer to utilize an open space after the development is already carried out in accordance with the regulations in force when the permissions were obtained ?
- (ii) Whether the developer is bound by the principle of promissory estoppel after the development permission is obtained and the plans are approved ?

3. Briefly, the facts of the case are that the Appellant no. 1, now deceased, signed an Agreement which the Respondent no. 1-Developer of a purchase of a flat. The other Appellants also signed similar Agreements somewhere on 22.05.1990 to purchase flats in the property which came to be developed by the Respondent no. 1. It is the case of the Appellants that the Respondent no. 1 had represented them he had obtained the necessary licences for sub-division of the entire property known as "*Boisso*" alias "*Gorbat Bixalem*",

bearing registration no. 13825 of book B-36 surveyed under no. 39/1 and enrolled under matríz no. 571. It is further their contention that the licence for construction of the building Akashdarshan had been obtained by the Respondent no. 1 and approved by the statutory authorities to put up three buildings adjoining each other which, according to them, together had an 'L' shape. It is further their case that the occupants of the buildings could enjoy the benefits of the open spaces situated adjacent to the said plot no. 13. It is also the case of the Appellants that the Respondent no. 1 represented that he would constitute a Co-operative Housing Society in the name and style of . Akashdarshan Co-operative Housing Society and that the said buildings would be provided without underground tank for ensuing regular supply of water and that the Appellants would have a right to join the proposed society. It is further their case that upon such representative, the Agreement came to be executed for the purpose of purchasing respective flats by the Appellants in the said building. The consideration of the flat was fixed considering the proportionate share in the whole plot bearing no. 13. It is further their contention that after the possession of the respective flats came to be given to the Appellants, the Respondent no. 1 put up two structures illegally in the open space of plot no. 13 on the northern side without the consent of the Appellants. It is also their case that in December, 1994, the Respondent no. 1 started constructing in the open space which was appertaining to the said flat and in terms of the said Agreement, the benefits thereof were already handed over to the Appellants herein. In Order to protect their rights and get their conveyances in their favour the Appellants filed a suit somewhere on 20.12.1984 in the Court of the learned Civil Judge, Senior Division, at Ponda, against the Respondents for permanent and

mandatory injunction; for declaration as well as for a relief to convey the disputed property in favour of the Co-operative Society along with the respective flats which were agreed to be purchased by the Appellants herein. The appellants also sought for a permanent injunction restraining the Respondent no. 1 from carrying out any construction in the open space. The Respondents filed their written statement disputing the claim put forward by the Appellants, inter alia, contending that they had the required licence to carry out the construction of the building in the open space of the suit plot no. 13. It is further their case that as the title of the land was not conveyed and, according to them, in view of the terms of the Agreement, Respondent no. 1 is entitled to carry out the new construction in the open land in plot no. 13. The learned Civil Judge, Senior Division, at Ponda, after framing the issues and recording the evidence by Judgment and Decree dated 31.7.2004, directed the Respondent no. 1 to remove the illegal construction and granted a permanent injunction restraining the Respondent no. 1 from carrying out any construction on the suit plot no. 13.

3. Being aggrieved by the said Judgment, the Respondent no. 1-defendant no. 1 in the suit preferred an Appeal before the learned Lower Appellate Court which came to the disposed of by Judgment and Decree dated 09.06.2005 thereby allowing the Appeal of the Respondent no. 1 and, inter alia, holding that the Respondent no. 1 was entitled to carry out the construction in the open land and directing the Respondent no. 1 to convey the property in favour of the Society except for the open land reserved in favour of the Respondent no. 1.

4. Being aggrieved by the said Judgment passed by the Lower Appellate Court, the Appellants have preferred the above Second Appeal which came to be admitted on the aforesaid substantial question of law.

5. Shri M. B. D'Costa, learned Senior Advocate appearing for the Respondents, has pointed out that the Lower Appellate Court has misconstrued the Agreement between the parties executed way back on 22.05.1990 whereby the Respondent no. 1 sold flats to the Appellant along with the undivided rights in the disputed plot no. 13. Learned Senior Advocate further pointed out that as per the said Agreement, there is a clear stipulation that the Respondent no. 1 would put up three buildings adjoining one and another which, according to the learned Senior Advocate were constructed way back in the year 1990 and that the three buildings were together having an 'L' shape. Learned Senior Advocate further pointed out that the three buildings are clearly depicted in the plan produced by the Appellants approved by the statutory authorities and despite of such material, the Lower Appellate Court has erroneously taken a view that the 'L' shaped building constructed in the year 1990 was only one building and the Appellants were entitled to put up two more buildings in the disputed plot. Learned Senior Advocate further pointed out that the Lower Appellate Court has further erroneously noted that the land appurtenant to the said flat was not agreed to be sold to the Appellants and, consequently, the question of the Appellants claiming any right therein would not arise. Learned Senior Advocate further pointed out that it is not in dispute that when the plans were originally approved in the year 1990, the Respondent no.1 had already consumed the then available FAR and, as such,

merely because the land which was originally a residential area was thereafter designated as a commercial area, no rights would accrue to the Respondent no. 1 to put up an additional structure in the disputed plot. The learned Senior Advocate further pointed out that the open land in plot no. 13 was reserved for parking and such land was sought to be misused by the Respondent no. 1 by putting up an additional constructions in the disputed plot. Learned Senior Counsel thereafter has taken me through the Agreement executed between the parties to point out that the Appellants were entitled to the flat along with the undivided rights which were appurtenant to the said flat as on the date on which the Agreement was executed in favour of the Appellants in the year 1990. Learned Senior Advocate further pointed out that as the whole FAR was already consumed as on the date of the original sanctioned plan was approved in favour of the Respondent no. 1, the question of Appellants of benefiting change in FAR would not at all accrue to the Respondent no.1. Learned Senior Advocate further pointed out that the Lower Appellate Court has erroneously taken a view that as no title was conveyed in favour of the Appellants, the Agreement executed in the year 1990 which, inter alia, include the undivided rights of the land would not extend to the open land on the said plot. Learned Senior Advocate further pointed out that the open spaces are for the benefit of the occupants of the flat and, as such, as the Respondent no. 1 had already agreed to convey such undivided rights in favour of the Appellants, it was not open to the Respondent no.1 to carry out any construction in the open land without the consent of the Appellants herein. The learned Senior Advocate has thereafter taken me through the plans which have now been approved to point out that in case such construction is put up, there would be congestion in the plot no.

13 causing great hardship to the occupants of the flats which would also include the Appellants herein. Learned Senior Advocate further pointed out that the fact that the flat along with the undivided right to the land were handed over to the respective Appellants, has been clearly averred by the Appellants in the plaint which has not been disputed by the Respondent no. 1 in the written statement. The learned Senior Advocate further submits that as the Appellants were in possession of the flats along with the open lands reserved for the benefit of all the occupants of the flats, equitable title was created in favour of the Appellants which cannot be deprived by the Respondent no. 1 by putting up the construction in the disputed land. Learned Senior Advocate further submits that the substantial questions of law framed by this Court are to be answered in favour of the Appellants herein and the impugned Judgment passed by the First Appellate Court be accordingly modified. Learned Senior Advocate has relied upon the Judgment of this Court reported in **(2002) 1 GLT 141** in the case of **Down Mangor Valley & anr. vs. Mormugao Municipal Council & Ors.**

6. On the other hand, Shri J. E. Coelho, learned Senior Advocate, appearing for the Respondent no. 1, has supported the impugned Judgment passed by the Lower Appellate Court. Learned Senior Advocate has pointed out that on bare reading of the Agreement between the parties, the title of the land has not been conveyed in favour of the Appellants. Learned Senior Advocate further submits that in terms of Section 54 of the Transfer and Property Act, unless there is a registered conveyance of an immovable property in favour of such person, the question of claiming that any interest has accrued to the Appellants merely on the

basis that the Flat has been handed over to the Appellants, would not arise. Learned Senior Advocate has laid emphasis on clause 23 and 26 of the Agreement to point out that the open lands in the plot no. 13 were reserved for the benefit of the Respondent no. 1 which, according to him, was entitled to enjoy such land in the manner he so desires. Learned Senior Advocate, further submits that there are no restricted clauses in the Agreement which would restrain the Respondent no. 1 from carrying out any construction in the open land. Learned Senior Advocate further submits that the Respondent no. 1 has an Agreement with the original owners to put up a new construction in terms of the transactions between the parties which, according to him, entitles the Respondent no. 1 to put up a construction in the open land. Learned Senior Advocate further submits that the open spaces referred to by the Appellants, were in the context of the open spaces kept for the whole development of the entire property in terms of the development permission granted in favour of the Respondent no. 1 of the entire sub-division consisting of 13 plots. Learned Senior Advocate has thereafter taken me through the Judgment of the Lower Appellate Court and pointed out that the learned Judge has rightly appreciated the evidence on record and has correctly construed the Agreement to come to the conclusion that the Respondent no. 1 was entitled to put up a new construction in the suit plot. The learned Senior Advocate further pointed out that considering the manner in which the suit has been filed, the question of restraining the Respondent no. 1 from putting up any new construction in the open land is totally erroneous. Learned Senior Advocate has thereafter taken me through the plaint and pointed out the real controversy raised by the Appellants which, according to him, clearly shows that the Appellants are not entitled to claim

any right to the open land in plot no. 13. The learned Senior Advocate has thereafter taken me through the relevant portions of the evidence and pointed out that the case of the Appellants that the Respondent no. 1 is not entitled to put up any new construction in the open land is contrary to the documents on record. Learned Senior Counsel in support of his submission, has relied upon the Judgments of the Punjab and Haryana High Court reported in **AIR 1961 P & H 378** in the case of **Sardarilal vs. Shrimati Shakuntla Devi**. Learned Senior Advocate, as such pointed out that the Appeal be rejected.

7. I have duly examined the contentions of the learned Senior Advocates appearing for the respective parties. I have also gone through the records. The basic aspect to be examined in the facts of the present case is the construction of the Agreement entered into between the Appellants and the Respondent no. 1 in respect of the disputed property. On perusal of the Agreement dated 22.05.1990, the recitals therein disclose that the developer-Respondent no. 1 herein has obtained permission for the construction of three multi storeyed buildings in the above described property, dated 06.12.1989 and the Municipal Licences dated 23.01.1990. The next recital also shows that the site plan of the buildings constructed in the above described property are shown in the plan no. 1 annexed to the said Agreement. On perusal of such plan and taking note of the said recitals the three buildings referred to therein have to be construed to be the ones shown in the said plan. It is well settled that the operative part of an Agreement is controlled by the recitals. In the present case, the recitals referred to herein above, clearly disclose that the plans for three buildings were already sanctioned by the

statutory Authorities consisting of the Town Planning Authority as well as the Municipal Authorities. Hence, taking note of the material on record, I find that the licence to put up the three buildings were already obtained by the Respondent no. 1 when the said Agreements were executed way back in 1990. In this connection, the findings of the Lower Appellate Court that the building shown in the plan consisted of only one building and that the Respondent no. 1 was entitled to put up another two buildings are totally erroneous and cannot be borne out from the record. The Lower Appellate court has misconstrued the said Agreement to come to the conclusion that the Respondent no. 1 had put up only one building and that there were another two buildings which the Respondent no. 1 was entitled to put up in the disputed property. To that extent, the construction of the Agreement between the parties by the Lower Appellate Court cannot be accepted and, as such, deserves to be set aside.

8. Besides, to examine the real intention of the parties, if one peruses the operative part of the said Agreement Clause 2 therein clearly provides that upon payment of the total consideration which would include a sum of Rs.63,500/- towards the proportionate share in the said property, the developers who are the Respondent no.1 herein agreed to cause the transfer of the proportionate share in the said land in favour of the appellants. The clause further provides that in case of any breach of the terms by the prospective purchaser of the flat, the Respondent no. 1 would not be liable to transfer the proportionate share in the said land. Thus, Clause 2 of the said Agreement clearly contemplates that the Respondent no.1 had also agreed to convey the undivided right in the land on receipt of the

consideration of Rs.63,500/-. The proportionate undivided right of the land would thus be the undivided right in the land appurtenant to the area where the three buildings were intended to be put up in terms of the licence referred to in the said Agreement. The price which has been fixed is on the basis that the undivided rights would be the one upon calculating the built up area of the three buildings which were contemplated to be put up by the Respondent no. 1. Such right would also extend to the whole area of the plot no. 13. The plan attached to the Agreement clearly show the buildings being put up in plot no. 13 and depicts the open lands reserved for such development of the property. In such circumstances, the contention of Shri J. E. Coelho Pereira, learned Senior Counsel appearing for the Respondent no. 1, that the undivided right of the land would not extend to the open land shown in the plan cannot be accepted. The open lands were not separated from the three buildings intended to be put up. In such circumstances, the Lower Appellate Court was not justified to come to the conclusion that on the basis of the said agreement, the undivided rights agreed to be conveyed in favour of the Appellants would not extend to the open land shown in the said plan and as such hold that the Appellants had no right to the open land. Admittedly, it is not in dispute that after the buildings were completed way back in the year 1992, the possession of the flats along with the undivided rights of the land on was handed over to the Appellants and the other occupants of the said building. In such circumstances, the question of putting up any new building on the basis of the change of zone would not accrue to the Respondents herein without seeking the consent of the occupants of the flats. As the undivided rights of the plot were already agreed to be transferred in favour of the Appellants as existing on the date

of the Agreement in the year 1990, it is not open to the Respondents to deprive the flat owners of such undivided right on the basis of the change of zoning in the year 1994. It is clearly accepted by Shri J. E. Coelho Pereira, learned Senior Counsel appearing for the Respondent no. 1, that as on 1990 the statutory regulations did not permit the Respondent no. 1 to put up the new constructions which are under dispute in the present Appeal. In such circumstances, the rights of the parties with regards to the suit property have crystalised as on the date of the Agreement between the Appellants and the Respondent no. 1 in the year 1990. Once it has been held by the Lower Appellate Court that the Appellants were entitled for specific performance of the said agreements in respect of the individual flats of the appellants/society such rights would also include the undivided rights in respect of the open land reserved in the plans attached to the said Agreement. Taking note of the fact that the suit which was for specific performance of the said Agreement in favour of the occupants of the flats and/or the Society, the contention that no title has been conveyed in favour of the Appellants on the basis of the said Agreement for sale would not at all survive.

9. Apart from that, as it is not in dispute that way back in the year 1992 the possession of the flats and the undivided portion of the land was handed over to the respective Appellants herein, an equitable interest was created in the land under the building in favour of the Appellants. In such circumstances, merely because of some change to the zoning in the year 1994, the Respondent no. 1 was not justified to put up any new construction in the disputed plot without the consent of the occupants of the flat which include the Appellants herein. As the

Respondents had also agreed to convey the undivided rights in favour of the Appellants, no new construction or extension to the building could have been carried out by the Respondent no. 1 herein. The Regulations in Clause 23 and 26, relied by the learned Senior Advocate appearing for the Respondents would not assist the learned Senior Advocate to contend that any new construction could be put up in the open land.

10. On going through the Judgment passed by the learned Trial Judge dated 31.07.2004, I find that whilst examining issue nos. 1, 2 and 7, the learned Judge has taken note of the open space shown therein and on the basis of appreciating the evidence on record, and has come to the conclusion that the Respondent no. 1 has not produced any material that the Appellants were not entitled to the benefit of the said open space and to the set back area. The learned Judge also found that on the basis of the Agreement executed between the parties, the Appellants had agreed to purchase their respective flats/shops along with the corresponding undivided share in the said plot no. 13. The learned judge also noted that as far as the Agreement of Sale at exhibit Pw. 1/T, what was agreed to be sold was the flat having a built up area of about 85 square metres in the proposed building and on due completion of the flat, the Respondent no. 1 agreed to transfer the proportionate share in the land of the said property and transfer the said flat in favour of the Appellant no. 2 for a consideration of Rs.2,25,000/- which included a sum of Rs.63,500/- towards the proportionate share of the land appertaining to the flat in the said building. The learned Judge also noted that what was agreed to be sold was the so called built up area as stated therein along with

the proportionate share of the land covered by the said proposed building and nothing beyond that. The learned Judge also took note of the Mortgage Deed at exhibit Pw.1/D to which the Respondent no. 1 is also a party with the Madgaum Urban Co-operative Bank to hold that it also shows that what was mortgaged was the flat together with the undivided proportionate right in the plot underneath the said building in which the said flat was located. The learned Judge also noted that all the Agreements produced on record in respect of the purchase of flats/shops would lead to the same conclusion. The learned Judge also took note of the observations of this Court in the case of Down Mangor Valley Resident's W. Association vs. The Chief Officer Mormugao M. C. & anr. in Writ Petition no. 251 of 2001 to come to the conclusion that issue no. 1 was partly answered in favour of the Appellants but, however, the open space of the whole developed plot admeasuring an area of 1845 square metres was for the benefit of all the plot owners referred to therein. Whilst examining issue no. 6, the learned Judge has noted that Dw. 2 had admitted that the proposed disputed two buildings were being constructed in the area shown as parking lots in the approved plans. The learned Judge also examined the plans at exhibit Dw.1/F to note that the proposed additional construction is touching the existing 'L' shaped building on the eastern side corner and the northern side. The learned Judge also noted that Dw. 1 had also admitted that the Municipal Licence obtained by the Respondent no. 1 in the year 1990 was in respect of only one building and that the permission obtained from the SPDA in 1989 was for the construction of only one building. The learned Judge also noted that Dw. 2 had admitted that whilst submitting the plans for the original 'L' shaped building, the Respondent no. 1 had shown parking lots or areas

for four wheelers and two wheelers parking and that the proposed additional structure does not adhere to the said parts as provided under the Planning and Development Authority (Development Plan of Regulations of 1989). The learned Judge as such noted that the disputed constructions were being put up in the parking area without the consent of the Appellants. Upon appreciating the evidence on record, the learned Judge, inter alia, restrained by an injunction, the Respondent nos. 1 to 9 from carrying out any construction contrary to law and without the consent of the Appellants in plot no. 13 admeasuring 1586.31 square metres. The learned Judge further ordered that the Respondent nos. 1 to 9 shall remove the illegal and incomplete construction undertaken near the building "Akashdarshan" towards the east/northern side of the plot no. 13. The learned Judge also ordered the Respondent nos. 1 to 9 to provide some facility or underground water reservoir and further directed the Respondent nos. 1 to 9 to sign, execute and get registered a Deed of Sale and transfer the title along with the ideal share in the said plot no. 13 as identified in para A of the plaint. The approval dated 01.07.1994 in respect of the new construction as well as the licence issued by Ponda Municipal Council was declared void and illegal. The Respondents were also, inter alia, restrained by a permanent injunction from carrying out any construction of whatsoever nature pursuant to the approved plan.

11. On going through the findings of the learned Trial Judge, I find that as already pointed out herein above, the learned Judge has rightly taken a view that the Appellants had a right to the open space and set back areas as shown in the plan attached to the respective Agreements of the Appellants. The learned Judge

also rightly came to the conclusion that the proposed new buildings were being put up in the area which was shown as parking space for four wheelers and two wheelers and, consequently, found that the disputed approvals obtained in the year 1994 were null and void.

12. The Lower Appellate Court whilst passing the Judgment dated 09.06.2005, has misconstrued the Agreements to come to the conclusion that there was a right reserved in favour of the Respondent no. 1 to put up addition building in the disputed plot no. 13. The learned Lower Appellate Court has failed to note that on plain reading of the Agreement, there was no such reservation in the Agreement in favour of the Respondent no. 1 nor could it be construed accordingly. The original Agreement in favour of the Appellants has been misconstrued by the Lower Appellate Court as already emphasised hereinabove and, as such, the findings of the learned Appellate Court that the approvals for the new buildings are legal cannot be sustained for the reasons already referred to herein above. In such circumstances, I find that the findings of the Lower Appellate Court to that effect have been erroneously arrived based on misconstruction of the Agreement and the oral evidence of the Respondent no. 1 as pointed out herein above which clearly discloses that an equitable right was created in favour of the Appellants based on the Agreements for sale whereby the set back area and the open spaces reserved for parking of two wheelers and four wheelers were agreed to be conveyed in favour of the occupants of the existing 'L' shape buildings which included the Appellants herein and possession thereof was already delivered to such Appellants herein.

13. For the aforesaid reasons, as the Respondent nos. 1 to 9 had also agreed to convey the undivided rights corresponding to the respective flats/shops in favour of the Appellants, the change in the zoning from residential to commercial would not entitle the developer-Respondent no. 1 herein to utilize the open space without the consent of the Appellants after the development was carried out in accordance with the regulations in force when the permissions were granted.

14. As far as the second substantial questions of law is concerned, as the open space and the set back area were reserved for the benefit of the flats/shop occupants of the original building, 'L' shaped, the Respondent nos. 1 to 9 are estopped from now claiming that they have a right to put up new buildings in such set back/open space area. Once a concluded agreement was arrived at in favour of the Appellants in respect of plot no. 13, any further extensions cannot be undertaken without the consent of all the occupants of the flats/shops. Both the substantial questions of law as such are answered in favour of the Appellants and against the Respondents herein.

15. In view of the above, I pass the following :

ORDER

(I) The Appeal is partly allowed.

(II) The impugned Judgment passed by the Lower Appellate Court is quashed and set aside and stands modified as under :

(1) Respondent nos 1 to 9 shall provided a sump facility or underground

water reservoir with requisite pump for raising water to the storage tanks on the terrace of the said building Akashdarshan in the said plot no. 13, more particularly described in prayer (a) in the plaint, at the cost of the Respondent no. 1.

(2) The Respondent nos. 1 to 9 shall sign, execute and get registered the Deed of Sale in respect of the flats/shops of the Appellants and the Respondent nos. 10 to 13 for transferring the title in respect of their respective flats/shops agreed to be sold to them and shall transfer unto them proportionate shares in the whole plot no. 13 more particularly described in Para (A) of the plaint with a condition that such vendees shall join Akashdarshan Co-operative Society in case the same is constituted.

- (III) The cost of such expenses and registration shall be borne by the Appellants and the Respondent nos. 10 to 13 herein.
- (IV) Respondent nos. 1 to 9 are restrained by a permanent injunction from putting up any new construction in the disputed open lands in plot bearing no. 13.
- (V) Appeal stands disposed of accordingly with no Orders as to costs.

F .M. REIS, J.

arp/*