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

NOTICE OF MOTION NO. 713 OF 2010
IN
SUIT NO. 348 OF 2010

The Laxminarayan Shopping Centre
Co-op. Premises Society Ltd. ...Plaintiffs
Vs.
Majithia Enterprises & Anr. ...Defendants

Mr. Vaibhav Sugdhan a/w. Mr. Rajeev Carvalho i/b. Siddharth Sharma, Advocates for the Plaintiff
Mr. Zal Andhyarijuna a/w. Mr. Nishant Sasidharan with
Mr. E.K. Sasidharan, Advocates for the Defendant No.2

CORAM : MRS. ROSHAN DALVI, J.
DATED : 27TH JULY, 2015

ORDER:

1. In the above suit the plaintiff society has challenged the deed of conveyance executed by defendant No.1 in favour of defendant No.2 dated 18th January, 2008 and called upon defendant No.1 to specifically perform its statutory obligation under Section 15 of the Maharashtra Ownernship Flats Act, 1963 (MOFA) which would be in terms of the various agreements entered into by defendant No.1 as the developer of the suit property with the flat purchasers of the building of the plaintiff society.

2. Consequently in the notice of motion the plaintiff has sought an injunction against transfer, alienation or creation of third party rights or development and redevelopment of two buildings / structures called Gautam Niwas Nos. 1 & 2 on the suit plot of land. The plaintiff has also sought an injunction against demolition of those structures, but which have been demolished by defendant No.2 consequent upon a notice under Section 354 of the MMC Act stated to have been issued by the MMC.

3. The parties to the suit have from time to time entered into various agreements. They are bound by the respective contractual obligations thereunder. The first of such contracts / agreements are the agreements with flat purchasers of the plaintiff society one of which is annexed to the plaint and is dated 14th July, 1979. Thereafter there has been another agreement also between the plaintiff and defendant No.1 for further construction of the society building in the basement thereof which is dated 11th September, 2000.

4. Consequent upon the MOU between the plaintiff and defendant No.1, defendant No.1 entered into further agreements with further parties who have also been members of the plaintiff society for sale of individual units in the basement dated 1st November, 2002; they would also be flat

purchasers.

5. That having been done and there having been no further agreements between the plaintiff and either of the defendants, defendant No.1 who was the initial developer and defendant No.2, who is shown to be the successor-in-title of defendant No.1, thereafter entered into a deed of conveyance of the entire suit plot of land together with the aforesaid buildings / structures on 18th June, 2008. Such a conveyance must be in terms of the agreement and subject to the obligations of defendant No.1 under the agreement, but it is shown to be not so and hence the conveyance is challenged. It would, therefore, have to be seen whether the conveyance is in terms of the initial MOFA agreements of 1979 and the later MOU of 2000.

6. It would, therefore, be material to see the initial agreement to understand the obligations of the parties thereunder. Those are the MOFA agreements. The society would be bound by the agreements entered into by its own members once it is registered and would represent its own members. Defendant No.1 would, of course, be bound by agreement entered into by it and consequently defendant No.2, who claims the right title and interest of the suit property from defendant No.1, would be equally bound by the obligations under such agreements to the extent that they

are in accordance with law which is MOFA and not in contravention thereof. Needless to state that if the agreements / contracts are in contravention of MOFA they would be void to that extent under Section 23 of the Indian Contract Act, 1872 (ICA).

(a) The first recital in the MOFA agreements of 1979 traces the title of defendant No.1 as the owner of the suit property who was to be the promoter of the society premises under Section 2(c) of MOFA and was to develop the suit plot of land.

(b) The second recital in the agreement shows the compliance of Section 7 of MOFA in showing the building plans and specifications for inspection of the flat purchasers.

(c) The third recital in the said agreement shows that the defendant No.1 intends to avail the entire FSI for construction of the building available in respect of the said property and further FSI which may be available thereafter for which the flat purchasers gave their consent.

(d) The fourth recital shows the reservation of the right of defendant No.1 to make alterations in the plans, in the structure of the building and to construct additional structures without reference to the flat purchasers without obtaining any previous consent of the flat purchasers.

7. Upon these recitals the defendant No.1 entered into the agreement for construction and sale of one flat each to the flat purchasers, the specifications of which were given in their respective agreements, one of which is annexed as **Exhibit-A** to the plaint. The relevant terms and conditions of the agreement require a note.

(a) Under clause 11 of the said agreement defendant No.1 was to sell, assign or otherwise deal with the interest of the flat purchasers in the suit land and building or any part thereof without their consent or objection provided that defendant No.1 did not in any way affect or prejudice the right created in favour of the flat purchasers.

(b) Under clause 20 of the said agreement defendant No.1 as the party of the first part agreed to transfer the said land described in the schedule to the agreement with existing buildings, the proposed building to be constructed by defendant No.1 to the plaintiff society and the plaintiff society was to grant a lease of the old existing buildings to defendant No.1 for 999 years at a nominal rent of Re.1/- or to any other Co-operative Society as defendant No.1 may require the plaintiff society to grant. The parties further provided in the said clause itself that accordingly the tenants of the old existing building would become the tenants of defendant No.1 or its nominees. The tenants would be entitled to purchase the tenements on ownership or become members of the plaintiff society, who would be admitted as such members without any consideration for such admission.

8. Clause 20 runs thus:

Clause – 20

"The Party of the First Part agrees to transfer the said land described in the First Schedule hereunder written with the old existing buildings thereon alongwith the buildings proposed to be constructed on the said land by the Party of the First Part to the Co-operative Society to be registered or to a Limited Company with or without conditions including a condition that the transferee Co-operative Society or Limited Company shall grant a lease of the old existing buildings more particularly known as ***Gautam Niwas Nos. 1 and 2*** *bearing Ward Nos. P-6897/102/3 and P/6898/102/3A admeasuring built up area of 18438.94 sq. ft in all to the party of the First Part or to the nominee or nominees of the party of the First Part for a period of 999 years and at a nominal yearly rent of Rs.1/-and payable if demanded or in alternative the party of the First Part may require the said Co-operative Society or Limited Company to transfer or lease*

*to one or more Co-operative Societies or Limited Companies portions of the land in the said property described in the First Schedule including building or buildings on such portion and for purpose of such transfer or lease, it is hereby agreed between the parties hereto that on the transfer or lease of the old existing buildings **Gautam Niwas No.1 and** 2 to the party of the First Part or its nominees as aforesaid, the tenants in the said old existing buildings shall be the tenants of the party of the First part or its nominees. The tenants shall be entitled to purchase their respective tenements on ownership basis and shall be entitled to become the member of the Society if any formed and the party of the Second Part shall admit such tenant and shall have no objection to admitting such tenant purchaser, as member of the Co-operative Society to be formed on purchase of his own tenements without charging any consideration for such admission of such tenant on purchase by him of his tenement as member of Co-operative Society or limited Company."*

9. It is conceded by both the parties that both the parties to the agreement, the plaintiff society who is the successor-in-title of the flat purchasers and defendant No.1 who is predecessor-in-title of defendant No.2, are bound by the aforesaid clause 20. It is, therefore, also conceded that defendant No.2 who is the successor-in-title of defendant No.1 is also bound by the said clause.

10. The purport and import of clause 20 must, therefore, be understood. Defendant No.1 was the owner of the suit plot of land. On a part of the suit plot of land a new building was being constructed by defendant No.1. Defendant No.1

developed the suit plot of land by constructing a building. The flat purchasers agreed to purchase flats / units in suit construction. The society of the flat purchasers was to be conveyed the property. What property was to be conveyed has been specified in clause 20. Clause 20 deals with the transfer of “the said land”. That land is described in **Schedule-I** to the agreement.

11. Schedule-I to the agreement shows land admeasuring 3907.70 sq. mtrs being plot No.5A of TP Scheme No.1 at Malad together with buildings and structures thereon and showing the 4 boundaries thereto.

12. Clause 20 of the agreement specifies what the buildings and structures were. These are two old existing buildings / structures known as Gautam Niwas Nos. 1 & 2.

13. Hence what was sought to be transferred and conveyed was the land admeasuring 3907.70 sq. mtrs being plot No.5A and having buildings known as Gautam Niwas Nos. 1 & 2. Aside from the said transfer / conveyance the parties agreed that the plaintiff society would grant a lease of the said buildings back again to defendant No.1. The lease was at a nominal annual rent of Re.1/- which was payable, if demanded and not otherwise. Upon such rent the lease would be effectuated. The lease was of building with tenants.

The tenants would be the tenants of defendant No.1. Those tenants would be entitled to purchase their respective tenements on ownership basis and the plaintiff society was obliged to admit them as members of the society. The property to be leased for an annual rent of Re.1/- was, thus a fully encumbered property. Defendant No.1 would be the landlord of the tenants though upon the conveyance of the land the plaintiff would have been their landlord. Defendant No.1 would have the rights and obligations under the Bombay Rent Act, 1947 which was applicable to landlords and tenants at the time of the agreement (and of course its successor, the Maharashtra Rent Control Act, 1999). Both defendant No.1 and the plaintiff, therefore, had obligations under the said clause. The consideration payable for the grant of the lease of the property was, therefore, appropriate to the worth of that property. A building or a structure fully tenanted would be leased at an annual rent of Re.1/- payable, if demanded. The tenants would continue to be the tenants of defendant No.1 and defendant No.1 would be the owner in place of the plaintiff society. The tenants would become members of the society also. In effect, therefore, the said two buildings / structures would have no value to either of the parties. To prevent the contract of lease of the buildings being void for want of consideration, the consideration was specified to be Re.1/- payable annually, if demanded.

14. Defendant No.1 is the owner as also the developer and builder. He would know and understand best the worth of the contract he was to execute and the consideration payable thereunder. The lease agreed upon by him with the flat purchasers, which would bind the society once it is registered, would show the premises to be leased. The premises to be leased was the old existing <u>buildings</u>, fully tenanted.

15. Defendant No.1 would contend that what was agreed between the parties was the lease of the <u>land</u> below the buildings because defendant No.1 was to avail of the entire FSI for the construction of the building available on the suit plot of land as also further on additional FSI as would be made available.

16. Reading clause 20, which is under the written contract between the parties showing the lease of the building as the lease of the land under the building is statutorily impermissible. It would require the Court to consider the inclusion of oral evidence in proof of terms of the contract which is specifically excluded under Section 91 of the Indian Evidence Act 1872, the relevant part of which runs thus:

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

> ***"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents. –*** *When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, <u>no evidence</u> shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, <u>except the document itself</u> ..."*

17. Mr. Andhyarijuna on behalf of defendant No.2 argued that defendant No.1 could never have contemplated the sale of the building / structure which is fully tenanted and hence fully encumbered. Defendant No.1 could only have contemplated the lease of the land below the building / structures which he could develop and the FSI of which he could exploit. If that was so the determination of the consideration of Re.1/- as the annual rent payable, if demanded would not be comprehended. Defendant No.1 as the developer at the time of the execution of the agreements of flat purchase with the respective flat purchasers in 1979 was bound by the various statutory provisions under MOFA, the important amongst them was the obligation of defendant No.1 as the promoter to complete the title and convey his right, title and interest in the land of the building sought to be developed by him in accordance with the agreements that he executed with the flat purchasers under Section 4 of the

MOFA within the statutory period. Section 11(1) was applicable to the parties at the time of the execution of the agreements of flat purchaser, which runs thus:

> ***"11. Promoter to Convey title, etc., and execute documents according to agreement –*** *[(1)] A promoter shall take all necessary steps to complete his title and convey, to the organization of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association o flat takers [or apartment owners] his right, title and interest in the* <u>*land*</u> *and* <u>*building*</u>*, and execute all relevant documents therefor in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power."*

18. Of course sub-sections 2 to 5 of Section 11 was then not applicable to the parties and need not be considered.

19. The position that prevailed between the flat purchasers and defendant No.1 was, therefore, the obligation of defendant No.1 to convey the entire land and the entire building which formed the schedule to the agreement with the flat purchasers. That was plot No.5A admeasuring 3907.70 sq. mtrs and the building Gautam Niwas Nos. 1 & 2**.**

20. The plaintiff society, which was the successor-in-title of the flat purchasers, would, therefore, be the complete owner

of plot No.5A admeasuring 3907.70 sq. mtrs as also the building / structures Gautam Niwas Nos. 1 & 2.

21. If the society were to lease back to defendant No.1 the land, the consideration payable by defendant No.1 would be quite different from the consideration agreed to be paid for such use. If the plaintiff society was to lease fully tenanted buildings Gautam Niwas Nos. 1 & 2 to the defendant No.1 the annual lease rent agreed by the parties at Re.1/-, payable if demanded, would in order. Consequently even if the oral evidence of the terms of clause 20 of the contract governing defendant No.1 is taken into account it cannot stand to reason that what was contemplated by the parties was to lease the land below the building, the FSI of which could be utilised and exploited by defendant No.1 and not the lease of the tenanted buildings themselves.

22. Thus the parties agreed and they as well as their successors-in-title are bound by clause 20 of the initial agreements of flat purchase under which defendant No.1 would convey the land as statutorily required by him and the flat purchasers and thereafter the plaintiff society would lease the building back to defendant No.1 for the paltry consideration.

23. Defendant No.1 has sought to convey to defendant No.2 as the owner the land under the buildings Gautam Niwas Nos. 1 & 2.

24. What was conveyed is the property mentioned in the schedule to the said conveyance. The schedule shows Plot No.5A admeasuring 4090 sq. mtrs with buildings and structures thereon. It is stated that 4090 sq. mtrs was original area of the suit plot from which certain setback was deducted to arrive at 3907.70 sq. mtrs which was shown in the schedule to the agreements for flat purchase.

25. Hence if what is agreed to be conveyed is the entire property admeasuring 4090 sq. mtrs, it would include the land below the buildings and structures which is Gautam Niwas Nos. 1 & 2.

26. The agreements to flat purchasers are of 1979. The conveyance is sought to be entered into in 2008. Defendant No.1 was the owner of the suit property in 1979. He was also the promoter of the society building under Section 2(c) of MOFA. He was bound by the statutory requirements of MOFA as enacted until then. The owner / promoter who would develop the suit plot of land by constructing the building consisting of flats which were sold to several flat purchasers

who later formed the plaintiff society had to convey the entire plot of land to the society under Section 11 of MOFA. Section 11 would require him to do so within the prescribed time. Rule 9 of the Maharashtra Ownership Flats Rules, 1964 would require defendant No.1 to do so within 4 months of the registration of the plaintiff society. Hence within such time defendant No.1 would no longer be an owner of the suit plot of land. He would statutorily cease to have ownership rights. Defendant No.1 of course, breached Rule 9 of the rules and did not convey the suit plot of land to the plaintiff society. He further sought to continue to act as the owner of the suit plot of land and sought to transfer the suit plot of land and his ownership rights thereunder to which he had no interest under the law.

27. The plaintiff society agreed to lease the buildings Gautam Niwas Nos. 1 & 2 to defendant No.1. Hence defendant No.1 would have been the lessee of the building though not the owner of any part of the suit property. As the lessee of the building he may or may not be entitled to assign the lease to a third party depending upon his contract of lease with the plaintiff society. Clause 20 of the aforesaid agreement which contemplates the lease does not contemplate any further assignment. An assignment could be made only if specifically contracted.

28. Defendant No.2 seeks to act upon the conveyance. Defendant No.2 seeks to exploit the FSI of the remaining part of the suit property aside from the land below the structures and the buildings of the plaintiff society and more specially the land below the building upon the premise that the entire FSI has not been yet exploited.

29. Defendant No.2 claims that there is additional FSI of the land below the buildings Gautam Niwas Nos. 1 & 2 as also a part of the TDR which is purchased by defendant No.1. Defendant No.2 would claim such right pursuant to the third recital in the agreement with the flat purchasers dated 14th July, 1979 which has been set out herein above.

30. It is trite that that though recitals do show the history of the parties to the contract or the suit property or the intent of the parties, they are not the contractual terms, stipulations, conditions or covenants. They do not govern the act of the parties and cannot be enforced. Of course, defendant No.1 as also defendant No.2 who claims through defendant No.1, would want to avail of the entire FSI as mentioned in the third recital of the flat purchasers' agreements of 1979, but the availability of the entire FSI is dependent upon the available and exploitable FSI and not the FSI which is not agreed to be availed of and is so stated in the third recital itself.

31. Mr. Andhyarijuna contended that the parties were bound by the aforesaid third recital allowing defendant No.1 to utilise the FSI of the entire plot. A recital is not a term of the contract. It is also not a stipulation or a condition. The meaning of recitals must be first understood to accept the effect of the recitals.

32. **Concise Oxford English Dictionary Eleventh Edition, revised at page 1200** defines recital as:

> "*the part of a legal document that <u>explains its purpose</u> and gives other <u>factual information</u>*".

33. **Black's Law Dictionary Eighth Edition by Bryan A. Garner at page 1298** defines recital as:

> *"A preliminary statement in a contract or deed <u>explaining the reasons</u> for entering into it or the <u>background</u> of the transaction, or showing the <u>existence</u> of particular facts.*

34. Odgers' on construction of Deeds and Statutes, fifth edition at page 149 explains recitals in documents to be <u>introductory or narrative</u>. It would show what has led up to the <u>necessity or desirability of executing the deed</u> or document represented by the expression *"whereas"*. It further shows that recital may detail a long history of title to land or

may be:

> "in the words of Lord Halsbury L.C. *"a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made"*. It further sets out : *"In 1693 Lord Holt declared that "the reciting part of a deed is not at all a necessary part either in law or equity … it hath no effect or operation"*. It then sets out the other uses and recites thus :
>
> *"In particular recitals may be material (i) to record some fact in order to obtain the benefit of the presumption of truth in deeds, etc.,..... (ii) to set out the circumstances under which the deed is to operate and the intention of the parties ….., (iii) to operate by estoppel, and thus to strengthen the title of the grantor".*

35. The earliest case in which a recital came to be explained was **Ex Parte Dawes In Re Moon 1886 XVII QBD 275(AC) at page 286 by Lord Esher M.R.** thus:

> *"Esher, M.R. This is a deed of assignment or conveyance of property by way of security, and the question is how it is to be construed. It is to be construed by what appears on the face of it, and by nothing else. You may of course look at the state of circumstances which existed at the time when it was made, but in the present case that will not help us at all in the construction. The deed must be construed as it stands, and by reference to nothing else.*
>
> *Now there are three rules applicable to the construction of such an instrument. If the recitals are clear and the operative part is ambiguous, the recitals govern the construction* (not the transaction). *If the recitals are ambiguous, and the operative part is clear, the operative part must prevail. If both the recitals and the*

operative part are clear, but they are inconsistent with each other, the operative part is to be preferred".
(bracket supplied)

36. The Supreme Court came to interpret and explain recitals in the case of **Ram Charan Das Vs. Girja Nandini Devi AIR 1966 SC 323 @ 327** which was a case of a family arrangement to determine whether or not it was a temporary or permanent settlement between the parties. After citing the very recital the Court was called upon to consider, in paragraph 9 of the judgment, the Court observed that the parties could accept the relationship of specific parties in the family and the shares allotted to each of them which could have been challenged by persons not bound by the settlement.

37. Referring to the Dictionary of English Law by Jowitt the Supreme Court set out what recitals are thus:

> *"statements in a deed, agreement or other formal instrument, introduced to explain or lead up to the operative part of the instrument".*

38. The Supreme Court explained that the recitals could be narrative or introductory, if they set forth the facts on which the instrument is based or if they explained the motive for the operative part respectively.

39. As explained in the case of **Ex Parte Dawes In Re**

Moon (supra) the Supreme Court also set out that where the recitals were clear and the operative part was ambiguous they would govern the construction of the contract (they would not be taken in any event to be the terms binding upon the parties, a contrary provision in the contract itself being expressly made notwithstanding).

40. The Supreme Court further set out :

> *"Normally a recital is evidence as against the parties to the instrument and those claiming under them and in action on the instrument itself the recitals operate as an estoppel, though that would not be so on a collateral matter".*

41. The recitals would, therefore, show what parties contemplated and the terms of the contract would set out the respective reciprocal covanants or obligations of the parties.

42. This case was followed in the case of **Maihar Cement, Century Textile & Industries Limited Vs. Krishna Gears (P) Ltd. & Anr. 2000 VI AD (DELHI) 1= 2000 (54) DRJ 364 = AIR 2000 Delhi 362** in which the Court was called upon to construe a bank guarantee. The Court observed:

> *"The recital clauses cannot be read into the operative clause so as to convert an unconditional bank guarantee into a conditional one".*

43. This was again followed in the case of **Galaxy Power Cable Ltd. Vs. Canara Bank 2001(60) DRJ 578 at page 588 = 92 (2001) DLT 133** in which also the construction of a bank guarantee came up for consideration. The Court was called upon to consider two cases including the case of **Maihar Cement** (supra). The Court observed that in one case the notification of bank guarantee can be confirmed by reference to the recital. In the other the terms were so explicit, precise and unambiguous that:

> *"in toning them down by alluding to the recitals the purpose of the Bank Guarantee would be violated".*

Hence the Court observed that:

> *"the recitals should not overwhelm the obvious import of the operative part of the Bank Guarantee".*

This the Court did by considering the definition of recital in the Dictionary as aforesaid as also in the judgment in the case of **Ex Parte Dawes.**

Consequently the Court concluded :

> *"It would in the present case be fallacious to construe and confuse the recitals with the operative part, even if it is assumed that both are clear. In the event that the language of the operative part of the Bank Guarantee is ambiguous which is not the case here, it would be permissible to take recitals into contemplation".*

44. In no case has the Court construed the recital as a term, or a stipulation in a contract which can be sought to be enforced by any party disregarding the terms of the actual

contract themselves.

45. The FSI of the land below the two structures is not shown by the parties to be made available to defendant No.1 under the agreements of flat purchase. In fact clause 20 would negate such an intention specially with regard to the land below the buildings / structures Gautam Niwas Nos. 1 & 2 since the land is not even agreed to be leased to defendant No.1.

46. Thus seen the parties contracted for carving out an exception to the obligation of defendant No.1 under Section 11 of MOFA with regard to the lease of the buildings Gautam Niwas Nos. 1 & 2 only upon consideration of Re.1/- to be paid annually, only if demanded. The successors-in-title of both the parties – the plaintiff society of the flat purchasers and defendant No.2 who claims through defendant No.1 would be bound by the said contract. Defendant No.1 could be entitled to convey any property as the owner on the date of the conveyance which is capable of being conveyed to defendant No.2 or any other party. It is seen that defendant No.1 is incapable of conveying any part of the suit property to any one other than the plaintiff society. No part of the suit property, therefore, could be conveyed to defendant No.2. Defendant No.1 would not have the right, title and interest to transfer any part of such property to defendant No.2. Hence

defendant No.2 cannot get any right, title and interest in the said property as none can transfer a better title than what he could have.

47. Reliance upon the judgment in the case of **Grand Paradi Co-operative Housing Society Ltd. & 31 Ors. Vs. Mont Blanc Properties & Industries Pvt. Ltd. & Another in Appeal No. 599 of 2002 in Suit No. 99 of 2002** is misplaced. Clause 14 of the agreement between the parties in that case showed the agreement to lease for 999 years "the said property on which the building is to be constructed" and included "the conveyance of the building to be constructed".

This case is not one such. The parties in this suit did not agree to convey the property (land) including the buildings Gautam Niwas Nos. 1 & 2. They agreed to lease only the buildings.

48. Consequently the entitlement to any part of the suit property is only of the plaintiff society. Hence the plaintiff society as the owner of the suit property, and who must be taken to be the owner of the suit property, would have the legal right to prevent any transfer of any part of the suit property and be ultimately conveyed the title in the entire suit property subject to clause 20 relating to further lease to be created of the buildings / structures Gautam Niwas Nos. 1 & 2 thereon.

49. It is argued that between the aforesaid two contracts defendant No.1 entered into the MOU with the plaintiff society on 11th September, 2000 to develop the basement premises of the plaintiff society under which defendant No.1 was entitled to sell such developed and constructed basement / stilt premises to various third parties. These premises also would be in the land which is agreed to be developed for the co-operative society. It would be governed by the requirements of MOFA as on the date of such a contract. Indeed defendant No.1 has constructed the basement premises / stilt under plans which are sanctioned by the BMC and entered into similar agreements for the units constructed therein. The purchasers of the units would be flat purchasers and would be governed by those provisions. The MOU is executed by defendant No.1 with the society itself. The consent of the society under Section 7 of MOFA is, therefore, clear. Defendant No.1 would have the right to construct further and additional premises as per such construction. The construction of such premises or the creation of rights in further flat purchasers / unit purchasers would be within the law. It has nothing to do with the lease of the land below the buildings / structures Gautam Niwas Nos. 1 & 2 or the exploitation of the FSI of the land below those structures.

50. Defendant No.1 has entered into further agreements

with the purchasers of units in the basement on 1st November, 2002. These agreements cannot go further than the rights that defendant No.1 acquired under the MOU dated 11th September, 2000.

51. Defendant No.2 would rely upon the terms of the agreements that defendant No.1 entered into with the unit purchasers (as flat purchasers of portions of the basement). The third recital of the agreement of 2002 shows the consent given by the society for additional construction. Such consent is for the construction of basement, without more. The 5th recital shows that defendant No.1 was then developing further property utilising the unutilised FSI <u>in the stilt</u> and also further FSI acquired by defendant No.1 by purchase of TDR certificates for the new construction <u>in the stilt.</u> Under the 9th recital of the said agreement defendant No.1 has sought to take the consent of the unit purchasers of the basement for using "such" FSI or further or additional FSI which may be available as also added FSI. The said agreement is for construction of the basement / stilts.

52. Under clause 20 of the said agreements of 2002 defendant No.1 seeks to <u>transfer the land</u> described in the first schedule thereunder, which is identical to the schedule in the ultimate conveyance as also in all material particulars the schedule in the agreements of flat purchasers of 1979.

53. Under clause 20 however the defendant No.1 and the further purchasers of the basements have agreed that the plaintiff society shall transfer the land and grant a lease of the requisite portions of land with the old existing buildings Gautam Niwas Nos. 1 & 2 of specified area.

54. Clause 20 of the agreements of 2002 are materially different from and in addition to clause 20 of the agreements of 1979 with the initial flat purchasers by which the society came to be bound. The agreements of 2002 are not confirmed by plaintiff society. Yet the obligation of the plaintiff society to transfer the land "with" old existing buildings Gautam Niwas Nos. 1 & 2 is imputed upon the society. The plaintiff society would not be bound by any contract which is in addition to or in derogation with what the plaintiff society was already bound to do. It is upon such additional obligation of the society upon which defendant No.2 would claim the lease of the land "under the old existing buildings Gautam Niwas Nos. 1 & 2" that defendant No.2 would seek to further exploit the FSI of the suit property. This is statutorily as also contractually impermissible.

55. Consequently the plaintiff society has made out a good prima facie case for grant of the injunction sought.

56. The notice of motion of the plaintiff society is made absolute in terms of prayer (a) except the last portion bracketed in red since the buildings Gautam Niwas Nos. 1 & 2 have already been demolished.

57. The defendants, therefore, shall not deal with, dispose off, alienate, encumber, or create any third party rights in the suit land admeasuring 3907.70 sq. mtr being plot No.5A of TP Scheme No.I at Malad, Mumbai.

58. The defendants shall also not develop any further such plot of land or construct any building thereon.

(ROSHAN DALVI, J.)