

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****ARBITRATION APPEAL NO. 6 OF 2015****ALONGWITH****CIVIL APPLICATION NO. 6 OF 2015****IN****ARBITRATION APPEAL NO. 6 OF 2015**

**M/s. Paranjape Schemes (Construction) Ltd.,)
A Company incorporated and Register under)
Indian Companies Act, 1956 having its)
administrative office at PSC House, CTS NO.)
111 + 111/2, Anand Colony, Off.Prabhat Road,)
Pune – 411 004)
Registered office at Somnath CTS 988,)
Rammandir Road, Next to Tilak Mandir,)
Vile Parle (E), Mumbai – 400 057) Appellant**

VERSUS

**1. Mr.Avinash Madhukarrao Yekhande,)
Age : 42 years, Occ: Service,)
R/o. G-1002, Madhukosh, S.No.4/2, 16 and 17)
Wadgaon Khurd Sinhagad Road, Pune – 411041)**

**2. Mr.Shrinivas Vijaykumar Dombe,)
Age : 37 years, Occ: Service,)
R/o. G-102, Madhukosh, S.No.4/2, 16 and 17)
Wadgaon Khurd Sinhagad Road, Pune – 411041)**

**3. Mrs.Sangeeta Vikas Waskar,)
Age : 40 years, Occ: Housewife,)
R/o. G-401, Madhukosh, S.No.4/2, 16 and 17)
Wadgaon Khurd Sinhagad Road, Pune – 411041)**

**4a. Mr.Prakash Parashuram Gosavi,)
Age : 45 years, Occ: Service)**

4b. Mrs.Ashvini Prakash Gosavi,)

Age : 38 years, Occ:Housewife,)
 both R/o. G-702, Madhukosh, S.No.4/2,)
 16 and 17 Wadgaon Khurd Sinhagad Road,)
 Pune – 411 041)

5. Mr.Avinash Shrihari Pawal,)
 Age : 34 years, Occ: Service,)
 R/o. C/o. Nanda Tukaram Gundalkar,)
 S.No.36, Dhanakwadi, Pune – 411 043)

6. Mr.Ranjit Surendra Deshmukh,)
 Age : 51 years, Occ : Self Employed)
 Walvekarnagar, Parvati, Pune – 411 009)

7. Kailas Vasant Joshi,)
 Age : 31 years, Occ: Service,)
 R/o. 1457 B. Shukrawar Peth,)
 Bhaumaharaj Lane, Pune – 411 002)

8. Mr.Bhimrao Daji Ronge (HUF),)
 Age : 51 years, Occ : Agriculture,)
 R/o. Kanishka Plot No.9, Gat No.102/3,)
 Karmayogi Nagar, Link Road, Pandharpur,)
 Dist: Solapur – 413 304)

9. Mr.Kedar Shrikrishna Khapare,)
 Age:30 years, Occ : Self Employed,)
 R/o. Saudamini Apartment, Flat No.4,)
 Opp.Sarovar Hotel, 100 ft. Road,)
 Vishrambaug, Sangli – 416 415)

10. Mr.Abhijit Surendrarao Deshmukh,)
 Age : 44 years, Occ: Doctor,)
 R/o.“Aastha” Hospital Rukhmini Nagar,)
 Amravati Maharashtra)

..... Respondents

ALONGWITH
 CIVIL APPLICATION NO. 22 OF 2015
 IN
 ARBITRATION APPEAL NO. 6 OF 2015

- | | | |
|---|---|-------------------------|
| 1. Snehal Prabodh Kelkar, |) | |
| Age : 33 years, Occ: Housewife, |) | |
| R/o.Raghunandan, Patwardhan Baug, |) | |
| Erandavane, Pune |) | |
|
2. Prabodh Vikram Kelkar, |) | |
| Age : 35 years, Occ: service |) | |
| R/o.Raghunandan, Patwardhan Baug, |) | |
| Erandavane, Pune |) | Applicants |
|
3. Jayant Digambar Sant, |) | |
| Age : Adult, Occ: service, |) | |
| R/o. 203, Sarita Englace, Navsha Maruti |) | |
| Mandir, Sinhagad Road, Pune – 411 030 |) | |
|
4. Anand Digambar Sant, |) | |
| Age : Adult, Occ: service, |) | |
| R/o. 203, Sarita Englace, Navsha Maruti |) | |
| Mandir, Sinhagad Road, Pune – 411 030 |) | |
|
5. Vijay Chandrakant Bharte, |) | |
| Age:Adult, Occ.:profession |) | |
| R/o. 4, Nikhil Garden, Manik Baug, |) | |
| Sinhagad Road, Pune – 411 051 |) | |
|
6. Rupali Vijay Bharte, |) | |
| Age:Adult, Occ.:Housewife |) | |
| R/o. 4, Nikhil Garden, Manik Baug, |) | |
| Sinhagad Road, Pune – 411 051 |) | |
|
7. Shrikant Gulabrao Kale, |) | |
| Age:Adult, Occ.:Lawyer |) | |
| R/o. B,603, Isha Garden, Off.Mahesh Vidyalaya) |) | |
| Near Gandhi Bhavan, Kothrud, Pune – 411 038) |) | |
|
8. Manisha Shrikant Kale, |) | |
| Age:Adult, Occ.:service |) | |
| R/o. B,603, Isha Garden, Off.Mahesh Vidyalaya) |) | |
| Near Gandhi Bhavan, Kothrud, Pune – 411 038) |) | |

9. Tushar Suresh Potphode,)
 Age : 40 years, Occ.: LIC Agent, Kasba Peth,)
 Pune – 411 011)
10. Vidya Tushar Potphode,)
 Age : Adult, Occ.: Service, Kasba Peth,)
 Pune – 411 011)
11. Manoj Ramesh Joshi,)
 Age : Adult, Occ.: service,)
 R/o. C2/14, Danmodar Vihar, Hingane (Khurd))
 Pune)
12. Mugdha Manoj Joshi,)
 Age : Adult, Occ.: service,)
 R/o. C2/14, Danmodar Vihar, Hingane (Khurd))
 Pune)
13. Ravindra Madhukar Joshi,)
 Age : Adult, Occ.: service,)
 R/o. Intop Heights, Sector 19, Airoli,)
 Navi Mumbai)
14. Manisha Ravindra Joshi,)
 Age : Adult, Occ.: Housewife,)
 R/o. Intop Heights, Sector 19, Airoli,)
 Navi Mumbai)
15. Angad Sushila Ajgaonkar,)
 Age : Adult, Occ.: employed,)
 R/o. 4, Rupdarshini, Lt.Dilip Gupte Road,)
 Mahim, Mumbai 400 016)
16. Sayali Shirish Nimkar,)
 Age : Adult, Occ.: service,)
 78/31, Vrundavan Society, Majiwade,)
 Thane (West) 421 600)
- Applicants

IN THE MATTER BETWEEN

M/s. Paranjape Schemes (Construction) Ltd.,)
A Company incorporated and Register under)
Indian Companies Act, 1956 having its)
administrative office at PSC House, CTS NO.)
111 + 111/2, Anand Colony, Off.Prabhat Road,)
Pune – 411 004)
Registered office at Somnath CTS 988,)
Rammandir Road, Next to Tilak Mandir,)
Vile Parle (E), Mumbai – 400 057) Appellant

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 Age : 51 years, Occ : Self Employed)
 Walvekarnagar, Parvati, Pune – 411 009)
7. Kailas Vasant Joshi,)
 Age : 31 years, Occ: Service,)
 R/o. 1457 B. Shukrawar Peth,)
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8. Mr.Bhimrao Daji Ronge (HUF),)
 Age : 51 years, Occ : Agriculture,)
 R/o. Kanishka Plot No.9, Gat No.102/3,)
 Karmayogi Nagar, Link Road, Pandharpur,)
 Dist: Solapur – 413 304)
9. Mr.Kedar Shrikrishna Khapare,)
 Age:30 years, Occ : Self Employed,)
 R/o. Saudamini Apartment, Flat No.4,)
 Opp.Sarovar Hotel, 100 ft. Road,)
 Vishrambaug, Sangli – 416 415)
10. Mr.Abhijit Surendrarao Deshmukh,)
 Age : 44 years, Occ: Doctor,)
 R/o.“Aastha” Hospital Rukhmini Nagar,)
 Amravati Maharashtra)
- Respondents

Mr.P.S.Dani, Senior Advocate, i/b. Mr.Prasad Kulkarni for the
 Petitioner/Appellant.

Ms.Gauri Godse, a/w. Mr.Dilip Athavale, Mr.Jaydeep Deo for the Respondents.

Mr.Atul Damle, Senior Advocate, i/b. Mr.Anant Vadgaonkar for the
 Interveners/Applicants in Civil Application No.22 of 2015.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 6th APRIL, 2016

PRONOUNCED ON : 29th APRIL, 2016

JUDGMENT :

Admit. Learned counsel appearing for the respondents waive service. By consent of parties, appeal is heard finally.

2. By this appeal filed under section 37 of the Arbitration and Conciliation Act, 1996, (for short the said 'Arbitration Act'), the appellant has impugned the order and judgment dated 21st January, 2015 delivered by the learned District Judge – 14, Pune allowing the application filed by the respondents partly filed under section 9 of the Arbitration Act and temporarily restraining the appellant from carrying out construction of 'E' Building in terms of prayer clause (A) of the application, till further orders. The appellant herein was the original opponent in the proceedings before the learned District Judge – 14, Pune whereas the respondents herein were the applicants.

3. Some of the relevant facts for the purpose of deciding this appeal are as under :-

4. The respondents desired to acquire residential accommodation for themselves and their family members. The appellant is a developer who has proposed to construct various buildings in the city of Pune. On 31st December, 2011 Pune Municipal Corporation granted approval to the building plans submitted by the appellant for the Buildings E, F and G and issued a commencement certificate. Insofar as the respondents are concerned, the respondents have purchased various flats in Building G constructed by the appellant. On 31st December, 2011 the appellant published brochure of the scheme 'Madhukosh'.

5. Sometime in the year 2012, the respondents executed separate agreements with the appellant in respect of various flats purchased in building G under section 4 of the Maharashtra Ownership Flats(Regulation of the Promotion, Construction, Sale, Management and Transfer) Act,1963 (for short 'MOFA'). It is the case of the respondents that the appellant deferred the construction of the proposed Building E which was near proposed DP Road due to delay in receiving tree cutting permission. One of the members had made a complaint on 3rd April, 2013 about the proposed construction of the Building L originally sanctioned as Building E.

6. On 27th September, 2013, Pune Municipal Corporation issued commencement certificate for revised Building E thereby shifting its position abutting to Building G under Commencement Certificate No.CC/2000/13.

7. On 15th October, 2013 Pune Municipal Corporation issued a completion Certificate bearing No.OCC/1029/13 for Buildings G and F. On 19th December, 2013 the appellant started construction of plinth of Building E. On 4th January, 2014, the appellant informed the respondents to take possession of their respective flats in Building G and informed that if the possession was not taken by the respondents of their respective flats in Building G, the penalty would be charged to the respondents by the appellant on the overdues. Sometimes in the month of January/February 2014 the respondents accordingly took possession of their respective flats from the appellants in Building G.

8. On 20th September, 2014 some of the respondents herein entered into a Deed of Apartment with the appellant. It is the case of the respondents that during the period between February 2014 and October 2014, the appellant had convened number of meetings with the flat purchasers including the respondents and

promised to settle the dispute raised by the flat purchasers with regard to 22 flats in Building G. During the said period, the appellant constructed RCC structures upto second slab of Building E.

9. On 13th October, 2014, the respondents herein filed an application under section 9 of the Arbitration Act against the appellant inter alia praying for interim measures by way of an order of injunction from effecting further construction of Building E to the layout of property described in paragraph 1A of the said application in terms of the building plan approved by Pune Municipal Corporation in terms of CC No. 2000/13 dated 27th September, 2013 and also praying for an order of perpetual injunction from creating any third party interests in respect of flats in Building E.

10. The appellant herein filed an affidavit in reply in the said proceedings and opposed the said application for interim measures on various grounds including on the ground of maintainability of the said application and on the ground of jurisdiction. It was contended by the appellant that the said application filed under section 9 was *de-hors* the arbitration clause and was thus not maintainable. The application was also opposed on the ground of alleged delay on the part of the respondents in approaching the court. It was contended that the provisions of MOFA being an special enactment would supersede the provisions of Arbitration Act and thus the said application filed under section 9 was not maintainable on that ground also.

11. By an order and judgment dated 21st January, 2015, the learned District Judge – 14, Pune allowed the said arbitration application filed by the respondents partly i.e. restraining the appellant by an order and injunction by effecting further

construction of Building E in the layout of the property described in paragraph 1A of the said application in terms of the building plan approved by the Pune Municipal Corporation in terms of CC No.2000/13 dated 27th September, 2013 till further orders. This order of learned District Judge – 14, Pune is impugned by the appellant in this appeal under section 37 of the Arbitration Act.

12. Civil application No.22 of 2015 is filed by the applicants who claims to be the flat purchasers in Building 'E' by the appellant and seeks intervention/impleadment as parties in the Arbitration Appeal No. 6 of 2015 filed by the appellant. Civil application filed by the applicants is opposed by the respondents on the ground that these applicants had never applied for impleadment/intervention in the arbitration application filed by the respondents before the learned District Judge – 14, Pune and thus cannot be allowed to be impleaded/to intervene in the present appeal filed by the appellant. The application is also opposed on the ground that these applicants were not parties to the arbitration agreement entered into between the appellant and the respondents.

13. Mr.Dani, learned senior counsel for the applicant invited my attention to some of the provisions of one of the agreement entered into between the appellant and one of the respondents and also to the provisions of Deed of Apartment executed between the appellant and some of the respondents. Reliance is also placed on recital 'D' and 'H' of the agreement executed under section 4 of MOFA and on clauses 6, 11(m), 13, 21(b) (d), 25 and 45. It is submitted by the learned senior counsel that under clause 21 of the said agreement entered into between the parties, it was agreed that the purchaser shall become member of the condominium and shall co-operate the owner/developer in that regard in that respect. It was agreed that the developer shall be entitled to form more than one condominiums by

combining flat purchasers of one or more buildings together, at its sole discretion, and the purchasers shall not be entitled to take any objections whatsoever thereto.

14. The developer and the consenting parties agreed to submit their respective rights, title, interest, claims relating to the said property and the said buildings to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing and registering one or more Deeds of Declaration togetherwith the bye-laws under section 2 thereof. Under clause 21(e) it was provided that if the developer form more than one condominiums in the said project, the amenities/facilities/rights of ways etc. shall be enjoyed by all the condominiums and members thereof jointly, unless the developer has provided the same exclusively, in the concerned Deed of Declaration.

15. Under clause 21(g), it was provided that the developer shall cause the submission of the said property togetherwith the said buildings to the provisions of the Maharashtra Apartment Ownership Act, 1970 by forming one or more condominiums, within a period of one year of completion of the said project/scheme. Under section 21(h), it was provided that the developer and the concerned parties shall execute and/or cause to be executed the conveyance in the nature of the Deed of Apartment relating to the concerned purchaser, within a period of one year of date of registration of the said Deed of Declaration.

16. It is submitted by the learned senior counsel that under clause 26 of the said agreement, the purchasers had agreed and declared that they had no claim save and except in respect of the particular flat agreed to be sold to the purchasers under the said agreement and subject to the terms and conditions appeared in the said agreement.

17. Clauses 45 and 46 of the said agreement which are relevant for the purpose of deciding these appeals are extracted as under :-

45. The Parties to this Agreement have agreed that in case any dispute or difference arises between the parties about the meaning or interpretation of any one of the clause or any term of the Agreement, the such dispute or difference shall first be referred to the Arbitrator appointed by the Owner/Developer as per the provisions of Arbitration and Conciliation Act, 1996.

46. Except otherwise mentioned and provided herein, this Agreement shall always be subject to the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963.

18. Under clause 49 of the said agreement, it was provided that the purchaser and developer shall present the said agreement as well as the final conveyance or any document in form of Deed of Apartment at the proper registration office for registration within the time limit prescribed by the Registration Act and the purchaser and the developer shall attend such office and admit execution thereof. The said agreement was duly registered with the Sub Registrar.

19. Learned senior counsel for the appellant placed reliance on the Deed of Apartment dated 20th September, 2014 executed between the appellant and one of the flat purchaser and more particularly recital 'J', clauses 1, 19 and 20. It is submitted that some of the respondents having executed Deed of Apartment and having signed a separate Deed of Declaration under the provisions of Maharashtra Apartment Ownership Act, 1970, all their rights, interest and title if any, under the agreement entered into under section 4 of MOFA stood novated/superseded under the said Deed of Apartment read with Deed of Declaration. He submits that mere

execution of an agreement for sale under section 4 of MOFA itself would not confer any title in the flat in favour of the flat purchasers by the appellant and title deed could be conferred only by execution of the Deed of Apartment read with Deed of Declaration.

20. It is submitted that in view of the parties having executed a Deed of Apartment alongwith Deed of Declaration, agreement entered into between the parties under section 4 of MOFA ceased to exist for all the purposes. He submits that admittedly in the Deed of Apartment read with Deed of Declaration, there existed no arbitration agreement between the parties in view of earlier agreement executed under section 4 of MOFA stood novated/superseded by execution of Deed of Apartment read with Deed of Declaration and thus the application filed by the respondents under section 9 of the Arbitration Act itself was without jurisdiction and not maintainable. He submits that the Deed of Declaration was executed by more than five flat purchasers. The other seven flat purchasers have registered Deed of Apartment during the period between July and September 2014. Learned senior counsel for the appellant placed reliance on the judgment of Supreme Court in case of ***Young Achievers vs. IMS Learning Resources Private Limited (2013) 10 SCC 535*** and in particular paragraphs 5 to 8 in support of his aforesaid submission.

21. The next submission of the learned senior counsel for the appellant is that the MOFA being a special enactment which was applicable to the parties when the said agreement under section 4 of MOFA was executed, the respondents could not have invoked the provisions of the Arbitration Act for filing any proceedings against the appellant including the application for the interim measures under section 9. He submits that the proceedings if any, which could be filed by the

respondents under the said agreement entered into under section 4 of MOFA could have been entertained only before a civil court and not under the provisions of Arbitration Act.

22. Without prejudice to the aforesaid submission, it is submitted by the learned senior counsel that even if clause 45 of the MOFA agreement is invoked by the respondents for the purpose of referring the dispute to arbitration and for filing an application for interim measures under Section 9 of the Arbitration Act, the dispute and difference between the parties about the meaning or interpretation of any one of the clause or any term of the said MOFA agreement could only be referred to arbitration and not the dispute as proposed to be referred by the respondents as is apparent from averments made in the application filed for interim measures by the respondents under Section 9 of the Arbitration Act. In support of this submission, learned senior counsel invited my attention to paragraphs 3, 4, 7 to 11 and 21 of the arbitration application filed by the respondents for interim measures. He submits that it is not the case of the respondents that a new construction carried out by the appellant is contrary to any of the provisions of the said MOFA agreement.

23. It is submitted that the claims proposed to be made by the respondents in arbitration application are dehors the provisions of clause 45 of MOFA agreement and thus none of the claims proposed to be made by the respondents in the arbitral proceedings are arbitrable. He submits that the entire application under Section 9 of the Arbitration Act filed by the respondents is based on the alleged violation of the statutory provisions under MOFA and is not based on any alleged violation of any of the provisions of the MOFA agreement. He submits that under the said clause 45 of the MOFA agreement, the learned arbitrator has

no jurisdiction to adjudicate upon the violation of any of the provisions of the MOFA as alleged by the respondents. He submits that none of the averments made by the respondents in the said arbitration application discloses any dispute as to any meaning or interpretation of any of the clauses of the MOFA agreement. He submits that on this ground, the dispute, if any, in respect of the new construction carried out by the appellant is not arbitrable as invoked under the MOFA agreement.

24. It is submitted that the scope of referring the dispute under clause 45 of the MOFA agreement is thus very limited and any claim made by the respondents which does not disclose any dispute requiring any interpretation of any clause or meaning of any of the provisions of the MOFA agreement is thus beyond the jurisdiction of the learned arbitrator. He submits that learned District Judge thus had no jurisdiction to entertain the application filed under Section 9 of the Arbitration Act for interim measures on this ground alone. He submits that the learned District Judge has exceeded his jurisdiction by entertaining, trying and disposing of the arbitration application for interim measures under Section 9 of the Arbitration Act.

25. It is submitted by the learned senior counsel that in the arbitration application filed by the respondents and in the correspondence addressed by the respondents to the appellant, the respondents have made serious allegations of fraud and misrepresentation against the appellant which allegations cannot be adjudicated upon in the arbitral proceedings. He submits that the learned District Judge, therefore, could not have granted any interim measures against the appellant and in favour of the respondents based on such allegations of fraud and misrepresentation made by the respondents against the appellant. He submits

that since the said allegations of fraud and misrepresentation cannot be decided by the arbitrator, the interim relief being in aid of final relief thus could not have been granted by the learned District Judge under Section 9 of the Arbitration Act.

26. It is submitted by the learned senior counsel that when the construction of four buildings was going on, the respondents had also admittedly noticed that the construction of building 'E' also had started. In support of this submission, learned senior counsel invited my attention to paragraph 7 of the arbitration application and would submit that the respondents were fully aware of commencement of construction of building 'E'. The construction of building 'G' was already over and the possession of various flats was handed over to the flats purchasers including the respondents by the appellant. He submits that it was not the case of the respondents that the respondents were not aware of the amendment in the layout plan submitted by the appellant.

27. It is submitted that most of the respondents have already entered into a final sale deed after personal visiting to the site. He submits that possession receipt of the respondents would also show the numbers of plans having been sanctioned by the local authority in favour of the appellant including the plan in respect of the building 'E'. He submits that building 'E' is constructed upto the 6th floor. The third party rights are created by the appellant in favour of various flat purchasers. He submits that in view of gross delay and laches on the part of the respondents in applying the interim measures, the learned District Judge could not have granted interim measures. It was not a fit case for grant of injunction. He submits that the appellant has already spent substantial amount on carrying out construction of portion of the building. It is submitted that the balance of

convenience was in favour of the appellant and not the respondents.

28. It is submitted by the learned senior counsel for the appellant that in paragraph 13 of the arbitration application, the respondents have alleged that the construction of building 'E' was abutting to terraces and windows of flats in building 'G' and was affecting the easementary rights of the respondents which allegations cannot be referred to arbitration.

29. It is submitted by the learned senior counsel that prima facie finding of the learned District Judge that there was no novatio in view of there being two separate agreements i.e. MOFA agreement and Deed of Apartment is totally erroneous and shows perversity. On the issue of balance of convenience, the learned senior counsel for the appellant placed reliance on the judgment of this Court in the case of **Lodha Estate Private Limited Vs. Shri Kishan Waman Bhoir & Ors.**, reported in **2012 (1) ALL MR 143** and in particular paragraphs 10 and 12 thereof. It is submitted by the learned senior counsel that even in the arbitration application filed by the respondents, the respondents have averred that they would make a claim for compensation against the appellant. He submits that on this ground alone, the learned District Judge could not have granted any injunction thereby stating further construction of 'E' building causing tremendous hardship not only to the appellant, but also to various flat purchasers in 'E' building.

30. Ms. Godse, learned counsel for the respondents, on the other hand, submits that admittedly Deed of Apartment was not signed by the three flat purchasers out of ten flat purchasers. She submits that the appellant had issued a brochure showing the different locations of 'E' and 'G' buildings. She submits that even

layout plan sanctioned by the Municipal Corporation and shown to the respondents showed the same location.

31. In so far as the issue of existence of arbitration clause raised by the appellant is concerned, it is submitted by the learned counsel for the respondents that even upon execution of the Deed of Apartment, the rights and obligations under the MOFA agreement were not superseded by the said Deed of Apartment and the provisions of the MOFA agreement continued to subsist and binding between the parties. She submits that the Deed of Apartment was executed for the purpose of transferring the proportionate share in the land including common amenities in favour of the flat purchasers and the said document is not a title deed in respect of the flats purchased by the respondents. She submits that the MOFA agreement is not restricted to the flats purchased by the respondents, but it was in respect of the entire property including the land which was to be developed by the appellant by constructing various buildings including 'G' building. She submits that the dispute could not be restricted to only flats purchased by the respondents, but was in respect of the entire property and thus the dispute in respect of the entire property was arbitrable. In support of her this submission, learned counsel invited my attention to clauses 45 and 46 of the MOFA agreement.

32. It is submitted by the learned counsel for the respondents that under the provisions of the MOFA, the title in respect of the flats purchased by the respondents already stood transferred in favour of the flat purchasers. The Deed of Apartment which was executed by some of the respondents was not executed for conferring any title in respect of the flats purchased by the respondents. She submits that even after execution of such Deed of Apartment, the breaches of the

MOFA agreement committed by the appellant could still be adjudicated upon by referring such dispute to the arbitration by invoking clause 45 of the agreement. Without prejudice to the aforesaid submission, it is submitted that even if Deed of Apartment is executed, the provisions of MOFA agreement did not come to an end in toto. The dispute having arisen under the said agreement thus can be referred to arbitration under clause 45 of the MOFA agreement.

33. In so far as the submission of the appellant that the dispute or difference arising out of meaning or interpretation of any of the clauses or any of the provisions of the said MOFA agreement only could be referred to arbitration and not the dispute as proposed to be referred by the respondents is concerned, learned counsel for the respondents placed reliance on clauses 6, 13, recital (b) i.e. "entire property." Learned counsel also invited my attention to various averments made in the arbitration application filed under Section 9 for interim measures by the respondents including paragraphs 7 & 8. It is submitted by the learned counsel that the dispute raised by the respondents thus also relates to the meaning or interpretation of various clauses of the MOFA agreement and thus such dispute raised by the respondents are arbitrable.

34. It is submitted by the learned counsel for the respondents that the respondents have not made any allegations of fraud or misrepresentation as canvassed by the appellant. She submits that even if any allegations of fraud or misrepresentation are made by the respondents, there is no bar under the provisions of the Arbitration Act for referring such dispute to arbitration. She submits that the respondents have only explained their understanding about possession of land in the arbitration application.

35. It is submitted by the learned counsel for the respondents that Section 4 of the MOFA provides for a format of the agreement that is required to be entered into by a developer/promoter in favour of the flat purchasers. It further provides for mandatory requirements of providing for a common area/facilities and for disclosure of the property card of the entire property. Under Section 5 of the MOFA, the promoter is required to maintain a separate account. Role and powers of the Competent Authority are prescribed under Section 5A of the MOFA. Under Section 10 of the MOFA, the promoter has to form a Society. Under Section 11 of the MOFA, the promoter has to convey title in respect of the land to the Society or the apartment owners in favour of group of flat purchasers.

36. It is submitted that under Section 11 of the MOFA, there is no individual transfer of property in favour of the flat purchasers. Even if, the Deed of Declaration/Deed of Apartment is executed in respect of the land and for common amenities agreement would still survive in so far as the purchase of flats is concerned. Learned counsel placed reliance on the judgment of this Court in the case of ***Vrindavan (Borivali) Co-operative Housing Society Limited Vs. Karmarkar Brothers & Ors.***, reported in ***1982 Mh. L.J. 607***. It is submitted that even if the dispute for enforcement of any provision of the MOFA agreement and/or alleging violation of the provisions of the MOFA in view of the arbitration agreement between the parties, such dispute cannot be tried by a Civil Court. In view of the arbitration agreement between the parties, arbitral proceedings are not barred. It is submitted that the arbitral proceedings for enforcement of the provisions of the MOFA agreement or even for the enforcement of the statutory rights provided under the MOFA, such proceedings/action cannot be construed as an action in rem but would only be an action in personam. She submits that the claims thus proposed to be made by the

respondents are arbitrable and can be adjudicated upon in the arbitral proceedings. The parties can always enter into an agreement referring such dispute to arbitration under the provisions of the Arbitration Act.

37. Learned counsel for the respondents placed reliance on the judgment of the Supreme Court in the case of ***Booz Allen & Hamilton Inc. Vs. SBI Home Finance Ltd. & Ors.***, reported in ***2011 (5) SCC 532*** and in particular paragraphs 34 to 39 thereof in support of her submission that the claims proposed to be made by the respondents are in personam and are not in rem and thus arbitrable.

38. Learned counsel for the respondents placed reliance on the judgment of the Supreme Court in the case of ***Ashapura Mine-chem Ltd. Vs. Gujarat Mineral Development Corporation***, reported in ***2015 (8) SC 193*** and in particular paragraphs 19 and 21 thereof. She submits that there is no question of any novation of the MOFA agreement by Deed of Apartment and/or Deed of Declaration. She submits that both the agreements are independent agreements and are not overlapping or Deed of Apartment cannot be superseded of the MOFA agreement since the appellant had committed the breaches under the provisions of the MOFA agreement still survives.

39. Learned counsel for the respondents placed reliance on clause 21(d) of the MOFA agreement and would submit that merely because the parties had agreed to submit their respective rights, title and interest claims relating to the entire property and the said buildings to the provisions of the Maharashtra Apartment Ownership Act, 1970, the said provisions would not apply in respect of the individual flat. She submits that the terms “the said building and the said property”

would not apply to the individual flat. My attention is also invited to the Schedules I and II to the Deed of Apartment and it is submitted that even the said Schedules would indicate that the reference is made to the entire property and not to the individual flat. Reliance is also placed on Schedule V of the said Deed of Apartment. She submits that under the said Deed of Apartment, the flat purchaser is given 0.7% individual share in the common area in the building and the land. She submits that the Deed of Apartment is only a consequential document and not a document entered into a substitution for sale i.e. MOFA agreement.

40. It is submitted by the learned counsel for the respondents that for the purpose of resolving the dispute between parties, arbitration clause would continue to survive even if performance of the obligations under the MOFA agreement does not survive. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in the case of ***Damodar Valley Corporation Vs.K.K. Kar***, reported in ***1974 (1) SC 141*** and more particularly paragraphs 7, 9 and 11 thereof. Reliance is also placed on the judgment of this Court in the case of ***Lloyds Steel Industries Limited Vs. Oil & Natural Gas Corporation Ltd.***, reported in ***AIR 1997 Bombay 337*** and in particular paragraphs 15 and 16 thereof. It is submitted that all the disputes proposed to be referred by the respondents to the arbitration are the disputes under the MOFA agreement and are not under the Deed of Apartment.

41. It is submitted by the learned counsel that the relief claimed in the arbitration application filed under Section 9 of the Arbitration Act is in aid of final relief proposed to be claimed by the respondents in the arbitral proceedings. The respondents have not filed any statement of claim till date. The respondents

were thus entitled to seek interim measures under Section 9 of the Arbitration Act in aid of final relief proposed to be claimed by the respondents in the arbitral proceedings.

42. It is submitted by the learned counsel for the respondent that the appellant had proposed to construct 'E' building which was originally located on the front side and location whereof has been now shifted adjoining to the 'G' building occupied by the respondents hereto and others. The appellant could not have carried out such construction without obtaining individual and informed consent of the flat purchasers. In support of this submission, learned counsel for the respondents placed reliance on the judgment of Supreme Court in the case of ***Lakeview Developers Vs.Eternia Co-operative Housing Society Ltd.***, reported in ***2015 SCC OnLine Bom 3824*** and more particularly paragraphs 25, 33 to 36, 42 to 45, 51 and 61 to 67 thereof.

43. It is submitted by the learned counsel for the respondents that whether the appellant could have been permitted to change the user or could be permitted to shift the location of 'E' building from its original location to the location adjoining to the 'G' building is concerned, the same would also be a dispute arising out of the interpretation of the provisions of the agreement for sale and more particularly clauses 6, 9 and 13 which will have to be read with clauses 45 and 46 of the MOFA agreement. She submits that if the appellant is allowed to develop building 'E' during the pendency of the arbitral proceedings, nothing will survive in the arbitral proceedings commenced by the respondents and the claims of the respondents would be frustrated and would become infructuous. She submits that the respondents have already explained the alleged delay in the application filed under Section 9 of the Arbitration Act. She submits that the

respondents were already ready and willing and are even now ready and willing to go to the arbitration as per the agreement for sale entered into between the parties. She submits that the claims in the arbitral proceedings would be for compliance of the statutory obligations under the provisions of the MOFA and for compliance of the obligations of the appellant under the agreement for sale including removal of structure not constructed by the appellant as per the original layout which would be within the provisions of the arbitration agreement. She submits that there is no bar in the arbitral proceedings to decide the issue on violation of the statutory obligations under the provisions of the MOFA and also the violation of the agreement for sale under the MOFA agreement. She submits that balance of convenience is thus in favour of the respondents and not in favour of the appellant.

44. Learned counsel for the respondents distinguishes the judgment of this Court in the case of **Lodha Estate Private Limited (supra)** relied upon by the learned senior counsel for the appellant on the ground that the facts before this Court in the said judgment were totally different. She submits that in this case, the respondents are litigating in the bonafide manner and balance of convenience lies in their favour. She submits that the appellant having committed violation of the provisions of the MOFA and have illegally got the layout amended cannot seek any equity from this Court. Learned counsel also distinguishes the judgment of the Supreme Court in the case of **Young Achievers Vs. IMS Learning Resources Private Limited (supra)** on the ground that Deed of Apartment executed between the appellant and some of the respondents did not supersede or novate the agreement for sale executed between the parties and thus the agreement for sale as well as the arbitration agreement contained therein survives even after execution of Deed of Apartment

read with Deed of Declaration. She submits that the agreement for sale entered into between the parties under Section 4 of the MOFA and Deed of Apartment read with Deed of Declaration executed between the appellant and some of the respondents are for different purposes and both the agreements survive.

45. Learned counsel for the respondents placed reliance on the judgment of the Supreme Court in the case of ***Veena Hasmukh Jain Vs. State of Maharashtra***, reported in ***1999 (5) SCC 725*** and in particular paragraphs 3 to 6 and 8 thereof in support of her submission that since there was an obligation on the part of the appellant to hand over possession of the respective flats to the respondents by the appellant even before execution of conveyance under the said MOFA agreement, the said MOFA agreement itself was a conveyance of flat and conferred title therein. She submits that till the appellant implements the entire layout of the entire property, the agreement entered into under Section 4 of the MOFA would not come to an end and the arbitration clause recorded therein would still survive. Learned counsel placed reliance on clause 6 and 29 of the MOFA agreement and would submit that the appellant had undertaken to carry out construction of the entire property as per the layout sanctioned. She submits that whether the developer can shift 'E' building which was originally located in the layout on the front side to the location adjoining to the building 'G' itself is an issue of interpretation under the provisions of the MOFA agreement is thus arbitrable.

46. Mr.Dani, learned senior counsel for the appellant also placed reliance on some of the paragraphs of the judgment of the Supreme Court in the case of ***Booz Allen & Hamiltan Inc.(supra)*** and would submit that the dispute under the provisions of the MOFA agreement and for adjudication of the statutory

violation under the MOFA would be the proceedings in rem and thus are not arbitrable. He submits that the averments made in the arbitration application itself would indicate that the claims proposed to be made by the respondents on the basis of which the respondents have applied for interim measures would not be arbitrable. He submits that the claims proposed to be made by the respondents are not based on the alleged interpretation of any of the clauses of the MOFA agreement. Learned senior counsel made an attempt to distinguish the judgment of the Supreme Court in the case of ***Ashapura Mine-chem Ltd. (supra)*** on the ground that the facts before the Supreme Court in the said judgment were totally different than the facts of this case. He submits that the MOFA agreement was not a stand alone agreement.

47. Learned senior counsel for the appellant placed reliance on the judgment of the Supreme Court in the case of ***Damodar Valley Corporation (supra)*** and would submit that in view of the MOFA agreement having been substituted by Deed of Apartment, it amounted to novation under Section 62 of the Indian Contract Act, 1872 and thus the arbitration clause which existed in the MOFA agreement perished along with the said agreement in view of the said agreement having been substituted by Deed of Apartment which did not contain any arbitration agreement. Learned senior counsel for the appellant distinguishes the judgment of this Court in the case of ***Lloyds Steel Industries Limited (supra)*** on the ground that the facts before this Court in the said judgment were totally different than the facts of this case.

48. In so far as the submission of the learned counsel for the respondents that under the Deed of Apartment executed between the appellant and some of the respondents, title of the flats was not conveyed but only portion of the share in

the land was conveyed in favour of some of the respondents in concerned, learned senior counsel placed reliance on the covenant (p) of the Deed of Apartment and would submit that the said Deed of Apartment also conveyed the title in respect of the flats.

49. Learned senior counsel for the appellant distinguishes the judgment of the Supreme Court in the case of ***Veena Hasmukh Jain (supra)*** on the ground that the agreement for sale executed under Section 4 of the MOFA itself cannot be construed as Deed of Conveyance conferring title in respect of the flats but the same is to be treated as a Conveyance only for the purpose of payment of stamp duty under the provisions of the Maharashtra Stamp Act, 1958.

REASONS AND CONCLUSIONS :-

50. It would be appropriate to refer to some of the provisions of agreement to sale dated 18th June, 2012, executed between the appellant developer, consenting parties and also one of the flat purchaser. In the said agreement for sale, the petitioner had clarified that the petitioner had got executed and registered in its favour the sale deed/deed of assignment, development agreements in respect of the said property which comprised of right to develop, construct and sale of ownership flats/apartments to be constructed on the said property. The appellant had commenced construction of the buildings to be developed on the said property. The Municipal Corporation of the City of Pune had sanctioned layout of building plan. The Corporation had sanctioned the plan for construction of buildings A to G on the said property. The appellant had disclosed the copies of Village Form No.VII/VIIA/XII in respect of the said property and also the title certificate in respect thereof issued by an advocate. Insofar as flat purchasers who are parties to the present proceedings are concerned, they have purchased the flats under

different agreements in the 'G' Building.

51. In paragraph (6) of the said agreement, the appellant agreed to construct on the said property the buildings in accordance with plans, designs and specifications seen and approved by the purchasers prior to the execution of the agreement and duly approved by Municipal Corporation with such variations and modifications as the appellant in their absolute authority may consider expedient. It is further provided that the appellant shall be entitled to change the sanctioned layout plan, to add and construct one or more buildings/wings in the said property and complete the said project/scheme as per altered layout sanctioned plan without any consent of the purchasers. It is provided that the purchasers had expressly agreed and undertaken not to raise any objection in that behalf as long as the total area thereafter being agreed to be sold to the purchasers was not reduced by any such changes.

52. In my view it is thus clear that the appellant had obtained blanket consent from the flat purchasers which is not permissible in law. Under clause 10 of the said agreement, the purchasers had agreed to take possession of the said flat within seven days of the owner giving written notice to the purchasers intimating that the said flat is ready for use and occupation. Upon obtaining possession of the flat from the developer, the purchaser agreed to maintain the said flat at his cost alone.

53. Under clause 11(j) of the said agreement, it is provided that the purchaser had inspected the sanctioned building plans of the said project and the conditions stipulated therein by the Pune Municipal Corporation and the purchasers and/or the association/condominium to be formed of the flat purchasers shall not raise any complaint/objections of whatsoever nature and shall abide by the same all time,

and after having covenanted to that effect in favour of the developer, the purchaser had agreed to purchase the said flat from the developer.

54. Under clause 11(m) of the said agreement it was provided that the developer had reserved the right to delete the items or specifications or amenities from brochure of the said project which was given/supplied to him on the basis of site conditions and liabilities of carrying out of the said items, specifications and amenities and in given situation, if the developer opts for or deletes the same, then the purchaser shall not raise any complaint/objections and shall not be entitled to receive any compensation monetary or otherwise.

55. Under clause 13 of the said agreement, it was provided that the developer shall be entitled to change the user of any portion of the said property and/or any structures thereon for any other purposes at the absolute discretion of the developer but subject to the rights of the purchasers in respect of the said flat hereby agreed to be sold and subject to the rules and regulations for the time being in force in that behalf.

56. Under clause 19 of the said agreement, it was provided that the only rights being conferred upon the purchaser under the said agreement were the rights in respect of the particular flat specified in the said agreement. The rights of the developer in respect of not only of the rest of the structures proposed as aforesaid to be constructed on the said property but also of all the open spaces remaining on the said property and the right to utilize inherent and unutilized FSI or applicable TDR in respect of the said property in future and shall even after execution thereof remain unaffected and for the rest of the structures proposed to be constructed on the said property.

57. In clause 21 of the said agreement, a provision was made for conveyance of title as envisaged under Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1963 in respect of the said flat. Under clause 21(d), it was provided that the owner/developer and consenting parties shall submit their respective rights, title, interest, claims relating to the said property and the said buildings to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing and registering one or more Deeds of Declaration. The purchaser shall give his no objection if any change or modifications are made in the draft bye laws of the condominium as may be required by concerned authority. Under clause 21(e) it was provided that the said condominiums shall have to share all their amenities/facilities/rights of way etc. with other flat purchasers/other condominiums pertaining to adjacent properties developed by the developer or any of its sister concern including association of persons, in the vicinity of the said property. Under clause 21(h) it was provided that the developer and the consenting parties shall execute and/or cause to be executed the conveyance in the nature of the Deed of Apartment relating to the concerned purchaser within a period of one year from the date of the registration of the said Deeds of Declaration.

58. Clause 45 of the said agreement provided for arbitration. Clause 46 of the said agreement provided that except otherwise mentioned and provided in the said agreement, the said agreement shall always be subject to the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. Clause 49 provided that the purchaser and the owner shall present the said agreement as well the final conveyance or any document in form of Deed of Apartment at the proper registration office. The

schedule appended to the said agreement provided for the entire property and not only the flats agreed to be sold in favour of the flat purchasers.

59. In so far as the Deed of Apartment dated 20th September 2014 executed by the appellant and some of the respondents is concerned, clause 1 of the said document records that the vendor conveyed a flat mentioned therein having 0.65% undivided right, title, share and interest in common areas and facilities forever and discharge the same unto the use of the purchaser. It also records that the vendor thereby agreed to transfer full ownership right and to grant, sell, convey, assure and transfer the said flat together with all the fittings, fixtures, proportionate undivided share and interest in the general common areas and facilities and also in the restricted areas and facilities as described in the Deed of Declaration along with the undivided impartible and proportionate interest in the said property.

60. In clause 20 of the said document, it is recorded that the the persons occupying the flat in the Madhukosh Apartment (Buildings A,B, C & D) condominium and/or the future schemes which the developer may implement on the balance land or adjacent property shall have perpetual uninterrupted right to enter, pass, re-pass, ingress, egress etc. on the said property described in Schedule IV of the Madhukosh Apartment (Building F & G) condominium. It further provided that the persons occupying the flat in the Madhukosh Apartment (Building F & G) condominium shall have perpetual uninterrupted right to enter, pass, re-pass, ingress, egress etc. on the said property described in Schedule IV of the Madhukosh Apartment (Building A, B, C & D) and/or the future schemes which the developer may implement on the balance land and on the adjacent property.

61. In clause 32 of the said document, it is provided that the purchaser had already paid stamp duty at the time of agreement as per the then rates, date and amount mentioned therein. In Schedule V of the said agreement, the description of the flat/shop/apartment is mentioned together with proportionate 0.65% undivided share in common areas and facilities described in the Deed of Declaration of the said property.

62. A perusal of the reminder letter dated 4th January 2014 addressed to one of the respondents by the appellant indicates that the appellant had called upon the flat purchaser to take possession of the flat sold to him by making final payments and to complete the formalities on or before 12th January 2014 and threatened to charge penalty on overdues. On 10th October 2014, the appellant once again called upon the flat purchaser to pay the dues immediately and threatened to charge interest against overdue payments. Similar letters giving threats to charge interest/penalty against the overdue payments were addressed by the appellant to the flat purchaser which are forming part of the record.

63. In so far as the submission of the learned senior counsel for the appellant that the parties having executed a separate Deed of Declaration and also a Deed of Apartment under the provisions of the Maharashtra Apartment Ownership Act, 1970, and thus their right, title and interest, if any, under the agreement entered into under Section 4 of the MOFA, stood novated/superseded under the said Deed of Apartment read with Deed of Declaration is concerned, a perusal of the Deed of Apartment executed between the appellant and some of the respondents herein does not indicate that by executing such a Deed of Apartment along with a Deed of Declaration, they had superseded the agreement for sale entered into

under Section 4 of the MOFA or that the said agreement for sale stood merged with the said Deed of Apartment along with Deed of Declaration. A perusal of the said Deed of Apartment, on the other hand, indicates that the said Deed of Apartment was executed for the purpose of transferring share in the common amenities and the land by the appellant in favour of the flat purchasers.

64. A perusal of the clause 46 in the agreement for sale read with clause 45 of the said agreement clearly indicates that the said agreement for sale is made subject to the provisions of MOFA, except otherwise mentioned and provided therein. The appellant-developer and the consenting parties under the said agreement had agreed to submit their respective rights, title, interest and claims relating to the said property and the said building to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing and registering one or more Deeds of Declaration. In my prima facie view, the Deed of Apartment was not executed between the parties for the purpose of conferring any title in favour of the purchasers in respect of flats agreed to be sold under the agreement for sale, but was only for the purpose of transferring shares in the common amenities in the land and buildings constructed by the appellant-developer.

65. In my view, though there is a reference in the Deed of Apartment to the flats agreed to be sold in favour of the respondents, the said document would not convey any title in respect of the flats agreed to be sold to the respondents but it was for limited purpose for transferring proportionate shares in the common amenities. Be that as it may, it is a common ground that all the respondents with whom the appellant had entered into an agreement for sale were not parties to the Deed of Apartment. Under Section 11 of the MOFA, it is provided that the promoter has to 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 or to an association of the flat-takers or apartment owners his right, title and interest in the land and building and to execute all relevant documents therefor in accordance with the agreement executed under Section 4 of the MOFA.

66. It is thus clear that the parties had executed a Deed of Apartment in view of Section 11 of the MOFA so as to transfer the share of the flat purchasers in the land and the building and common amenities. In my view, merely because a Deed of Apartment is executed in furtherance of an agreement of sale in view of Section 11 of the MOFA, the rights and obligations of the parties existing under the provisions of the MOFA are not taken away. In my view, there is no substance in the submission of the learned senior counsel for the appellant that the agreement for sale which was entered into by and between the appellant and the flat purchasers under Section 4 of the MOFA no more exists and is novated and/or superseded in view of execution of the Deed of Apartment along with Deed of Declaration between the parties.

67. Be that as it may, since some of the respondents have admittedly not entered into Deed of Apartment or also the Deed of Declaration with appellant, the effect of such execution of the Deed of Apartment along with Deed of Declaration only with some of the flat purchasers will have to be considered at the time of hearing of the arbitral proceedings before the learned arbitrator.

68. A perusal of the provisions of the agreement for sale and also Deed of Apartment does not indicate that it was the intention of the flat purchasers to give up their right, title and interest in the flats under the said agreement for sale

by executing Deed of Apartment and Deed of Declaration. If the parties had intended to supersede the agreement for sale in toto by execution of Deed of Apartment, the same ought to have been specifically provided in the said Deed of Apartment which admittedly is not provided. In my view, since the Deed of Apartment does not supersede the agreement for sale, the arbitration agreement existed in the agreement for sale is not perished as canvassed by the learned senior counsel for the appellant and continued to exist for the purpose of adjudication of the dispute between the parties.

69. It is a common ground that in the application filed by the respondents under Section 9 of the Arbitration Act, the respondents had intended to refer the dispute to the arbitration in respect of subject matter of the said agreement for sale and not under a Deed of Apartment or a Deed of Declaration. In my view, clause 45 of the agreement for sale has to be read with clause 46 thereof. A conjoint reading of both the provisions clearly indicates that except otherwise provided in the said agreement, the said agreement for sale shall always be subject to the provisions of the MOFA. It is not provided either in the said agreement for sale or in the Deed of Apartment that after the said execution of the Deed of Apartment along with the Deed of Declaration, rights and obligations of the parties under the agreement for sale executed under Section 4 of the MOFA would come to an end and/or stand substituted by the provisions of the said Deed of Apartment along with the Deed of Declaration.

70. In my view, there is thus no substance in the submission of the learned senior counsel for the appellant that there was no arbitration agreement between the parties in view of execution of Deed of Apartment along with the Deed of Declaration or that the application filed by the respondents under Section 9 of the

Arbitration Act before the learned District Judge was not maintainable on that ground or otherwise.

71. In my view, learned counsel for the respondents is right in her submission that even if for the sake of argument, it is construed that MOFA agreement would not survive in view of execution of the Deed of Apartment, arbitration clause which is an independent agreement would continue to survive till all the obligations of the parties under the said agreement for sale were performed. In my view, learned counsel for the respondents has rightly placed reliance on the judgment of the Supreme Court in the case of ***Damodar Valley Corporation*** (*supra*) and more particularly paragraphs 7 and 9 to 11 thereof which would assist the case of the respondents. In my view, the learned District Judge has rightly held that the agreement for sale entered into between the parties and the Deed of Apartment executed between the appellant and some of the respondents are two separate documents and were executed for different purposes. In my prima facie view, the learned District Judge was right in holding that the agreement for sale is not substituted by execution of Deed of Apartment between the parties and both subsist.

72. Supreme Court in case of ***Damodar Valley Corporation*** (*supra*) has held that a contract is the creature of an agreement between the parties and where the parties under the terms of the contract agree to incorporate an arbitration clause, that clause stands apart from the rights and obligations under that contract, as it has been incorporated with the object of providing a machinery for the settlement of disputes arising in relation to or in connection with that contract. It is not the case of the appellant that the agreement for sale entered into between the parties was a void, illegal or fraudulent agreement.

73. The Supreme Court has held that if the original contract has no legal existence, the arbitration clause also cannot operate and for along with the original contract, it is also void. In the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it and between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. It is held that as the contract subsists for certain purposes, the arbitration clause operates in respect of those purposes. It is held that in those cases, it is the performance of the contract that has come to an end but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. It is held that as the contract subsists for certain purposes, the arbitration clause operates in respect of those purposes.

74. In my view, the judgment of Supreme Court in case of ***Damodar Valley Corporation*** (supra) supports the case of the respondents. In my view the arbitration agreement recorded in clause 45 of the agreement for sale would survive for adjudication of disputes through arbitration.

75. Insofar as judgment of Supreme Court in case of ***Young Achievers*** (supra) relied upon by the learned senior counsel for the appellant is concerned, Supreme Court has held that the arbitration clause in an agreement cannot survive if the agreement containing arbitration clause has been superseded/novated by a later agreement. A perusal of the said judgment indicates that the party in the said proceedings, in the later agreement had agreed for full and final settlement of all

their claims and had provided that any violation of points mentioned therein will attract legal course of action and penalties ranging from forfeiture of the security deposit and pending claims. The Supreme Court on interpretation of the later agreement held that it was a mutually agreed document containing comprehensive terms and conditions which admittedly did not contain an arbitration clause and the original agreement stood novated by fresh agreement.

76. In my view, the said judgment would not assist the case of the appellant. The facts before the Supreme Court in the said matter were totally different. In this case there is no provision in the Deed of Apartment that after execution of the said Deed of Apartment, the agreement for sale entered into between the parties ceased to exist or was superseded by the said Deed of Apartment or was cancelled. On the contrary clause 46 of the agreement for sale categorically provides that except otherwise mentioned and provided in the said agreement, the said agreement shall always be subject to the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

77. Insofar as submission of the learned senior counsel that there were serious allegation of fraud and misrepresentation made by the respondents and such allegations cannot be referred to arbitration is concerned, the respondents have clarified this issue before the learned District Judge and also before this court that there were no such allegation of fraud or misrepresentation made by the respondents against the petitioner. The respondents had clarified only their understanding about letter of possession signed by the respondents. The learned District Judge has dealt with this issue in paragraph 14 and paragraph 24 and has held that there was no specific case made out as to the fraud or misrepresentation. A perusal of the application filed by the respondents under section 9 of the

Arbitration Act indicates that there are no allegation of fraud as canvassed by the learned senior counsel for the appellant.

78. In my view even if there are allegations of fraud made by the respondents, there is no bar under the provisions of Arbitration Act from referring disputes containing such allegations to arbitration. In my view there is thus no merit in the submission made by the learned senior counsel for that there were any allegation of fraud or misrepresentation made by the respondents or that the same could not be referred to arbitration.

79. Insofar as submission of the learned senior counsel that even if clause 45 of the MOFA agreement which provides for arbitration agreement exists, none of the dispute raised by the respondents in the application for interim measures under section 9 filed by the respondents would fall within the ambit of the said arbitration clause is concerned, it is not in dispute that the respondents have not filed any statement of claim till date. Be that as it may, a perusal of various averments made in the application for interim measures filed under section 9 by the respondents clearly indicates that there are disputes or differences having arisen between the parties about the meaning or interpretation of various clauses of the said agreement for sale.

80. In my view whether under various clauses of the agreement, the appellant could have obtained blanket consent from the respondents from carrying out any changes in the plan or could carry out construction after obtaining sanction from the Municipal Corporation on the same plot would be a dispute or difference about the meaning or the interpretation of this provision. The question as to whether the appellant could change the location of a building after showing layout plan to the

flat purchaser or not would also be a dispute or difference arising out of interpretation of the provisions of the said agreement for sale.

81. Be that as it may, since the respondents have not filed any statement of claim till date, the exact nature of the claims proposed to be made by the respondents in the arbitral proceedings can be known only after such statement of claim is filed. The Supreme Court as well as this court in catena of decisions has taken a view that the court has to construe an arbitration agreement liberally so as to encourage the party to arbitration agreement to resolve their disputes through a mechanism of the arbitral process. In my view there is thus no substance in the submission of the learned senior counsel for the appellant that the nature of dispute raised in the application for interim measures under section 9 would indicate that none of those disputes would fall within the purview of arbitration agreement recorded in clause 45 of the agreement for sale. Clauses 6, 13 and recital (b) referred to the entire property agreed to be developed by the appellant under the said agreement for sale. In my view the respondents thus can raise a dispute even if the appellant carry out any development on the entire property in breach of the provisions of the said agreement for sale though the respondents may not have purchased the flats in other buildings proposed to be constructed by the appellant and more particularly in 'E' building, if the construction of 'E' building would affect their right, title and interest in the 'G' building. In my view there is thus no substance in the submission of the learned senior counsel that the dispute in respect of construction in 'E' building would not be arbitrable under clause 45 of the MOFA.

82. Supreme Court in case of **Booz Allen & Hamilton Inc.**(supra) has carved out the categories of disputes which would be in the nature of action in rem or in

personam. In my view the disputes for enforcement of the statutory provisions under MOFA or under specific performance of the provisions of MOFA agreement would not be an action in rem but would be an action in *personam*. I am not inclined to accept the submissions made by the learned senior counsel for the appellant that the allegation of statutory violation under MOFA cannot be referred to arbitration either on the ground of the same being alleged to be in the nature of action in rem or on the ground that the same can be decided only by the civil court.

83. In my view since the parties had entered into an arbitration agreement, disputes arising out of statutory violation of the MOFA or for specific performance of the provisions of MOFA agreement can be decided in the arbitral proceedings. If there would not be any arbitration agreement between the parties, such disputes arising out of alleged statutory violation of MOFA or for specific performance of obligations under MOFA agreement could be tried by a civil court. In my view there is thus no substance made by the learned senior counsel for the appellant that such issue could be decided only by a civil court and not in the arbitral proceedings. In my view judgment of Supreme Court in case of **Booz Allen & Hamilton Inc.**(supra) relied upon by the learned senior counsel for the respondents would apply to the facts of this case and would assist the case of the respondents.

84. Insofar as judgment of Supreme Court in case of **Ashapura Mine-Chem Limited** (supra) relied upon by both the parties is concerned, the Supreme Court considered an argument whether the arbitration clause contained in the MOU was a stand alone agreement or not. In my view the arbitration agreement recorded in clause 45 of the agreement for sale would survive for the purpose of referring the dispute arising under the said agreement for sale. It is not in dispute that the

respondents have proposed to refer their disputes arising out of the said MOFA agreement only.

85. In my view the learned counsel for the respondents is right in a submission that merely because the party had agreed to submit their respective right, title, interest or claims relating to the entire property and the said building under the provisions of Maharashtra Apartment Ownership Act, 1970, in view of clause 21(d) of the MOFA agreement and other related provisions thereof, the provisions of Maharashtra Apartment Ownership Act, 1970 would not apply in respect of the individual flat. In my view the arbitration agreement thus recorded in clause 45 of the MOFA agreement would subsist and the said MOFA agreement is not substituted by a Deed of Apartment. The judgment of this court in case of **Lloyds Steel Industries Limited** (supra) would also assist the case of the respondents.

86. A perusal of the record *prima-facie* indicates that originally the appellant had proposed to construct two buildings i.e. “E” which was located on the front side which location was shown all through out in the plan shown to the flat purchasers, which has been now shifted admittedly adjoining to “G” building occupied by the respondents thereto and others. There was neither any informed consent obtained by the appellant from the flat purchasers for shifting of location of “E” building from the front side to the location adjoining to “G” building nor such disclosure was made by the appellant to the respondents in writing or otherwise before getting any amendment to the plan sanctioned from Pune Municipal Corporation. This Court in case of **Lakeview Developers** (supra) has held that unless there was informed consent and full disclosure of the amendment proposed by the developer before the same is carried out, the developer could not have carried out any such amendment to the original sanctioned plan or to the lay

out. The judgment of the Division Bench of this Court in case of ***Lakeview Developers*** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

87. In my view, learned counsel for the respondent is right in the submission that dispute as to whether the appellant could have been permitted to change the user or could be permitted to shift the location of “E” building from its original location to the location adjoining to “G” building would be a dispute arising out of the interpretation of the provisions of the Agreement For Sale and more particularly clauses 6, 9 and 13 which dispute can be adjudicated upon under the arbitration agreement recorded in clause 45 read with clause 46 of MOFA agreement.

88. In my view, the learned District Judge has rightly observed in paragraph 20 of the impugned order that admittedly the construction of “E” building was not on the place which was shown in the brochure issued by the appellant. It is held that when there is a change in the location of the building “E”, which was shown in the brochure at the time of the agreement dated 13th March, 2012, the respondents herein have every right to raise their objection and such change of location could not be as per the whims and wishes of the appellant. It is rightly held that even for making such changes, the consent of the flat purchasers was necessary.

89. Insofar as the submission of the learned senior counsel for the appellant that the respondents themselves had averred in the application for interim measures that they would claim compensation against the appellant and thus cannot seek specific performance of the MOFA agreement and consequently no injunction under section 9 could have been granted by the learned District Judge is

concerned, in my view along with a claim for specific performance, a claimant can also seek compensation also in addition to a claim for specific performance. Merely because the respondents had reserved their right to make a claim for compensation, on that ground the plea of specific performance cannot be rejected. Be that as it may the respondents have not yet filed their statement of claim so far in the arbitral proceedings and thus this plea of the learned senior counsel for the appellant deserves to be rejected at this stage.

90. Insofar as the submission of the learned senior counsel for the appellant that there was delay on the part of the respondents in filing the application for interim measures is concerned and that the appellant already having constructed about six storeys of the building “E” and on that ground itself no interim measures could be granted by the learned District Judge is concerned, a perusal of the application filed by the respondents under section 9 of the Arbitration & Conciliation Act, 1996 indicates that the respondents had explained the alleged delay in filing the arbitration application. The construction of “G” building was over in which various flat purchasers including the respondents herein had purchased the flats. There were several letters addressed by the appellant to the flat purchasers to pay the balance consideration and to take possession of their respective flats immediately and had threatened to levy penalty / interest in case of any delay in obtaining possession of those flats. Some of the flat purchasers had borrowed money for purchasing the flats. The flat purchasers had held various meetings in which the Directors of the appellant had alleged to have given various assurances to look into the complaints made by the respondents. It is not in dispute that when the respondents filed an application under section 9 of the said Act before the learned District Judge, the appellant had commenced construction in full speed. When the application was filed by the respondents, the appellant had not

constructed six storeys as canvassed by the appellant at this stage.

91. During the pendency of the application under section 9 of the Arbitration Act, the appellant increased the speed of the construction at their own risk. In my view, the respondents had sufficiently explained the delay, if any, in filing the application under section 9 of the said Act before the learned District Judge. I have also perused the photographs produced by both the parties showing the stage of the construction of the building “E”. A perusal of these photographs indicates that the said construction now put up by the appellant are just adjoining the building “G” by which western side terraces have been completely blocked. The appellant has removed the safety grills on the western side windows of building “G”. The respondents may suffer health hazardous due to construction of building “E” which may result in noise, air pollution or excessive vibration. The air and light which would could been available to the flat purchasers of “G” building also would be seriously affected. It is averred by the respondents in the said application under section 9 of the said Act that when the respondents noticed construction of “E” building, the same was completed upto second floor by the appellant and only when the construction of RCC structure reached second floor, the appellant had offered possession of flats in the building “G” in the month of December, 2013 and January, 2014 to the flat purchasers although the completion certificate thereof was issued in favour of the appellant by the Pune Municipal Corporation in the month of October, 2013.

92. In my view, learned counsel for the respondents is right in his submission that if the appellant is allowed to complete the construction of “E” building adjoining “G” building, in these circumstances, the reliefs proposed to be claimed by the respondents in the arbitral proceedings would become infructuous and

serious prejudice would be caused to the flat purchasers. In my view, the balance of convenience is thus in favour of the respondents and not in favour of the appellant. The respondents have already shown their readiness and willingness to refer their disputes to arbitration in accordance with arbitration clause. The statement made by the learned counsel for the respondent is accepted.

93. Insofar as the judgment of this Court in case of ***Lodha Estate Private Limited*** (supra) relied upon by the learned senior counsel for the appellant is concerned, in my view the facts before the Division Bench of this Court in the said matter were totally different. In this case the respondents have been litigating in *bona-fide* manner alleging breach of statutory obligations of the developer and for seeking specific performance of the provisions of MOFA agreement. The said judgment of the Division Bench of this Court in case of ***Lodha Estate Private Limited*** (supra) would thus not assist the case of the appellant. The facts in the said matter are clearly distinguishable in the facts of this case. In my view, the appellant has *prima-facie* violated the provisions of MOFA and also MOFA agreement cannot seek any equity from this Court.

94. The Supreme Court in case of ***M/s.Gujarat Bottling Co. Ltd. & Ors. vs. The Coca Cola Co. & Ors. (1995) 5 SCC 545*** has held that the Court while granting interim injunction has to consider whether the plaintiff has *prima-facie* case, whether balance of convenience was in his favour and whether the plaintiff will suffer any irretrievable injury if relief by way of injunction is not granted. In my view the respondents (original claimants) in this case have satisfied all three tests for granting injunction as laid down by the Supreme Court in case of ***M/s.Gujarat Bottling Co. Ltd. & Ors.*** (supra). The said judgment, in my view, would squarely apply to the facts of this case. The learned District Judge has rightly adverted to

the said judgment and has applied the principles thereof in the facts of this case.

95. Insofar as the submission of the learned senior counsel for the appellant that the judgment of the Supreme Court in case of ***Veena Hasmukh Jain*** (supra) would not apply to the facts of this case on the ground that in the said judgment the Supreme Court had considered the provisions of the Bombay Stamp Act and not the provisions of MOFA and even if a document can be construed as a conveyance for the purpose of payment of stamp duty, the same cannot be construed as a conveyance under the provisions of MOFA is concerned, in my view, there is no merit in this submission of the learned senior counsel for the appellant. The flat purchasers in this case had fully paid the consideration to the appellant and were also handed over possession of their respective flats by the appellant. Admittedly, the said agreements were entered into under section 4 of MOFA. In my *prima-facie* view, the Deed of Apartment was executed between the appellant and some of the flat purchasers in furtherance of the provisions made in the said MOFA agreement. In my *prima-facie* view, the Deed of Apartment was executed for the purpose of transferring the share of the flat purchasers in the common amenities and land and the building. The judgment of the Supreme Court in case of ***Veena Hasmukh Jain*** (supra) would apply to the facts of this case.

96. Insofar as Civil Application No.22 of 2015 filed by some of the alleged flat purchasers in building “E” seeking intervention in the present appeal is concerned, it is not in dispute that these applicants had not applied for intervention before the learned District Judge in the application filed by the respondents under section 9 of the said Act. In my view, these applicants cannot be allowed to intervene in these proceedings filed under section 37 of the said Act. The applicants can adopt independent proceedings in respect of their alleged cause of action in appropriate

Court in accordance with law. I am thus not inclined to grant any relief in the said civil application filed by the intervenors.

97. A perusal of the order passed by the learned District Judge clearly indicates that the learned District Judge has dealt with all the submissions, pleadings and the documents and has adverted to several judgments of the Supreme Court and this Court and applied the principles thereof in the facts of this case. I do not find any infirmity with the order passed by the learned District Judge.

98. Learned senior counsel for the appellant in his initial argument had though urged that the impugned order passed under section 9 of the said Act by the learned District Judge-14, Pune was without jurisdiction on the ground that the said application could be heard, entertained and disposed of only by the Principal District Judge, Pune, after such initial argument, learned senior counsel did not press the said issue. This Court thus need not consider the said issue raised by learned senior counsel for the appellant in this order. In my view, the appeal is devoid of merits.

99. I therefore, pass the following order :-

- i). Arbitration Appeal No.6 of 2015 is dismissed.
- ii). In view of dismissal of the arbitration appeal, Civil Application No.6 of 2015 for stay does not survive and is disposed of.
- iii). Civil Application No.22 of 2015 for intervention filed by the applicants is dismissed.
- iv). No order as to costs.
- v). The respondents are directed to take steps to apply for

appointment of the learned arbitrator within six weeks from today, failing which interim order passed by the learned District Judge to stand vacated without further reference to the Court.

[R.D. DHANUKA, J.]