

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 117 OF 2016

IN

NOTICE OF MOTION NO. 2672 OF 2014

IN

SUIT NO. 2073 OF 2014

M/s.Dosti Corporation,)
a partnership Firm registered under the)
Indian Partnership Act, 1932 having its)
office at Lawrence & Mayo House,)
1st Floor, 276, Dr.D.N.Road, Fort,)
Mumbai – 400 001) Appellant

VERSUS

1. Sea Flama Co-operative Housing Society)
Limited, a society registered under the)
Maharashtra Co-operative Societies Act,)
1960 having its address at Sea Flama Dosti)
Flamingos Complex, Tokeshi Jivraj Road,))
Parel-Sewree, Mumbai – 400 015)

2. Standard Industries Limited,)
a company incorporated under the)
provisions of the Indian Companies Act,)
1956 having its registered office at)
59, The Arcade, Worli Trade Centre,)
Cuff Parade, Colaba, Mumbai – 400 005)

3. Sky Flama Co-operative Housing Society)
Limited, a society registered under the)
Maharashtra Co-operative Societies Act,)
1960 having its address at Sky Flama Dosti)
Flamingos Complex, Tokershi Jivraj Road,))
Parel-Sewree, Mumbai – 400 015)

4. Sandy Flama Co-operative Housing Society)
Limited, a society registered under the)

Maharashtra Co-operative Societies Act,)
1960 having its address at Sandy Flania,)
Dosti Flamingos Complex, Tokershi)
Jivraj Road, Parel-Sewree,)
Mumbai – 400 015)

5. Snow Flama Co-operative Housing Society)
Limited, a society registered under the)
Maharashtra Co-operative Societies Act,)
1960 having its address at Snow Flama,)
Dosti Flamingos Complex, Tokershi)
Jivraj Road, Parel-Sewree,)
Mumbai – 400 015) Respondents

ALONGWITH
APPEAL FROM ORDER (ST) NO. 23483 OF 2015
IN
NOTICE OF MOTION NO. 2672 OF 2014
IN
SUIT NO. 2073 OF 2014

Standard Industries Limited,)
a company incorporated under the)
provisions of the Indian Companies Act,)
1956 having its registered office at)
59, The Arcade, World Trade Centre,)
Cuffe Parade, Colaba, Mumbai – 400 005) Appellant

VERSUS

1. Sea Flama Co-operative Housing Society)
Limited, a society registered under the)
Maharashtra Co-operative Societies Act,)
1960 having its address at Sea Flama Dosti)
Flamingos Complex, Tokeshi Jivraj Road,))
Parel-Sewree, Mumbai – 400 015)

2. M/s.Dosti Corporation,)
a partnership Firm registered under the)
Indian Partnership Act, 1932 having its)
office at Lawrence & Mayo House,)

1st Floor, 276, Dr.D.N.Road, Fort,)
Mumbai – 400 001)

3. Sky Flama Co-operative Housing Society)
Limited, a society registered under the)
Maharashtra Co-operative Societies Act,)
1960 having its address at Sky Flama,Dosti)
Flamingos Complex, Tokershi Jivraj Road,)
Parel-Sewree, Mumbai – 400 015)

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Limited, a society registered under the)
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Dosti Flamingos Complex, Tokershi)
Jivraj Road, Parel-Sewree,)
Mumbai – 400 015)

5. Snow Flama Co-operative Housing Society)
Limited, a society registered under the)
Maharashtra Co-operative Societies Act,)
1960 having its address at Snow Flama,)
Dosti Flamingos Complex, Tokershi)
Jivraj Road, Parel-Sewree,)
Mumbai – 400 015) Respondents

Mr.Aspi Chinoy, Senior Advocate, a/w. Mr.Girish Godbole, Ms.Jyoti Sinha, i/b. Negandhi Shah & Himaytullah for the Appellants in Appeal from Order No.117 of 2016.

Mr.E.P.Bharucha, Senior Advocate, a/w.Mr.Mayur Khandeparkar, Mr.Nasir Rizvi, Ms.Megha Jankiram, i/b.Thakore & Jariwala Associates for Respondent No.1 in Appeal from Order No.117 of 2016.

Mr.D.D.Madon, Senior Advocate, a/w. Mr.Chirag Balsara, Mr.Ankit Tripathi, i/b.Mr.Ramgopal Tripathi for Respondent No.2 in Appeal from Order No.117 of 2016 and for Appellant in Appeal from Order (St) No.23483 of 2015.

Mr.Zain Mokhi, i/b. Mr.Kalpesh Joshi for Respondent Nos. 3 to 5 in Appeal from Order No.117 of 2016 and in Appeal from Order (St) No.23483 of 2015.

Mr.S.U.Kamdar, Senior Advocate, a/w. Ms.Jyoti Sinha, i/b. Negandhi Shah & Himaytullah for Respondent No.2 in Appeal from Order (St) No.23483 of 2015.

Mr.J.Reis, Senior Advocate, a/w. Mr.Mayur Khandeparkar, Mr.Nasir Rizvi, Ms.Megha Jankiram, Mr.H.N.Thakore, i/b.Thakore & Jariwala Associates for Respondent No.1 in Appeal from Order (St) No.23483 of 2015.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 25th FEBRUARY, 2016

PRONOUNCED ON : 7th APRIL, 2016

JUDGMENT :

By consent of parties, both these appeals were heard together finally at the admission stage and are being disposed of by a common order.

2. Appeal from Order No.117 of 2016 filed by the original defendant no.1 inter alia challenging the order dated 27th July, 2015 passed by the learned trial judge in the Notice of Motion No.2672 of 2014 which was filed by the respondent no.1 herein (original plaintiff) and thereby granting temporary injunction against defendant nos. 1 and 2 restraining them from putting up any construction work upon or over the suit properties till disposal of the suit and further restraining them from using any FSI as available in the suit properties or part thereof till disposal of the suit.

3. Appeal from Order (St) No.23483 of 2015 has been filed by the original defendant no.1 challenging the said order dated 27th July, 2015. Respondent nos. 3, 4 and 5 in these appeals were the original defendant nos. 3, 4 and 5 respectively in the notice of motion. For the sake of convenience, the parties as described in the notice of motion were described in this judgment. Some of the relevant facts for the purpose of deciding these two appeals are as under :-

4. Defendant no.2 was the original owner of the suit property i.e. land bearing CS No.5/209 (part) of Parel Bhoiwada and Sewri Division and C.S.No.210 (part) of Parel Sewri Division admeasuring in aggregate 27,185.46 sq.mtrs. both situate at Tokershi Jivraj Marg, Sewri, Mumbai.

5. By a registered development agreement dated 10th June, 2004 between the defendant no.2 and defendant no.1, the defendant no.2 gave the suit property to the defendant no.1 for the purpose of development of the suit property and also executed a registered irrevocable power of attorney.

6. On 10th September, 2004, the defendant no.2 entered into a registered supplemental development agreement with the defendant no.1 confirming that the defendant no.2 had received full and final consideration from defendant no.1 and also executed further irrevocable power of attorney granting various powers to the defendant no.1 for developing the suit property.

7. The development of the suit property commenced on 27th May, 2004 and continued till 31st March, 2008. During the stage of the construction on the suit property, various parties entered into agreement for sale with the defendant no.1 for purchase of various flats in the four wings constructed by the defendant no.1. The defendant no.1 constructed a complex i.e. Dosti Flamingos Project comprising of four wings i.e. Wing 'A', Wing 'B', Wing 'D' and Wing 'E' and subsequently registered four separate co-operative housing societies viz. Snow Flama, Sandy Flama, Sea Flama and Sky Flama respectively connected by a common basement podium on the said property. The original plaintiff and defendant nos. 3 to 5 are those four societies occupying those four wings i.e. Wing 'A', Wing 'B', Wing 'D' and Wing 'E' respectively.

8. On 27th May, 2004, the defendant no.1 obtained commencement certificate from the Municipal Corporation of Greater Mumbai. On 22nd June, 2007, the defendant no.1 obtained completion certificate for Wing 'A' which was subsequently registered as Snow Flama Co-operative Housing Society Limited and Wing 'B' which was registered as Sandy Flama Co-operative Housing Society Limited. It is the case of the plaintiff that defendant no.1 however did not form the society as per obligation cast on the defendant no.1 under the provisions of Maharashtra Ownership Flats Act, 1963.

9. On 31st March, 2008, the Municipal Corporation issued a completion certificate for the entire complex with the entire sanction and accurate FSI of 38185.10 sq.mtrs. save and except 2.5 sq. mtrs as on that date being fully utilized. According to the plaintiff, the development thus stood completed on 31st March, 2008.

10. On 19th May, 2010, the defendant no.1 registered the Snow Flama Co-operative Housing Society Limited i.e. after delay of about three years from the date of completion and handing over the possession to various flat buyers in the said 'A' wing. On 3rd June, 2010, the defendant no.1 registered the Sky Flama Co-operative Housing Society Limited i.e. Wing 'E' in the said complex. On 14th June, 2010, the defendant no.1 registered the Sandy Flama Co-operative Housing Society Limited (Wing 'B') i.e. after after three years delay from the date of completion and handing over possession to the various flat buyers in the said wing 'B'. On 17th June, 2010, defendant no.1 registered Sea Flama Co-operative Housing Society Limited (Wing 'D') i.e. after delay of about two years from the date of completion and possession.

11. The plaintiff society appears to have filed various applications under the Right to Information Act in the year 2012-13. It is the case of the plaintiff that the plaintiff came to know that the defendant no.1 had applied for modification of the plan. On 9th November, 2009, the Municipal Corporation issued intimation of disapproval (IOD) for public parking lot for B+G+P+10 Upper floors, commencement certificate for work upto plinth level to proceed with the said building or work at any time before 17th November, 2010 admeasuring about 15990.32 sq.mtrs. and 41.96 mtrs in height. The Municipal Corporation also issued IOD on 7th June, 2010 in favour of the defendant no.1 for construction of Wing 'C' for stilt + P connected to existing parking and podium of the complex + 1st to 19th floor admeasuring 7995.16 sq.mtrs area in 62.77 mtrs. in height. The plaintiff obtained Certificate of Area Statement in respect of Wing 'C' under the Right to Information Act.

12. The plaintiff also came to know that on 4th March, 2011 the Urban Development Department of the State Government had sent a letter to the Municipal Commissioner requesting it to submit a proposal for amendment of clause 33(24) of the Development Control Regulation for limiting the height of parking towers to 4 floors and also revocation of all sanctioned proposals where the commencement certificate had not been issued. The Municipal Corporation thereafter issued a circular on 22nd June, 2011 thereby prescribing certain conditions under clause (iv) of the Regulation 33(24) of the Development Control Regulation and certifying that all proposals for public parking lots shall be considered subject to those conditions. The new conditions sought to limit the height of the public parking to ground plus 4 upper floors and two basements.

13. It is the case of the plaintiff that the defendant no.1 had applied for construction of a public parking lot without obtaining consent of the members of the plaintiff and defendant nos. 3 to 5 society and that part of the construction was not forming part of original plan as disclosed to each of the flat purchaser. It is also the case of the plaintiff that the entire construction was to be carried out by the defendant no.1 only for residential purposes and not for commercial purposes. It is the case of the plaintiff that if any commercial construction activities are allowed, it would reduce the open space and recreational area which would be in violation of Regulation 23 of the Development Control Regulation and public parking lot would create additional problems and pollution in an already overcrowded neighbourhood, which would affect the members and their family residing on the said property.

14. On 19th August, 2013, the plaintiff addressed three separate legal notices through their advocates to the defendant no.1 calling upon the defendant no.1 to discharge its obligations and complete the conveyance, to remove barricades and desist from obtaining and/or to withdraw any sanction for purported public parking lot and also called upon the defendant no.1 to pay over corpus amount. According to the plaintiff, the defendant no.1 through their advocates three letters all dated 24th October, 2013 gave evasive reply and falsely denied that no breaches were committed by the defendant no.1. The plaintiff through their advocates' three letters dated 9th July, 2014 again called upon defendant no.1 to comply with their various obligations. On 10th July, 2014 the plaintiff filed a suit in the City Civil Court at Bombay against the defendants. Defendant nos. 3 and 5 were made formal parties to the said suit.

15. The plaintiff in the said suit applied for an order and directions against the defendant nos. 1 and 2 to convey the suit property in favour of the plaintiff and defendant nos. 3, 4 and 5 without any encumbrances or any future obligations and directing to do all acts, deeds and things as may be required. The plaintiff also prayed for perpetual order and injunctions against defendant nos. 1 and 2 from dealing with and/or putting up any construction on the suit property and/or submitting any plan and/or getting any plan sanctioned and/or withdrawal of any plan and approval in respect of the construction work and various other reliefs. In the said suit, the plaintiff filed a notice of motion for injunction against defendant nos. 1 and 2 from putting up any construction work upon or over the suit property admeasuring 27,185.46 sq.mtrs., from submitting any plan sanctioned etc. The defendant nos. 1 and 2 filed a detailed affidavit in the said notice of motion and opposed grant of any interim relief. The plaintiff filed rejoinder to those affidavits in reply. The learned trial judge by an order dated 27th July, 2015 allowed the said Notice of Motion No.2672 of 2014 filed by the plaintiff and granted interim relief which is impugned by the defendant nos.1 and 2 in the aforesaid two appeals respectively.

16. Mr.Chinoy learned senior counsel for the defendant no.1 invited my attention to various clauses in one of the agreement entered into between one of the flat purchaser with the defendant no.1 and also tendered a copy of the brochure and made various submissions about the rights and obligations of the parties and various disclosures made by the defendant no.1 in the agreement entered into between the flat purchasers and the defendant no.1.

17. Reliance is placed on the Recital (I) on page 4 of the said agreement

which provides that the promoters had become entitled to develop the said entire land described in the first schedule to the said agreement and that the promoters had at that time taken up the development on part area out of the land described in the first schedule and the said part was shown in the yellow coloured boundary line. It is submitted that it was thus clear that the promoters had proposed to construct the buildings on the said entire land however in phase wise manner as per the plans approved or to be approved by the Municipal Corporation.

18. Reliance is placed on clause 24(a) of the agreement and it is submitted that under the said clause the promoters had intended to form a separate organization for each building on each of the several plots in the Dosti Flamingos project in respect of and limited to the second schedule land and the building on that land. He submits that his clients had intended to form an apex / federal society / organization / association of all such separate societies to look after, maintain, manage and conduct all the affairs of the common areas etc.

19. Learned senior counsel placed reliance on clause 36 of the said agreement and would submit that his clients had agreed to execute necessary lease of the second schedule land and conveyance of the building within 12 months but only after all the premises were sold and after full development for the said entire project of Dosti Flamingos comprising of various buildings were completed by utilizing FSI of the entire land and other surrounding areas and after full utilization in case FSI available due to any change in the Development Control Regulations under the Slum Rehabilitation Scheme or otherwise.

20. Learned senior counsel placed reliance on clause 37(a) of the said agreement and submits that on the date of execution of the said agreement, FSI

available in respect of Dosti Flamingos project was 1.33. He submits that the promoters had utilized part of the FSI for Sea Flama Building and the balance FSI on the said entire land was to be utilized by his clients by constructing the additional buildings elsewhere. He submits that the flat purchasers had agreed and confirmed that the promoters would be entitled to further FSI if any available due to additional FSI or Slum Redevelopment Scheme or otherwise by constructing the buildings in the open area available in the Dosti Flamingos project and/or by constructing additional flats in the buildings that may have already been constructed even after execution / registration of the lease thereof and/or conveyances.

21. It is submitted by the learned senior counsel that the plaintiff society thus could not seek conveyance of the entire property or injunction in respect thereof which was to be developed in phase wise manner. He submits that when the agreements were entered into with various flat purchasers by the developer, it was made clear that the flats were not to be constructed at that time except on the portion shown in yellow on the plan annexed to the agreement. He submits that the developer had fully disclosed to all the flat purchasers about the area to be developed in accordance with section 3(2) of the MOFA, 1963 and there was no suppression. Reliance is placed on section 11 of the MOFA, 1963 and it is contended that the conveyance has to be for the land on which the buildings for the society were constructed and not for the entire holding of the developer. The developer had agreed to execute the conveyance in respect of the buildings and the land underneath of those buildings only. The execution of the conveyance was to be executed in respect of the common area only in favour of the apex society.

22. It is submitted that the provisions of sections 7 and 7A of the MOFA

were not even applicable to the facts of this case. He submits that the new development which was proposed by his clients was not on the yellow portion shown in the plan but was admittedly on the plot outside yellow portion. He submits that the learned trial Judge has not considered the submission of the developer that the development which was the subject matter of the suit was outside the yellow portion. It is submitted by the learned senior counsel that the plans showing the buildings which was initially approved was touching the podium.

23. Learned senior counsel also placed reliance on the brochure which was shown to the members of the plaintiff society and submits that it would indicate that the developer had agreed to carry out the construction in phases and that the members of the plaintiff society were not entitled to claim conveyance in respect of the entire plot which was a larger plot.

24. Learned senior counsel for the defendant no.1 developer also placed reliance on various provisions of the Maharashtra Housing (Regulation Development) Act, 2012 and more particularly sections 1(3), 2(q), 3(1), 3(3), 14(1), 18, 19, 21, 22, 23, 36, 51 and 56. Reliance is also placed on section 6 of the General Clauses Act and also on section 7 of Bombay General Clauses Act, 1904. It is submitted that admittedly sections 18 and 19 of Maharashtra Housing (Regulation Development) Act, 2012 had been notified and brought into force on 8th July, 2014 before the present suit came to be filed by the plaintiff. He submits that under section 19 of the said Act since the proposed development was not only of one building of a lay out, till such time the entire development was completed, conveyance could be executed only in respect of the buildings along with FSI consumed in the individual building. He submits that section 11 of the MOFA was

accordingly impliedly repealed. He submits that in view of section 19 of the Act of 2012, the developer was entitled to develop the said two demarcated plots which had been specifically retained for future development by using FSI available under Regulation 33(24) of the Development Control Regulation.

25. It is submitted that in view of non-obstante provision in section 19(2) of the said Act, 2012, the promoters shall be entitled to develop and continue to develop the remaining layout land notwithstanding contained in the Act or in any agreement or in any judgment, decree or order of any Court or in any other law for the time being in force with the right to use the internal access roads, all facilities, amenities, and services in the lay out and to construct any additional structure thereon by consuming balance Floor Space Index and balance transfer of the development right, Floor Space Index and balance additional FSI relating to the said lay out and also any future increasing Floor Space Index and transfer of development right etc. due to change in law or the policies of the Government or local authority. He submits that though section 3(3) of the said Act of 2012 is not notified which provides for an obligation to disclose, the developer had already made all disclosures and has thus complied with even the said provisions.

26. It is submitted that though by a notification issued by the Government, section 56 of the said Act, 2012 is not notified, there is implied repeal of MOFA in toto. He submits that saving provision in Section 56 of the said Act, 2012 is identical to saving provision under section 7 of the Bombay General Clauses Act, 1904. He submits that section 7 of the Bombay General Clauses Act, 1904 would apply to the facts of this case. In support of his submission that there was implied repeal of the entire provisions of MOFA, learned senior counsel placed reliance on the judgment of the Supreme Court in case of **Zaverbhai**

Amaidas vs. The State of Bombay, AIR 1954 SC 752 and more particular paragraphs, 12, 14 and 15.

27. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of ***Lalji Raja & Sons vs. Firm Hansraj, 1971(1) SCC 721*** and in particular paragraph 16 thereof and it is submitted that the alleged rights for seeking conveyance of the entire property had not accrued. He submits that at most the plaintiff had a right to sue for conveyance of the larger area which right is yet to be adjudicated upon and thus section 7 of the Bombay General Clauses Act, 1904 would not assist the plaintiff.

28. Learned senior counsel also placed reliance on the judgment of the Supreme Court in case of ***Hungerford Investment Trust Limited vs. Haridas Mundhra & Ors. (1972) 3 SCC 684*** and in particular paragraph 19 and it is submitted that mere right to take advantage of the provision of the Act would not amount to accrual of any right. Reliance is also placed on the judgment of the Supreme Court in case of ***M.S. Shivananda vs. Karnataka State Road Transport Corporation & Ors., (1980) 1 SCC 149*** and in particular paragraphs 13 and 15 and it is submitted that accrued right must be independent right and not merely right to sue. He also placed reliance on the judgment of the Supreme Court in case of ***Vishwant Kumar vs. Madan Lal Sharma & Anr., (2004) 4 SCC 1***, and in particular paragraph 4.

29. It is submitted by learned senior counsel that there was no reduction of the recreation ground area in view of the proposed development by the developer on the portion of the land outside yellow boundary. He submits that section 19(2) of the said Act of 2012 recognizes the public purpose. The developer

had generated the FSI due to public parking plot and had proposed to construct an independent building. The plaintiff would not be affected by the public parking space or by the construction of “C” building. He submits that the developer had already proposed to maintain green area, ingress and egress and also open space.

30. Mr. Bharucha, learned senior counsel for the plaintiff on the other hand invited my attention to the agreement entered into between the parties and also to the area statement of the project undertaken by the defendant no.1 which is annexed at page 511 of the appeal paper book and would submit that the said area statement showed permissible floor area 38185.10 sq.mtrs. and the developer had proposed total built up area as 38182.60 sq.mtrs. thereby leaving only about 2.5 meters by consuming FSI available at 1.327. He submits that it is thus clear that when the developer had submitted a plan for sanction from the Municipal Corporation and four wings having constructed by the developer, the entire FSI was already consumed except about 2.5 sq.mtrs. and nothing was left for development. He submits that the developer had got the plan sanctioned of the entire plot and not only portion of the plot on which the four wings were constructed by the developer in which the flats are occupied by the members of the plaintiff and defendant nos. 3 to 5.

31. It is submitted by the learned senior counsel that the concept of the public parking lot under regulation 33(24) of the Development Control Regulation was admittedly introduced on 20th October, 2008 i.e. much after the completion of the said four wings in respect of which the developer had entered into an agreement with the flat purchasers who are members of the four societies. It is submitted that even if the brochure placed reliance upon by the developer is considered, it is clear that even in the said brochure the developer had disclosed

that the developer would construct residential complex and did not disclose the construction of any commercial building. He placed reliance on rules 8 and 9 of the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Rules, 1964 which provides that the promoter shall submit an application to the Registrar for registration of the co-operative society or the company, as the case may be within four months from the date on which the minimum number of persons required to form such organization have taken flats. Under rule 9 of the said rules, it is provided that if no period for conveying the title of the promoter to the organization of the flat purchaser was agreed upon, the promoter shall execute the conveyance within four months from the date on which the co-operative society or the company is registered or, as the case may be, the association of the flat taker was duly constituted.

32. It is submitted by the learned senior counsel that the intimation of disapproval was admittedly granted in favour of the defendant no.1 in respect of the public parking lot on 9th November, 2009. He submits that much prior to that date, the defendant no.1 was under an obligation to execute conveyance in favour of the plaintiff and defendant nos. 3, 4 and 5 society in respect of the entire plot. It is submitted that admittedly the intimation of disapproval was granted by the Municipal Corporation for building 'C' Wing on 7th June, 2010. He submits that the plaintiff and defendant nos. 3 to 4 were completely kept in dark by defendant no.1 about the amendment to the plan and about further intimation of disapproval granted by the Municipal Corporation for public parking lot and building 'C' Wing. The plaintiff had accordingly applied for documents under the provisions of Right to Information Act and subsequently came to know about the amendment in the sanction plan which were originally shown to the plaintiff and defendant nos. 3 to 5 society and about the intimation of disapproval subsequently obtained by the

defendant no.1 from the Municipal Corporation. He submits that the plaintiff accordingly filed a suit in the month of July 2014 inter alia praying for various reliefs.

33. It is submitted by the learned senior counsel that the said project of the defendant no.1 was completed much prior to the introduction of Regulation 33(24) of the Development Control Regulation. The completion certificate was already granted by the Municipal Corporation. The entire FSI except 2.5 meters available on the entire plot was already used by the defendant no.1 on construction of four wings which are occupied by the members of the plaintiff and defendant nos. 3 to 5.

34. Learned senior counsel invited my attention to some of the provisions of the agreement entered into between the defendant no.1 and one of the members of the society and would submit that the defendant no.1 could not have obtained any blanket permission for carrying out any further development in future.

35. Mr.Bharucha, learned senior counsel for the plaintiff placed reliance on the following judgments in support of his submission that the developer could not have taken any blanket consent from the members of the plaintiff and defendant nos. 3 to 5 for carrying out any development in future :-

1. ***Madhuvihar Co-operative Housing Society & Ors. vs. Jayantilal Investments & Ors.*** 2010(6) Bom.C.R.517 (Paragraph 46)
2. ***Ravindra Mutenja & others vs. Bhavan Corporation & Others*** (paragraph 13)
3. ***Ratna Rupal Co-operative Housing Society Ltd. vs.***

Rupal Builders & Ors. (2011) 5 Bom.C.R. 561 (paragraphs 22 to 27 and 29)

4. ***Lakeview Developers vs. Eternia Co-operative Housing Society Ltd.***, 2015 SCC Online 3824 (paragraph 42)

5. ***Noopur Developers vs. Himanshu V.Ganatra and others***, 2010(7) Mh.L.J.694 (paragraph 13).

36. Insofar as issue raised by the defendant no.1 across the bar whether the provisions of MOFA stood repealed impliedly or not, it is submitted by the learned senior counsel for the plaintiff that except few provisions of the Act of 2012, the other provisions were not brought in force under a subsequent notification issued by the State Government. He submits that even section 56 of the said Act of 2012 which provides for repeal and savings clearly makes it clear that on and from the appointed day the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 shall stand repealed. He submits that admittedly no notification has been issued by the State Government appointing the day thereby repealing the entire provisions of MOFA. He submits that in any event, the said provisions cannot apply with retrospective effect.

37. It is submitted that much prior to 2012, the project was already completed. The rights in favour of the plaintiff society and defendant nos. 3 to 5 had already accrued to get the conveyance of the entire property in favour of the plaintiff and defendant nos. 3 to 5. It is submitted that the parties were and are governed by the provisions of MOFA and not the said Act of 2012 as canvassed by the learned senior counsel for defendant no.1. He submits that the intention of the legislature is very clear that the said provision of the said Act of 2012 would not

apply with retrospective effect but would apply with prospective effect i.e. the date on which the notification would be issued by the State Government thereby specifically repealing the provisions of MOFA. In support of this submission, learned senior counsel placed reliance on the following judgments :-

1. ***Lal Shah Baba Dargah Trust vs. Magnum Developers and others***, 2015 SCC Online SC 1319 (paragraphs 30 to 33)
2. ***Delhi Cloth and General Mills Company Limited vs. Income Tax Commissioner, Delhi and another***, Volume LIV Indian Appeals at page 425
3. ***Sri Vijayalakshmi Rice Mills, New Contractors Co. and others vs. State of Andhra Pradesh and others*** (1976) 3 SCC 37 (paragraph 5)
4. ***Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar and others***, (1999) 8 SCC 16 (paragraphs 22 to 25 and 27)
5. Judgment of Supreme Court in case of ***J.S.Yadav vs.State of U.P. & Anr.*** decided on 18th April, 2011 in Civil Appeal No. 3299 of 2011 (paragraphs 20 to 22)

38. Without prejudice to the aforesaid submissions, Mr.Bharucha, learned senior counsel for the plaintiff would submit that even if sections 18 and 19 of the said Act of 2012 were brought in force, even those provisions would clearly indicate that it was an obligation on the part of the promoter of the society of the flat purchasers to execute conveyance till such time entire development is completed in respect of the structure of the building in which the minimum number of 60% of the flats are sold alongwith FSI consumed in such building, subject to the right of the promoter to dispose of the remaining flats if any, within

the time prescribed. He submits that admittedly, more than 60% of the flats in the plaintiff and defendant nos. 3 to 5 society were already sold by the defendant no.1. The FSI of the entire plot except 2.5 square meters was already consumed in construction of those four wings. He submits that proviso to section 19 would only apply if the said project was incomplete and further FSI was left for consumption whereas in this case hardly about 2.5 sq.mtrs. FSI was left. He submits that the provisions of Bombay General Clauses Act, 1904 and more particularly section 7 thereof would apply to the facts of this case. He submits that since the right to get conveyance in respect of the entire property had been already accrued in favour of the members of the plaintiff and defendant nos. 3 to 5 society, such accrued interest cannot be affected even if the provisions of the said Act of 2012 would have been brought into force.

39. Mr.Bharucha, learned senior counsel for the plaintiff distinguished the judgment of Supreme Court relied upon by Mr.Chinoy in case of ***Vishwant Kumar vs. Madan Lal Sharma and another*** (supra) on the ground that the said judgment was under the provisions of the Rent Act which provided for obligation on the part of the tenant to take various steps before approaching a court of law. He submits that since defendant no.1 was under an obligation to execute the deed of conveyance in respect of four wings and the entire plot in favour of the plaintiff and defendant nos. 3 to 5 society, the said right was already accrued in favour of these societies.

40. Insofar as judgment of Supreme Court in case of ***Hundgerford Investment Trust Limited (In voluntary Liquidation) vs. Haridas Mundhra and others***, (1972) 3 SCC 684 is concerned, it is submitted by the learned senior counsel that the said judgment deals with the approach of the court in case of

rescission of a contract and is not applicable to the facts of this case.

41. Mr.Reis, learned senior counsel appearing for the respondent no.1 (original plaintiff) in Appeal From Order (Stamp) No.23483 of 2015 submits that the original building plan was sanctioned in the year 2004 in respect of one building comprising of 5 wings i.e. wings “A” to “E” and showing the consumption of FSI in respect of the entire area of the building i.e. 27185 sq. mtrs. He submits that there was no question of any TDR in island city. It is submitted that on 6th February, 2005, the original plan was amended showing podium, recreational ground and open space. The last amendment carried out by the defendant no.1 was on 13th April, 2007 by which the defendant no.1 had proposed to delete wing “C” and added those floors in the wings “A” and “E”. He submits that the defendant no.1 had consumed the entire FSI of the entire plot in construction of four wings. On 20th March, 2007, the Municipal Corporation granted occupation certificate. On 29th March, 2008, the completion certificate was issued by the Municipal Corporation under section 353-A of the Mumbai Municipal Corporation Act certifying that the building was completed in all respects and thus the file in respect of the said plot was closed.

42. It is submitted that Regulation 33(24) of the D.C. Regulations came into force admittedly for the first time on 20th October, 2008 i.e. much after issuance of the completion certificate by the Municipal Corporation. The defendant no.1 had applied for IOD under Regulation 33(24) on 18th September, 2009. On 18th November, 2009, the IOD was issued by the Municipal Corporation for public parking lot. It is submitted that “C” wing constructed by the defendant no.1 was connected with the existing building wings “A” and “E” which were old wings. He submits that the brochure relied upon by the defendant no.1 cannot be

considered as a sanctioned plan but would only show some amenities proposed to be provided by the defendant no.1. The said brochure was not even part of the agreement entered into between various flat purchasers and the defendant no.1 and thus was not relevant.

43. Learned senior counsel invited my attention to some of the provisions of the agreement entered into between one of the flat purchaser and the defendant no.1 and would submit that even in the said agreement there was a reference made to the IOD dated 7th February, 2004 and the property to be constructed was specifically described. He submits that even in the title certificate annexed to such agreement the area certified was as 27185 sq. mtrs. which was the measurement of the entire property. He submits that the building plans submitted by the defendant no.1 was approved for the entire property and not in respect of phase-1 as contended by the learned senior counsel for the defendant no.1. Reliance is also placed on the copies of various building plans submitted by the defendant no.1 to the Municipal Corporation duly sanctioned. He submits that in the original plan sanctioned in the year 2004, the defendant no.1 had proposed development of the entire plot showing the entire area admeasuring 27185.46 sq. mtrs. Reliance is also placed on summary statement showing that the entire FSI was consumed in the construction of four wings which are occupied by the members of the plaintiff and defendant nos.3 to 5 which statement showed nil FSI in respect of "C" wing.

44. Learned senior counsel for the plaintiff also tendered a copy of the written statement filed by the defendant no.1 in the suit filed by the plaintiff before the Bombay City Civil Court. My attention is invited to paragraphs 3(c), (g), (i) and (j) of the written statement and it is submitted that the defendant no.1 had admitted that they had proposed to construct all plots reserved for the entire

property. In the written statement it is also pleaded by the defendant no.1 that the plaintiff had no statutory right either to prevent or object to put up the proposed construction on the lay out of the entire property. In paragraph 3(i) of the written statement, it is pleaded by the defendant no.1 that the plots for development of the entire property as approved by the Municipal Corporation were duly disclosed to the members of the plaintiff society and / or prior to the time of entering into the agreement for sale. It is also pleaded that the said building wing “C” whose construction is now sought to be opposed by the plaintiff was to come up on one of the said two portions and was accordingly shown in the sanctioned plan.

45. It is submitted that though the said written statement was filed by the defendant no.1 on 11th February, 2015, the defendant no.1 neither referred to any of the provisions of the Act, 2012 nor relied upon the same in the written statement. He submits that the submission now made by the defendant no.1 in the present proceedings across the bar are contrary to the averments made in the written statement. My attention is invited to paragraph 3(k) of the written statement and it is submitted that it was pleaded by the defendant no.1 that prior to entering into agreement with the flat purchasers, the defendant no.1 through its brochure had particularly stated that the entire project of Dosti Flamingos will be constructed in phase wise manner and also particularly in the plan annexed to the brochure and the defendant no.1 had earmarked the pockets of plot which were to be retained by them for future development. He submits that the said alleged brochure did not form part of any agreement.

46. My attention is invited to the affidavit in reply filed by the defendant no.1 to the notice of motion before the learned trial Judge and would submit even in the affidavit in reply, the defendant no.1 never placed reliance on any of the

provisions of the said Act, 2012.

47. Mr.Reis, learned senior counsel also placed reliance on the judgment of this Court in ***Marwadi Shares & Finance Limited vs. Miral Kanaksinh Thakore & Anr., 2014(1) Bom.C.R. 481*** in support of his submission that the rights in the property had already accrued in favour of the members of the society and also the plaintiff and defendant nos.3 to 5 society, which cannot be taken away even if the provisions of Act, 2012 were partly brought in force. He also placed reliance on the judgment of the Supreme Court in case of ***Lakeview Developers*** (supra) and more particular in paragraphs 51 and 52. Reliance is also placed on the judgment of this Court in case of ***Malad Kolil Co-operative Housing Society Ltd. & Anr. vs. Modern Construction Co. Ltd. & Ors., 2013(2) Bom. C.R. 414*** and in particular paragraphs 35 to 38 and it is submitted that the promoter is not only required to make disclosure concerning inherent FSI but is also required at the stage of lay out plan to declare whether the plot in question in future is being capable of loaded with additional FSI/floating FSI/TDR. He submits that the defendant no.1 did not disclose in the agreement that whether on the suit plot there was any additional FSI/floating FSI/TDR capable of being loaded. He submits that it was mandatory obligation on the part of the defendant no.1 to disclose to the flat purchasers at the time of execution of the agreement about the entire project / scheme.

48. Mr.Chinoy, learned senior counsel in re-joinder submits that it was disclosed to the flat purchasers by the defendant no.1 that the project of construction on the entire land was to be implemented in phases. Defendant no.1 had accordingly disclosed that the first phase was for construction of the portion shown in the yellow colour. He submits that Dosti Flamingos project included two

reserved areas which could be developed by availing of the additional TDR/FSI. He submits that the obligation by the defendant no.1 to execute the deed of conveyance or lease was in favour of Apex society for the entire area and there could not be a separate conveyance in respect of four buildings / wings in favour of the plaintiff and defendant nos.3 to 5 society. He submits that the TDR could be used in island city and was to be used for carrying out construction in phase-2. The plaintiff or the defendant nos.3 to 5 were thus not concerned with the construction of the balance portion on the two reserved area and thus no injunction could have been granted by the learned trial Judge.

49. It is submitted that when the construction of the first phase was completed in the year 2008, the plaintiff was put to notice that second phase would be constructed outside the boundary shown in yellow colour and that conveyance / lease could be executed only after completion of both phases was over. He submits that there is no provision in the agreement for execution of conveyance for phase one only.

50. It is submitted by learned senior counsel that the period of execution of the deed of conveyance under section 11 of the MOFA Act would apply only if there was no provision in the agreement for execution of the such deed of conveyance. He submits that in this case the agreement however, provided that the execution of lease / conveyance to be executed only after the entire project of the defendant no.1 was completed. He submits that the period of four months would not apply to the completion of phase one.

51. It is submitted that even if according to the plaintiff various clauses of the agreement were void or were contrary to the provisions of the MOFA Act, the

said plea has to be adjudicated upon by the competent authority. No vested right is thus accrued in favour of the plaintiff till such plea of the plaintiff is adjudicated upon based on the validity of the clauses of the agreement.

52. Insofar as the judgment of this Court in case of ***Madhuvihar Co-operative Housing Society*** (supra) relied upon by Mr.E.P. Bharucha, learned senior counsel for the plaintiff is concerned, learned senior counsel for the defendant No.1 placed reliance on paragraph 55 of the said judgment and would submit that the said judgment of the learned single Judge of this Court would not apply in the facts of this case since the defendant no.1 had proposed to carry out construction phase wise. It is submitted that similarly the judgment of this Court in case of ***Ratna Rupal Co-operative Housing Society Ltd.*** (supra) delivered by this Court and the judgment of this Court in case of ***Noopur Developers*** (supra) would also not apply on the similar ground. Insofar as the judgment of this Court in case of ***Lakeview Developers*** (supra) relied upon by the learned senior counsel for the plaintiff is concerned, the said judgment is distinguished on the ground that the Division Bench of this Court in the said judgment in case of ***Man Ratna Developers, Mumbai vs. Megh Ratan Co-operative Housing Society, (2008) 110 (10) Bombay Law Reporter, 3571*** has taken a different view. He submits that the demarcated phase was already to the knowledge of the plaintiff on the date of execution of the agreements by its members with the defendant no.1.

53. It is submitted by learned senior counsel that section 19 of the 2012 Act cannot be read with section 11 of the MOFA. He submits that there is no dispute that the provisions of the 2012 Act is not applicable with retrospective effect. He however, submits that since the plaintiff or the defendant nos.3 to 5 did not have any accrued right, the plaintiff would be governed by the provisions of

the said 2012 Act. Learned senior counsel distinguished the judgment of the Supreme Court in case of **J.S. Yadav** (supra) relied upon by Mr.E.P. Bharucha and would submit that unless the plaintiff would succeed in getting declaration from the competent Court, the plaintiff is not entitled to the execution of the deed of conveyance from the defendant no.1 in respect of four wings and the land underneath thereto and thus no vested right can be said to have accrued.

54. Reliance is placed on section 19(2) of the Act of 2012 read with proviso and it is submitted that there is no requirement that if the entire FSI is consumed, no development in the remaining portion can be carried out even if the developer avails of further FSI/TDR. He submits that in the lay out, balance land can be allowed to be constructed by using TDR/FSI. He submits that this is not a case of increase of FSI but is a case of loading of TDR against all the constructions of public parking lot by the defendant no.1 in view of the introduction of the provisions under Regulation 33(24) of D.C. Regulations.

55. Reliance is also placed on section 19(8) of the said Act of 2012 and it is submitted that since the construction of phase-2 is not over till date, the stage of execution of deed of conveyance in favour of the Apex society has not arisen. He distinguished the judgment of this Court in case of **Malad Kokil Co-operative Housing Society Ltd. & Anr. vs. Modern Construction Co. Ltd. & Ors.** (supra) on the ground that there was no phase wise construction proposed by the developer in that case and thus the said judgment would not assist the case of the plaintiff. He placed reliance on the judgment of the learned single Judge of this Court in case of **Jamaluddin A. Khan & Ors. vs. M/s.Build Craft & Ors.** delivered on 31st January, 2011 in Appeal From Order No.1121 of 2010 and in particular paragraphs 8 to 12 and would submit that the learned single Judge of this Court in the said judgment

had considered the phase wise construction proposed by the developer in the same lay out and had taken a different view in that matter.

56. Insofar as the submission of learned senior counsel for the original plaintiff that the brochure issued by the defendant no.1 could not have been relied upon to show the proposed construction in the lay out in phases is concerned, it is submitted by learned senior counsel for the defendant no.1 that the defendant no.1 had placed reliance on the sanctioned plan. The defendant no.1 had referred to the brochure only to show that the construction was proposed by the defendant no.1 in phase-1 on the portion of the plot marked in yellow colour. He submits that only when the further TDR is loaded, it could be reflected in the plan.

57. Insofar as the submission made in the written statement by the defendant no.1 is concerned, it is submitted that even in the said written statement, it was the case of the defendant no.1 that the construction was proposed to be carried out by the defendant no.1 phase wise. Two portions of the plot was earmarked for carrying out construction in phase-2.

58. It is submitted by Mr.Bharucha, learned senior counsel for the plaintiff that there was admittedly no disclosure made by the defendant no.1 even in the said brochure that the defendant no.1 would carry out any construction for commercial purpose. He submits that even the said brochure would indicate that the defendant no.1 had proposed only to carry out the construction for residential purpose.

REASONS & CONCLUSIONS :

59. The learned trial Judge after considering the approved plans has observed that in the plans dated 13th April, 2007 and 22nd June, 2007, the defendant

no.1 had not shown the proposed construction of “C” wing. On 18th November, 2009 the defendant no.1 got approved the plan which showed that they wanted to construct the public parking lot of 10 floors and “C” wing of 25 floors upon the suit plot. It is observed that admittedly the said proposed construction of 10 floors of the public parking lot and 25 floors of “C” wing was not shown in the previous plans got approved by the defendant no.1.

60. The learned trial Judge has observed that in the plan dated 14th February, 2005, it was shown by the defendant no.1 that they would construct 15 floors in “C” wing however, on the plan dated 18th November, 2009 it was shown that there would be 25 floors in the “C” wing. It is held that the defendant no.1 since 2004-05 had not made it clear what kind of construction would be there upon the plot, which was adjacent to “E” wing. The learned trial Judge observed that after taking into consideration the plans and brochure produced on record, it could not be said that there was a complete and true disclosure of the entire project and sufficient compliance of section 7 of MOFA Act by the defendant no.1 while entering into agreement with the plaintiff and defendant nos.3 to 5. It is also observed that whatever FSI was granted in favour of the defendant no.1 in the year 2004-2005 had been already utilized by them by constructing wings “A”, “B”, “D” and “E”. In the year 2010 and the plaintiff and the defendant nos.3 to 5 societies are already registered.

61. The learned trial Judge after adverting to section 10 of the MOFA *prima-facie* held that merely because defendant nos.1 and 2 had failed to execute the conveyance deed immediately within four months of the registration of the societies, they cannot take advantage and claim that they are entitled to develop the suit plots. The learned trial Judge also *prima-facie* held that pages 36, 37 and

42 of the agreement were violative of statutory provisions of the MOFA and against the aim and object of Legislation while enacting MOFA.

62. The learned trial Court also distinguished the judgment of this Court in ***Man Ratna Developers, Mumbai vs. Megh Ratan Co-operative Housing Society*** in paragraphs 39 and 40 of the impugned order and passed an injunction order restraining the defendant nos.1 and 2 from putting up any construction upon and over the suit property till the disposal of the suit and from using any FSI as available to the suit property or any part thereof till the disposal of the suit.

63. A perusal of a copy of the agreement relied upon by both the parties between the defendant no.1 and the flats purchasers indicates that in the recital (A) of the said agreement, there was a reference to the Development Agreement dated 10th June 2004 entered into between the defendant no.2 and the defendant no.1 by which the defendant no. 1 was granted development rights in respect of the entire plot admeasuring aggregating to 27185.46 sq.mtrs. and shown surrounded by black colour boundary lines on the plan annexed as plan “A” to the said development agreement.

64. In the recital (G) of the said agreement, it was provided that the Executive Engineer, Building Proposals (City) of Mumbai Municipal Corporation had by 'Intimation of Disapproval' (for short “IOD”) bearing No.EEBC/8797/ES/A dated 7th February 2004 sanctioned the plan permitting reconstruction of buildings subject to the terms and conditions stated in the said IOD.

65. In the recital (I) of the said agreement, it was provided that the defendant no.1 had become entitled to develop the said entire land described in the first schedule to the said agreement i.e. the entire land and shown surrounded by black colour boundary lines. The defendant no.1 had taken up the development of the part of land and is shown surrounded in yellow coloured boundary lines in the said plan. It was provided that the entire project is being intended to be implemented in a phase wise manner by the promoters on the said entire land which is known as “DOSTI FLAMINGOS.”

66. It was provided that the promoters had at present taken up the development on the part of an area out of land described in the first schedule and the said part of land is shown in yellow coloured boundary lines in the said plan. It was provided that the promoters shall be entitled to make any variations, alterations, amendments or deletions to or in the development or the said project, layout, plans and specifications of the flats and premises in the said building, relocating/realignment of the water, power, sewage, telephone, gas and other services and utility connections and lines etc. It was further provided that promoters proposed to construct buildings on the said entire land in a phase wise manner as per the plans approved or to be approved by the Municipal Corporation with such amendments and alterations as may be permitted. It was further provided that the reference to the said entire land and the said Dosti Flamingos project in the said agreement shall be deemed to mean and include that the nearby contiguous, adjacent and adjoining lands and properties may be acquired in future and construction thereon wherever the context so permits or requires.

67. In clause (M) of the said agreement, it was provided that the

promoters will convey and transfer the building and structure/s to be constructed on the said entire land to a co-operative society or societies or any other organization/s that may be formed in respect of that particular building or buildings and give lease or leases of land on which the building/s was/were to be constructed with land appurtenant thereto which was required to be kept open surrounding the said building/s or proportionate open space whichever was less, as the case may be, to such respective society in respect of the building for which it was formed or to a federation of societies (in the layout) that may be formed to be decided by the promoters in their sole discretion on a nominal lease rent for a period of 99 years from the date when occupation certificate by the Municipal Corporation was granted with option to renew it for a further period of 99 years. It was further provided that the said lease of second scheduled land and conveyance or conveyances of building/s will be executed or got executed when various plots of land situated in the vicinity of the second scheduled land were fully developed by the promoters and full Floor Space Index (FSI) thereon including any benefit of FSI/TDR that was transferred and permitted to be consumed on the said various plots of land in a Dosti Flamingos project including the second scheduled land and the buildings thereon were consumed and appropriated by the promoters fully.

68. The title certificate, property register card and plan "A" were annexed to the said agreement. The promoters had agreed to give possession of the premises to the purchasers on particular dates in each of the agreements.

69. Under clause 24 of the said agreement, it was provided that the promoters intended to form a separate organization for each building on each of several plots in the said Dosti Flamingos Project in respect of and limited to the

said second scheduled land and the building on that land. The promoters also intended that an Apex/Federal society/organization/association of all such separate organization/s societies will be formed who will look after, manage, maintain and conduct all the affairs of common areas, common roads, common service lines, common amenities and common garden in the said Dosti Flamingos Project. The promoters also intended to give lease of the land and comprised of such common areas to be given to the said Apex/federal organization at a nominal rent of Rs.100/- per year. The second Schedule mentioned in that agreement referred to a building called 'Snow Flama' which was to be built on the land admeasuring about 1097 sq.mtrs. forming part of the said land mentioned in the first schedule.

70. Under clause 36 of the said agreement, it was provided that the promoters shall within 12 months but only after all premises were sold and after full development of the said entire project of “Dosti Flamingos” comprising of various buildings was completed by utilizing the full FSI of the said entire land and other surrounding plots taken by the promoters and after fully utilizing increased FSI available due to any change in the Development Control Rules or by way of amalgamation/ sub-division with adjoining properties and/or having fully utilized the TDR which may be obtained by the promoters and/or after having fully utilized any FSI available for development and/or construction on the said various plots of land in Dosti Flamingos Project under slum redevelopment scheme if applicable, however, after 12 months from the date of the said organization was formed whichever was later but only after receipt by the promoters of the full consideration or price of all premises and all other dues receivable in terms of the agreement.

71. Under clause 37 (a) of the said agreement, it was provided that the FSI available in respect of the said Dosti Flamingos Project was at present 1.33 from the date of execution of the said agreement. It was further provided that the purchasers had agreed and confirmed that the promoters will be entitled to further FSI, if any, available due to additional FSI or slum redevelopment scheme or otherwise hereinafter by constructing buildings in the open area available in Dosti Flamingos Project and/or by constructing additional floors on the buildings that may have already been constructed even after the execution and/or registration of the leases thereof and/or conveyances.

72. Under clause 37(d) of the said agreement, it was provided that the promoters shall have the absolute, exclusive and full right, authority to acquire certificate/s of development right/s in respect of entire land including the said second scheduled land and/or properties and make additional construction on the said entire land including second scheduled land and/or the said building by utilizing such development rights.

73. The defendant no.1 has placed reliance on a brochure in respect of "DOSTI FLAMINGOS" Project which provides for the 7 vast acres of Dosti Flamingos residential complex comprises of eight opulent towers : Four 25-storeyed, two 15-storeyed and two 9-storeyed towers, each offering spacious 2 & 3 bedroom apartments. It is mentioned that there was a generous space between each and every building that offers absolute privacy and an uninterrupted view from home from the flats of the flats purchasers. There would be ample stilt and below-the-podium parking space etc. There was no reference to any commercial premises in the said brochure. Admittedly, the said brochure relied upon by the defendant no.1 which refers to sketch plan of four buildings

was not forming a part of the agreement entered into between the defendant no.1 and the flats purchasers, nor the same was referred to in the agreement entered into between the flats purchasers and the defendant no.1. Be that as it may, there is nothing on record to indicate that the said brochure was shown to the flat purchasers at the time of execution of the agreement or their consent was taken based on the brochure.

74. A perusal of the record indicates that there is no dispute that the original building plan was sanctioned in the year 2004 in respect of one building comprising of 5 wings i.e. wings "A" to "E" and showing the consumption of FSI in respect of the entire area of the building i.e. 27,185 sq. mtrs. There is no dispute that on 6th February 2005, the defendant no.1 had got the original plan amended showing podium, recreational ground and open space. The said plan was further amended at the instance of the defendant no.1 on 13th April 2007 by which the defendant no.1 had proposed in the plan to delete wing "C" and added those floors in the proposed wings "A" and "E". There is no dispute that according to the original plan duly amended also the entire FSI then available on the suit plot was to be consumed except to the extent of 2.5 sq. mtrs.

75. There is no dispute that on 20th March, 2007, the Municipal Corporation had granted occupation certificate in respect of the building constructed in respect of the wings constructed by the defendant no.1 which have been occupied by the flats purchasers in those four wings which are occupied by the members of the plaintiff and the defendant nos.3 to 5-societies. On 29th March, 2008, a completion certificate was issued by the Municipal Corporation under section 353-A of the Mumbai Municipal Corporation Act, 1888 certifying that the building was completed in all respects. The file in respect of the said plot

was accordingly closed after issuance of such completion certificate under section 353-A of the Mumbai Municipal Corporation Act, 1888.

76. There is no dispute that Regulation 33(24) of the Development Control Regulations, 1999 came into force admittedly for the first time on 20th October 2008 much after issuance of the completion certificate by the Municipal Corporation. The then purchasers in all these four wings were already handed over possession of their respective flats upon the Municipal Corporation granting occupation certificate on 20th March 2007 and upon granting completion certificate on 29th March 2008.

77. There is no dispute that the defendant no.1 had applied for IOD under Regulation 33(24) of the Development Control Regulations, 1999 admittedly on 17th September, 2009. The Municipal Corporation had issued such IOD admittedly on 18th November 2009 in favour of the defendant no.1 for "Public Parking Lot." The "C" wing constructed by the defendant no.1 was connected with the existing building wings "A" and "E" which were old wings.

78. A perusal of the title certificate issued by the Solicitors which was annexed to the said agreement entered into between the defendant no.1 and the flats purchasers also indicates that the title certificate was issued certifying the area as 27,185.46 sq.mtrs. which was the measurement of the entire property. There is no dispute that the original building plan which was amended at the instance of the defendant nos.1 and 2 till the possession of the flats was handed over to the members of the plaintiff and the defendant nos.3 to 5-societies was approved for the entire suit property and not in respect of Phase-1.

79. A perusal of the copy of the plan sanctioned in the year 2004 produced for perusal of this Court also indicates that the defendant no.1 had proposed a development of the entire plot showing the entire area admeasuring 27,185.46 sq.mts. A perusal of the summary statement which was forming part of the record also clearly indicates that the entire FSI was consumed by the defendant no.1 in the construction of four wings which are occupied by the members of the plaintiff and the defendant nos.3 to 5 except 2.5 sq.mtrs. The said statement would further indicate that the FSI in respect of "C" wing was nil.

80. I shall now decide the issue as to whether the defendant no.1 could have taken blanket consent of the members of the plaintiff and defendant nos. 3 to 5 society to carry out any development in future without their consent in future again and whether the defendant no.1 had disclosed about the details of the development to be carried out in future on the suit plot to the members of the plaintiff and defendant nos. 3 to 5 society at the time of execution of the agreements with the members. Learned senior counsel appearing for the plaintiff and defendant no.1 relied upon various judgments of Supreme Court and this court on this issue.

81. This court in case of **Ravindra Mutenja & Others** (supra) has held that once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA have been completed and possession is handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the provisions of MOFA, he is entitled to take advantage of any additional F.S.I. that may become available because of

subsequent events. It is held that subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. Once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the rules framed under MOFA is over, the permission of such purchasers would be required. In the said judgment this court considered a situation where the building completion certificate for the building of the plaintiffs was issued in the year 1997. The developer had to put up the construction, based upon the permission/license granted and to construct the building and to convey the title by sale deed in terms of Rule 9. It is held that if property had been conveyed, prima facie the remaining FSI or FSI which became subsequently available on the facts of the case, would be to the society to whom the land had to be conveyed.

82. This court considered the fact that the building in that matter was approved in December, 2001. It is accordingly held that the builder did not have any rights under which they were entitled to put up an additional building contrary to section 7-A of the MOFA. It is not in dispute that in this case, the construction of all four wings was already completed sometime in the year 2008. The Municipal Corporation had already issued a completion certificate under the provisions of Mumbai Municipal Corporation Act in respect of the said four wings in which the defendant no.1 developer had already utilized the entire FSI except 2.5 sq.mtrs. It is also not in dispute that the members of the plaintiff and defendant nos. 3 to 5 society were already put in possession by the defendant no.1 much prior to the defendant no.1 applying for IOD in respect of the public parking lot and for other constructions proposed to be made.

83. This court in case of ***Madhuvihar Co-operative Housing Society*** (supra) has held that there is consistent view of this Court, that the blanket consent or authority obtained by the promoter, at the time of entering into agreement of sale or at the time of handing over possession of the flat, is not consent within the meaning of Section 7(1) of the MOFA, inasmuch as, such a consent would have effect of nullifying the benevolent purpose of beneficial legislation. It is held that the consent as contemplated under Section 7(1) of the MOFA has to be an informed consent which is to be obtained upon a full disclosure by the developer of the entire project and that a blanket consent or authority obtained by the promoter at the time of entering into agreement of sale would not be a consent contemplated under the provisions of the MOFA.

84. This court also considered the judgment of Division Bench in case of ***Manratna Developers vs. Megh Ratan Co-operative Housing Society Ltd.*** 2009(2) Bom.C.R.836. The learned Single Judge of this court distinguished the said judgment of the Division Bench in case of ***Manratna Developers*** (supra). In this case though the case of the defendant no.1 is that the defendant no.1 had proposed to carry out the construction in a phased manner, the fact remains that the entire FSI except 2.5 sq.mtrs. was already utilized as then available under the provisions of Development Control Regulation in construction of four wings which have been occupied by the members of the plaintiff and defendant nos. 3 to 5 society. The construction of all the said four wings which were subject matter of various agreements of flat purchasers and the defendant no.1 was over much prior to the date of the introduction of section 33(24) in the Development Control Regulations. The defendant no.1 admittedly did not take any consent of the members of the plaintiff and defendant nos. 3 to 5 society in respect of any future development on the suit plot based on any informed disclosure to the members of

the plaintiff and defendant nos. 3 to 5 society. None of the parties had contemplated the introduction of the provisions of Regulation 33(24) of the Development Control Regulation when the agreements were entered into between the plaintiff and defendant nos. 3 to 5 society by the defendant no.1. In my view there is substance in the submission of Mr.Bharucha and Mr.Reis, learned senior counsel appearing for the societies that right to get conveyance of the suit property from the defendant no.1 in favour of the society had already accrued and thus without their consent, the defendant no.1 could not have applied for modification of the plan and/or for carrying out any further development on the suit property as contemplated under the provisions of MOFA.

85. This court in case of ***Ratna Rupal Co-operative Housing Society Ltd.*** (supra) adverted to the judgment of this court in case of ***White Towers Co-operative Housing Society Ltd. vs. S.K.Builders*** (2008) 6 Bom.C.R.371 and several other judgments. In case of ***White Towers Co-operative Housing Society Ltd.***(supra), this court has held that the promoter is not only required to make disclosure concerning the inherent F.S.I., but he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional F.S.I./floating FSI/TDR. It is held that at the time of execution of the agreement with the flat takers, the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one building scheme or multiple number of buildings scheme. It is further held that the prior consent of the flat purchasers would only not be required, if the entire project is placed before the flat purchasers at the time of the agreement and the developer puts additional construction in accordance with the layout plan.

86. In the said judgment, it is held that if the developer wants to make

additional construction which is not a part of the layout, consent of the flat purchasers would be required. It is held that once the buildings shown in the approved plan are completed and possession is handed over, the Developer cannot contend that because he has not formed the Society and because he had not conveyed the property he can take advantage of the additional FSI which became subsequently available. Such FSI will go to the society to whom the land had to be conveyed. It is held that the advantage of the FSI would be taken only when the building is under construction and only for the buildings forming part of the development plan or layout plan already approved. It is held that subsequent amendment of layout plan without the consent of the flat purchasers was not permissible. Therefore, once the building is completed in terms of the plan and the flat purchasers are to be put in occupation, permission of the flat purchasers would be required. If subsequently FSI becomes available under the Development Control Rules, it would be available to the Society to whom the land had to be conveyed.

87. This court also considered the judgment of this court in case of ***Bajranglal Eriwal and Ors. v. Sagarmal Chunilal and Ors.*** (2008) 6 Bom. C.R. 887 in which it is held that the specific consent was relatable to the particular project or the scheme of Development which was intended to be implemented. The scheme which could be implemented could only be under the sanctioned plan or a plan under the layout shown to the flat purchasers. In the absence of that the statutory embargo to alter or add to any structures on the plot would continue and would be lifted only upon the written consent of the flat purchasers. It is held that the blanket consent taken in the agreement would defeat public policy and would dilute the purposive object and intent of the legislature and would not eliminate the abuses and malpractices which it sought to remedy.

88. It is held that the additional FSI cannot be claimed by the Developer for putting up any additional building not under the approved plan. The failure and neglect to register the society and convey the property would certainly not give any right to the Developer to step upon the property or to claim any FSI. The FSI belongs to the plot. The plot must be taken to be conveyed after the statutory period and thus the FSI that would be available only to the true owner of the plot. Failure to convey would not constitute the Developer a true owner. That would be putting a premium upon his default and that would constitute an abuse of legal process. It is held that any FSI for putting up any additional construction not in the initial sanctioned plan can therefore never enure for the benefit of the Developer except with the express written permission of all the flat purchasers or the Society, after its formation. It is held that such FSI would belong to and can be exploited by none other than the Society of flat purchasers. This court in the said judgment of ***Ratna Rupal Co-operative Housing Society Ltd.*** (supra) also adverted to the judgment of Division Bench in case of ***Manratna Developers*** (supra) and distinguished the same. Admittedly in this case, the defendant no.1 did not disclose any plan in respect of the additional construction sought to be put up by the defendant no.1 to the plaintiff and defendant nos. 3 to 5 society before obtaining such sanction from the Municipal Corporation nor obtained their disclosed consent.

89. This Court in case of ***Ravindra Mutenja & Ors.*** (supra) has held that once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA Act, have been completed and possession handed over, the builder / owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the Act, he is entitled to take advantage of any

additional F.S.I. that may become available because of subsequent events. It it held that it would be so at the stage the building is under construction or the building is not completed and/or purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, *prima-facie*, of the flat purchasers would not be permissible.

90. It is held in the said judgment that once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the Rules framed under MOFA is over, the permission of such purchasers would be required. It is held that if property had been conveyed, *prima-facie* the remaining F.S.I. or F.S.I. which become subsequently available on the facts of the case, would be to the society to whom the land had to be convened.

91. It is not in dispute that in this case the defendant no.1 had to carry out construction in accordance with the plan referred to in the agreement for sale and I.O.D. issued by the Municipal Corporation based on such sanctioned plan. The construction of all four wings was fully completed. The Municipal Corporation had already granted completion certificate. The members of the plaintiff and defendant nos.3 to 5 society were already put in possession of their respective flats by the defendant no.1. The subsequent amendment of the lay out plan in my view could not have been effected by the defendant no.1 without the consent of the flat purchasers and such amendment without such consent was not permissible and thus not binding on the flat purchasers. The judgment of this Court in case of ***Ravindra Mutenja & Ors.*** (supra) squarely applies to the facts of this case.

92. The Division Bench of this Court in case of ***Lakeview Developers*** (supra) has after adverting to the judgment of the Supreme Court in case of ***Jayantilal Investments vs. Madhuvihar Co-operative Housing Society*** (supra) has held that though the object behind the amendment in section 7(1) and insertion of section 7(A) was to give maximum weightage to the exploitation of development rights which existed in the land by construction of additional buildings subject to total layout allowing construction of more buildings and subject to complying with the building rules or building bye-laws or Development Control Regulations. It is however clarified that at the same time this could be done only after full and true disclosure of particulars mentioned in Section 3(2) is made incorporating the same as provided under sub-section (1-A) to Section 4 in the agreements with the flat purchasers, which has to be harmoniously read with Section 10 of the MOFA which cast obligation on the promoter to form a Co-operative Housing Society of the flat takers and under section 11 to complete his title and convey the title to the Society within a prescribed time under Rule 8 of the said Rules.

93. It is held that the developer cannot claim that he can continuously exploit the building potential for eternity without conveying the land in favour of the society. The objection to convey the land in favour of the society within a prescribed time and the obligation to make true and full disclosure under clauses 3 and 4 of Form V remains unfettered. This Court had considered a situation, where the developer had fully utilized the full F.S.I. / potential of the land and was under an obligation to convey the property after the construction of 10th building and was trying to construct four other buildings by claiming additional T.D.R. and trying to load it on 4 additional buildings. This Court accordingly held that the full development potential / F.S.I. had already been utilized by the developer and his claim that additional buildings were constructed by utilizing the additional T.D.R.

prima-facie did not appear to be correct if the lay out plan produced by the plaintiff society was taken into consideration. This Court held that even if there is any contractual condition mentioned in the contract permitting the construction till the entire land was developed, the statutory obligations would over ride the contractual clauses in the agreement.

94. In my view, there was neither any disclosure made by the defendant no.1 to the flat purchasers about any such development in future based on any further F.S.I. being made available on the basis of the construction of public parking lot nor such additional F.S.I. was contemplated at that stage nor any consent was taken from the flat purchasers after such F.S.I. was made available for construction of new buildings. The Division Bench of this Court in case of **Lakeview Developers** (supra) has considered similar facts and has rejected the identical submissions made by the defendant no.1 in this case. The judgment of the Division Bench of this Court, in my view, squarely applies to the facts of this case. I am respectfully bound by the said judgment.

95. A perusal of the said judgment of the Division Bench of this Court in case of **Lakeview Developers** (supra) indicates that the Division Bench has also adverted to the earlier judgment of the Division Bench of this Court in case **Man Ratna Developers** (supra) and has distinguished the said judgment and has held that the observations made by the Division Bench of this Court in **Man Ratna Developers** (supra) did not much assist the developer. In my view, reliance placed by learned senior counsel for the defendant no.1 on the judgment of this Court in case of **Man Ratna Developers** (supra) would be of no assistance to the defendant no.1 and is clearly distinguishable in the facts of this case.

96. This Court in case of **Noopur Developers** (supra) after adverting to the judgment of the Division Bench of this Court in case of **Man Ratna Developers** (supra) and after adverting to Rules 8 and 9 framed under the MOFA has held that the Legislature had certainly intended that the formality of conveying the title and formation of society must be completed within the time as stipulated so that an unscrupulous promoter should not take disadvantage of the same. This Court also held that the permission of the flat purchasers would be necessary if time to form the society and convey the property is over or expired. This Court after adverting to the judgment of the Supreme Court has held that the promoter is required to make disclosure concerning the inherent F.S.I. and also at the stage of lay out plan he is required to declare whether the plot in question in future is capable of being loaded with additional F.S.I. /floating F.S.I./T.D.R. It is held that if the entire scheme including the information about T.D.R. / F.S.I. is not disclosed, then the promoter loses his right to use the residual F.S.I. It is held that if the original layout plan would have shown the proposed construction in phased manner, then the promoter did have right to construct the additional building without permission of the flat purchasers.

97. In this case, the original plan shown to the flat purchasers did not show any construction on any portion of the land other than those four wings. It is not in dispute that the plan shown to the flat purchasers was in respect of the entire plot and not only in respect of those four wings. The entire F.S.I. except 2.5 sq. mtrs. was already exhausted. The defendant no.1 had not disclosed that the plot in question was capable of being loaded with the additional F.S.I./floating F.S.I./T.D.R. The judgment of this Court in case of **Noopur Developers** (supra) squarely applies to the facts of this case.

98. This Court in case of ***Malad Kokil Co-operative Housing Society Ltd. & Anr.*** (supra) after adverting to the judgment of the Supreme Court in case of ***Jayantilal Investments*** (supra) has considered a situation where the developer had shown the layout plan and did not disclose regarding the proposed additional buildings. It is held that the reason that the entire layout should be presented to the flat purchaser and that there should be full disclosure made to him is with the purpose that he should be aware as to what the entire lay out of the scheme in which he is going to purchase the property. This Court has considered an illustration that if the original layout shows only the proposed building of ground + one, the flat taker would purchase the same with the knowledge that only few more persons are likely to join the society and there would not be much effect on the facilities, amenities etc. provided to the members of the society. However, if a structure of ground + one is converted in a towering structure of 28 storeys, the entire scenario would change. The number of additional members that would reside on the said plot would increase by substantial number, thereby putting an additional load on the infrastructure, amenities, facilities etc. available on the said plot.

99. It is held that if this is permitted, the very purpose of requiring a developer to make full and complete disclosure would stand frustrated. This Court rejected the contention of the developer that if any layout area is earmarked for proposed construction, it hardly matters if the layout shows a building of 1+1 floor and the construction is in fact of four storeys, 10 storeys or 28 storeys. It is held that if such an argument is accepted, it would frustrate the very purpose of beneficial legislation like MOFA.

100. In my view, merely because there was a clause in the agreement for

sale that the defendant no.1 would be entitled to carry out construction on a portion outside the yellow line boundary in future and had alleged to have obtained the blanket consent of the flat purchasers, since there was no disclosure or full disclosure about the proposed construction on the portion of the land outside the yellow line boundary area and the fact whether the land in question was capable of any further construction on the date of sanction of such layout plan, the defendant no.1 could not have applied for amendment to the sanctioned plan without obtaining prior consent of the flat purchasers in writing. Such blanket consent in the agreement for sale without full disclosure is contrary to the provisions of MOFA and cannot be enforced by the developer. In my view, the judgment of this Court in case of ***Malad Kokil Co-operative Housing Society Ltd. & Anr.*** (supra) squarely applies to the facts of this case. There is thus no merit in the submissions made by Mr.Chinoy, learned senior counsel for the defendant no.1 that there was informed and full disclosure made to the flat purchasers about the development on two portions of the suit plot outside the yellow boundary line. Admittedly, the defendant no.1 had amended the plan more than once after showing such plan to the flat purchasers without obtaining any informed consent after making full disclosure of the proposed amendment by the developer on the suit plot.

101. In so far as the judgment delivered by the learned Single Judge of this Court in the case of Jamaluddin A. Khan (supra) relied upon by the learned senior counsel for the defendant no.1 is concerned, a perusal of the said judgment indicates that the sanction was granted by the Municipal Corporation in favour of the developer for phase-wise development. It is not in dispute that in this case, a plan which was shown to the flat purchasers by the defendant no.1 was admittedly sanctioned in respect of the entire plot and showed consumption of

the entire FSI available to the said plot except 2.5 sq.mtrs. The said judgment of this Court thus would not assist the case of the defendant no.1-developer and is clearly distinguishable in the facts of this case.

102. In my prima facie view, there is no substance in the submission of the learned counsel for the defendant no.1 that the obligation of the defendant no.1 was to execute a Deed of Conveyance or a lease of the entire properties in favour of the apex society and not the society of the flat purchasers who had purchased various flats in those four wings. Though there was a recital in the agreement for sale that the developer would be entitled to FSI in future, there was no disclosure made by the developer that whether such suit plot was capable of being loaded with any FSI or TDR in future and if so, to what extent and what would be the nature of construction proposed to be made by the developer on the suit plot. In my prima facie view, there is no substance in the submission of the learned counsel for the defendant no.1 that the members of the plaintiff and the defendant nos.3 to 5-societies were concerned only with the four wings constructed on the suit plot and the land underneath and not the entire suit property. In my view, there is no merit in the submission of the learned counsel for the defendant no.1 that the provisions of Sections 7 and 7A of the MOFA did not apply to the agreements entered into between the parties.

103. The next question that arise for consideration of this Court is whether provisions of the MOFA or any part thereof, more particularly Sections 10 and 11 thereof, stood repealed by the provisions of Maharashtra Housing (Regulation Development) Act, 2012 and whether the rights and obligations of the parties are accordingly governed by the said Act of 2012 and not under the provisions of the MOFA. The question that arises for consideration of this Court is whether

there was any implied repeal of the provisions of the MOFA by the provisions of the said Act of 2012. This Court also has to consider as to whether any rights of the flat purchasers to get the deed of conveyance executed in favour of the plaintiff and defendant nos.3 to 5-societies had already accrued much prior to 8th July 2014 when the notification was issued under the provisions of the said Act of 2012 notifying that Sections 1, 18, 19, 21, 22, 23, 36, 51 and 52 thereof were brought in force and what was the effect of the government not notifying and not bringing in force Section 56 thereof.

104. It is not in dispute that the plaintiff and the defendant nos.3 to 5-societies were already registered some time in the year 2010. The Municipal Corporation had already issued a Completion Certificate on 31st March 2008 for the entire project as per the entire sanction layout with accurate FSI of 38185.10 sq.mtrs. save and except 2.5 sq.mtrs. The flat purchasers who are members of the plaintiff and the defendant nos.3 to 5-societies have been handed over possession of the respective flats by the defendant no.1 upon obtaining completion certificate in respect of those four wings. Sections 18 and 19 along with few other provisions of the said Act of 2012 had been notified and brought in force on 8th July 2014 before the date of filing of the suit by the plaintiff-society in the Bombay City Civil Court. Admittedly no notification is issued by the Government for bringing the other provisions of the said Act of 2012 except referred in paragraph 103 aforesaid including Section 56 which is the saving provision.

105. A perusal of the agreement for sale entered into between one of the flat purchasers which was on record and the defendant no.1 indicates that the defendant no.1 was to execute a deed of conveyance in favour of the societies in

respect of the buildings constructed on the said suit plot. In my prima facie view, the flat purchasers as well as the societies were thus entitled to get the conveyance deed executed from the defendant no.1. There was, however, gross delay on the part of the defendant no.1 to execute deed of conveyance in favour of the plaintiff and the defendant nos.3 to 5-societies. The project of the defendant no.1, in my view, was complete when the completion certificate was granted by the Municipal Corporation in respect of the suit plot.

106. Supreme Court in the case of *Lal Shah Baba Dargah Trust (supra)* has held that in case where there is a repealing clause to a particular Act, it is a case of express repeal, but in a case where doctrine of implied repeal is to be applied, the matter will have to be determined by taking into account the exact meaning and scope of the words used in the repealing clause. It is held that the implied repeal is not readily inferred and the mere provision of an additional remedy by a new Act does not take away an existing remedy. While applying the principle of implied repeal, one has to see whether apparently inconsistent provisions have been repealed and re-enacted. It is held that the implied repeal of an earlier law can be inferred only where there is enactment of a later law which had the power to override the earlier law and is totally inconsistent with the earlier law and the two laws cannot stand together. If the later law is not capable of taking the place of the earlier law, and for some reason cannot be implemented, the earlier law would continue to operate.

107. Supreme Court in the case of *Sri Vijayalakshmi Rice Mills, New Contractors Co. and Ors.* (supra) has held that statutes should not be construed so as to create new disabilities or obligations or impose new duties in respect of transactions which were complete at the time of the Amending Act came into

force.

108. Supreme Court in the case of Maharaja Chintamani Saran Nath Shahdeo (supra) has adverted to the earlier judgment of the Supreme Court in the case of ***Hitendra Vishnu Thakur Vs. State of Maharashtra***, reported in **(1994) 4 SCC 602** in which the Supreme Court has culled out the principles with regard to the ambit and scope of an amending Act and its retrospective operation as follows :-

“(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is tex-tually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.”

It is further held that if the amending Act affects the substantive right of the party, it would have prospective operation. If there is also no express or implied provisions in the amending Act to indicate that the Act will have retrospective

effect, the amending Act would apply prospectively.

109. Supreme Court in the case of J.S. Yadav (supra) has construed the term “vest” and has held that the vested right is a right independent of any contingency. Such a right can arise from a contract, statute or by operation of law. A vested right can be taken away only if the law specifically or by necessary implication provide for such a course. It is held that the legislature is competent to make a provision with retrospective effect but the intention of the legislature to apply the amended provisions with retrospective effect must be evident from the Amendment Act itself expressly or by necessary implication.

110. A perusal of the provisions of the Act of 2012 does not indicate any legislative intention to apply the provisions of the said Act of 2012 with retrospective effect. It is not in dispute that there is no notification issued by the Government bringing the entire provisions of the said Act in force. Though the notification is issued bringing few provisions of the said Act of 2012 into force, those provisions would not substitute the existing provisions of the MOFA under which the rights to get the deed of conveyance executed in favour of the flat purchasers from the developer had already been accrued and vested in them. In my view, such vested rights in favour of the flat purchasers cannot be taken away by the Act of 2012 or any part thereof or even by issuing notification in respect of few provisions of the said Act. Be that as it may, since the entire Act is not brought into effect and that also with retrospective effect, the parties who are governed by the Act of the MOFA cannot be governed under the provisions of the said Act of 2012.

111. The principles of law culled out by the Supreme Court in the case

of Maharaja Chintamani Saran Nath Shahdeo (supra) and J.S. Yadav (supra) squarely apply to the facts of this case. I am respectfully bound by the principles laid down by the Supreme Court in the above referred judgments.

112. In my view, there is no substance in the submission of the learned counsel for the defendant no.1 that a right to sue to apply for execution of a deed of conveyance in favour of the flat purchasers and against the defendant no.1-developer had accrued and till such time such right to sue was adjudicated upon in the pending suit, there could not be any vested right in favour of the flat purchasers to get the deed of conveyance executed. The right to get the deed of conveyance executed is a statutory and vested right provided under the provisions of the MOFA in favour of the Societies and such right could not be construed merely as a right to sue. The plaintiff-society has filed a suit for enforcement of such right which was already accrued in favour of the society and its members.

113. A perusal of section 1(3) of the said Act of 2012 makes it clear that the State Government is permitted to issue a notification in the Official Gazette appointing different date for different provisions of the said Act. It is made clear that under the said provision that any reference in any such provision to the commencement of the Act shall be construed as a reference to the coming into force of that provision. Section 56 of the said Act provides that on and from the appointed day, MOFA shall stand repealed. The proviso to section 56 provides that such repeal however shall not affect various rights, privileges, obligation or liability acquired, accrued or incurred under the law so repealed, investigation, proceedings, legal proceedings or remedy in respect of any such right, privilege, obligation etc. and the same shall be continued or enforced as if the said Act had

not been passed. Admittedly no notification is issued in respect of section 56 of the said Act. By a notification dated 8th July, 2014 issued by the State Government, the Government has appointed 8th July, 2014 to be date on which the provision of sections 1, 18, 19, 21, 22, 23, 36, 51 and 52 of the said Act of 2012 shall come into force. I am thus not inclined to accept the submission of the learned senior counsel for the defendant no.1 that the entire provisions of MOFA have repealed by the provisions of the said Act of 2012.

114. Insofar as the judgment of the Supreme Court in case of **Zaverbhai Amaldas** (supra) relied upon by the learned senior counsel for the defendant no.1 is concerned, it is held by the Supreme Court that if the subject matter of the later legislation is identical with that of the earlier, they cannot both stand together, than the earlier is repealed by later enactment which principle will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. In my view, this judgment will not apply to the facts of this case in view of the fact that both the provisions i.e. MOFA as well as the provisions of the said Act of 2012 are enacted by the State Government. A perusal of the said Act of 2012 and more particularly the provisions which are notified, including sections 18 and 19 are not identical with sections 10 and 11 of MOFA.

115. In my view, all these provisions which are notified under a notification dated 8th July, 2014 do not indicate that the same are made applicable with retrospective effect. Be that as it may, even if section 19(2) of the said Act of 2012 is considered, in case of a layout, the conveyance has to be executed by the developer in respect of the structures of the buildings in which a minimum number of 60% of total flats are sold of the floor space index consumed in such building

till such time the entire development of the layout is completed, subject to the right of the promoter to dispose of the remaining flats, if any, and the receipt of the entire consideration amount and outstanding dues from all the flat purchasers. Admittedly more than 60% flats were already sold by the defendant no.1 in each of the four wings in which the flats are occupied by the members of the plaintiff and defendant nos.3 to 5 societies. The defendant no. 1 has admittedly not executed conveyance in favour of the plaintiff and the defendant nos.3 to 5 even in respect of the structures of the buildings along with floor space index consumed in the said building. In my view, Mr.Bharucha, the learned senior counsel for the plaintiff is right in his submission that even if section 19 of the said Act of 2012 is made applicable in the facts of this case, the defendant no.1 has not even complied with the said provision.

116. Insofar as the judgment of the Supreme Court in case of **Vishwant Kumar** (supra) is concerned, the Supreme Court has held that there is a difference between a mere right and what is acquired or accrued. It is held that mere right existing on the date of repeal to take advantage of repealed provision is not a right accrued within section 6(c) of the General Clauses Act. In my view, under the provisions of MOFA and more particularly section 11 thereof, a duty is cast upon the promoter to take all necessary steps to complete his title and convey to the organization or person to take flat which is a registered either as a co-operative housing society or as a company or to an association of flat takers or apartment owners, his right, title and interest in the land and a building and to execute all relevant documents therefore in accordance with the agreement executed under section 4. Such right created in favour of flat takers or of the organization or persons is a statutory right which is absolute and it is a mandatory obligation cast on the promoter to execute such deed or conveyance. In my view, such right

accrued in favour of the members of the plaintiff and defendant nos.3 to 5 is not a mere right to sue or a right to take advantage of statutory provision. The judgment of the Supreme Court in case of **Vishwant Kumar** (supra) thus would not assist the case of the defendant no.1 and is clearly distinguishable in the facts of this case.

117. Insofar as the judgment of the Supreme Court in case of **M.S. Shivananda** (supra) relied upon by the learned senior counsel for the defendant no.1 is concerned, in my view, the said judgment also would not assist the case of the defendant no.1 in view of the fact that the right accrued in favour of the plaintiff and the defendant nos.3 to 5 under the provisions of MOFA were not right to take advantage of the provisions under repeal but the rights vested and accrued to get the deed of conveyance executed. It was the mandatory duty of the promoter under section 11 to execute the deed of conveyance and convey the title in favour of the flat takers. The said judgment of the Supreme Court in case of **M.S. Shivananda** (supra) thus would not assist the case of the defendant no.1.

118. Insofar as the judgment of the Supreme Court in case of **Hungerford Investment Trust Limited** (supra) relied upon by the learned senior counsel for the defendant no.1 is concerned, the Supreme Court has considered the provisions of the Specific Relief Act, 1963 and has dealt with the approach of the Court in case of recession of contract. In my view, the said judgment of the Supreme Court thus does not apply to the facts of this case at all. Similarly the judgment of the Supreme Court in case of **Lalji Raja & Sons** (supra) in which it is held that whether the mere right, existing at the date of repealing statute, to take advantage of provisions of the statute repealed is not a right accrued within the meaning of usual saving clause will not assist the case of the defendant no.1 for the reasons

recorded aforesaid.

119. This Court in case of ***Marwadi Shares & Finance Limited*** (supra) has after considering the effect of section 6 of the General Clauses Act, 1897 has held that the rights and remedy accrued to a party would continue and cannot be divested by an amendment unless it is intended by an amendment to make it applicable with retrospective effect. The said judgment of this Court would apply to the facts of this case and would assist the case of the plaintiff.

120. A perusal of the record showing the nature of the amendments made to the plans which were shown to the flat purchasers by the defendant no.1 which were substantial changes, after handing over possession of the flats to the members of the plaintiff and defendant nos.3 to 5, in my *prima-facie* view, there is no merits in the submission made by the learned senior counsel for the defendant no.1 that the members of the plaintiff and defendant nos.3 to 5 societies are not going to be affected by such construction proposed to be put up under the amended plans and more particularly in respect of green area ingress / egress, open space or that there would be no reduction of ground area as canvassed by the learned senior counsel for the defendant no.1.

121. A perusal of the written statement and affidavit in reply filed by the defendant no.1 in the suit filed by the plaintiff before the Bombay City Civil Court clearly indicates that neither any reference to the Act of 2012 were made therein, nor any submissions were advanced before the learned trial Judge though certain provisions of the said Act were already brought in force before the submissions were advanced by both the parties before the learned trial Judge. Be that as it may, I am not inclined to accept the submission of the learned senior counsel for the

defendant no.1 that any of the provisions of MOFA stood repealed by the said Act of 2012 with retrospective effect. In my view, the rights to get the deed of conveyance executed in favour of the plaintiff and the defendant nos.3 to 5 accrued much prior to issuance of the notification under the Act of 2012 cannot be taken away even if some of the provisions of the said Act of 2012 are made applicable in view of the specific provisions under section 6(e) of the Bombay General Clauses Act, 1904.

122. A perusal of the impugned order passed by the learned trial Judge indicates that the learned trial Judge has passed the impugned order after considering the submissions made by both the parties, has considered the pleadings of both the parties and have rendered detailed reasons while granting reliefs in favour of the plaintiff. There is no infirmity in the order passed by the learned trial Judge granting injunction against the defendant nos.1 and 2.

123. In my view both the appeals from order are thus devoid of merit. I therefore, pass the following order :-

- a). Appeal From Order No.117 of 2016 and Appeal From Order (Stamp) No.23483 of 2015 are dismissed.
- b). In view of the disposal of the appeals from order, the civil applications filed by the defendant no.1 do not survive and are accordingly disposed of. No order as to costs.

[R.D. DHANUKA, J.]