

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6998 OF 2021

M/s.Sancheti Properties, A Partnership
firm having its address at 401, Renata
Chambers 2145 Sadashiv Peth, Pune

Through its partners :

- (i) Pukhraj Bansilal Sancheti
- (ii) Kishore Bansilal Sancheti .. Petitioners

Versus

- 1. Eve's Garden B1 Co-operative
Housing Society Ltd, thru its
Members and Representatives
- (i) Mr.Bhausahab Sakharam Khodade
- (ii) Rajendra Nula

- 2. Hemant Arvind Chhedda
- 3. Dyanoba Nagoji Ingale
- 4. The Municipal Corporation of Pune,
thru its Commissioner, PMC Bldg,
Shivaji Nagar, PUNE. .. Respondents

...

Mr.R.D. Soni with Mr.V.R. Kasle, Tushar Momaya. Jinesh
Shankala i/b Ram & Co. for the petitioner.

Mr.Sitesh Sharma with Mr.Peeyush Rathi, Amit Rathi, Omkar
Thombre, Vijay Upadhyay for respondent no.1.

CORAM: BHARATI DANGRE, J.
RESERVED : 25th OCTOBER 2021.
PRONOUNCED: 29th NOVEMBER 2021.

JUDGMENT :-

1 By the present petition, the petitioner - a partnership firm, represented through its partners, assail the concurrent finding recorded by the two Courts against it, the first one being, the order dated 7th July 2021 passed by the learned Joint Civil Judge, Sr. Division, Pune below Exhibit-5, in Special Civil Suit No.664 of 2021, allowing the application and the second order, passed by the learned District and Sessions Judge, Pune on 23rd September 2021 in Miscellaneous Civil Appeal No.155 of 2021, which upheld the finding by the First Court, resultantly dismissing the Appeal of the petitioners.

2 Heard learned counsel Mr.R.D. Soni for the petitioner and Advocate Sitesh Sharma for the respondents. Since the parties have expressed their intention to argue the Writ Petition finally, at the stage of admission and have tendered the compilation of documents on record, I deem it fit to hear the petition finally.

Hence, Rule. Rule is made returnable forthwith.
Heard by consent of parties.

3 The petitioner, a partnership firm situated in Pune acquired development rights in respect of a plot of land admeasuring 2 Hectares 20 Ares i.e. 22000 sq.m bearing 34/1-A/ situated at Mundhawa, Pune vide agreement dated 10th May

2006. The petitioner constructed eight buildings on the suit property bearing Nos.A, B1, B2, B3, B4, C1, C2, D, the project being styled as 'Eves Garden'. The flats in the building were sold out to the respective purchasers through individual agreement being executed with each flat purchaser, and pursuant thereto, they occupied the flats and formed and registered Co-operative Housing Societies separately, for each building.

4 The dispute in the Writ Petition revolve around the agreement executed between the flat purchasers in building No. B-1, through the agreements duly registered at Haveli No.10 and purported to be executed under Section 4 of the Maharashtra Ownership of Flats Act, 1963 (hereinafter referred to as 'MOFA').

Special Civil Suit No.664 of 2014 came to be filed by the Eves Garden, B1 Co-operative Housing Society through its Chairman Mr. Bhausahab Khodade, occupant of flat no.504 and its Secretary, occupant of flat no.903 with another plaintiff no.2, being occupant of flat no.606 of Building B-1 for declaration, permanent injunction and performance of statutory obligation. The suit was premised on non-adherence to the mandatory provisions of MOFA Act and continuation of the development of the subject lay out in the scheme of 'Eves Garden', contrary to the agreement executed by the promoter/the petitioner with them.

5 The plaintiff pleaded that the plaintiffs are the purchasers of Unit No.504 and 606 in Wing B-1 in the Scheme constructed on the land particularly described in para - 1A of the plaint. In para 1B of the plaint, a distinct piece and parcel of land admeasuring 1000 sq.m, of Survey No.34, Hissa No.1A/1 was set out along with its description and the properties described in para 1A and 1B were referred to as the 'suit properties'.

 It was pleaded that at the time of the sale of the said unit of flat by the Promoters (petitioners herein), a copy of the N.A-cum-Commencement Certificate sanctioned by the Competent Authority was annexed and the plaintiffs proceeded to purchase the flats relying upon the representation given to them by the Promoter and Co-operative Housing Society of the unit purchasers came to be registered for B-1 Scheme, known as 'Eves Garden' B-1 Co-operative Housing Society on 14th June 2018. On formation of the co-operative society, since the Promoter failed to transfer the title of the proportionate land area, out of the property mentioned in para 1A of the Suit, to the Co-operative housing society, in which the units of the plaintiffs are located, it was pleaded that deemed ownership of the proportionate area came to be vested in Eves Garden, B-1 Co-operative Housing Society.

 The plaintiff aver that on or before 14th February 2021, the plaintiffs noticed that the land located towards the North end of the Scheme was amalgamated by the Promoters in the scheme

of the plaintiffs and the promoters have started construction of a new building, which is in violation of Section 4 of the MOFA i.e. without obtaining prior informed consent of the purchasers. The plaintiffs prayed for a decree of permanent injunction thereby restraining the defendants, either themselves or claiming through any person through them from revising the existing plan including but not limited to plan dated 12/3/2020. A declaration is also sought to the effect that the revised plan sanctioned after the plan dated 21/4/2012 shall be declared as void *ab initio*, in absence of the consent of the plaintiffs. Damages/compensation to the tune of Rs.Five lakhs was also prayed for.

6 In the written statement, the defendant/ promoter set out a specific case to the effect that the flats in the building which were constructed, were sold out to the individual purchasers after executing a separate agreement, wherein the intention to carry out further construction, with amalgamation of the lay out was already spelt out and it was agreed upon by the flat purchaser, who subsequently formed and registered the housing co-operative society. It was specifically pleaded that the Promoter had purchased 1000 sq.m of land adjacent to the eight buildings which were already constructed by them vide registered agreement for sale on 10th December 2014 and on acquiring the said piece of land, the building No. E, to House 24 flats was proposed and accordingly, the promoters got the sanction lay out

plan revised and commenced the construction of the said building. It was pleaded that substantial construction had taken place and it has reached upto 8th slab (last slab i.e. two parking floors + 6 floors).

7 It is in the backdrop of the aforesaid factual scenario, pleaded by the rival parties, the plaintiffs moved an application below Exhibit-5, which was allowed and injunction was granted in their favour and against the petitioners, from proceeding with the construction of Building 'E' and this order is upheld by the Addl. District and Sessions Judge, Pune in Civil Appeal No.155 of 2021.

8 In the backdrop of the aforesaid, and on perusal of the impugned orders, the following points arise for my consideration.

- (A) Whether the plaintiffs had accorded their consent to the revision of sanctioned plan and whether the said consent can be construed as 'informed consent' for revision of the sanctioned plan.
- (B) Whether on acquiring the additional land and after obtaining requisite approvals from the planning authority, construction of building 'E' would amount to alteration or addition?
- (c) Whether any prejudice is caused to the plaintiffs/flat purchasers in form of amenities or any other count, on the basis of which the Courts below were justified in granting injunction against the petitioner/ promoter?

9 The learned counsel Mr.Soni appearing for the petitioner would invite my attention to the agreement executed with the individual flat owners and by referring to the terms set out in the said agreement placed on record, his submission is that the plaintiffs were made aware of the proposal to amalgamate the adjoining plot described in the First Schedule and to jointly carry out the Scheme and to prepare a fresh lay out, change the locations of the building and open spaces, after obtaining sanction from the proper authorities. Mr.Soni would submit that the flat purchasers by signing the said terms in the agreement had accorded their consent for the same. Submission of Mr.Soni is, the Scheme initially covered an area of 22,000 sq.m and the lay out was sanctioned, upon which the construction of 8 buildings was carried out, which housed 456 apartments. He submit that the entire project which was contemplated in the agreement was divided in six phases and phase No.VI comprised building/ Wing No.E, which was not presently sanctioned but was to be sanctioned in future and the separate area for the said building was reserved in the north-east corner of the lay out. Since the agreements recorded the consent of the signatories/purchasers, to amalgamate the existing plot comprising of the area of 22,000 sq.m, with the newly acquired additional area, the construction on the newly acquired plot according to Mr.Soni would be liable to be covered by Section 7A of the MOFA and the building 'E',

according to him, is covered by the amended portion of Section 7(1)(ii) which now apply the terminology “additions in the structure of the building” in place of “any additional structure”.

Mr.Soni would specifically rely upon clause 53 and 54 in the agreement executed on 24/12/2012 and certain clauses which are found in the agreement executed in the year 2017 with one of the flat purchaser in B-1 Society, being flat no.803, which is strictly in conformity with the newly amended provisions of MOFA. In short, his submission is that the construction of building ‘E’ is saved by Section 7A and there was an informed consent accorded by the plaintiffs for raising the said structure. He would submit that, 'E' building is constructed on a plot which is not part of the initial lay out of 22,000 sq m but is proposed to be constructed on a piece of land which is acquired and amalgamated subsequently and the construction of the said building is in accordance with the plan sanctioned by the Planning Authority. In any case, the learned counsel submit that if the construction of the building is on additional area of 1000 sq.m, the plaintiffs who are the occupiers of the scheme which was completed at much earlier point of time and the flats wherein, were handed over to the occupiers, have no reason to make a grievance about construction of a new building, since they have failed to establish that there is reduction in the amenities provided to them, nor they have established any prejudice but the only ground pleaded is that the structure in form of building 'E'

is without informed consent being obtained from the members of the eight societies which are part of the original lay out of 22,000 sq.m which is also apparently incorrect.

10 Mr.Soni further submit that out of eight separate societies in the original lay out of 22,000 sq.m, only the plaintiff society, that too, at the instance of two members has filed the Suit, the other seven societies, or their occupants, have never objected to the construction of building 'E' at any point of time. Further, in B-1 society, there are 64 members but barring the present plaintiffs, no one has raised any objection.

Per contra, the counsel for the respondent (original plaintiffs) would oppose the Writ Petition by accusing the Promoters in unilaterally revising the disclosed plans and carrying out non-permitted alteration and variations. Increasing the number of tenements/apartments in the lay out by adding 24 apartments itself has increased the pressure on the common areas and facilities including open space, STD, water tanks, OWC, internal roads, is the submission. Apart from mounting pressure on the promised amenities and facilities like water supply, it is argued by the learned counsel Mr.Sharma that the whole exercise undertaken by the promoter is in gross violation of provisions of MOFA, which being a social beneficial legislation, do not permit any deviation/alteration in the scheme disclosed to the unit purchasers at the time of entering into the respective agreements,

without obtaining mandatory consent of the allottees/unit purchasers in the scheme/project.

11 Learned counsel has placed reliance on the decision Apex Court in Jayantilal Investment Vs. Madhuvihar Co-op Housing Society, (2007) 9 SCC 220, wherein it has been held that the obligation of the Promoter under MOFA to make true and full disclosure of the flat owners remains unfettered even after inclusion of Section 7A in the Act, and wherein the Apex Court has held that the obligation is strengthened by insertion of sub-section (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36/86. He would further place reliance on the following decisions in form of authoritative pronouncements of Law on the point in issue :

- (i) White Towers Co-operative Housing Society Ltd. Vs. M/s.S.K. Builders and ors, 2008 SCC Online Bom 1836,
- (ii) M/s.Dosti Corporation Sea Flama Co-operative Housing, 2016 SCC Online Bom, 1836.
- (iii) Malad Kokil Co-operative Housing Society Ltd and ors, Vs. The Mordern Construction Co.Ltd and Ors, (2013) 2 Bom CR 414
- (iv) Lakeview Developers and Ors. Vs. Eternia Co-operative Housing Society Ltd and ors, MANU/MH/0622/2015.
- (v) Eternia Co-operative Housing Society Ltd and ors Vs.Lakeview Developers and Ors, 2015(5) Bom.CR 680.
- (v) Ravindra Mutneja & ors vs. Bhavan Corporation & ors, (2003) All MR 521.

In light of the position of law being settled on the point by the aforesaid binding precedents, the submission of the learned counsel for the respondent is that the injunction has been rightly granted in favour of the plaintiffs and the Writ Petition do not warrant any consideration, by disturbing the said injunction.

12 The petition revolve around the provisions of MOFA which cast certain obligations on the developer and the present case revolve around Section 7 which is the subject matter of various authoritative pronouncements. The Hon'ble Supreme Court in case of Nahal Chand Laloochand Pvt.Ltd Vs. Panchali Co-operative Housing Society (Civil Appeal No. 2544/2010) has emphasized on the object of MOFA, wherein their Lordships in para 40 of the judgment have recorded as under :-

“40 MOFA was enacted by the Maharashtra Legislature as it was found that builders/developers/promoters were indulging in malpractices in the sale and transfer of flats and the flat purchasers were being exploited. The effect of MOFA may be summarized as follows. First, every promoter who constructs or intends to construct block or building of flats in the area to which MOFA applies has to strictly adhere to the provisions contained therein, i.e., inter alia, he has to make full and true disclosure of the nature of his title to the land on which the flats are constructed and also make disclosure in respect of the extent of the

carpet area of the flat and the nature, extent and description of the common areas and facilities when the flats are advertised for sale. Secondly, the particulars which are set out in Section 4(1A) (a) (i) to (x) have to be incorporated in the agreement with the flat purchaser. Thirdly, the promoter has to apply to the Registrar for registration of the organization (co-operative society or company or condominium) as soon as minimum number of persons required to form such organization have taken flats. As regards unsold flats, the promoter has to join such organization although his right to dispose of unsold flats remains unaffected. Fourthly, and more importantly, the promoter has to take all necessary steps to complete his title and convey to the organization his right, title and interest in the land and building and execute all relevant documents accordingly”.

13 The MOFA is an enactment to regulate the promotion of construction of, the sale and management and transfer of flats on ownership basis. It aim to curb the abuses, malpractices and difficulties relating to the promotion of construction, sale and management and transfer of flats, particularly in the wake of the shortage of housing in the State of Maharashtra.

Section 3 of the Act set out general liabilities of a Promoter, who is bound to make full and true disclosure of the nature of his title to the land, on which the flats are to be constructed along with the disclosure of all encumbrances on such land. Section 4 also comprise of a duty of the promoter to enter

into agreement before accepting the payment or deposit from a flat purchaser and Section 5 cast a duty on promoter to maintain separate account of sums received as advance or deposit and to be a trustee thereof and to disburse the same for the purpose for which the amount was made over to him. Another provision of great significance, in form of a right conferred on a purchaser and a duty cast on a promoter, is contained in Section 7 of the MOFA.

Section 7 of the MOFA, as it originally stood, i.e. prior to its amendment by the Amending Act No.36/1986 restricted to the promoters right to make the following alterations, once the plans and specification of a building, as approved by their local planning authority, were disclosed or furnished to any person, who agreed to take one or more flats in the building: (i) any alterations in the structure described in the plans and specifications in respect of the flats or flat agreed to be taken, without previous consent of that person and (ii) any other alterations in the structure of the building, or construct any additional structures, without previous consent of all persons who have agreed to take the flats. Clause (ii) of Sub-section (1) of Section 7 underwent a change by deleting the words “or construct any additional structures” and by substituting it with the words “additions in the structure of the building”.

This amendment was brought to overcome the decision of the Division Bench of this Court in case of Kalpita Enclave Co-Operative Housing Society Ltd vs Kiran Builders

Pvt. Ltd, 1987 (1) Bom.CR 355, which took a view that a promoter was not entitled to put up an additional structure not shown in the original lay out plan, without the consent of the flat takers. To get over the said interpretation, the legislature stepped in and deleted the words “or construct any additional structure”.

By way of abundant caution, Section 7A came to be inserted, which provide that the deleted words i.e. “or construct any additional structure” shall be deemed never to apply in respect of construction of any other additional buildings/structures constructed or to be constructed. The newly inserted Section 7A which came as a clarification, removed the doubts about interpretation of the terminology substituted in Section 7 (1)(ii), with a consequence, the restriction contained in Section 7 pursuant to the amendment, applied to construction of "additions in the structure of the building", and not “additional structures” i.e. structures other than the buildings, in respect of which the disclosure is made in the plans and specifications.

14 The interconnection between the two i.e. Section 7 and Section 7-A came up for consideration before the Hon'ble Apex Court in a decision arising from this very Court, in the case of Jayantilal Investment Vs. Madhuvihar Co-op Housing Society (supra). The position of Section 7 prior to the amendment and after its amendment was exhaustively dealt with and the following observations were made :-

“13 Therefore, the legislature has sought to regulate the activities of the promoter by retaining Sections 3 and 4 in the Act. It needs to be mentioned at this stage the question which needs to be decided is whether one building with several wings would fall under amended Section 7(1)(i). Section 7A basically allows a builder to construct additional building provided the construction forms part of a scheme or a project. That construction has to be in accordance with the lay out plan. That construction cannot exceed the development potentiality of the plot in question”.

In para-14, Their Lordships of the Apex Court made an attempt to balance the rights of a promoter to make alterations and additions in the structure of the building on one hand, *vis-a-vis* his obligation to convey the right, title and interest in the property to the Society in the following words :-

“Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the lay out plan on the one hand vis-`-vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure of the flat takers remains unfettered even after the inclusion of Section 7A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36/86. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which

inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker”.

Clauses 3 and 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964 was extensively quoted by highlighting the obligation of a promoter to comply with all the terms, conditions, stipulations and restrictions if any, which may have been imposed by the concerned local authority at the time sanctioning the said plans.

15 The true and full disclosure by the promoter flows from the obligation cast on the promoter vide Section 3 and 4 of the MOFA and Form no.5 which is the prescribed form of agreement. It is authoritatively held in *Jayantilal Investment*, that this obligation remain unfettered because the concept of developed ability has to be harmoniously read with concept of registration of Society and conveyance of title, and once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of flat takers as long as the builder puts up additional construction in accordance with the lay out plan, building rules and development control regulations.

16 Referring the question as to whether the case in hand fall within the ambit of amended Section 7(1)(ii) or whether it is within the ambit of Section 7A, the matter was remitted back to the High Court, to ascertain the factual position, by examining whether the project in question consists of 7 independent buildings or whether it is one building with 7 wings.

Upon the matter being remitted to the High Court, a Single Judge of this Court (Justice B.R. Gavai, as his Lordship was then), decided the question made over to it, in the case of Madhuvihar Co-operative Housing Society vs. Jayantilal Investment & ors, {(2010) 6 All M.R. 600}.

After referring to the scheme of MOFA contained in Sections 3 and 4 as well as Sections 11 and 16, in terms of the directions, the plans submitted by the promoters were verified to indicate that the plan consisted of 7 wings which are interlinked to each other and the sanction plan reflected 7 wings which were changed from Seven to Five, and thereafter, five to six. In the backdrop of the aforesaid factual scenario and on referring to various terms in the agreement between the parties, the following observations are relevant :-

“40 It can, thus, be seen that it is settled position of law, as laid down by the Apex Court, that a prior consent of the flat owner would not be required if the entire project is placed before the flat taker at the time of agreement and that the builder puts an additional construction in accordance with the

layout plan, building rules and Development Control Regulations. It is, thus, manifest that if the promoter wants to make additional construction, which is not a part of the layout which was placed before flat taker at the time of agreement, the consent, as required under Section 7 of the MOFA, would be necessary.”

In the facts of the case, it was held that the Scheme floated in the year 1985 was showing 7 wings and the building was completed in the year 1989 and the purchasers who had entered into the agreement with the promoter, were put in possession. It was held that the promoter was statutorily obliged to execute conveyance in favour of the Society within the stipulated period and the additional structure which was not forming part of the original lay out in the year 1985, could not have been constructed without consent of the Society, since the building consisted of distinct wings which would be interlinked and the proposed building was not a new building and the defendant was thus restrained from erecting any additional structure over the suit property without consent of the persons with whom the promoter had entered into the agreements to purchase the flats in the building, constructed on the suit plot.

17 An important observation in the very same judgment, as regards the term "Consent" used in Section 7 is also relevant and I deem it appropriate to reproduce the same.

“46. Thus, 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.

47. It is, thus, clear that it is a consistent view of this court, 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. I am in respectful agreement with the consistent view. The interpretation placed by the learned Single Judges of this court is in consonance with the benevolent provisions of the MOFA which have been enacted for protecting flat takers”.

The above observation, therefore, lead to a position indicating that blanket consent or authority obtained by the promoter is no consent within the meaning of Section 7(1) of MOFA and what is expected, is an informed consent.

18 This being the position of law, it must be applied to the facts in hand to ascertain whether the concurrent findings rendered by the two Courts consider the aforesaid position and hence, I move to the merits of the matter.

19 Pertinent to note that the MOFA, no doubt cast an obligation on the promoter to make available to the flat purchaser what they were promised, when the purchase agreement was executed. Having once entered into an agreement, wherein the terms and agreement are set out and upon accepting the same, when substantial amount is invested by a purchaser for purchase of flat, the Act ensure that he get what he deserve as per the agreement, and the promoter/builder do not vary the benefits promised, to his detriment. This is what Section 7 aim to achieve. As far as disclosure of all particulars of the building or project, the manner in which such disclosure shall be made, is set out in Section 3 of the Act which cast general liability on the promoter, who intend to construct or constructs a block or building of flats, all/some of which are to be taken or are taken on ownership basis and the duty of the promoter is to make full and true disclosure of the nature of his title to the land on which the flats are constructed, or are to be constructed, as well the true and full disclosure of all encumbrances on such land, including any right, title, interest or claim of any party in or over such land. The promoter is also duty bound to give inspection on 7 days notice of the plans and specifications of the building built or to be built and shall also disclose the nature of fixtures, fittings and amenities, provided or to be provided. The other details which are to be specified by the promoter include the date by which the possession of the flat will be handed over as well as the disclosure

of all outgoings, including, taxes, water charges, electric charges etc. When the flats are advertised for sale, the promoter is also duty bound to disclose, *inter alia*, in the advertisement the particulars, i.e. the extent of the carpet area of the flat, including the area of the balconies, price of the flat, including proportionate price of common areas and facilities, nature, extent and description of common areas and facilities as well as that of the limited common areas and facilities, if any. Apart from this, by the amended sub-section 1-A of Section 4, which has been inserted by the very same amendment by which change is effected in Section 7(1)(ii) and by which Section 7-A has been brought on the statute book, the agreement to be registered in terms of sub-section (1) of Section 4 shall also necessarily contain the particulars specified in clause (a) and shall be accompanied with the documents specified in clause (b). It is imperative for the promoter to include clauses 3 and 4 of Form V in such an agreement which provide for the following :-

“3 The Promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions if any, which may have been imposed by the concerned local authority at the time sanctioning the said plans or thereafter and shall, before handing over possession of the Flat to the Flat Purchaser, obtain from the concerned local authority occupation and/or completion certificates in respect of the Flat.

4 The Promoter hereby declares that the Floor Space Index available in respect of the said land is square metres only and that no part of the said floor space index has been utilised by the Promoter elsewhere for any purpose whatsoever. In case

the said floor space index has been utilised by the Promoter elsewhere, then the Promoter shall furnish to the Flat Purchaser all the detailed particulars in respect of such utilisation of said floor space index by him. In case while developing the said land the Promoter has utilised any floor space index of any other land or property by way of floating floor, space index, then the particulars of such floor space index shall be disclosed by the Promoter to the Flat Purchaser.

20 In the light of the aforesaid statutory provisions, it would be apposite to refer to the agreements executed by the petitioner with the original plaintiffs, who allege absence of consent in construction of building 'E' by the promoter.

A copy of the agreement executed by the promoter with the plaintiff No.1(a) Bhausahab Khodade dated 24/12/2012 is placed on record, to which the owner of the plot, is a consenting party.

The agreement disclose the particulars of the land on which the construction of building is proposed by the promoter and the same is described as under :-

A] All that piece and parcel of land situated within the Registration, Sub Dist., Taluka Haveli, Dist. Pune and outside the limits of Pune Municipal Concerned authority bearing S.No.34/1A/1, Moje Mundhwa, Pune admeasuring an area of 22000 Sq.mtrs. out of the total area of 3 Hectares 09 Are and more particularly described in First Schedule hereunder is owned by the Consenting Party herein.

21 The Schedule appended to the said agreement described the property with its boundaries and the area is set out as 2 Hectares 20 Area i.e. 22000 sq.m out of the total area of 3 Hectares 9 Are.

Upon description of the property, the Agreement comprised the following clauses :-

C] The Promoter decided to construct building on the said property and sell the flat, shops, units therein on ownership basis. The Promoter thereafter prepared a layout and building plans of the buildings to be constructed on the said property which was approved and sanctioned by the Asst. Director Town Planning Office vide No. Layout/NABP/ Mouje Mundhwa/ Tal. Pune City/ S.No.34/1A/SSP/5273 dt. 17.11.2008, which was revised under No. NABP/Mouje Mundhwa/Tal. Pune City / S.No. 34/1A(pt)/SSp/2507 dt. 15.7.2010. The permission for the non agricultural use of the said land was obtained from the Collector Pune under. No. PMN/NA/SR/19/08 dt. 5.1.2009 revised under No. PMN/ NA/SR/11/2010 dated 9.9.2010.

E] The Flat Purchaser demanded from the Promoter and the Promoter has given inspection to the Flat Purchaser of all the documents of title relating to the said land, the development agreement, the plans, designs and specifications prepared by the Promoter's Architect and of such other documents as are specified under the Maharashtra Ownership Flats (Regulation of the Promotion, construction, sale, management and Transfer) Act, 1963 (hereinafter referred to as "the said Act") and rules made thereunder.

I] The Flat Purchaser offered to the Promoter for allotment to the Flat No. B1-504 on 5th floor in the Building to be constructed on the said plot which is more particularly described in Annexure D hereunder written and which for the sake of convenience-is-hereafter referred to as the said Flat.

NOW THEREFORE, THIS INDENTURE WITNESSETH AND IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES HERETO AS UNDER:

1. The Promoter herein has obtained sanction of the building plans in respect of the buildings which are under construction on the said land and the Promoter herein shall continue to construct and complete the construction of the said buildings on the said, land in accordance with the plans, designs and specifications sanctioned by the concerned authority which have been seen and approved by the flat purchaser/s subject to such alterations and modifications as the Promoter in its sole discretion may think fit and necessary or may be required by the concerned local authority/Government to be made in them or any of them.

2. The Flat Purchaser's hereby gives/give his/her/their irrevocable consent to the Promoter herein to carry out such alteration, modifications in the sanctioned plans of the said buildings as the Promoter in its sole discretion thinks fit and proper and/or such modifications and alterations which are necessary in pursuance of any law, rules, regulations, order or request made by the local authority, planning authority, or Government or any officer of any local authority.

Provided that the Promoter shall have to obtain prior consent in writing of the flat purchaser/s if such alterations and modifications adversely affect the construction of the said flat hereby agreed to be sold. The Flat Purchaser/s herein shall have no right to withhold such permission without any reasonable cause and shall give such permission as and when required by the Promoter herein.

22 The other clauses in the agreement set out the description in the flat referred to as "the said flat/accommodation, being sold for consideration of Rs.40,69,100/-. Clause (3) further set out the amenities in the following manner :-

3. The nature, extent and description of the common areas and facilities are more particularly described in the Second Schedule written hereunder and the Promoter has agreed to provide the amenities in the said flat/accommodation which are more particularly described in the annexure "E" written hereto

5. It is hereby declared that sanctioned plan/s have been shown to the Flat Purchaser/s and the Floor Space Index (FSI) available is shown in the said plan/s. Similarly, the Floor Space Index, if any, utilised as floating floor space index or in any manner, i.e. to say transfer from the said land or floor space index of any other property used on the said land is also shown in the plan/s. In this Agreement, the word FSI Floor Area Ratio shall have the same meaning as understood by the Planning Authority under its relevant building regulations or bye laws. The Promoter shall be entitled to float F.S.I. of the

Property in the present scheme to any other property and vice-versa if so permitted by the concerned authority. The Promoter shall also be entitled to use the FSI of the internal roads, road widening FSI, TDR, etc on the said building and or other buildings in the layout of the said project.

6. The Promoter has made full and true disclosure of the title of the said land as well as the encumbrances, if any, known to the Promoter. The Promoter has also disclosed to the Flat Purchaser/s nature of its right, title and interest or right to construct buildings. The Promoter has also given inspection of all the documents to the Flat Purchaser/s as required by law. The Flat Purchaser/s having acquainted himself/ herself/themselves with all the facts and right of the Promoter has entered into this Agreement.....

16. It is hereby agreed that the areas mentioned in sub-para (A) of the Second Schedule shall be the common areas and facilities and the Promoter shall be entitled to declare all other areas as restricted or reserved areas and facilities and/or alienate and dispose of other areas and facilities in such manner as the Promoter thinks fit.

30. The flat/unit purchasers hereby irrevocably empower the Promoter and anyone of its partner as power of attorney holder of the flat/unit purchaser to execute any document, letter etc. thereby permitting the Promoter to utilize balance or additional FSI and TDR and for the said purpose to revise the layout and building plans from time to time, to avail of any benefits, to obtain FSI for open space and get the building plan for open space sanctioned.....

23 The most important recital in the said agreement read as under :-

53. The Promoter at its discretion shall be entitled to amalgamate the said Plot described in the First Schedule hereunder written with the adjoining plots/land and to jointly carryout the scheme and in the said event from time to time change/prepare the layout, change the locations of the buildings and open spaces (if any) and internal roads (if any) and get them sanctioned from proper authorities and to do all such other acts as may be required by the Promoter or legal provisions applicable therefor. The Flat Purchaser has given the consent for the same and if required give such consent in future.

54. If any portion of the said property adjoining the existing road is or will be reserved for the purpose of road widening or D.P. Road then the concerned authority may pay the compensation therefor in terms of additional F.S.I. in respect of the said portion under the road widening to be utilised in the remaining portion of the Property or in any other property by floating the F.S.I. In such an event and as and when such FSI is granted, the Promoter shall be entitled to use the same and additional built up area in the said property either by way of construction of new building or extension of the buildings which are presently permitted or in any other property as per the discretion of the Promoter. The Flat Purchaser has hereby given his irrevocable consent therefor and the Promoter shall be entitled to revise the plans, get the same sanctioned from ADTP, construct the additional units permitted by ADTP and to allot/sell them to various persons. The Flat Purchaser shall have no objection for the said new allottees to be admitted as members of the Society.

24 Meaningful reading of the above clauses in the agreement, reveal that it contemplated phase wise development and construction of buildings on the land and the purchaser chose not to raise any objection and accorded consent for adding new buildings, and also to further revise or amend the revised plans as and when thought necessary by promoter in clause 58 of the agreement. The amenities spaced in the lay out belong to the promoter and to develop or transfer the same or to deal with the same was the promoters discretion as per clause 61.

It is this agreement which was signed by the plaintiffs, which set out schedule of the property, specifications of the flat, the amenities to be provided with a clear indication that there will be addition of a new building and revision or amendment of the revised plans as desired by the promoter.

25 Another set of agreements, which is executed in the year 2017 between another flat purchaser who was allotted Apartment No.803 in B-1 Society i.e. in favour of one Hemant Kumar Patil, clearly set out the nature and particulars of the Scheme as under :-

G(a) Nature and Particulars of the entire scheme are as under The layout is sanctioned for the area of 22000 Sq.mtrs. After excluding area under R.D. RW (M.D.R.) admeasuring 646.36 Sq.mtrs. and area of amenity space admeasuring 3203.20 Sq.mtrs., balance

area admeasuring 18150.44 Sq.mtrs, is under development. The layout plan is sanctioned by Asst. Director Town Planning Office vide No. Layout/NABP/Mouje Mundhwa/Tal. Pune City/S.No.34/1A/ SSP/ 5273 dated 17.11.2008 which was revised under No.NABP/Mouje- Mundhwa/Tal. Pune City/ S.No.34/1A(pt) SSP/2507 dated 15.07.2010. The Said Layout Further revised by no. NABP/Mouje-Mundhwa/Tal-Pune city/ Sr.No 34/1A/ 1/SGP/4654/ 5/7/2011. The said layout was further revised and approved by the P.M.R.D.A. vide Letter No.BHA/C.R.No.592 Mouje Mundhwa/ S.No.34/1A/ 1 (P) dated 21.11.2016. The Promoter will revise the said layout in future and it will be sanctioned when permitted by availing FSI for road under reservation and paid FSI or TDR.

(b) The entire project is divided in six phases called Phase I, II, III, IV, V and VI. The Phase No. I consists of buildings/wings No.A. Phase No.II consists of Building/ Wing Nos.B1+B2. Construction of the wings in Phase No.I and II are completed and Completion Certificate obtained prior to 1st May 2017. Phase No.III consists of Building Wing Nos. B3+B4. Construction of the said wings are completed and Completion Certificate obtained on 16/06/2017. Phase No.V consists of Building/Wing Nos. C1+C2. Construction of the said wings are completed and Completion Certificate obtained prior to 1 May 2017. Phase No.V consists of Building/Wing No.D. Phase No.VI consists of Building/ Wing No. E which is presently not sanctioned but will be sanctioned in future. Space for the said Building no E is reserved in North-East comer of the layout. Separate Co-operative Housing Society of the unit holders in each Phase will be formed and structure of the said Building's will be conveyed to the said society. After completion of the

entire scheme i.e. all the phases federation / apex body will be formed of all the said societies /phases and entire land along with all common area and facilities such as open space, club house, internal roads. transformer, STP, underground water tank etc. will be conveyed to such federation/apex body

26 The above agreement also include other covenants/recitals, strictly according to the amended provisions of the MOFA and the Schedule of Property phrased in light of it, is set out as under:-

FIRST SCHEDULE

Phase No.II admeasuring notional land area of 5366.92 Sq.mtrs. (which includes proportionate land under open space, internal road, transformer, STP, water tank) which consists of Building Nos. B1+B2 totally admeasuring built-up area of 7893.80 Sq. mtrs. and covering ground/ plinth area of 947.48 Sq. mtrs. out of all that piece and parcel of land and ground within the Registration, Sub-District, Taluka Haveli, Dist.Pune and within the limits of PMRDA bearing S.No.34/1A/1 (part), Mouje Mundhwa, Pune

27 The Second Schedule set out the common areas and facilities in phase-II and also the limited common areas and facilities as per the amended provisions of MOFA.

28 With these covenants being included in the agreements of the plaintiffs who are occupants of building B-1,

Eves Garden B-1 Co-operative Housing Society Limited, the agreement with the promoter, clearly made a disclosure about the sanction lay out area of 22,000 sq.m and the project being divided in six phases. A clear indication was given to the effect that phase-V consisted of building No.D whereas phase VI consisted of building No. E which was not sanctioned but will be sanctioned in future and the space for the building No.E is reserved in North-East corner of the lay out.

Another important aspect, is that the construction of the eight buildings being A, B1, B2, C, C1, C2, C3 and D was completed in 2017, which comprise of 456 apartments and the occupancy certificates were also issued, pursuant to which eight separate societies were formed. The plot on which the initial development lay out was sanctioned, was admeasuring 22,000 sq.m and all the eight buildings were situated within the said layout. The additional area of 1000 sq.m on the north side of the initial lay out was purchased by the petitioner in the year 2014 and the balance, on amalgamation of the said plot, along with the additional area received a sanction, along with building 'E', permitted to be constructed thereupon. The construction of the 'E' building, after complying with the necessary condition of sanction, commenced in 2019 and though the said construction was taking place next to the building of the plaintiffs, till it reached the RCC structure upto 4th storey, no objection was raised.

29 The building 'E' which is being constructed in any case is situated on an additional plot of 1000 sq.m which is amalgamated with the original plot described in Schedule - A of the agreement and clause 53 in the agreement clearly contain a stipulation that the promoter shall be entitled to amalgamate the plot described in the First Schedule with the adjoining plots/land and to jointly carry out the Scheme and in such an event, change/prepare the lay out, change the locations of the building and open spaces and internal roads and to get sanction from the authorities to that effect. The flat purchaser/the plaintiffs accorded their consent to the same. With this clear indication of the addition of a new building, not on the area covered in the First Schedule of the agreement, but by amalgamating a piece of land about 1000 sq.m with the original plot, the case clearly fell within Section 7-A and since the building 'E' is an additional structure, it can be erected by the promoter without the consent of the flat owners in the earlier building. Even if this is so, perusal of the agreement would clearly reveal that the promoter has sought consent for amalgamation of the plot and more so, the plaintiffs are not put to any inconvenience, in the sense that there is no reduction in their amenities/facilities, nor they have been able to demonstrate the same before the Courts below. The only averment which they made in the plaint is that the promoters have converted the open space into parking and has sold it to different unit purchasers in

the scheme and the installation of the garbage plant is without the knowledge of the unit purchasers, is the only averment, without establishing as to how they are adversely affected by construction of building 'E'. Nothing as above, however, amount to alteration in structure of building B-1. Pertinent to note that barring the three plaintiffs, no objection is raised about construction of building 'E' by any other occupants in any other buildings or by other occupants of building B1, and the plaintiffs have filed the Suit when the construction of the building is substantially completed. The promoter in his written statement has specifically pleaded that on account of the construction of a new building, no right, title, possession of the plaintiffs is affected and even the newly constructed building is being erected as per approved plans and construction permissions and even RERA certificate is also obtained.

30 On an application filed under Order 39 Rule 1 and 2, the plaintiffs set out a case of balance of convenience in their favour and sought a restrain order against the promoter to stall the construction of the disputed wing 'E' which is at the stage of casting of 4th slab. No case is made out by them as to how the construction of the said building would cause any prejudice to the occupiers of Building B-1 and that too, plaintiff nos.1, 2 and 3 and the learned Courts below without adverting to the factual position, in form of various terms stipulated in the agreement

between the parties where the promoter had made a disclosure about the building 'E' being constructed in future and to which the plaintiffs had accorded their consent, merely relying upon the authorities cited before it, granted injunction. The First Court has recorded that the issue as to whether the alleged consent letter issued by the plaintiffs in favour of defendant no.1 can be treated as 'informed consent' under Section 7 of MOFA will be decided during judicial inquiry but *prima facie* case is made out to the effect that there is violation of provisions of Section 7 of MOFA.

31 The aforesaid finding is clearly perverse since the learned Judge has failed to take into consideration the agreement between the promoter and the plaintiff no.1, where he had consented to amalgamation of the plot and construction of a new building thereupon and this consent is manifestly an informed one, in light of the various clauses in the agreement, which are reproduced above and to which the trial Court has not even adverted to.

The Appellate Court upheld the finding of the First Court by relying upon various authorities cited before it in ignorance of the factual position.

32 Pertinent to note that while granting injunction under Order 39 Rule 1 of the CPC, the parameters are well settled and

existence of *prima facie* case, coupled with balance of convenience and irreparable loss are the factors which would deserve consideration before an injunction is granted.

Perusal of the factual scenario and the provision of the MOFA, tilt the balance of convenience in favour of the defendant/promoter who has taken all necessary care to disclose all material particulars about the construction of building 'E' to the prospective purchasers, when agreements were entered into, for purchase of their units in building B-1. The petitioner/promoter has adhered to the requirement of law of disclosing the details of the scheme as contemplated under MOFA to the plaintiffs. It is the petitioner who would suffer irreparable loss, since the construction which has reached upto the level of 4th slab of 'E' building has been stalled. The promoter no doubt is entitled for returns of his investment when he has undertaken the construction of the building 'E', about which an informed consent was obtained from the plaintiffs and the Courts below have completely missed out that the balance of convenience as well as irreparable loss is to the petitioner and not to the plaintiffs. The buildings, if not completed would result into huge pecuniary loss to the petitioner since the building 'E' at present is half way, and the time gap would render the standing structure useless, which would not be in the interest of the promoter who has invested money in the scheme.

33 Learned counsel Mr.Soni is perfectly justified in placing reliance upon the decision of the Apex Court in case of ECE Industries Ltd Vs. S.P. Real Estate Developers Pvt.Ltd. (2009) 12 SCC 776, wherein the Apex Court has deprecated grant of injunction where substantial construction had taken place on the suit land, involving huge investment and has observed as under :-

“26 It is well settled that when construction has been made on a land, which is of considerable magnitude, and when the plaintiff shall not face any substantial injury, if no order of injunction is granted because of payment/deposit of the entire amount payable by the defendant to the plaintiff under the Agreement, though belatedly, we are of the view that the Court will not, as a matter of course, pass an order of injunction against the other party restraining the other party from raising any construction on the suit property till the disposal of the suit.

27 If ultimately, the suit filed by the plaintiff-appellant is decreed, he can be compensated in damages or the defendants/respondents may be directed to pull down the construction and deliver vacant possession to the plaintiff/appellant when no equity can be claimed for such construction by the defendants/ respondents”.

However, in case of M/s.Noopur Developers Vs. Himanshu Ganatra & Ors., a judgment of this Court which was taken before the Hon'ble Apex Court, the Court had deemed it appropriate to

modify the interim order passed by the trial Court, as confirmed by the High Court in the following terms

- “1 The petitioner shall be free to continue with the construction of the building at the disputed site.*
- 2 The building shall be constructed by the petitioner at its own risk and cost and without any claim of equity.*
- 3 The petitioner shall carry out development in accordance with the sanctioned plan and the relevant statutory provisions.*
- 4 The construction already raised and the one which will be raised hereinafter shall be subject to final adjudication of the Suit.”*

34 It is settled position of law that grant of injunction is based on principle of equity and it is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties, ordinarily would not be entitled to an order of injunction. One should not be oblivious to the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof and the Court dealing with the matters must make all endeavour to protect interest of the parties and for the said purpose, application of mind on part of the trial Court is imperative.

In the present case, since the plaintiffs were not able to demonstrate any substantial injury if the construction work was not stopped by order of injunction, a relief of injunction ought to have been refused. The order of injunction has

substantially and irreparably injured and prejudiced the petitioner/promoter and this aspect has been completely ignored by the Courts below. The orders, therefore, cannot be sustained and are liable to be set aside.

Consequently, the Writ Petition is allowed and the petitioner/promoter is held entitled to continue with the construction of building 'E' at his own risk and cost, without any claim for equity. The construction already raised and its completion in form of building 'E' shall be subject to the final adjudication of the Suit.

Rule is made absolute in aforesaid terms. No order as to costs.

(SMT.BHARATI DANGRE,J)

After the judgment is pronounced, the counsel for the respondent/original plaintiffs seek stay of the judgment. I am not inclined to grant the same since I have held that the balance of convenience and the irreparable loss to the petitioner before me has persuaded me to disturb the concurrent finding rendered by two Courts below. In any case, I have balanced the equities by directing that the structure of building 'E' shall be subject to outcome of the Suit and the promoter shall not claim any equity.

(SMT.BHARATI DANGRE,J)