



Sayali Upasani

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

APPEAL FROM ORDER NO. 447 OF 2023

Mithila Apartment Co-operative Housing ...Appellants
Society Limited and Others

Vs.

Nahalchand Laloochand Pvt. Ltd. and ...Respondents
Others

Mr. Sandeep Parikh with Mr. Durgaprasad P. and Revan
Nansi, i/b PDS Legal, for the Appellant.

Mr. V. A. Thorat, Senior counsel i/b Rajesh Kachare, for
Respondent No. 1.

CORAM:- N. J. JAMADAR, J.

RESERVED ON : 21st JUNE, 2023.

PRONOUNCED ON:- 6th OCTOBER, 2023.

JUDGMENT:-

1) This Appeal is directed against a common order dated 16th March, 2023, passed by the learned Judge, City Civil Court, Borivali Division in Notices of Motion taken out by the appellants-plaintiffs in L.C. Suit No. 11 of 2021 and Notice of Motion No.2812 of 2021, taken out by the Koshal Co-operative

Housing Society Ltd., in L.C Suit No.2579 of 2021 to the extent the Notice of Motion bearing No.804 of 2022, Notice of Motion No.1756 of 2022 and Notice of Motion No.827 of 2023 came to be rejected.

2) For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed in L.C. Suit No. 11 of 2021.

3) The background facts necessary for the determination of this Appeal, can be summarized as under :-

(a) Mithila Co-operative Housing Society Limited (Mithila), plaintiff No.1 is a Society registered under the Maharashtra Co-operative Societies Act, 1960 ("the Act, 1960"). Plaintiff No.2 is a member and one of the original flat purchasers. Nahachal Laloochand Pvt. Ltd., (Nahalchand), defendant No.1 is a Company registered under the Companies Act, 1956. Municipal Corporation of Greater Bombay (MCGM), defendant No.2 is the Planning Authority.

(b) Nahalchand - defendant No. 1 had floated a scheme of construction of buildings for residential purposes on a parcel of non-agricultural land being Survey No.63, City Survey No. 369-B (Part) of village Malad, Taluka Borivali, Mumbai, admeasuring about 7365.90 Sq.mtrs ("the suit land").

Defendant No.1 constructed the building (Mithila) and the occupation certificate was granted on 19th June, 1986. Respondent No.1 had executed agreements for sale in favour of the flat purchasers in accordance with the provisions of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA, 1963"). The flat purchasers in the said building formed themselves into plaintiff No.1 -Society, in the year 1987.

(c) Under the terms of the said agreement for sale the respondent No.1 was obligated to convey the title of the suit land to plaintiff No.1 - Mithila after the Society was formed. Respondent No.1 did not discharge its statutory obligation under the provisions of MOFA, 1963 to convey title. Instead of conveying the title of the suit land in favour of the plaintiff No.1, defendant No.1 - Nahalchand went on constructing additional buildings over the suit land in breach of the obligations under the MOFA, 1963. In the process, the defendant No.1 constructed three more buildings namely Koshal, Avanti and Takshashila.

(d) It is the claim of the plaintiffs that the defendant No.1 unlawfully and unjustifiably availed the FSI, fungible FSI and TDR pertaining to the suit land, which vested in the plaintiff

No.1. Defendant No.1 thus was not entitled to utilise the said FSI, fungible FSI and TDR. The plaintiffs further asserted that the MCGM - defendant No.2 had issued the I.O.D., Commencement Certificate and Occupation Certificate in respect of the new buildings, which were being erected in breach of the statutory provisions, and to the grave prejudice of the rights of the plaintiffs. The plaintiffs, thus, approached the Court seeking diverse reliefs including a decree for conveyance of the suit land, prohibitory and mandatory injunctions and other consequential reliefs.

(e) In the said suit, the plaintiffs took out Notices of Motion, seeking interim reliefs. In Notice of Motion No.804/2022, the plaintiffs, inter alia, sought a temporary order and injunction against defendant No.1 to forthwith remove at its own costs all buildings/structures on the suit land other than Mithila apartment, to restrain the defendant No.1, from carrying out any further construction or submitting any proposal to MCGM-defendant No.2 for construction/development into and upon the suit land, restrain the defendant No.1 from in any manner dealing with, disposing off or creating any third party rights into and upon the suit land, to restrain MCGM - defendant No.2 from in any manner permitting any further construction

or granting any further approval or permission to defendant No.1 to carry out any further development or construction on the suit land.

(f) By taking out Notice of Motion No. 1756 of 2022, the plaintiffs sought to restrain MCGM - defendant No.2 from in any manner, issuing a building completion certificate or occupation certificate for the building under construction or any part or portion thereof on the suit land, and to forthwith state on oath the FSI, TDR and Fungible and other benefits allowed to defendant No.1 for development of suit land and the unutilized balance, if any.

(g) In Notice of Motion No.827 of 2023, the plaintiffs prayed for an interim order and injunction against the MCGM - defendant No.2 to forthwith revoke and/or cancel and/or suspend the occupation certificate issued by it to the defendant No.2 to Nahalchand- defendant No.1 in respect of the building Takshshila claimed to have been constructed on the suit land.

(h) It would be contextually relevant to note that the Koshal Co-operative Society Housing Ltd., (Koshal) the Society of the flat purchasers in the building Koshal, constructed by the defendant No.1, also instituted suit No.2579 of 2021 and sought declaratory and injunctive reliefs.

(i) In the Notice of Motion No. 2812 of 2021 Koshal also sought a temporary injunction to restrain the defendant No.1 from carrying out any further construction and to restrain MCGM - defendant No.2 from issuing any fresh/further permission and/or Commencement Certificate in respect of construction to be carried out on the suit land and a temporary injunction to restrain defendant No.1 from parting with possession of and/or creating any third-party interest in the new Takshashila building/AA Wing allegedly constructed by utilizing the proportionate FSI/TDR benefit admissible to Koshal.

(j) The defendant No.1 resisted the Notice of Motion. The substance of the resistance of defendant No.1 as regards the Notices of Motion taken out by Mithila was that Mithila was claiming conveyance of a plot of land larger than Mithila is entitled to. The agreement for sale executed by the defendant No.1 incorporates the specific consent of each flat purchaser for the construction of additional buildings. The conveyance was to be executed only upon construction of all the buildings in the layout. The plaintiffs did not approach the Competent Authority under Section 11 of the MOFA, 1963. At

best, the plaintiffs are entitled to conveyance of the area and FSI consumed for the construction of Mithila apartment.

(k) The defendant No.1 contended that the injunctive reliefs sought by the plaintiffs were incapable of being granted at an interim stage. Defendant No.1 has incurred huge expenditure in constructing the additional buildings in conformity with the sanctioned layout and approvals granted by the planning authority. Grant of conveyance of a larger part or an order for demolition of the existing buildings and restraining defendant No.1 from creating third-party rights would cause irreparable loss not only to defendant No.1, but also the third parties in whose favour the rights have already been created. It was contended that inordinate delay dis-entitles the plaintiffs from the equitable reliefs.

(l) MCGM- defendant No.2 also assailed the tenability of the suit for want of notice under Section 527 of Mumbai Municipal Corporation Act, 1888. It was further contended that the reliefs claimed by the plaintiffs with regard to the I.O.D., commencement certificate and occupation certificate were beyond the jurisdiction of the Civil Court.

(m) The learned Judge, City Civil Court after appraisal of the material on record and submissions canvassed across the bar

was persuaded to reject the Notices of Motion holding, *inter alia*, that the plaintiffs have not applied for unilateral deemed conveyance before the Competent Authority in terms of Section 11 of MOFA, 1963 for over a period of 30 years. The plaintiffs were fully aware of the developments being carried out as high-rise buildings were constructed on the suit land. Yet the plaintiffs did not pursue the remedy.

n) In any event, in the view of the trial Court, the prayers for demolition of all the buildings except Mithlia apartment including Koshal and Avanati, which were already constructed, and given occupation certificates, could not have been entertained as those societies were not impleaded as parties to the said suit. Likewise, the learned Judge, City Civil Court was of the view that even the prayers in respect of the newly constructed building AA-Takshshila had become infructuous as an occupation certificate in respect of the said building had also been issued.

(o) The learned Judge was also of the view that complicated and triable issues arose for determination and it would not be expedient to decide those issues on the basis of the affidavits at an interim stage. On the aspect of the balance of convenience

and irreparable loss, the learned Judge was persuaded to return the findings against the plaintiffs.

4) Being aggrieved and dis-satisfied by the impugned Order, the plaintiffs are in appeal.

5) I have heard Mr. Sandeep Parikh, the learned Counsel for the appellants-plaintiffs and Mr. V. A. Thorat, the learned Senior Counsel for respondent No.1 at some length. With the assistance of the learned Counsel for the parties, I have also perused the pleadings and material on record.

6) Mr. Parikh urged that, the learned Judge City Civil Court, did not properly appreciate the aspect of prima facie case and also erred in holding that the balance of convenience tilted in favour of the defendant No.1 and in the event of grant of interim injunction, defendant No.1 would suffer irreparable loss. The settled position in law as regards the rights, which accrue upon the completion of a building by a promoter, where the promoter, in breach of the statutory obligation under Section 4 of the MOFA, 1963, fails to convey the title to the Society, was completely ignored by the learned Judge City Civil Court. Mr. Parikh urged with a degree of a vehemence that this Court has consistently held that the consent for further development by the promoter ought to be an “informed

consent". A promoter can not be permitted to reap the benefits, which accrue upon the additional FSI/fungible FSI etc. being granted, subsequently, as the title to the land on which the building stands statutorily vests in the organization of the flat purchasers.

7) Mr. Parikh placed a very strong reliance on the decision of this Court in the case of **Malad Kokil Co-operative Housing Society Ltd and Others Vs. Modern Construction Co. Ltd and Others**¹. After advertng to the provisions contained in Section 4 of MOFA, 1963 and Clause 4 of Form-V, as it then stood, this Court held that after the registration of the Society, the residual FSI would have been available to the Society in respect of land on which the building was constructed.

8) Mr. Parikh would submit that if the injunction restraining the defendant No.1 from creating third-party interest in the building sought to be constructed is not granted and the defendant No.2 is not directed to furnish on an affidavit, the particulars of the FSI/fungible FSI and TDR consumed, the plaintiffs would be left in the lurch. Even if the plaintiffs eventually succeed in the suit, they would be a presented with a fait accompli. It is, therefore, necessary to restrain the

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defendant No.1 from dealing with or disposing of or creating any third-party rights and developing or carrying out construction over the suit land and to restrain the defendant No.2-Corporation from permitting any further approval or further construction or granting any permission to defendant No.1 and direct the defendant No.2 to state on oath FSI, TDR and Fungible FSI and other benefits allowed to defendant No.1 in respect of the suit land and unutilized benefits, if any.

9) In opposition to this, Mr. Thorat submitted that, the reliefs in the Notices of Motion could not be granted under any circumstances. Taking the Court through the prayers in the Notices of Motion, especially as regards the demolition of the rest of the buildings, Mr. Thorat would urge that in the absence of the Co-operative Societies, which represent those buildings such prayers can not be entertained at all. It was submitted that, the suit suffers from the vice of non-joinder of necessary parties. It was further urged that other reliefs in the Notices of motion have also been rendered infructuous as those buildings have been constructed and occupation certificates have been granted. At this stage, grant of the interim relief as sought by the plaintiffs would cause grave prejudice not only to defendant No.1 but

also to the third parties whose interest has been created in the said buildings.

10) To start with, it may be necessary to note that the I.O.D. in respect of Mithila was granted on 25th June, 1982. Occupation certificate was issued on 19th June, 1986. In respect of another building Koshal. I.O.D. was granted on 7th May, 1986 and the occupation certificate, post completion of building, was issued on 31st May, 1991. Indisputably, two more buildings namely Avanti and AA-Takshshila have been constructed in the intervening period. It may not be necessary to refer to multiple I.O.D. amendments thereto, Commencement Certificate and Occupation Certificate granted in respect of those buildings.

11) It would suffice to note that even in respect of AA-Takshashila, the Occupation Certificate came to be granted on 9th December, 2022, though the suit came to be instituted while AA-Takshashila was raised up to the 4th floor. The fact that defendant No.1 had not executed conveyance in favour of Mithila and the latter has not applied for unilateral conveyance before the Competent Authority under Section 11 of MOFA, 1963 are also incontrovertible.

12) In the backdrop of the aforesaid facts, the pivotal question that would arise for adjudication is whether the further construction and development by the defendant No.1 post, the construction of Mithila is in consonance with the agreement of sale between the defendant No. 1 and flat purchasers of Mithila, and in conformity with the provisions of MOFA, 1963. Of necessity, recourse to the clauses contained in the agreement for sale between defendant No.1 and the flat purchasers becomes necessary.

13) Under clause 11 of the agreement for sale (page No.105 of the Appeal Memo), the exclusive right, title or interest whatsoever in the suit land until execution of the conveyance of the suit land by the defendant No.1 to the flat purchasers was to vest in the defendant No.1. Clause 13(a) and (b) are of material significance. They read as under :-

"13. (a) THE OWNER has specifically informed the Purchaser/s that if as a result of change in the policy of the Municipal Corporation of Greater Bombay there is any increase in the present F.S.I. then and in that event the Owner shall be entitled to the said increase in F.S.I. and that the Purchaser/s shall not be entitled to object to the Owner utilising or consuming the said F.S.I. in the said building which is being proposed to be constructed by the Owner on the said land described in the First Schedule hereunder written or on the ad-joining property belonging to the Owner.

(b) THE OWNER has made it clear to the Purchaser/s that if as a result of such increase in

F.S.I. or otherwise the Owner shall have a right to amend, alter, modify or vary the plans already sanctioned by the Municipal Corporation of Greater Bombay and/or any other concerned Government Authorities as may be required by the Municipal Corporation of Greater Bombay and/or any other concerned Government Authorities or as may be required by the Owner PROVIDED THAT the same are sanctioned by the Municipal Corporation of Greater Bombay and/or any other concerned Government Authorities as aforesaid and that the Purchaser/s shall be deemed to have consented to the Owner making such alterations and/or modifications in the said plans which have already been sanctioned by the Municipal Corporation of Greater Bombay and/or any other concerned Government Authorities."

14) Under Clause 14, the defendant No.1 was to have the right to make additions or put up additional structures on the suit land or any part thereof as may be permitted by MCGM and those additional structures would always be the properties (even after the said land and the said building were conveyed and transferred to the Society) and the defendant No.1 can deal with such property in the manner it chooses. The purchasers agreed not to make objections whatsoever to any such constructions, dealings with or disposal of the additional structures by the defendant No.1

15) *Prima facie*, it appears that the flat purchasers had given consent for further development over the suit land. Mr. Parikh urged with tenacity that such consent has to be an, "informed

consent". This submission brings to the fore, the interplay between Section 7 and Section 7A of MOFA, 1963, Section 7 of the MOFA incorporates the rights of a purchaser and also the obligations of the promoter. Section 7 of MOFA, as it stood prior to its amendment by amending Act No.36 of 1986, restricted the promoters rights to make the specified alterations once the plans and specification of buildings as approved by the planning authority were disclosed or furnished to any person who agreed to take one or more flats in the building. Clause (ii) of Sub-section (1) of Section 7 was amended by substituting the words "or construct any additional structure" with, "additions in the structure of the building".

16) By way of abundant caution, Section 7A came to be inserted in the MOFA, 1963 to provide that the deleted words, "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, under a scheme or project of development in the layout after obtaining the approval of the local authority.

17) The interplay between Section 7 and Section 7A of the Act, 1963 arose for consideration before the Supreme Court in the case of **Jayantilal Investments Vs. Madhuvihar Co-operative**

Hsg. Society and Others². The observations of the Supreme Court in paragraph Nos. 16 to 19 are instructive and thus, extracted below:-

"...16. 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)(ii). 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. Section 10 of MOFA casts an obligation on the promoter to form a cooperative society of the flat takers as soon as minimum number of persons required to form a society have taken flats. It further provides that the promoter shall join the society in respect of the flats which are not sold. He has to become a member of the society. He has the right to dispose of the flats in accordance with the provisions of the MOFA. Section 11 inter alia provides that a promoter shall take all necessary steps to complete his title and convey the title to the society. He is obliged to execute all relevant documents in accordance with the agreement executed under Section 4 and if no period for execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period. Rule 8 inter alia provides that where a cooperative society is to be constituted, the promoter shall submit an application to the Registrar for registration of the society within four months from the date on which the minimum number of persons required to form such society (60%) have taken flats. Rule 9 provides that if no period for execution of a conveyance is agreed upon, the promoter shall, subject to his right to dispose of the remaining flats, execute the conveyance within four months from the date on which the society is registered.

17. 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-à-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 are quoted hereinbelow:

"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 utilized by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilized by the Promoter elsewhere, then the Promoter shall furnish to the Flat Purchaser all the detailed particulars in respect of such utilization of said floor space index by him. In case while developing the said land the Promoter has utilized 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. The residual F.A.R. (F.S.I.) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the Society the residual F.A.R. (F.S.I.), shall be available to the Society."

(emphasis supplied)

18. The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of lay out plan to declare whether the plot in question in future is capable of being loaded with additional FSI/ floating FSI/ TDR. In other words, 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. Clause 4 shows the effect of the formation of the Society.

19. In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated

above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. 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 the flat takers as long as the builder put up additional construction in accordance with the lay out plan, building rules and Development Control Regulations etc.”

18) In the case of **Malad Kolil** (Supra), on which a very strong reliance was placed by Mr. Parikh, after adverting to the aforesaid decision in the case of **Jayantilal** (Supra), it was, *inter alia*, enunciated that the promoter ought to make complete disclosure to the flat purchaser at the time of placing the scheme before the flat purchaser. If the entire project is placed before the flat purchaser at the time of entering into an agreement for sale, then the promoter is not required to obtain prior consent of the flat purchaser. However, if the promoter desires to make additional construction not part of the plan originally placed before the flat purchasers at the time of entering into the agreement for sale then consent as envisaged under Section 7 of MOFA, 1963 would be necessary. Moreover, such consent under Section 7 of MOFA 1963 can not be “blanket consent” but must be an “informed consent” meaning thereby the flat purchasers were made fully cognizant of the proposed future

development and, yet, gave consent. The observations in paragraph Nos. 35 and 40 read as under:-

"...35. As discussed herein above, as held by the Apex Court in the case of Jayantilal Investment , it is obligatory on the part of the promoter to make full and complete disclosure of the development potentiality of the plot which is a subject matter of agreement. It has also been held that promoter is not only required to make disclosure concerning inherent FSI but he is also required at the stage of the layout plan to declare whether plot in question in future is being capable of loaded with additional FSI/floating FSI/TDR. As held by the Apex Court, at the time of execution of the agreement promoter is statutorily obliged to place before the flat takers the entire project/scheme. It has been held by the Apex Court that once the entire scheme is placed before the flat takers at the time of the agreement then the promoter is not required to obtain prior consent of the flat taker as long as the construction is in accordance with layout plan, building rules and DCR.

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40. After considering the various judgments on the issue, I have observed in the case of Madhuvihar Co-operative Housing Society Vs. Jayantilal Investments³

"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."

It is thus clear that in unequivocal terms, it has been held that a blanket consent or authority obtained by the promoter at the time of entering into an agreement of sale is not a consent within the meaning of Section 7 of the MOFA. It has to be an informed consent which is to be obtained on full disclosure by the developer of the entire project. In that view of the matter, the contention in that regard is also liable to be rejected."

19) It thus emerges that the position in law has crystallised to the effect that the consent as contemplated under Section 7(1) of MOFA, 1963 has to be an "informed consent", which is obtained upon full and fair disclosure of the entire project by the promoter and that a blanket consent or authority obtained by the promoter at the time of entering into agreement for sale would not serve the purpose.

20) In the case at hand, the learned Judge City Civil Court was of the view that the questions as to whether there was an informed or blanket consent? Whether the defendant No.1 had

utilized the FSI, and Fungible FSI or other benefits, which would have accrued to the plaintiffs for the construction of additional buildings ? Whether the disclosure made by defendant No.1 was full and true disclosure within the meaning of Section 3 and 4 of MOFA, 1963 ? were required to be adjudicated at the trial after recording evidence and the Court was not equipped to decide those issues at an interim stage.

21) Undoubtedly the Court has to take a prima facie view of the matter while considering the prayers for temporary injunction. However, in the facts of the case, the aforesaid approach of the learned Judge appears to be justifiable. As noted above, the plaintiffs approached the Court seeking conveyance of title, prohibitory and injunctive reliefs, few of which are mandatory in nature, after about 35 years of the grant of the occupation certificate. In the intervening period, two more buildings were constructed apart from AA-Takshashila. One of the reliefs claimed by the plaintiffs is to demolish all these structures on the suit land except Mithila- apartment. Indisputably the societies representing those buildings have not been impleaded as party defendants to the suit. A suit claiming such reliefs, which inexorably affect the rights and interests of the persons in the occupation of those buildings

ex facie suffers from the vice of non-joinder of necessary parties.

22) In the circumstances of the case, the huge time lag and failure on the part of plaintiffs to seek unilateral conveyance under Section 11 of MOFA, 1963 also impinges upon the existence of a prima-facie case in favour of the plaintiffs. It is imperative to note that the plaintiffs had sought execution of conveyance in favour of Mithila as early as 29th December, 1987. In response thereto, on 24th February, 1988, defendant No.1 had contended that it was not possible to execute the conveyance as Mithila formed part of the layout of the entire property bearing CTS No. 369-B. Once the entire suit land was fully developed, the request for conveyance would be complied with. Having been made aware of such stand of defendant No.1, (which can be urged to be legally unsustainable) the plaintiffs ought to have worked out their remedies to get the conveyance of the suit land.

23) Inaction on the part of the plaintiffs for all these years can not be said to be inconsequential, especially, while considering the prayers for equitable reliefs at an interim stage. It is well recognized that a person who seeks equitable reliefs at an interim stage must approach the Court with an element of

urgency. If a party chooses not to approach the Court and seek interim reliefs at an opportune time, the inaction and delay operates to its peril. Reasons are not far to seek. With the passage of time, invariably third party rights are created and equities intervene. In such a situation, it would be inequitable to grant interim reliefs. A profitable reference in this context can be made to a Division Bench Judgement of this Court in the case of **Ferani Hotels Private Limited and Others Vs. Nusli Neville Wadia and Others**⁴. The observations in paragraph Nos. 32 and 33 read as under:-

“32. One glaring factor which must weigh with the Court in the present case is the element of delay on the part of the administrator in moving the Court. The delay on the part of the administrator must be considered from the perspective of two periods : (i) the period between the date of the disputes that arose under the agreement and the date of the suit; and (ii) the period between the date of the institution of the suit and the first application for the grant of ad interim relief. The material on the record would indicate that right from April 2000, the administrator was aware of the transactions between Ferani and entities which the administrator alleged were related or associated companies. The record would show that as far back as on 16 May 2000 the administrator had questioned the transaction between Ferani and the Fifth Defendant on the ground that it was not a genuine sale. Ferani had on 9 June 2000 stated that the sale consideration accorded with the prevailing market prices at the time and offered

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to sell to the administrator an equivalent number of 56 flats on the same terms and conditions. Between 10 and 23 April 2001, the administrator had requested Ferani to send copies of agreements entered into pursuant to the transactions with Defendants 8 to 13, which agreements (negotiation letters) Ferani then submitted. On 23 April 2002 the administrator objected to a transaction entered into with the Sixth Defendant on the ground that being a group company the transaction was not with a genuine third party. On 2 May 2002 Ferani informed the administrator that for all practical purposes, the sale in favour of the Sixth Defendant had to be treated as a sale to a third party and was a genuine sale. On 2 June 2005, the administrator objected to the transaction that had taken place with Defendant No.31. On 2 April 2005, an MOU was entered into between Ferani and the Fifth and Sixth Defendants for the purchase of certain non-residential units of which copies were forwarded on 5 April 2005. On 5 April 2005 Ferani addressed communications to the administrator intimating the receipt of sums under letters of negotiation. Admittedly, several meetings took place between the parties on and after May 2005 when the administrator objected to the transactions. On 2 November 2005 the administrator in a communication suggested that after a notice of seven days, he shall be free to revoke the power of attorney provided to Ferani on account of its abuse. A meeting took place on 16 November 2005 between the representatives of the parties where it was agreed that a chart furnishing identities of the purchasers of the units / buildings and a break up of the transactions by category would be furnished. According to the administrator, the chart was furnished on 17 November 2005.

33. We have adverted to some of these events because they would suggest prima facie, though in fairly unmistakable terms, that parties were in dispute over the transactions which Ferani

entered into right since April 2000. The record before the Court would, prima facie, indicate that from time to time the administrator raised objections to those transactions and was confronted with the defence by Ferani that the transactions accorded with the prevailing market price and were genuine transactions. In this background, the fact that the administrator chose to file the suit only in May 2008 assumes significance. Equities have intervened in the meantime. It has been stated before the Court on behalf of Ferani that in the interregnum steps have been taken for the removal of encroachment and for carrying out the work of development. Third party rights have intervened. Even after the suit was instituted on 13 May 2008, an application for ad interim relief was moved before the Learned Single Judge only on 3 March 2010. The only explanation which the administrator had for the delay in moving an application for ad interim relief is that the Sub Registrar and the Municipal Corporation had been moved not to register documents or, as the case may be, to grant building permission and it was only in October / December 2009 that the Municipal Corporation informed him that absent any injunction, it would proceed with permissions. Admittedly, in the meantime, the work under the project was continuing. These are circumstances which must weigh with the Court in declining to grant a stay on construction at the ad interim stage. The order which the Learned Single Judge passed precludes the sale of any unit whatsoever without the consent of the parties. Parties are in dispute and an order of the Court restricting the sale of constructed premises only with the consent of the parties would virtually bring the entirety of the project to a stand still. The entitlement of the administrator under the agreement dated 2 January 1995 is to the receipt of a share in the gross total consideration equivalent to 12%. The grant of injunctive relief restraining Ferani from selling its units would therefore neither be in accordance with the

equities of the situation nor the mutual rights and obligations of the parties.”

24) In the light of the aforesaid position in law, I am impelled to hold that the learned Judge City Civil Court was justified in holding that the plaintiffs failed to make out a prima facie case.

25) In a situation of this nature, where a party chooses not to prosecute its rights for over 30 years and substantial development has been carried out by the other party with resultant third-party rights, the balance of convenience tilts in favour of the party which carries out the development. In the event of injunction as prayed for by the plaintiffs, even limited to restraining the defendant No.1 from creating third-party rights and/or dealing with or disposing of the units in the building AA-Takshashila which has been granted occupation certificate, by the planning authority, it would surely cause irreparable loss to the defendant No.1. In addition, the third parties whose rights have been created in the intervening period, would also suffer grave prejudice.

26) To put it in other words, a person who has maintained stoic silence for a long time and allowed another party to carry out development entailing huge costs, may not be entitled to equitable relief of injunction.

27) A useful reference, can be made to the decision of the Supreme Court in the case of **ECE Industries Limited Vs. S.P. Real Estate Developers Pvt Ltd and Others**⁵, wherein the Supreme Court enunciated that where substantial construction has been carried out, the Court should not, as a matter of course, restrain the party from raising further construction. The observations in paragraphs Nos. 26 and 27 read 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 respondent-defendants".

28) In the instant case, not only the construction has been carried out with the approval of the planning authority long back but occupation certificates have also been granted. To restrain defendant No.1 from creating third-party

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interest and/or otherwise dealing with the units in those buildings would cause irreparable loss to the defendant No.1. Conversely, in the event the plaintiffs succeed in the suit, the Court can appropriately mould the reliefs.

29) The conspectus of the aforesaid consideration is that, the learned Judge City Civil Court has kept in view the principles which govern the grant of temporary injunction and justifiably exercised the discretion not to grant the temporary injunction, as prayed. In exercise of limited appellate jurisdiction, this Court does not find any reason to interfere with the exercise of the said discretion. Hence, the appeal deserves to be dismissed.

30) Thus, the following order

ORDER

- i)** The appeal stands dismissed.
- ii)** In the circumstance of the case, there shall not order as to costs.

[N. J. JAMADAR, J.]