

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

**APPEAL FROM ORDER NO. 534 OF 2023
WITH
INTERIM APPLICATION NO. 13262 OF 2023**

Rakhi Kamal Thakur nee Rakhi Hiralal ...Appellant
Rohra

Vs.

M/s. Rebuilt and Others ...Respondents

Mr. Prashant G. Karande and Mr. Sudam S. Patil i/b Mr.
Ajit S. Hodage, for Appellant.

Ms. Ishani Khanwilkar i/b Alvina Castelino, for Respondent
No. 5.

Ms. S. Saboo i/b Mr. Nikhil Kadam, for Respondent No. 4.

Mr. Vasant Dhawan, for Respondent No. 2.

CORAM:- N. J. JAMADAR, J.

DATED:- 31st AUGUST, 2023

ORDER:-

1) This Appeal is directed against an order dated 29th April, 2023, passed by the learned Judge, City Civil Court, in Notice of Motion No. 1063 of 2017, in Suit No.984 of 2017, whereby the

Notice of Motion taken out by the appellant/plaintiff seeking, *inter alia*, a mandatory direction to reserve one flat in a building being developed by the respondents-defendant Nos.2, 4 and 5 came to be rejected.

2) Background facts leading to this Appeal can be summerised in brief as under:-

(a) Nehru Nagar Shanti Bhuvan Co-operative Housing Society Ltd., (the Society) was the owner of building No.88, situated at Survey No.229 and 267 and CTS No. 6 (part) at Nehru Nagar ,Kurla East, Mumbai (the Society premises). The defendant No. 2 – Society entered into a Development Agreement with M/s. Rebuilt, the defendant No. 1, on 9th December, 2010. A power of attorney was also executed in favour of the defendant No. 1 to facilitate the re-development of the society premises. It was, *inter alia*, agreed thereunder that the defendant No. 1 would offer each of the 40 members of the society, a flat with specified area and features, and a further cash consideration along with transit rent etc. The defendant No. 1 was also to construct free sale component and appropriate the proceeds thereof.

(b) The plaintiff asserts the defendant No. 1 agreed to convey a flat, bearing No.905, admeasuring approximately 981 sq. ft. on the 9th floor of the proposed building for a consideration of Rs.39,25,000/-. The plaintiff paid the entire consideration through the banking channels and an allotment letter came to be issued to the plaintiff on 12th February, 2011, acknowledging the receipt of the entire consideration of Rs.39,25,000/- and the obligation to execute a formal agreement as envisaged by the provisions of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (MOFA) and the deliver possession of the said flat.

(c) The plaintiff avers the defendant No. 1 committed default in the construction of the building and delivery of the possession of the said flat, as agreed. Defendant No. 2 – Society thus cancelled the Development Agreement under a Deed of Cancellation of Development Agreement on 12th January 2015 executed by and between defendant No. 1 and defendant No. 2- Society. A MOU was executed between defendant No. 1 and M/s Navkar Life Space Pvt Ltd., defendant No. 3, who took over the

re-development of the society premises upon cancellation of the Development Agreement between defendant No. 1 and Society. In accordance with the terms of the said MOU, defendant No. 3 undertook to discharge all the liabilities of defendant No. 1. The name of the plaintiff along with particulars of the flat and the consideration parted with by the plaintiff, was included in the list annexed to the said MOU between defendant No. 1 and defendant No. 3.

(d) Eventually, the Development Agreement came to be executed between defendant No. 2 – Society and Shree Sidhhivinayak Classic Construction Pvt Ltd., the defendant No. 5 on 27th July 2016 and 15th May 2018. The plaintiff claims to have learnt about the said Development Agreement pursuant to an advertisement published on the website of respondent No. 4 in the year 2016.

(e) Since the defendants did not pay heed to the repeated requests of the plaintiff to perform their part of the obligation, the plaintiff was constrained to institute the suit for enforcement of the statutory obligations of the defendants under MOFA. In the said suit, the plaintiff took out a Notice of Motion seeking, *inter alia*, direction to the defendants to

reserve one flat admeasuring 981 sq. ft on the 9th floor or any other floor of the proposed building being constructed at the society premises, for the benefit of the plaintiff, to disclose all necessary particulars about the current status of the implementation of the re-development project and to deposit with the Court a sum of Rs.6,98,100/- towards the transit accommodation to be eventually paid over to the plaintiff upon final adjudication of the suit.

(f) The defendants resisted the prayers in the Notice of Motion. Defendant No. 2- Society contended that there was no privity of contract between the plaintiff and the defendant No. 2 – Society and the latter was not liable for any obligation which the defendant No. 1 might have incurred as the Development Agreement with defendant No. 1 came to be lawfully terminated. The suit against defendant No. 2 – Society was thus stated to be misconceived. Defendant Nos. 4 and 5 also resisted the prayers in the Notice of Motion on the ground of absence of the privity of contract between the plaintiff and defendant Nos. 4 and 5. At best, the plaintiff can have a claim against defendant No. 1 or for that matter defendant No. 3. However, in the absence of any statutory or contractual

obligation qua defendant Nos. 4 and 5, the plaintiff is not entitled to the reliefs of the present nature.

(g) The learned Judge, City Civil Court upon appraisal of the pleading, documents, the material on record and the submissions canvassed on behalf of the parties was persuaded to reject the Notice of Motion holding, *inter alia*, that parameters for grant of temporary injunction were not fulfilled. The learned Judge was of the view that there was no privity of contract between the plaintiff and defendant No. 2- Society and defendant Nos. 4 and 5, who were appointed by defendant No. 2- Society to develop the society premises.

3) Being aggrieved the plaintiff is in Appeal.

4) I have heard Mr. Prashant Karande, the learned Counsel for the appellant and Mr. Vasant Dhawan, the learned Counsel for respondent No. 2 – Society, Ms. S. Saboo, the learned Counsel for respondent No. 4 and Ms. Ishani Khanwilkar, the learned Counsel for the respondent No. 5 at some length. The learned Counsel for the parties took the Court through the pleadings and instruments executed by and between the parties including the Development Agreement, Deed of

Cancellation of the Development Agreement, and the MOU executed between defendant No. 1 and defendant No. 3.

5) Mr. Karande submits that the learned Judge, City Civil Court approached the case from an incorrect perspective. The learned Judge, according to Mr. Karande, committed a manifest error in not properly appreciating the legal character of defendant No. 2- Society. With the execution of the Development Agreement with defendant No. 1, to re-develop the society premises and granting rights to defendant No. 1 to sell the free sale component in the building to be developed, the defendant No. 2 – Society became a promoter within the meaning of Section 2 (c) of the MOFA Act, 1963. This crucial factor was not at all adverted to by the learned Judge, City Civil Court. To draw home the point that a society which entrusts the development of the premises to a developer becomes a promoter within the meaning of Section 2 (c) of the MOFA Act, 1963. Mr. Karande placed heavy reliance a judgment of this Court in the case of **Farhat Co-op. Housing Society Ltd., Mumbai Vs. Malkani Enterprises, Mumbai and Others**¹,

6) Mr. Karande would further urge that the fact that the plaintiff, an innocent and unsuspecting purchaser, had parted

1 2014 (6) Mh.L.J.

with entire consideration and the allotment letter came to be executed in favour of the plaintiff was also not adequately considered by the City Civil Court. Laying emphasis on the provisions contained in Section 4A of the MOFA Act, 1963 and the legislative object with which it came to be inserted in MOFA, 1963, Mr. Karande submitted the defence sought to be raised on behalf of the defendants that no rights emanate from the allotment letter as there is no registered agreement between the promoter and the plaintiff, is wholly misconceived.

7) To buttress the submission that an obligation under MOFA 1963 can be enforced even in the absence of a registered agreement for sale, Mr. Karande placed reliance on a decision of this Court in the case of **Harshal Developers Pvt Ltd Pune and Another Vs. Manohar Gopal Bavdekar and Another²** and another judgment of this Court in the case of **Sicily Varghese Kadamthottu Vs. Ramanlal Jayshankar Trivedi³**.

8) As against this Mr. Dhawan, the learned Counsel for defendant No. 2- Society submitted that the very premise of the suit is flawed. The Development Agreement in pursuance of which the defendant No. 1 allegedly agreed to convey the

2 2013 (1) Mh. L.J. 855

3 2022 (5) Mh. L.J. 570

subject flat to the plaintiff, came to be lawfully terminated with the clear stipulation that the defendant No. 2 – Society would not be liable for any of the obligations incurred by the defendant No. 1. In the face of such stipulation, according to Mr. Dhawan, no liability can be fastened on the defendant No. 2 – Society. It was further urged that the claim of the plaintiff that defendant No. 2 – Society became a promoter within the meaning of Section 2(c) of MOFA 1963 is legally unsustainable.

9) Supplementing the submissions on behalf of defendant No.2-Society, Ms. Khanwilkar, the learned Counsel for the defendant No. 5, strenuously submitted that the learned Judge, City Civil Court committed no error in recording a finding that there is no privity of contract between the plaintiff and defendant No. 5. Whatever rights the plaintiff claims to have acquired on the basis of the alleged agreement between the plaintiff and defendant No. 1, can no case to be enforced against the defendant No. 2 – Society, much less against the defendant No. 5 who has been lawfully entrusted with the re-development of the society premises. An endeavour was made to urge that even the allotment letter is of no assistance to the

plaintiff as a formal registered agreement was not executed by defendant No. 1.

10) Ms. Khanwilkar, the learned Counsel for the defendant No. 5, would urge that the controversy sought to be raised on behalf of the plaintiff as regards the liability of the society and the subsequent developer, as the promoters, is no longer res integra. A Single Judge of this Court in the case of **Vaidehi Akash Housing Pvt Ltd Vs. New D.N. Nagar Co-op Housing Society Union Ltd and Others**⁴ has enunciated the law in clear and explicit terms that if the rights of a prior developer are brought to an end upon a lawful termination of the Development Agreement, the third party purchasers cannot lay any independent claim against the Society or anyone claiming through the Society.

11) Mr. Karande joined the issue by canvassing a submission that the aforesaid decision has not adverted to the expansive definition of the “promoter” under Section 2 (c) of the MOFA, 1963. In the facts of the case, according to Mr. Karande, in view of the MOU between defendant No. 1 and defendant No. 3 under which the obligation in favour of the plaintiff was clearly acknowledged, the plaintiff cannot be left in the lurch despite

4 (2015) 3 AIR Bom R 270

having parted with the life's savings. It would, therefore, be necessary to secure the interest of the plaintiff till the final adjudication of the suit, urged Mr. Karande.

12) To start with, uncontroverted facts. The fact that the defendant No. 2- Society is the owner of the society premises and had initially entered into a Development Agreement with the defendant No. 1 is incontestable. There is not much controversy over the fact that defendant No. 1 could not carry out the development within the stipulated period. Cancellation of the said Development Agreement by executing a Deed of Cancellation by and between the defendant No. 1 and defendant No. 2 is also not in a contest. Likewise, there does not seem to be much controversy over the execution of the MOU between the defendant Nos. 1 and 3 though the parties differ over the consequences much emanate therefrom. At this stage, it is rather incontestable that the society premises is now being developed by defendant No. 5.

13) Though an endeavour was made on behalf of the defendants especially defendant No. 5, to canvass a submission that the allotment letter cannot constitute an agreement, of which specific performance can be sought as it is neither

registered nor duly stand, yet it would suffice to note that in view of the provisions contained in Section 4A of the MOFA, 1963, the said objection does not merit acceptance. Mr. Karande was justified in placing reliance on the decisions of this Court in the cases of **Harshal Developers** (supra) and **Sicily Varghese Kadamthottu** (supra), wherein it was enunciated that the provisions contained in Section 4A override Section 4 of the MOFA, 1963 and a suit for specific performance based on an unregistered agreement of sale under MOFA, 1963 is maintainable.

14) I am also persuaded to hold that there is a prima facie material which indicates that the defendant No. 1 had agreed to sale Flat No. 905 and accepted the entire consideration. The payment of consideration is evidenced by receipts and the entries in the bank accounts. Thus, the Court can legitimately proceed on the premise that the defendant No. 1 had agreed to convey Flat No. 905 and accepted the entire consideration for the same.

15) The controversy between the parties revolves around the question as to whether the aforesaid obligation incurred by the

defendant No. 1 can be enforced against defendant No. 2 – Society and the subsequent developer ?

16) In Clause (c) of Section 2, a ‘promoter’ is defined as under:-

“(c) [“promoter” means a person and includes a partnership firm or a body or association of persons, whether registered or not] who constructs or causes to be constructed a block or building of flats, [or apartments] for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both....”

17) Evidently, the definition of a promoter is of wide import. Juridical persons are specifically included within the definition of, “promoter”. Any person who constructs or causes to be constructed flats or apartments for the purpose of sale, satisfies the description of “promoter”. It also subsumes in its fold the persons who build and sell the flats within the ambit of the promoter where two different persons build and sell the flats.

18) A learned Single Judge of this Court had an occasion to consider the import of the definition of ‘promoter’ in the case of **Ramniklal Tulsidas Kotak and Others Vs Varsha Builders And**

Others⁵. The observations in paragraph Nos. 16 and 17 are material. They read as under:-

“....16. It emerges from the scheme of the said Act read with the definition of the expression “Promoter” contained in S. 2(c) of the said Act and Rule 5 of the statutory form referred to hereinabove that the Promoter must fall in either of the following categories:

(1) The promoter may be the owner of freehold land; or

(2) The Promoter may be the lessee of the land intended to be developed, provided the indenture of lease authorises the promoter to construct flats and sell the same on ownership basis;

(3) The promoter may have entered into an agreement to purchase the land from the lawful owner thereof. In such a case, the Vendor of the promoter must have a valid title to the said land and the agreement must not be terminable by the Vendor

(4) The Promoter is an agent of the owner or of the authorised lessee duly entitled to construct and dispose of flats on ownership basis. In such a case, the promoter/developer must make the owner of freehold or leasehold interest as Confirming Party to the agreement of sale of flat on ownership basis so as to bind the owner with all the terms, conditions and covenants of third party agreement. When the Promoter falls in 3rd or 4th category, the promoter has no title to the land in the sense in which the word “title” is normally understood in the property

5 AIR 1992 (2) 492

law. To this limited extent the expression “promoter's title” is used in the Maharashtra Ownership Flats Act 1963 in the special wider sense.

17. It is clear from the scheme of the Act that the promoter need not necessarily be the absolute owner of the land or a long term lessee thereof. At the same time, it is imperative that the promoter must have sufficient entitlement and right to construct on the land and dispose of the flats on ownership basis so as to bind the owner of the freehold and the leasehold interest...”

(emphasis supplied)

19) In the case of **Farhat Co-op. Housing Society** (supra) following the aforesaid pronouncement, another learned Single Judge observed, *inter alia*, as under:-

“28. There is one more dimension to the matter. As indicated above, it is the owners, who had obtained the IOD and commencement certificate from the MCGM and it is through the medium of the Respondent No. 1 that they have commenced and completed the construction. Therefore, in terms of Section 2(c) of the MOFA, which takes within its sweep the person who has caused the construction to be the Promoter, the owners can be said to be the Promoters, as they have admittedly caused the construction. It is therefore their obligation to see to it that the Society is conveyed what it is entitled to in terms of the agreement entered into with the flat purchasers by the Respondent No. 1, which, in

the instant case is the right to get a lease in its favour. In my view, since the owners having abdicated their obligation under the MOFA of conveying the property to the Society, the Competent Authority has rightly intervened in the matter by passing the impugned order. In my view, the impugned order granting the deemed conveyance has therefore to be construed in the context of the rights the Developer had i.e. the right to get a lease from the owners. Hence, the impugned order cannot be faulted with on the ground that the operative part of the order is vague or ambiguous....”

(emphasis supplied)

20) Whether the aforesaid pronouncements advance the cause of the submission on behalf of the appellant? Admittedly, the plaintiff is not a member of defendant No. 2- Society. Consequently, defendant No. 2 – Society does not owe any obligation to the plaintiff arising out of the jural relationship of the member and society. Indisputably, the plaintiff is a third-party purchaser qua the defendant No. 2- Society. The relationship between the plaintiff and defendant No. 2 – Society is primarily a matter of contract. Whether under the Development Agreement executed by a society with the developer, the former also incurs the liability towards the purchases from the developer is at the heart of the matter ?

21) That would essentially turn upon the terms of the contract between the society and the developer. If under the Development Agreement the society is a joint developer or retains control over the development even beyond the rehabilitation component, different considerations may come into play. In the facts of the case, as noted above, the Development Agreement between defendant No. 2- Society and defendant No. 1, the plaintiff transferor, came to be lawfully terminated under a Deed of Cancellation of the Development Agreement dated 12th January, 2015. The terms of the said Deed of Cancellation would determine the rights and liabilities of defendant No. 2- Society and the defendant No. 1 developer. Two clauses, namely Clause 6 and Clause 10, of the said Deed are of critical salience. They read as under:-

“6. That the party of the Second Part hereby declares that he/she/they/it/have/has not entered into any Agreement towards the mortgage, lease, or took/raise/borrowed any loan, or created any third party interest pertaining to the said plot of land bearing Survey No. 229 and 267 corresponding CTS No. 6 (part), in the registration sub-district of Kurla and district of Mumbai City admeasuring 931.87 sq. mtrs plot area as per lease deed and sale deed and additional it bit land area as per the actual demarcation on

site along with building thereon admeasuring 1392.64 sq. mtrs. In case anything happened or claim to the title of the said plot of land due to the act of the party of the Second part, he himself or his Firm through its Partner/ proprietor or person through them held responsible for the risk, cost, damages, penalty, loss, interest and consequences of whatsoever nature at his/her/their/its cost.

.....

10. It is agreed by and between the parties that any matters if filed in court or already filed by any party, individual person, company, firm, bank, institution etc for and against the party of the Second Part or Party of the First made as party to the suit, petition, complaint etc then the party of the Second party shall be defend the same by his own expenses and cost and consequences and the party of the First Part shall not spend for the same. They Party of the Second Party shall keep indemnified the party of the First Part for any loss, damages if occurs, due any litigation and/or Court orders filed against them."

22) The defendant No. 1 made a declaration that it had not entered into any transaction with regard to the society premises and created any third party interest therein. Defendant No. 1 further agreed that if any claim arises the defendant No. 1 would be liable for the costs and consequences thereof. It was further agreed that in the event any proceeding

was instituted against the defendant No. 1 and/or defendant No. 2, the defendant No. 1 would defend the same at its own costs and consequences and the defendant No. 1 will keep defendant No. 2 indemnified of any loss, damage due to any litigation and/or the orders passed by the Court.

23) Conversely, a clause acknowledging the liability of created by defendant No. 1, during the currency of the Development Agreement, by defendant No. 2 – Society is conspicuous by its absence. Defendant No. 2- Society did not acknowledge either expressly or by implication the liability to discharge the obligations incurred by the defendant No. 1.

24) The endeavour Mr. Karande to draw support and sustenance to the plaintiff's claim from the MOU executed by and between defendant Nos. 1 and 3 does not merit acceptance. It is true defendant No. 3 agreed to complete the re-development project and fulfill all the obligations of the erstwhile developer including any amount which was receivable/payable by the erstwhile developer – 2 from the purchaser/investor whose name found mention in the list Annexure-A appended thereto. However, defendant No. 2 – Society was not a party to the said MOU. Consequently, the

said MOU cannot be banked upon to fasten liability on defendant No. 2- Society. It is a different matter that even the Development Agreement between defendant No. 2 and defendant No. 3 could not fructify.

25) In the backdrop of the aforesaid position, which emerges out of the contractual obligations of the parties, a reference to the decision of this Court in the case of **Vaidehi Akash** (supra) becomes necessary. In the said case, the learned Single Judge was confronted with the question as to whether the developer who had been conferred with the authority to deal with the free sale component of the project by the Society, under the Society Development Agreement could exercise said authority for its own sake or on its own account as an independent contractor or as an agent of the Society. With reference to the clauses in the Development Agreement in the said case, the learned Single Judge enunciated that the contract between developer and the Society was on a principal to principal basis; it neither constitutes a partnership nor a joint venture or agency between the two. The third party purchasers with whom the developer might have entered into agreements for sale would have no privity of contract with the Society and the Society would in no

way be responsible for any claim made by such purchasers against the developer.

26) The observations in paragraph Nos. 84 and 85 are material and hence extracted below.

“84. The clauses quoted above, read together and in their proper perspective to be gathered from the whole agreement, clearly envisage the development and sale of the free sale component of the project by Vaidehi on their own account and as an independent contracting party, and not as agents of the Society. The contract between Vaidehi and the Society is on a principal to principal basis; it neither constitutes a partnership nor a joint venture or agency between the two. The third party purchasers with whom Vaidehi might enter into agreements for sale would have no privity of contract with the Society and the Society would in no way be responsible for any claim made by such purchasers against Vaidehi under their respective agreements for sale.

85. There being no privity of contract between the Society and the third party purchasers claiming under Vaidehi, the third party purchasers cannot claim specific performance of their respective agreements for sale except through Vaidehi. They stand or fall by Vaidehi. If the rights of Vaidehi are brought to an end upon a lawful termination of the Society

Development Agreement, the third party purchasers cannot lay any independent claim against the Society or anyone claiming through the Society. The agreements with third party purchasers are premised upon a valid, subsisting and enforceable agreement between their vendors, namely, Vaidehi and the owners, namely, the Society and in fact refer to the Society Development Agreement in this behalf. Admittedly, therefore, the third party purchasers had, or at any rate, ought to have, notice of the Society Development Agreement and its terms and conditions, and Vaidehi's obligations to perform the same. If Vaidehi fails to perform these obligations, the purchasers cannot but suffer the consequences. In other words, the purchaser's rights are subject to Vaidehi's rights and not higher than those. Therefore, from a contractual standpoint, the third party purchasers have no case against the Society or Rustomjee, who claim through the Society..."

(emphasis supplied)

27) The learned Judge also examined the claim of third party purchasers in the context of the provisions of MOFA, 1963 and answered the same in the negative by observing as under:-

86. Let us now consider if these third party purchasers have any rights under MOFA against the Society. It is submitted on their behalf that the Society is very much a 'promoter' within the meaning of MOFA as regards their respective

agreements for sale. Learned Counsel for the purchasers rely upon the definition of "promoter" contained in Section 2(c) of MOFA. The definition is in the following terms:

"promoter" means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats, or apartments for the purpose of selling some or all of them to other persons, or to a company, cooperative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both."

87. It is submitted that the Society can at any rate be said to have caused the building of flats to be constructed for the purpose of selling the same, and as a person, who causes such building to be built, is as much a promoter as a person who sells premises in such building.

88. The Society is the owner of the property and has entered into an agreement with the developers, i.e. Vaidehi, for redevelopment of its property. The redevelopment envisages construction of the Society's building to accommodate its members and also construction of building/s of flats/premises to be sold to outsiders. The agreement authorizes or entitles the developers to construct such building/s and sell flats/premises therein to outsiders. Such authority or entitlement is to the developers' account and in their own right, and as an

independent contractor. If in exercise of such authority or entitlement, a building is constructed by the developers, it cannot be said that such building is caused to be constructed by the Society within the meaning of Section 2(c) of MOFA.

89. Any other interpretation would lead to anomalous consequences, which could never have been contemplated by MOFA. The owners of lands entering into agreements for sale or development agreements with promoters/developers would be held as being subject all liabilities of a promoter, such as liability of disclosure of plans and specifications, outgoings etc. under Section 3 of MOFA, entering into agreements in accordance with Section 4, giving possession of flats and suffering the consequences of Section 8, forming co-operative societies of flat purchasers under Section 10, and so on. This would be plainly inconceivable.

90. Prima facie, thus, there is no case to treat the Society, who is merely in the position of an owner vis-a-vis the third party purchasers, as a 'promoter' within the meaning of MOFA and foist the obligations of a promoter on the Society in relation to the purchasers...."

(emphasis supplied)

28) I am in respectful agreement with the aforesaid enunciation. Even the expansive definition of the term 'promoter' under Section 2 (c) of MOFA, 1963 cannot be so

stretched as to fasten liability on the society which it has neither incurred under a contract nor statutorily enjoined.

29) In the case of **Goregaon Pearl CHSL Vs. Dr. Seema Mahadev Paryekar and Others in Appeal From Order (st) No.22143 of 2019**, the same learned Judge (S.C. Gupte, J.) again repelled the submission that in a situation of this nature a society falls within the ambit of the definition of promoter under Section 2 (c) of the MOFA, 1963 even after noticing the decision in the case of **Ramnijklal Tulsidas Kotak** (supra).

30) I, therefore, find substance in the submission on behalf of the defendant Nos. 2 and 5 that there is prima facie no privity of contract between the plaintiff, on the one part, and defendant Nos. 2 and 5, on the other part, and the plaintiff cannot enforce the obligations under MOFA, 1963 against defendant Nos. 2 and 5.

31) The learned Judge, City Civil Court thus committed no error in holding that the plaintiff is not entitled to the interim relief. The elements of balance of convenience and irreparable loss, especially qua defendant Nos. 2 and 5, also deserve to be answered against the plaintiff. I must hasten to add that the plaintiff prima facie has the remedies against the defendant

No. 1 and its successors in interest. But those rights do not sustain the prayers in the Notice of Motion. Therefore, no interference is warranted with the impugned order in exercise of limited appellate jurisdiction.

32) Hence, the following order.

ORDER

- I) The Appeal stands dismissed.
- II) In view of the dismissal of the Appeal, the Interim Application also stands disposed.
- III) Parties to bear their respective costs.

[N. J. JAMADAR, J.]