

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

APPEAL FROM ORDER NO.418 OF 2023

M/s. K. M. Realty

Thr. It's Partners Mr. Kunal Pankaj Raval

.... Appellant

Versus

Diamond Hill Co-Operative Housing
Society Limited

.... Respondent

...

Mr. Simil Purohit, a/w. Mr. Rubin Vakil, Mr. Malik Vora i/b. Pramodkumar & Co. for Appellant.

Mr. Gauraj Shah, a/w. Mr. Anish Mishra, Mr. Vishwanath Mishra i/b. Mr. Sanjeet Shukla for Respondent.

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**CORAM : SANDEEP V. MARNE, J.
RESERVED ON : 21 DECEMBER 2023
PRONOUNCED ON : 8 JANUARY 2024.**

JUDGMENT:

1. The issue involved in the present Appeal is about entitlement of a developer to construct an additional building, which is disclosed in the sanctioned layout, but specifications of which differ in respect of plinth area and number of floors than the one appearing in the

disclosed layout without obtaining flat purchasers' consent. Also involved is the issue whether the consent given by flat purchasers for utilization of the entire balance FSI potential would entitle the developer to make alterations in the disclosed plans and layout. Though the issues seem to be answered in judgments of the Apex Court in *Jayantilal Investments*¹ and of this Court in *Malad Kokil Co-operative Housing Society Ltd.*² and *Dosti Corporation*³, Appellant has sought to distinguish those judgments on a plea that those cases related to entitlement of developer to utilize additional FSI resulting out of introduction of new Development Control Regulation or changed policy and that Appellant, in the present case, enjoys the necessary flexibility to utilize the balance FSI potential arising out of erstwhile Regulations by making necessary changes in the plinth area as well as number of floors.

A. THE CHALLENGE

2. The issues arise on account of challenge raised by the Appellant (Developer) to the Order dated 22 February 2023 passed by the City Civil Court granting temporary injunction in favour of the Plaintiff/Respondent (Society) thereby restraining it from developing the suit property and/or alienating, selling, transferring and/ or disposing of any flats/ units in the proposed building to any third party and/or from

¹ *Jayantilal Investments Vs. Madhuvihar Coop. Housing Society & Ors.*, (2007) 9 SCC 220

² *Malad Kokil Co-operative Housing Society Ltd. Vs. The Modern Construction Co. Ltd. & Ors.*, (2012) 6 AIR Bom. R-257

³ *Dosti Corporation, Mumbai Vs. Sea Flama Co-operative Housing Society Ltd.*, 2016 (5) Mh.L.J. 102

carrying out any activity of demolition or construction on the suit property. The City Civil Court has however permitted Appellant-Defendant to carry out construction of building strictly in accordance with approved layout plan dated 26 July 2004. In short, the City Civil Court has injuncted Appellant-Defendant from carrying out any construction on the suit property otherwise than as per the approved plan dated 26 July 2004.

B. FACTUAL BACKGROUND

3. Briefly stated, facts of the case are that a Development Agreement was executed between the landowners and the Appellant-Developer on 03 February 2003 in respect of land admeasuring 4429.36 sq. mtrs. together with rights to utilize potential development area of about 3957 sq. mtrs. situated at City Survey No.13/13 and forming part of Survey No.267, Hissa No.1 (pt) of Village Kurla, Taluka Kurla situated at Chuna Bhatti (East), near Bunter Bhavan, off Sion-Chembur Road, Mumbai (**Suit Property**). The Appellant-Developer got the plans approved for construction of 03 buildings consisting of Wing-A, Wing-B and Wing-C on 26 July 2004. As per the plans so sanctioned, Appellant proposed to construct three Wings i.e. C-Wing as G + 7 floors, B-Wing as G + 7 floors and A-Wing as G + 7 floors. In pursuance of the plans so sanctioned, Appellant undertook development of two wings in the first phase and executed agreements with flat purchasers as per the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of

Construction, Sale, Management and Transfer) Act 1963 (**MOFA**). It appears that there are two types of agreements executed with the flat purchasers by the Appellant-Developer. In one of the Agreements dated 15 June 2005 executed with a flat purchaser, the proposed third building was to consist of G + 4 upper floors. However, in the Agreement subsequently executed on 28 December 2007 with another flat purchaser, the third building was shown to comprise G + 7 upper floors. Appellant completed construction of the two buildings as per the approved plans and an Occupancy Certificate was issued in respect thereof on 20 October 2010. The Third building could not be constructed simultaneously as, according to Appellant, there was an encroachment on the Plot, which was required to be removed. The flat purchasers of the two constructed buildings formed and registered Diamond Hill Co-operative Housing Society Limited (**Society**). The registration of the Society was allowed with a caveat that the Society shall not object for the additional construction as per the approved plans.

4. It is Appellant's case that there was encroachment on some portion of the layout on account of which, construction of the third building was held up. However such encroachment was not on the plinth of the proposed third building. Appellant claims that it has removed encroachment and has freed up substantial area in the layout. It is the case of Appellant that it applied to Municipal Corporation for sanction of fresh plans for construction of the third building and that the same were sanctioned by the Municipal Corporation on 18 November 2019. At

Society's instance, its Architect scrutinized the sanctioned plans in respect of the third building and opined that the plinth of the proposed building was different than the one sanctioned in the earlier plans. Architect also observed that the new building proposed to be constructed comprises of G + 16 upper floors and that such construction would affect the ventilation and light of the existing buildings. Complaining that Appellant-Developer was proposing to put up additional construction over and above one shown in approved layout plans forming part of MOFA Agreements executed with flat purchasers, the Society filed Short Cause Suit No.17 of 2020 in the City Civil Court seeking permanent injunction against Appellant-Developer from carrying out construction of additional building on the suit property. In its suit, Plaintiff-Society filed Notice of Motion No.4973 of 2019 seeking temporary injunction. The City Civil Court granted ad-interim relief restraining the Appellant-Developer from carrying out any construction at the suit property or from selling or transferring any flats to third parties by its Order dated 08 January 2020. The City Civil Court vacated ad-interim Order on 18 December 2020 on account of absence of Plaintiff's Advocate. On 21 December 2020, the Motion was placed on board at the instance of the Plaintiff for continuation of the ad-interim relief. The Advocate appearing for Appellant-Defendant showed willingness to file an undertaking that the construction would be subject to the final Orders passed in the Notice of Motion. Recording the said undertaking, the City Civil Court did not continue the ad-interim relief. The Plaintiff-Society

filed Appeal from Order (Stamp) No.1430 of 2021 challenging the City Civil Court's Order not continuing the ad-interim relief. The Appeal from Order was disposed of by this Court by Order dated 11 February 2021 continuing the ad-interim relief till disposal of the Notice of Motion. After hearing both the sides, the City Civil Court passed Order dated 22 February 2023, confirming ad-interim Order dated 08 January 2020 till disposal of the suit and accordingly disposed of Notice of Motion No.4973 of 2019. While the City Civil Court has temporarily enjoined Appellant-Developer from carrying on construction at the suit property, it has granted liberty to it to construct the third building strictly in accordance with the layout sanctioned on 26 July 2004. The Appellant-Developer is aggrieved by the Order dated 22 February 2023 and has filed the present Appeal.

C. SUBMISSIONS

5. I have heard Mr. Simil Purohit, the learned counsel for Appellant-Developer and Mr. Gauraj Shah, the learned counsel for Respondent-Society. Their submissions are briefly captured as under:

C.1 SUBMISSIONS ON BEHALF OF APPELLANT-DEVELOPER

6. Mr. Purohit, the learned counsel appearing for Appellant would submit that the City Civil Court has erred in temporarily enjoining Appellant-Defendant from carrying out construction over and above the approved layout plan dated 26 April 2004. He would submit

that Appellant is constructing an additional structure/building, for which consent of the flat purchasers / members of the Respondent-Society is not required in view of various clauses of the MOFA agreements. He would submit that the Appellant-Developer has taken up the suit property for phased development and in the first phase, it has constructed two wings both comprising of G + 7 upper floors. That under the MOFA agreements executed with the flat purchasers of the said two buildings, Appellant has disclosed the entire scheme of development on the layout. That there was specific disclosure made to the flat purchasers that the Appellant intended to construct 3 buildings / wings in the layout plan by using balance FSI potential available in the suit property. That the Appellant also reserved right to use, utilize, consume, exploit balance FSI potential available in respect of the suit property as well as benefit of TDR as may be approved or sanctioned by the competent authority. He would take me through various recitals and clauses of MOFA Agreements in support of his contention that the flat purchasers have specifically consented for construction of additional building/wing by using balance FSI potential. According to Mr. Purohit, once full disclosure is made to the flat purchasers about construction of additional building in the layout by utilizing balance additional FSI, there is no question of obtaining fresh consent of the flat purchasers.

7. Inviting my attention to provisions of Section 7A of MOFA, Mr. Purohit would submit that Section 7A was inserted by 1986 amendment to MOFA for excluding construction of additional

buildings / structures from applicability of provisions of Section 7 of the MOFA. That the third building is additional and independent structure and therefore the provisions of Section 7A would be applicable to the present case. That provisions of Section 7A of MOFA would have application in the instant case as the promoter has disclosed not only the scheme of its development in the layout and but also disclosed and informed to the flat purchasers about construction of the third building in the layout with reservation of right to use, utilize, consume and exploit balance potential FSI and TDR. Inviting my attention to Regulation 21 of Development Control Regulation 1991 (**DCR 1991**) Mr. Purohit would submit that the layout plan does not require or provide for total number of floors, details of consumption of FSI, TDR in a structure of the layout. That therefore requirement of disclosure in MOFA agreements for additional structures in layout must be construed in the context of provisions of Regulation 21 of DCR 1991.

8. Mr. Purohit would further submit that the Appellant is proposing to exploit only FSI potential under DCR 1991. At the time of completion of first phase, the total potential of the suit property alongwith TDR was 7320.82 sq. mtrs and after utilizing the FSI for first phase of 2900.61 sq. mtrs. the balance potential FSI left is 5968.02 sq. mtrs. That the said balance FSI potential is computed on the basis of DCR-1991 and that the Appellant has not taken benefit of additional FSI potential available under Development Control & Promotion Regulations-2034 (**DCPR-2034**). That therefore the Appellant must be

permitted to consume entire balance FSI potential of 5968.02 sq. mtrs. under DCR 1991. He would submit that construction of the third building comprising G+16 will not adversely impact any of the available amenities. According to Mr. Purohit, on account of removal of encroachment, the existing flat purchasers will be entitled to use additional open space in the layout. That the third building is being constructed in the same way as that of the other buildings without affecting light or ventilation of any of the existing flat purchasers. Mr. Purohit would seek to distinguish Judgments of Apex Court in ***Jayantilal Investments*** and of this Court in ***Malad Kokil CHS*** and ***Dosti Corporation*** (supra) and submit that all the 3 Judgments relate to situations where developers therein were attempting to take benefit of additional FSI made available due to change in the law/policy (introduction of DCR 1991). That in the present case, the Appellant is not utilizing the additional FSI available under the DCPR 2034 and that therefore none of the 3 Judgments are applicable in the instant case. He would rely upon Judgment of this Court in ***Mr. Sudhir Shetty & Anr. Vs. Mr. Dharma V. Desle***,⁴ in support of his contention that layout can always be altered. Relying on Judgment of ***Sancheti Properties Vs. Eve's Garden CHA***,⁵ Mr. Purohit would submit that so long as the amenities of flat purchasers are not affected, the Developer must be permitted to exploit the developable potentiality of the plot. Mr. Purohit would therefore pray for setting aside the Order passed by the City Civil Court

4 *Arbitration Petition No.171 of 2003 decided on 02 December 2003*

5 *2021 SCCOnline Bom 13929*

so as to enable the Appellant to restart the construction which has been held up on account of Order of injunction passed by the City Civil Court.

9. Mr. Purohit would further submit that Appellant has sought approval of the plans for the third building by utilizing the FSI and fungible area admissible only as per 1991 DCR and that the Developer has not utilized fungible FSI in respect of Society's building. Mr. Purohit makes a statement that even though reference to DCPR 2034 is noticed in some of the documents, the Appellant-Developer shall not utilize any FSI under DCPR 2034.

C. 2 SUBMISSIONS ON BEHALF OF RESPONDENT-SOCIETY

10. *Per contra*, Mr. Shah, the learned counsel appearing for Respondent No.1-Society (Plaintiff) would oppose the Appeal and support the Order passed by the City Civil Court. Mr. Shah would submit that what is sought to be constructed is not an additional structure but a 'Wing' and that therefore provisions of Section 7 of MOFA would apply to the present case. That express disclosure was made to the flat purchasers that the third wing would consist either of G+4 or G+7 upper floors. That the Appellant-Developer left the space for FSI blank in the agreement at its own peril and by misusing the said blank space, now it is actually utilizing the additional FSI available under the DCPR 2034. He would invite my attention to the specific admission given by Appellant in the Affidavit filed before City Civil Court that the construction of new building is in accordance with the DCPR 2034. According to Mr. Shah,

what is relevant is the layout and not the potential FSI. That construction must be carried out in accordance with disclosure made out in the layout plan and law does not permit in carrying out construction in contravention of disclosure made in layout on specious plea of availability of additional FSI. That the Appellant-Developer has altered the plinth of the proposed building by expanding the same over and above plinth of the proposed building shown in the original layout.

11. Mr. Shah would further submit that carrying out additional construction causes severe prejudice to the members of the Society. He would submit that as per the 2004 sanctioned plan, additional building was supposed to comprise of an area admeasuring 320.55 sq. mtrs. whereas the building now sought to be constructed by the Appellant comprises of area of 4091.45 sq. mtrs. thereby constructing excess area of 3776.90 sq. mtrs. causing unjust gain to the Appellant-Developer and loss to the Society. That in the process, the Appellant-Developer is impinging upon the rights crystalised in favour of flat purchasers.

12. Mr. Shah would further submit that since the Appellant-Developer is proposing to construct the third wing by utilizing FSI as per DCPR 2034, the distinction sought to be made by Mr. Purohit in respect of Judgments of the Supreme Court in *Jayantil Investments*, and of this Court in *Dosti Corporation* and *Malad Kokil Co-operative Housing Society Ltd.* (supra) is totally misplaced. He would submit that all the 3 Judgments specifically prohibit the Developer from carrying out any

construction contrary to the agreement or in any excess of the disclosed layout to the flat purchasers. He would rely upon Judgment of this Court in *Shri. Vitthal Laxman Patil Vs. Kores (India) Ltd. & Ors.*⁶ He would submit that Developer cannot carryout additional construction contrary to the disclosure without obtaining consent of the flat purchasers. He would also distinguish applicability of *Sudhir Shetty* (supra) by submitting that the case did not involve the issue of carrying out additional construction but only about rearrangement of area of Recreational Ground. Mr. Shah would rely on Order dated 23 November 2007 issued by the State Government under provisions of Section 154 of the Maharashtra Regional and Town Planning Act, 1966 providing that TDR in respect of land, which is yet to be conveyed to a Co-operative Society, would not be admissible to the Developer for carrying out additional construction over balance land or amalgamated plot. He would pray for dismissal of the Appeal.

D. REASONS AND ANALYSIS

13. The Order passed by the City Civil Court temporarily restrains Appellant-Defendant from carrying out construction otherwise than in accordance with approved layout plan dated 26 July 2004. The layout prepared by the Appellant-Developer and sanctioned by the Municipal Corporation envisages construction of 3 buildings/wings, viz. Wing-A, Wing-B and Wing-C. There appears to be some confusion

⁶ 2019 (6) ALL MR 369

about the nomenclature of the buildings already constructed and which is intended to be constructed. It appears that the building which is now sought to be constructed was earlier named as 'Wing-C', which is now shown in the newly sanctioned plan as 'Wing-A'. To avoid any confusion, proposed building is being referred in the present Judgment as the 'Third building'.

14. So far as construction of the third building is concerned, there appears to be no dispute amongst the parties about developer's right to construct it. The Plaintiff-Society is not opposed to construction of 3 buildings in the layout. However, it insists that construction of third building cannot be contrary to the sanctioned plan/layout dated 26 July 2004. As observed above, there is some degree of variance between the number of floors to be constructed in the third building in MOFA Agreements executed with different flat purchasers at different times. In the MOFA Agreements executed with flat purchasers in the year 2005, the third building is shown to consist of G+4 upper floors, whereas in the 2007 MOFA Agreements, number of floors to be constructed in the third building is shown as G+7 upper floors. In the light of disclosure in the 2007 MOFA Agreement, Mr. Shah has fairly conceded that the Appellant-Developer can construct the third building upto G+7 upper floors, subject to a condition that the plinth area is not altered than the one shown in the sanctioned plan dated 26 July 2004. Even City Civil Court has permitted Appellant-Developer to carryout construction of the third building as per sanctioned plan dated 26 July 2004. Thus, the

combined effect of the Order of the City Civil Court read with concession extended by Mr. Shah is that Appellant-Developer can construct third building comprising G+7 upper floors with the same plinth area as shown in the sanctioned plan of 2004. The Appellant-Developer however not only wants to construct building of G+16 upper floors, but desires to expand the plinth area beyond the one sanctioned in the 2004 plan. In fact, on account of confusion created because of vacation of the ad-interim relief during the period from 21 December 2020 to 11 February 2021, the Appellant-Developer apparently commenced the work of construction of the third building and it appears that the plinth of the building has already been completed. According to Plaintiff-Society, such construction is carried out in violation of injunction Orders granted by the City Civil Court and by this Court and that the Plaintiff-Society has filed applications seeking demolition of said construction. No doubt, such construction is carried out by Appellant after submitting an undertaking before the City Civil Court that the same would be subject to final orders passed in the Notice of Motion. For the purpose of present Appeal, I do not wish to delve deeper into that aspect. Suffice it to observe that plinth of the third building would cover larger footprint than the one shown in the 2004 sanctioned plan and plinth covering such larger footprint has already been constructed.

15. In the above factual background, I proceed to examine whether the injunction granted by the City Civil Court can be lifted or modified so as to enable the Appellant-Developer to progress

construction of the third building, which it has already commenced. To do so, a brief overview of the statutory framework of MOFA would be necessary. Section 3 of MOFA prescribes general liabilities of a promoter and makes it mandatory for the promoter to make full and true disclosures of various aspects including the plans and specifications of the building. Section 4 mandates execution and registration of agreement before accepting advance payment or deposit. Sub-Section 1A of Section 4 prescribes the particulars to be incorporated in such agreement. In exercise of powers under Section 15 of MOFA, Maharashtra Ownership of Flats (Regularisation of the Promotion of Construction etc) Rules 1964 (**MOFA Rules**) have been notified. Rule 3 deals with manner of making disclosure under Section 3 of MOFA and reads thus:

3. Manner of Making disclosure.— (1) A promoter for the purposes of making disclosure of any document referred to in section 3 or prescribed thereunder shall produce the original of such document before the person intending to take or taking one or more flats. The promoter shall display or keep all the documents, plans or specifications (or copies thereof) referred to in clauses (a), (b) and (c) of sub-section (2) of the said section 3 at the site and permit inspection thereof; Such person may ask the promoter all relevant questions for seeking further information or clarification in respect of any documents of matter to be disclosed, produced or furnished by or under the provisions of the Act; and the promoter shall be legally bound to answer all such questions to the best of his knowledge and belief.

(2) The promoter while making disclosure of the outgoings as required by clause (j) of sub-section (2) of section 3 shall state the basis on which any estimated figures or other information is given.

(3) The promoter shall, when the flats are advertised for sale, disclose inter alia in the advertisement the particulars as required by sub— clauses (i) to (iv) (both inclusive) of clause (m) of sub-section (2) of section 3.

16. Rule 4 of MOFA Rules mandates the developer to provides true copies of various documents including *inter alia* the plans and specifications of the buildings built or to be built on the land. Rule 4 reads thus:

4. True copies of certain documents to be given— A promoter shall, on demand and payment of a reasonable charge therefor, give to any person intending to take or taking one or more flats true copies of the following documents, namely:

- (a) all documents of title relating to the land on which the flats are constructed, or are to be constructed, which are in the promoter's possession or power;
- (b) the certificate by an Attorney-at-Law or Advocate referred to in clause (a) of sub-section (2) of section 3;
- (c) all documents relating to encumbrances (if any) on such land, including any right, title, interest or claim, of any party in or over such land;
- (d) the plans and specifications of the buildings built or to be built on the land referred to in clause (c) of sub-section (2) of section 3;
- (e) a list of fixtures, fittings and amenities (including the provision for one or more lifts) provided or to be provided for the flat;
- (f) a list referred to in clause (g) of sub-section (3) of section 3;
- (g) a list of all outgoings referred to in clause (j) of sub-section (2) of section 3 and the basis on which any estimated figures or other information is given to the person intending to take or taking the flat.

17. Rule 5 of MOFA Rules provides that the agreement to be entered under Section 4 of MOFA must be under Form V. Clauses 3 and 4 of Form V read thus:

“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 of sanctioning the said plans or thereafter and shall, before handing over possession of the Premises to 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 sq. 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 the 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.”

18. Coming back to the provisions of MOFA, Section 7 thereof prohibits alteration or additions to the building without consent of flat purchasers after disclosure of plans and specifications. Section 7 Reads thus:

7. After plans and specifications are disclosed no alteration or additions without consent of persons who have agreed to take the flats; and defects noticed within [three years] to be rectified.

(1) After the plans and specifications of the building, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make-

(i) any alteration in the structures described therein in respect of the flat or flats which are agreed to be taken, without the previous consent of that person;

(ii) any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take the flats in such building.]

(2) Subject to sub-section (1), the building shall be constructed and completed in accordance with the plans and specifications aforesaid; and if any defect in the building or material used, or if any unauthorised change in the construction is brought to the notice of the promoter within a period of ³[three years] from the date of handing

over possession, it shall wherever possible be rectified by the promoter without further charge to the persons who have agreed to take the flats, and in other cases such persons shall be entitled to receive reasonable compensation for such defect or change. Where there is a dispute as regards any defect in the building or material used, or any unauthorised change in the construction, for as to whether it is reasonably possible for the promoter to rectify any such defect or change, or as regards the amount of reasonable compensation payable in respect of any such defect or change which cannot be, or is not, rectified by the promoter, the matter shall, on payment of such fee as may be prescribed, land within a period of three years from the date of handing over possession, be referred for decision-

(i) in an urban agglomeration as defined in clause (n) of section 2 of the Urban Land (Ceiling and Regulation) Act, 1976, to such competent authority authorised by the State Government under clause (d) of section 2 of that Act, and

(ii) in any other area, to such Deputy Chief Engineer, or to such other officer of the rank equivalent to that of Superintending Engineer in the Maharashtra Service of Engineers, of a Board established under section 18 of the Maharashtra Housing and Area Development Act, 1976, as the State Government may, by general or special order, specify in this behalf. Such competent authority, Deputy Chief Engineer or, as the case may be, the other officer of a Board shall, after inquiry, record his decision, which shall be final.

19. Thus, Section 7 covers addition or alteration in flat or structure of the building. By Amendment Act of 1986, Section 7A came to be inserted in MOFA. 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. v. Kiran Builders Pvt. Ltd.*⁷, which took a view that a promoter was not entitled to put up an additional structure not shown in the original layout plan, without the consent of

⁷ (1987) 1 Bom CR 355

the flat takers. To get over the said interpretation, the legislature stepped in and deleted the words “or construct any additional structure”. It is clarified that Section 7 shall not apply to construction of any additional buildings or structures. Section 7A reads thus:-

7A. Removal of doubt

For the removal of doubt, it is hereby declared that clause (ii) of sub-Section (1) of section 7 having been retrospectively substituted by clause (a) of Section 6 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, management and Transfer) (Amendment) Act, 1986 (hereinafter in this Section referred to as "the Amendment Act"), it shall be deemed to be effective as if the said clause (ii) as so substituted had been in force at all material times; and the expression "or construct any additional structures" in clause (ii) of sub-section (1) of section 7 as it existed before the commencement of the Amendment Act and the expressions “constructed and completed in accordance with the plans and specifications aforesaid” and “any unauthorised change in the construction” in sub-section (2) of section 7 shall, notwithstanding anything contained in this Act or in any agreement, or in any judgement, decree or order of any Court, be deemed never to apply or to have applied in respect of the construction of any other additional buildings or structures constructed or to be constructed under a scheme or project of development in the layout after obtaining the approval of a local authority in accordance with the building rules or building bye-laws or Development Control Rules made under any law for the time being in force.

20. The Apex Court had an occasion to consider the above provisions of MOFA and MOFA Rules in its judgment in *Jayantilal Investments* (supra). The Supreme Court held that the obligation of the promoter under MOFA to make true and full disclosure to the flat takers remained unfettered even after the amendment of MOFA by Maharashtra Amendment Act 36 of 1986. That every agreement between the promoter and the flat takers would have to comply with the

prescribed Form V; the explanatory note under the form made it clear that clauses 3 and 4 were statutory and would have to be retained in every agreement between the promoter and the flat takers. That the promoter is not only obliged statutorily to give to the purchasers the particulars of the land, building, 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 and if any departure is to be made in the scheme so disclosed, consent of flat takers must be obtained. One of the issues before this Court in *Jayantilal Investments* was whether one building with several wings would fall under Section 7(1)(ii) or construction of such additional wing would be covered by provisions of Section 7A of the MOFA. While dealing with the issue of requirement of consent of flat purchasers for putting additional construction, the Apex Court has also answered the issue that construction of additional wing would be covered by provisions of Section 7(1)(ii) of MOFA requiring consent of the flat purchasers. It would be apposite to reproduce the findings of the Apex Court in *Jayantilal Investments* as under :-

15. The judgment of the Bombay High Court in Kalpita Enclave case was based on the interpretation of unamended Section 7 of MOFA. Consequently, it was held that a promoter was not entitled to put up additional structures not shown in the original layout plan without the consent of the flat takers. Thus, consent was attached to the concept of additional structure. Section 7 was accordingly amended. Section 7-A was accordingly inserted by Maharashtra Amending Act 36 of 1986. Section 7-A was inserted in order to make the position explicit, which according to the legislature existed prior to 1986, implicitly. Section 7 of MOFA came to be amended and for the purpose of removal of doubt, additional Section 7-A came to be added by Maharashtra Act 36 of 1986. By this amendment, the

words indicated in the parenthesis in the unamended Section 7(1)(ii), namely, "or construct any additional structures" came to be deleted and consequential amendments were made in Section 7(1)(ii). Maharashtra Act 36 of 1986 operated retrospectively. Section 7-A was declared as having been retrospectively substituted and it was deemed to be effective as if the amended clause had been in force at all material times. Further, it was declared vide Section 7-A that the abovequoted expression as it existed before commencement of the amendment Act shall be deemed never to apply in respect of the construction of any other additional buildings/structures, constructed or to be constructed, under a scheme or project of development in the layout plan, notwithstanding anything contained in the Act or in any agreement or in any judgment, decree or order of the court. Consequently, reading Section 7 and Section 7-A, it is clear that the question of taking prior consent of the flat takers does not arise after the amendment in respect of any construction of additional structures. However, the right to make any construction of additional structures/buildings would come into existence only on the approval of the plan by the competent authority. That, unless and until, such a plan stood approved, the promoter does not get any right to make additional construction. This position is clear when one reads the amended Section 7(1)(ii) with Section 7-A of MOFA as amended. Therefore, having regard to the Statement of Objects and Reasons for substitution of Section 7(1)(ii) by Amendment Act 36 of 1986, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act 36 of 1986 was to change the basis of the judgment of the Bombay High Court in Kalpita Enclave case. By insertion of Section 7-A vide Maharashtra Amendment Act 36 of 1986 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, if the total layout allows construction of more buildings, subject to compliance with the building rules or building bye-laws or Development Control Regulations. At the same time, the legislature had retained Section 3 which imposes statutory obligations on the promoter to make full and true disclosure of particulars mentioned in Section 3(2) including the nature, extent and description of common areas and facilities. As stated above, sub-section (1-A) to Section 4 was also introduced by the legislature by Maharashtra Act 36 of 1986 under which the promoter is bound to enter into agreements with the flat takers in the prescribed form. Under the prescribed form, every promoter is required to declare FSI available respect of the said land. The promoter is also in required to declare that no part of that FSI has been utilised elsewhere, and if it is utilised, the promoter has to

give particulars of such utilisation to the flat takers. Further, under the pro forma agreement, the promoter has to further declare utilisation of FSI of any other land for the purposes of developing the land in question which is covered by the agreement.

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 7-A 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 layout 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 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 layout 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 to the flat takers remains unfettered even after the inclusion of Section 7-A 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 (1-A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986. 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 Form V 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 local authority concerned at the time of sanctioning the said plans or thereafter and shall, before handing over possession of the flat to the flat purchaser, obtain from the local authority concerned 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. The residual FAR (FSI) 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 FAR (FSI), 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 layout 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 puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations, etc.

20. In the light of what is stated above, the question which needs to be examined in the present case is whether this case falls within the ambit of amended Section 7(1)(ii) or whether it falls within the ambit of Section 7-A of MOFA. As stated above, under Section 7(1) after the layout plans and specifications of the building, as approved by the competent authority, are disclosed to the flat takers, the promoter shall not make any other alterations or additions in the structure of the building without the prior consent of the flat takers. This is where the problem lies. In the impugned judgment, the High Court has failed to examine the question as to whether the project undertaken in 1985 by the appellant herein was in respect of construction of additional buildings or whether the project in the layout plan of 1985 consisted of one building with 7 wings. The promoter has kept the requisite percentage of land open as recreation ground/open space. Relocation of the tennis court cannot be faulted. The question which the High Court should have examined is: Whether the project in question consists of 7 independent buildings or whether it is one building with 7 wings? The answer to the above question will decide the applicability or non-applicability of Section 7(1)(ii) of MOFA, as amended. The answer to the above question will decide whether the time to execute the conveyance has arrived or not. This will also require explanation from the competent authority, namely, Executive Engineer, 'R' South Ward, Kandivali, Mumbai-400067 (Respondent 8 herein). In the dates and events submitted by the appellant promoter, there is a reference to the permission granted by ULC Authorities dated 16-11-1984 which states that the owner/developer shall construct a building with 7 wings. One needs to examine the application made by the promoter when he submitted the layout plan in 1985. If it is the building with 7 wings intended to be constructed in terms of the layout plan then the High Court is also required to consider the effect of the judgment in *Ravindra Mutneja v. Bhavan Corpn.*² in which the learned Single Judge has held that if a building is put up as a wing of an existing building, it cannot be constructed without the prior permission of the flat takers. In that connection, the High Court shall also consider permission dated 16-11-1984 under Section 21(1) of the ULC Act, application made to the competent authority when initial layout plan was sanctioned, applications for amendments to layout plans made from time to time and also agreements between promoter and flat takers.

21. Thus, as held by the Apex Court in *Jayantilal Investments* (supra), the construction of additional wing is covered by provisions of Section 7(1)(ii) of MOFA and is not protected by the provisions of Section 7A. Since the additional building is named as 'Wing' in the MOFA Agreements, it is sought to be suggested by Mr. Shah that what is sought to be constructed is an additional 'wing' and not a separate 'building'. In my view, it is not necessary to enter into this debate at this stage in view of the fact that the construction of the additional building has been specifically disclosed to the flat purchasers in the MOFA Agreements. Therefore, consent for construction of additional building has already been obtained from flat purchasers in the MOFA Agreements. Therefore whether the additional construction is to be treated as 'building' or 'wing', consent of flat purchasers is not needed for construction thereof, in view of specific disclosure made not only in the layout plan but also in the MOFA Agreement.

22. The real issue is about the nature of the additional construction that is proposed to be undertaken. As observed above, the proposed third building not only consists of additional floors than the one disclosed in the layout plan disclosed in MOFA Agreements, but is proposed to be constructed by extending the plinth area. The Appellant-Developer desires to extend the building to G+16 upper floors as against G+7 upper floors disclosed in MOFA Agreements. Also, comparative layout plans produced before this Court (by superimposing new plan

over old plan) would show that the third building is now being constructed on a much larger plinth area/footprint than the one indicated in the 2004 layout. Whether construction of additional floors and expansion of the plinth area can be permitted is the issue involved in the present Appeal.

23. Mr. Purohit has taken me through various clauses of MOFA Agreement in support of his contention that construction of additional floors and expansion of plinth area is permissible in view of various disclosures made in the MOFA Agreement. It would therefore be necessary to refer to the relevant clauses of the MOFA Agreement. The same are reproduced below :-

AND WHEREAS the Promoters have applied for and obtained sanction of plans, issue of I.O.D. bearing No.CE/3896/BPES/AL dated 2nd June, 2003 and Commencement certificate dated 15th September, 2003 for the purpose of development of the said property by constructing building thereon.

AND WHEREAS on the necessary application proposals being submitted for layout and sub division of the said entire property, the concerned Executive Engineer (BP) Eastern Subs by his letter date 22nd June, 2004 inter alia approved the layout and sub division of the said entire property on the terms and conditions mentioned therein.

AND WHEREAS as per the plans/scheme being submitted, the Promoters have presently proposed to construct three wings i.e. wing A consist of ground + seven upper floors wing B consist of Ground + Seven upper floors and wing C consist of Ground + seven upper floors by use of potentiality of FSI in respect of portion of the said property and entitled to and reserve their right to use, utilise, consume and exploit balance/ remaining potentiality of FSI available in respect of the said property as also the benefit of TDR in all forms to be acquired and purchased from the Intending seller so as to avail the same for additional construction by way of additional floors on the said building and the wings and/or by construction of additional structure/building/wings as may be and sanctioned by the concerned Development authority.

AND WHEREAS the copies of the said certificate of title and the copies of the plans, specifications of flats and other documents showing the nature of the title of the Promoters are hereto annexed and marked as Annexure "A" to "D" respectively.

AND WHEREAS the terms, conditions, stipulations and restrictions, if any, laid down or which may be laid by the local authorities including Municipal Corporation of Greater Bombay or my other public bodies in respect of the development of the said property will be observed and performed by the Promoters while constructing the said building which are based upon due performance and observance and the Occupation completion certificate in respect of the said building which is to be granted by the concerned local authorities.

AND WHEREAS the Promoters have accordingly commenced construction of the said buildings presently wing A. Wing B and Wing C as per the sanctioned plan and specifications presently approved by the concerned development authority and **reserve their right to construct additional structure additional floors on the said building under constructions.**

AND WHEREAS the **Purchasers have demanded from the Promoters and the Promoters have given to the Purchaser inspection of all the documents relating to the said building including sanctioned plans, designs, specifications** prepared by the Architect and/or such other documents such as Revenue and Survey documents as are prescribed under the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act 1963 (hereinafter referred to as the said Act) and the Rules made thereunder.

AND WHEREAS the Purchaser has applied to the Promoters herein for allotment to him/her/them a premises being flat/unit/premises/ office/car parking space no. _____ on _____ floor in wing A/wing B/ Wing C in the building known as "DIAMOND HILL" to be constructed on the said property.

AND WHEREAS relying upon the application as aforesaid and the agreement the Promoters have agreed to sell and allot to the Purchasers the said premises/flats at the price and on the terms and conditions as hereinafter appearing.

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2. The Promoters have presently commenced, construction of the building presently Three Wings i. e. **Wing A and Wing B consist of Ground + Seven Upper floors and Wing C consist of Ground Plus Four upper floors** on the said property more particularly described in the Schedule hereunder written in accordance with the plan, designs and specifications approved to be approved by the concerned local authority viz. Municipal Corporation of Greater Bombay and which have been seen and approved by the Purchaser, with only such variations and modifications as the

Promoters may consider necessary or as may be required by the concerned local authority or the Government to be made in them or any of them.

PROVIDED THAT, if necessary, the Promoters shall obtain prior consent of the Purchaser in respect of such variations and modifications which may adversely affect the Purchaser herein in respect of the premises agreed to be allotted under these presents and not in any other case or otherwise whatsoever.

5. The Promoters hereby declare that the floor space index available in respect of the said Project/Layout building/wing A, Wing B and Wing C on property described in the schedule hereunder written, is about _____ sq.mtrs. as per the plans presently sanctioned by the Development sanctioning Authorities. The Promoters are entitled to avail use, utilise, consume and exploit the benefit of TDR without the benefit of TDR in any manner whatsoever by whatever named called and in all forms to be acquired and purchased by them during or after commencement of construction and/or on completion of construction the building and/or all or any one or more of the said Three wings and as may be permitted by the concerned Development sanctioning authority and hereby also reserve their right to consume and avail the benefit of balance FSI available in respect of the said property and the benefit of TDR a additional Buildable area by whatever name called and in all forms in future and as may be permissible and that no part of the said floor space index has been utilized by the Promoters elsewhere for any purpose whatsoever. In case the said Floor Space Index has been or is being utilized by the Promoters elsewhere, then the Promoters shall furnish to the Purchaser/s the requisite detailed particulars in respect of such utilization of said floor space index by them. In case while developing the said property, the Promoters have utilized any further floor space index of any other property by way of floating floor, space index or TDR then the particulars of such floor space index shall be disclosed by the Promoters to the Purchaser at the time of execution of vesting documents contemplated hereinafter. The residual F.A.R. (F.S.I.) in the property not constituted will always belong to and be available to the Promoters till the execution of the Conveyance/vesting documents.

6. The Promoters hereby represent and declare and the Purchasers hereby confirm that as per the plans/scheme of the project being submitted, the Promoters have presently proposed to construct three wings i.e. wing A consist of ground + seven upper floors, wing B consist of Ground + Seven upper floors and wing C consist of Ground + seven upper floors by use of potentiality of FSI in respect of property/portion of the said property and entitle to and reserve their right to use, utilise, consume and exploit balance/ remaining potentiality of FSI available in respect of the said property as also the benefit of TDR by whatever named called in all forms to be acquired and purchased from the Intending sellers so as to avail the same for additional construction by way of additional floors on the said building and the wings and/or by construction of additional structure/building/wings as may be approved and sanctioned by the concerned Development authority.

8. The Promoters hereby represent and declare and the Purchaser hereby confirms that

(i) In addition to what is contemplated in clause (6) hereinabove, if due to any further change in the F.S.I. Rules, **more FS.I. becomes available** (including on account of staircase, walls, lifts, balcony, passage, etc.) **then in such event the Promoters alone shall be entitled to use, utilize, consume and exploit such addition F.S.I. on the said property by constructing additional structure or additional floors in the said building.**

(ii) In addition to what is contemplated in clause (6) hereinabove, **if due to any further change in the Development Rules and Regulations or by introduction of any policy by the Government of Maharashtra or any other concerned authorities any benefit of T.D.R. (Transferable Development Right) and/or Additional Buildable Area is available on the said property as a recipient plot, then in such event, the Promoters alone shall be entitled to avail such T.D.R. benefit for which they are entitled to acquire and purchase such F.S.I. by way of T.D.R. from any other property as may be permissible and to use, utilize, consume and exploit the same by constructing additional structure or additional floors on the said building presently sanctioned by the concerned Development Authorities.**

19. Unless it is otherwise agreed to by and between the parties hereto the Promoters shall after completion full development of the Scheme/Project by construction of all the buildings and wings including by use of the potentiality of all benefits including of TDR in all forms to the fullest on the said property, within reasonable period of not less than 24 months of formation/ registration of the society or Limited Company or organization, as aforesaid transfer and/or cause to be transferred to the Society or Limited Company or organization all their right, title and interest as the Promoters/Owners and to convey and transfer the said property together with the buildings by executing the necessary conveyance/declaration of the said Property to the extent as may be permitted by the authorities) and the said building in favour of such society or Limited Company or organization as the case may be such conveyance. declaration shall be in keeping with the terms and provisions of this Agreement. The Promoters may at their option and cause to be demised the building in favour of the said Organization by executing lease for the period as they decided.

24. It is based on the above clauses in the agreement that the Appellant claims right to utilize and exploit the entire balance FSI potential as per DCR 1991. Though some of the clauses empower the Developer to put up additional structures / additional floors even on

constructed buildings, Mr. Purohit fairly concedes the position that the same would be impermissible in view of provisions of Section 7 (1)(ii) of MOFA. He would further submit that for construction of a separate building by exploiting the balance FSI potential, fresh consent of flat purchasers is not required.

25. Thus, there is specific disclosure to the flat purchasers that the third building would consist only of G+4 or G+7 floors. In the plan sanctioned by the Municipal Corporation, the location and plinth area of each of the 3 buildings is indicated. Thus flat purchasers decided to purchase flats in the two buildings with clear idea that the third building would consist either 4 or 7 floors and that the third building would cover the ground area as indicated in the sanctioned layout. It is Mr. Purohit's submission that once the flat purchasers consented for use, utilization, consumption and exploitation of balance FSI potential, the number of floors or area of footprint would become irrelevant, and it is open for the developer to make necessary alterations in the additional building as may be necessary for the purpose of consumption of the entire balance FSI potential. He has submitted that in some cases, due to change of norms, the developer is unable to construct the building as sanctioned in the layout and is required to make necessary changes to fit the structure of the building within the changed norms. He would cite the illustration of fluctuations in height restrictions of constructions coming within the Airport Funnel Zone. That in a given case, though consent is obtained from flat purchasers about construction of additional

building of disclosed floors, by the time the construction is undertaken, the changed height restrictions imposed by the Airports Authority of India may not permit construction of those many floors. According to Mr. Purohit, in such case, the developer must enjoy necessary flexibility to alter the plinth area of the proposed building so as to utilize the potential FSI with which the earlier plans of additional building were sanctioned. In my view, the submission of flexibility to the developer to alter the nature of additional construction based on the cited illustration does not merit acceptance for variety of reasons. Firstly, the present case does not involve imposition of any restriction because of which the Appellant-Developer is precluded from constructing the third building as per the plans previously sanctioned. On the other hand, in the present case, the Appellant-Developer is proposing to put up additional construction over and above the one sanctioned in the disclosed plans and layout. Secondly, in case of the cited illustration, it is the risk that the developer takes by delaying construction of additional building till such time that the norms are alerted. Thirdly, under the guise of utilizing the available FSI potential, the developer cannot be permitted turn the disclosed plans and layout topsy-turvy, thereby completely frustrating the objective behind the statutory framework of MOFA and MOFA Rules. In any case, since the cited illustration has no application in the present case, the logic thereof cannot be applied here and as and when illustrated case comes up before Court, the same will have to be decided on the basis of factual position involved therein.

26. Also, the submission of Mr. Purohit about flexibility to the developer to amend the plans and layout for utilization of full FSI potential by putting up additional floors, appears to be in the teeth of the Judgment of this Court in *Malad Kokil CHS* (supra), in which a single judge of this Court (B. R. Gavai J as his Lordship then was) held in paragraph Nos.35, 36 and 37 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 /I[^] prime prime DR. 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.

36. It will, therefore, have to be seen as to whether the impugned construction which the developer desires to construct is in accordance with the full disclosure that he is required to make and as to whether it is in accordance with the layout plan which was presented to the flat purchasers at the time of execution of the agreement. As already discussed herein above, the disclosure that the developer made to the members of the plaintiff-society regarding the proposed S-5 building, which also was to be constructed if permitted by the Corporation, was to have ground + one floor. The same was located in one corner of the open plot abutting S-4 building. Insofar as the members of the appellant-society is concerned, in the agreement which have been entered into in 1982, there is a reference to S-5 building of ground + one floor. Insofar as members who have entered into agreement in 1984, there is no mention in so far as S-5 building is concerned. It is pertinent to note that in neither of the layouts annexed to 1982 agreement or 1984 agreement the proposed S-5 building is shown. On the contrary the area which is parallel to S.V. Road on one side and is surrounded by paved pathway on all other sides is shown as an open area. It is thus clear that the layout placed before the flat takers either does not show S-5 building or if it shows S-5 building, the same is shown to consist of

ground + one floor. In my considered view. therefore, in view of the law laid down by the Apex Court in Jayantilal Investment, since the construction which is sought to be made is not in accordance with layout plan presented to the flat takers, the same cannot be permitted unless there is a consent of the members of the plaintiffs and the appellant-society.

37. I am unable to accept the contention on behalf of the developer that if in the layout an area is earmarked for proposed construction, it hardly matters if the layout shows a building of 1 + 1 floor and the construction is in fact of four storeys, 10 storeys or 28 storeys. In my view the said argument is heard to be rejected. If such an argument is accepted, it would frustrate the very purpose of beneficial legislation like MOFA.

(emphasis supplied)

27. Thus, *prima facie* disclosure made in MOFA Agreement about the number of floors would also bind the developer and it would not be open for the developer to construct additional floors than the one disclosed in the MOFA Agreement.

28. In *Malad Kokil CHS* (supra), this Court also took note of Government Order dated 27 November 2007, on which reliance is placed by Mr. Shah before me and this Court held in para-76 and 77 of judgment as under:

76. Insofar as the contention by the learned Counsel for the developer that the Government Order dated 23rd November, 2007 are not applicable to the facts of the present case is concerned, said contention is also without any substance. It is the contention of the learned Counsel that the said Government Orders, which are issued under Section 154, are only applicable in case of amalgamation of plots and not when the TDR is purchased from somewhere else and loaded on the plot of a developer. I find that the said contention is based on a total misreading of the orders dated 23rd November, 2007. The said order provides that the concept of TDR has been incorporated in Development Control Regulations of the most of the cities which states that in lieu of grant of compensation for acquisition of reserved lands, a TDR should be given. It further states that there is also a provision of granting TDR for slum rehabilitation scheme. It further states

that insofar as Mumbai Municipal Corporation is concerned, the TDR is also available in respect of heritage buildings. It further states that TDR which is generated can be utilised by the land owner/developer himself or transferred to others. It states that, it has come to the notice of the Government that some developers at the time of getting plan sanctioned from the Planning Authority, do not include the TDR. It further states that after some construction is complete and Co-operative Society established, the developer do not execute the conveyance deed in favour of the Society. Thereafter, the developers seek permission for amalgamation of open plots in the 'neighbourhood' and without obtaining the permission of the Co-operative Society or the other land owners make an attempt to utilise the TDR even in respect of the area of the land on which construction is complete and construct multi storey buildings. It further states that, therefore, the individual rights of the persons are affected. It will be relevant to refer to the operative part of the said order issued under Section 154. It clearly states that while giving permission for construction by utilizing the TDR, if the developer has not executed conveyance deed in favour of a co-operative society of the occupants residing in the building constructed on the land, the TDR potential in respect of such part of the land on which construction is made should not be permitted to be used by the developer while giving permission for development of the remaining plot or amalgamated plot. It further states that in such cases the permission to use TDR should be given only insofar as the open land available on the plot. I find that applying the principle of contextual and textual interpretation, as argued by Shri Samdhani, the contention that said Government order is applicable only in case of amalgamation will have to be rejected. **Reading the order in entirety, it would reveal that said order has been issued with an object that a builder should not be permitted to use TDR potential of an area of a land on which the building is constructed and a Co-operative Society formed, however, the developer has not conveyed the said land along with building to the Society.**

77. The another contention of learned counsel appearing for the developers that the TDR is not in respect of the suit plot and the same is purchased from some other property and, therefore, no prejudice is caused to the plaintiff/appellant is also without any substance. Though the TDR sought to be loaded is in respect of some other property, it cannot be forgotten that insofar as TDR potentiality is concerned, the suit plot is a relevant factor. It cannot be forgotten that the TDR loaded cannot be more than inherent FSI available on the suit plot. It is not in dispute that the only remaining inherent FSI available on the suit plot is 0.7% inasmuch as 0.93% has already been utilised. Had the developers executed conveyance in favour of the plaintiff and the appellant to comply with statutory obligations, the TDR potential in respect of land on which buildings of plaintiff and defendants are already constructed would have been available to the plaintiff/appellant. Under the impugned plan the developers are using TDR potential which could have been otherwise available to the plaintiff/appellant society. In that

view of the matter, the contention in that regard is rejected.

(emphasis supplied)

29. In *Dosti Corporation* (supra), this Court held that mere existence of a clause in the agreement permitting Developer to carry out additional construction, in absence of any disclosure about the exact nature of construction, would not entitle the developer to carry out such additional construction, without obtaining prior consent of the flat purchasers in writing. Paragraph 100 of the judgment reads thus :-

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

30. Mr. Purohit is at pains to impress upon this Court that the Judgments of the Apex Court in *Jayantilal Investments* (supra) and of this Court in *Malad Kokil CHS.* and *Dosti Corporation* (supra) related to consumption of additional FSI/ TDR consequent to introduction of new

regulations/policy. Mr. Purohit has raised this contention that with a view to escape the requirement of obtaining informed consent from flat purchasers as per the law declared in those three Judgments by contending that the Appellant-Developer, in the present case is not utilizing any additional FSI arising out of DCPR 2034. The submission of Mr. Purohit may appear attractive in the first blush. However, Mr. Shah has invited my attention to several documents on record which clearly indicate that the construction of the third building is undertaken as per DCPR-2034. In Affidavit filed before the City Civil Court by the Appellant-Developer, it has specifically admitted that changes in law with regard to fungible FSI and DCPR 2034 were not known to anyone and that therefore consent in that regard was not obtained. The relevant averments made in the additional Affidavit dated 08 December 2020 filed by the Appellant-Developer before City Civil Court read thus :-

All the flat purchasers were also aware of the Phase wise construction undertaken by the Defendants and the same was disclosed in the agreement. The changes in law with regard to the Fungible FSI as well as DCPR, 2034 were not known to anybody and there is no record of disclosure about the same. Section 7(A) permits the Developers to put up the construction with the sanctioned Plan of the planning authority. I say that the present construction raises the height of the building upto 16th floor, which is the result of - (a) removal of encroachment to the extent of 142 square metres in the plot in question which has been removed, (b) provision of Fungible FSI on the part of the Defendants, by adopting and/or invocation of provisions of DCPR, 2034. It is respectfully submitted that the Plaintiffs, wing. cannot object to the construction of the third floor in phase wise manner since the same is disclosed to them at the time of executing the agreement for sale.

31. Mr. Shah has also invited my attention to the FSI calculation

made by the architect of Appellant-Developer while getting amended plans for the third building sanctioned. The said FSI calculation is placed on record at page No.96 of the paper book, which in fact contains comparative statement of FSI available in DCR 1991 and the one permitted to be consumed under DCPR 2034. As per the said statement, FSI admissible for construction of the third building as per DCR 1991 was 320.55 sq. mtrs whereas as per DCPR 2034, the proposed built-up area for the third building is shown as 1056.44 sq. mtrs. FSI calculation in 'Form A' of page 96 would indicate that under DCR 1991, the total basic FSI in respect of the entire plot was 3220.61 sq. mtrs. and the same is shown to have been increased in DCPR 2034 to 3956.50 sq. mtrs. Thus, provisions of DCPR 2034 are *prima facie* utilized for increase in the basic FSI and it is fallacious to contend that provisions of new DCPR 2034 are not taken into consideration for construction of the additional building.

32. Architect's certificate of the Developer is also placed on record, which indicates that the total built up area of the proposed third building is 4097.45 sq. mtrs. and the said FSI calculation is made by taking into construction provisions of DCPR 2034. The said FSI calculation in the Architect's certificate would indicate that over the total permissible built-up area (basic) of 3957.20 sq. mtrs. on the entire plot of land, the additional FSI computation is made by taking into consideration the entire plot area. The relevant portion of the Architect's certificate reads thus :-

As per the DCPR 2034 the Maximum potential of Plot u/ref is as under.

Sr. No.	Particulars	Area in Sq. Mt.
1)	AREA OF PLOT AS PER P. R. CARD	3,957.20
2)	DEDUCTION FOR	
	a) ROAD SET BACK	-
	b) PROPOSED ROAD	-
	c) ANY RESERVATION	-
	Total	-
3)	BALANCE AREA of plot (1-2)	3,957.20
4)	DEDUCTION FOR 15% RG	Nil
5)	NET AREA OF PLOT	3,957.20
6)	ADDITION FOR F.S.I.	-
7)	TOTAL AREA (5+6)	3,957.20
8)	PERMISSIBLE FSI	1.00
9)	PERMISSIBLE B.U.A.	3,957.20
10)	ADD ADDITIONAL FSI (5 X 0.50)	1,978.60
11)	ADD PERMISSIBLE TDR AS PER ROAD WIDTH (5 X 0.90)	3,561.48
12)	TOTAL PERMISSIBLE B.U.A. (9+10+11)	9,497.28
13)	PERMISSIBLE FUNGIBLE BUA (35% OF 12)	3,324.04
14)	PERMISSIBLE GROSS BUA INCLUDING FUNGIBLE (12 + 13)	12,821.32

As per present proposal, Built up area proposed for 'Wing A' is 4,097.45 sq.mt. (i.e. 3,035.15 sq.mt. + 1,062.30 sq. mt Fungible). Existing Built up area for 'Wing B' & 'Wing C' is 2,900.06 sq. mt. Therefore, Balance Built up area on plot u/ref is 5,823.81 sq. mt.

33. The above table indicates that permissible fungible area is calculated by considering the area of the entire plot. Though Mr. Purohit has submitted that the developer will not use the fungible FSI meant for the existing buildings of the Society, Architect's certificate would clearly

show that the entire plot area is taken into consideration for computation of permissible fungible built up area. This factual position has in fact forced Mr. Purohit to give an assurance to the Court that the Appellant-Developer shall not use any fungible area arising out of two buildings of the Society. However this assurance would not change the position that construction of the third building is undertaken as per the provisions of DCPR 2034. Therefore, the very basis for distinguishing the Judgments in *Jayantilal Investments, Malad Kokil CHS.* and *Dosti Corporation* is factually incorrect. In the present case it *prima facie* appears that the Appellant-Developer is utilizing not just additional FSI made available under DCR 1991 but also the additional FSI on account of introduction of DCPR 2034. In my view therefore all the three Judgments in *Jayantilal Investments, Malad Kokil CHS.* and *Dosti Corporation* would squarely apply to the present case.

34. In *Vitthal Laxman Patil* (supra) the Developer therein had proposed construction of an additional building (Nos. 16) by utilizing additional FSI available by way of TDR. Said building No. 16 was proposed to be constructed on land originally shown as Recreational Ground in the disclosed layout. This Court held in paragraph Nos. 10 and 11 as under:-

10. When the case of *Jayantilal Investments* came back to our Court on remand, a learned Single Judge of our Court, after referring to the division bench judgment of our Court in *White Towers Co-operative Housing Society Ltd. v. S.K. Builders*, 2008 (4) Mh.L.J. 894 : 2008 (6) Bom. C.R. 371

and another decision of a learned Single Judge of our Court in *Megh Ratan Cooperative Housing Society Ltd. v. Rushabh Rikhav Enterprises*, 2010 MhLJ Online 79 : 2009 (1) Bom. C.R. 361, asserted this position in the following words:

“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.”

11. The long and short of the position discussed above is that quite apart from the restrictions for development contained in Section 7 read with Section 7A of MOFA, the promoter's duty of disclosure and keeping to such disclosure, spelt out inter alia by Sections 3 and 4 of MOFA read with statutory clauses 3 and 4 of Form V prescribed in the Rules framed under MOFA, requires him to put up additional construction only in accordance with the layout plan disclosed to the flat takers at the time of entering into the contract for sale of flats consistent with the building rules contained in Development Control Regulations. **If the building site contains future development potential, i.e. any possibility of further construction, whether over one or the other building or buildings or anywhere else in the layout plan, the promoter's duty of disclosure requires him to firstly disclose such future construction; if it is to be over any particular building or buildings, the promoter must indicate such building or buildings and if is over any other area, such other area in the layout plan. He cannot disclose one or the other buildings or area/s for such additional construction and then construct somewhere else. He must keep to his disclosure.** A necessary corollary of this duty of disclosure is that if any particular area is to be kept open either as recreation ground (RG) or amenity space, he cannot, without disclosing a possible future use of such area, use the area for any additional construction.

(emphasis supplied)

35. Thus, the ratio of the Judgment of this Court in *Vitthal Laxman Patil* is that even if there is balance FSI potential in a plot, it is mandatory for the Developer to disclose to the flat purchasers construction of additional building in the layout plan.

36. Mr. Purohit has sought to rely upon Judgment of Division Bench of this Court in ***Sudhir Shetty*** (supra) in support of his contention that layout plans can always been altered. The Judgment in ***Sudhir Shetty*** would, however, have no application to the facts of the present case in that, the case before the Division Bench involved the issue of permissibility of amendment to the layout plan and requirement of consent of flat purchasers for such modification in the layout plan. In that case, the layout plan included two Recreational Grounds viz. RG-1 with area of 1452.75 sq. mtrs. and RG-2 of area of 1697.37 sq. mtrs. In the year 2002, the Municipal Corporation approved amended layout plan and the area reserved for RG-1 was permitted to be used for carrying out construction of building whereas, the area RG-2 was increased to 3144.31 sq. mtrs. It is in the light of these facts that this Court held that consent of the flat purchasers was not necessary for modification of layout since the total RG area provided the modified layout was as per requirement of DCR. Also, the Judgment in ***Sudhir Shetty*** did not involve putting up additional construction under Sections 7 or 7A of MOFA. Therefore, judgment of Division Bench of this Court in ***Sudhir Shetty*** delivered before the Apex Court judgment in ***Jayantilal Investments*** cannot be cited in support of an absolute proposition that the developer can always modify the layout and carryout construction contrary to the disclosed layout without the requirement of obtaining consent of flat purchasers.

37. Mr. Purohit has sought to contend that since amenities of the flat purchasers of existing two buildings are not reduced in any manner,

there is no question of obtaining their consent for construction of the 3rd building. This submission is premised on the availability of open space on account of removal of encroachment by the developer. Reliance in this regard is placed on judgment of this Court in *Sancheti Properties* (supra). In my view, the Judgment in *Sancheti Properties* will have no application since the issue in that case was about construction of additional building by amalgamating piece of land admeasuring 1000 sq mtrs. with the original plot. The flats purchasers' consent was obtained for such amalgamation and construction of additional building. It is in the light of this factual position that a Single Judge of this Court held that since there was no reduction in the amenities / facilities and that consent of flat purchasers was not necessary for construction of additional building under Section 7A of MOFA.

38. Also of relevance is the fact that the encroached portion of the land was always shown as a part of the layout. Thus this is not a case where additional land is made available in the layout. Therefore removal of encroachment by Appellant would not provide it with a license to undertake construction in violation of the disclosed plans and layout.

39. Mr. Purohit has relied on provision of Regulation 21 of the DCR-91 which, according to him, does not require disclosure of number of floors in a building in a layout. Regulation 21 reads thus:

21. Layout of land and Land Sub-division:

(1) Circumstances warranting preparation of a layout or sub-division :---

A layout or subdivision shall be submitted for the following:-

- (a) when more than one building (except for building accessory to the main building) is proposed on any land;
- (b) when development or redevelopment of any tract of land includes its division or sub- division into plots.
- (c) when the land under development admeasures 1000 sq.m. or more in a residential or commercial or in an industrial zone.

(2) Contents - Every sub-division/ layout shall contain sub-plots being formed after sub- division, access thereto, recreational open space, if any, required under Regulations 22 and 23 ,spaces for other ancillary uses if any required under Regulations 24 and 26 as also all the reservations, designations, allocations, road or road widening proposals of the development plan and the regular lines of streets prescribed under the Mumbai Municipal Corporation Act, 1888. Where there is a conflict between the widths or widening lines proposed in the development plan and those under the regular line of a street , the wider of the two shall prevail.

Provided that the Commissioner may, without any reduction in area, allow adjustment in the boundaries of reserved /allocated sites within the same holding and conforming to the zoning provisions to suit the development. In doing so, he will ensure that the shapes of altered, allocated/reserved sites are such that they can be developed in conformity with these Regulations.

40. True it is that a layout need not contain number of floors to be constructed in a building or FSI/TDR consumption. However in the present case, the sanctioned plans/layout of 2004 indicates the plinth area and location of the third building. It further made a specific disclosure to the flat purchasers in the MOFA agreements that the third building would comprise G+ 4/7 floors. Therefore, mere use of the word 'layout' by the City Civil Court in its order would not mean that the Appellant-Developer has a free hand to put up additional construction than the one disclosed to the flat purchasers.

41. After considering the entire conspectus of the case, I am of the view that City Civil Court has not committed any palpable error in granting temporary injunction in favour of Appellant-Developer. It has not granted blanket stay on construction of the third additional building. The City Civil Court has permitted Appellant-Developer to construct the third building in accordance with earlier sanctioned plans and layout, which was disclosed to the flat purchasers. This would enable the Appellant-Developer to construct G+7 upper floors building as per the plinth area indicated under the disclosed sanctioned layout. Construction already put up by Appellant was subject to the Order to be passed in the Notice of Motion as per the undertaking given by it before the City Civil Court. Therefore no equities can be claimed in respect of the construction so put at the site. It is not that substantial construction at the site has been carried out by Appellant. It is for the Appellant either to await final decision of the Suit by stopping the construction where it stands today, or it can demolish the same with a view to bring it on par with the plinth/footprint area indicated in 2004 layout plan and then to construct the third building upto G+7 floor. There is no embargo on doing so. The rights of the parties have correctly been balanced by the City Civil Court. I therefore do not find any reason to interfere in the Order passed by the City Civil Court. Needless to observe that all the findings recorded in the present Judgment are *prima facie* and the City Civil Court shall not be influenced by the same while deciding the suit finally.

42. I therefore do not find any merit in the present Appeal. The Appeal is accordingly dismissed without any order as to costs.

SANDEEP V. MARNE, J.

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