

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 18739 OF 2024

1. Mr. Haresh Vijaysinh Bhatia
2. Mr. Nikhil Pratapsinh Bhatia
3. Mr. Kiran Pratapsingh Bhatia

....*Petitioners*

: *Versus* :

1. District Deputy Registrar,
Co-operative Societies, Mumbai City-4
2. Vijay-II Co-op. Hsg. Soc. Ltd.
3. Vijay Co-op. Hsg. Soc. Ltd.

....*Respondents*

WITH

WRIT PETITION NO. 4649 OF 2025

Vijay Co-op. Hsg. Soc. Ltd.

....*Petitioners*

: *Versus* :

1. District Deputy Registrar,
Co-operative Societies, Mumbai City-4
2. Mr. Haresh Vijaysinh bhatia
3. Mr. Nikhil Pratapsinh Bhatia
4. Mr. Kiran Pratapsinh Bhatia
5. Mrs. Indira Vijaysinh Bhatia
6. M/s. Vijay Builders (Developers)
7. Vijay-II Co-op. Hsg. Soc. Ltd.

....*Respondents*

Mr. Pravin Samdani, Senior Advocate with Dhruva Gandhi, Mr. Pranav Nair, Mr. Prashant Asher, Mr. Naishadh Bhatia and Mr. Heetkumar Vachhani i/by. Crawford Bayley & Co., for the Petitioners in Writ Petition No. 18739 of 2024.

Mr. Sachindra B. Shetye, for the Petitioner in Writ Petition No. 4649 of

2025 and for Respondent No.3 in Writ Petition No.18739 of 2024.

Mr. Piyush Raheja with Mr. Feroze Patel, Mr. Sahil Gandhi, Ms. Dimple Vora and Ms. Riddhi Shah i/by. Markand Gandhi &Co., for the Respondent No.2 in Writ Petition No.18739 of 2024 and for Respondent No.7 in Writ Petition No.4649 of 2025.

Smt. V.R. Raje, AGP for Respondent No.1-State in Writ Petition No.18739 of 2024.

Mr. P.V. Nelson-Rajan, AGP for Respondent No.1-State in Writ Petition No.4649 of 2025

CORAM : SANDEEP V. MARNE, J.

JUDGMENT RESERVED ON : 30 APRIL 2025

JUDGMENT PRONOUNCED ON : 8 MAY 2025

JUDGMENT :

A. THE CHALLENGE

1) These two Petitions are filed challenging order dated 12 November 2024 passed by the District Deputy Registrar, Co-operative Society, Mumbai City (4) and Competent Authority issuing certificate of unilateral deemed conveyance of land and building in favour of Vijay-II Co-operative Housing Society Ltd. Petitioners in Writ Petition No.18739 of 2024 are referred to as '**Promoters**', who were also owners of the land on which layout development is carried out. They are aggrieved by conveyance of land on ownership basis in favour of Vijay-II Co-operative Housing Society Ltd (**Vijay-II CHS**) and contend that flat purchase agreements contemplated demise of mere leasehold rights in favour of societies formed by flat purchasers. The Promoters are also aggrieved by conveyance of Building 'Wing-D' and land utilized for its construction in

favour of Vijay-II CHS, which, according to them, is not a part of building of Vijay-II CHS. Accordingly, the Promoters have filed Writ Petition No.18739 of 2024 challenging order dated 12 November 2024 passed by the Competent Authority in favour of Vijay-II CHS.

2) Vijay Co-operative Housing Society Ltd. (*Vijay CHS*) is the other society in the same layout, which is also aggrieved by order of the Competent Authority dated 12 November 2024 and has filed Writ Petition No. 4649 of 2025. Its grievance is restricted to grant of right of way to Vijay-II CHS from main S.V. Road. Since both the Petitions challenge the same order, they are taken up for decision together.

B. FACTS

3) A very brief factual narration would be necessary for better understanding of issues raised in the Petitions. Mr. Vijaysinh Liladhar Bhatia, Pratapsinh Liladhar Bhatia, Haresh Vijasinh Bhatia, Nikhil Vijaysinh Bhatia, Rajani Pratapsinh Bhatia, Kiran Pratapsinh Bhatia and Indira Vijaysinh Bhatia are described as owners of the plot of land bearing CTS No. 48 admeasuring 3245.50 sq.mtrs. with setback /DP road benefit of 662.11 sq.mtrs. situated at junction of S.V. Road and Rambaug Lane, Borivali-Mumbai 400 092 within the revenue limits of Village-Magathane, Taluka-Borivali, Mumbai Suburban District (*entire plot*). After death of some of the landowners, it is claimed that Petitioners in Writ Petition No.18739/2024 are owners of the entire plot, who are referred throughout the judgment as '*the Promoters*'. A partnership firm was formed by name M/s. Vijay Builders, which has carried out development on the entire plot vide Intimation of Disapproval dated 10 May 1989. The Municipal Corporation of Greater Mumbai sanctioned plans for development of portion of the entire plot, under which the firm planned construction of buildings in the layout.

There is a debate amongst parties about the exact number of buildings taken up for construction on the entire plot. According to the Promoters, three buildings have been constructed on the entire plot viz. Vijay-I, Vijay-II and Wing-D. As against this, as per the contesting Respondent-Society (*Vijay-II CHS*), only two buildings have been constructed on the entire plot (*Vijay-I and Vijay-II*). Vijay-I building comprises only two wings – ‘A’ and ‘B’, each having ground + four upper floors and consists 40 residential units. Building Vijay-II, according to promoters, comprises of three wings – ‘A’, ‘B’ and ‘C’, each consisting of ground + 4 upper floors and having 40 residential units. The ‘D’ wing consists of ground + 2 upper floors and apparently has two residential flats in which one of the promoters and his family members reside. According to Vijay-II CHS, Wing-D is part of its building, whereas the promoters contend that Wing-D is a separate building altogether.

4) The Promoters entered into flat purchase agreements for sale of flats constructed in the entire layout. The flat purchasers of Vijay-I Building have formed Vijay CHS whereas flat purchasers of Vijay-II Building have formed Vijay-II CHS. According to the Promoters, the occupiers of two flats in the third building (*Wing D*) are not part of any of the two Societies.

5) Vijay CHS filed Application No. 265/2022 before the Competent Authority under Section 11 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (**MOFA**). In its application, Vijay CHS sought conveyance of leasehold rights in respect of portion of land in the layout, as well as the building in its favour. Vijay-II CHS was impleaded as party Respondent to Application No. 265/2022. The Competent Authority held that there are three buildings on the layout viz. the two buildings of Vijay-I and Vijay-II Societies and building named ‘Wing D’

and that the owners had retained land admeasuring 222 sq.mtrs. for themselves. The Competent Authority therefore allowed the application filed by Vijay CHS vide order dated 15 September 2023 issuing Certificate of unilateral deemed conveyance assigning leasehold rights of land admeasuring 1230.45 sq.mtrs alongwith building of the Society, together with setback benefit/FSI advantage of DP Road admeasuring 191.30 sq.mtrs. Vijay CHS has not challenged the order dated 15 September 2023 passed by the Competent Authority till date.

6) Vijay-II CHS also filed Application No. 28/2023 seeking unilateral deemed conveyance of land in its favour. The Competent Authority however rejected the application of Vijay II CHS by order dated 25 September 2023 holding that Vijay II CHS was entitled to be granted only leasehold rights in the land and not assignment of land on ownership basis. The Competent Authority also found that Board of Administrator was appointed on Vijay II CHS, which could not have filed application seeking deemed conveyance as the role of the Administrator was limited to looking after day-to-day affairs of the Society. The Competent Authority held in the order dated 25 September 2023 that there are three buildings in the layout. It found fault with the area calculations made by the Architect of Vijay-II Society and accepted the area calculations made by the Architect of the Promoters. It therefore held that Vijay II Society had sought conveyance of incorrect area without considering the entitlement of Wing-D building. The Competent Authority accordingly rejected the application of Vijay-II Society granting it liberty to file fresh application after complying with the requisite formalities and documentation, as well as considering the observations made in the order.

7) Vijay-II Society filed fresh application for deemed conveyance bearing Application No.142/2024 seeking unilateral

deemed conveyance of land admeasuring 1528.22 sq.mtrs, Recreational Ground admeasuring 269.69 sq.mtrs, totally aggregating 1797.91 sq.mtrs. Application No.142/2024 was opposed by the Petitioners, *inter-alia*, raising the objection of *res-judicata*. The Competent Authority has allowed Application No.142/2024 filed by Vijay-II CHS and has issued certificate of unilateral deemed conveyance of land admeasuring 1528.22 sq.mtrs and recreational ground admeasuring 269.69 sq.mtrs. alongwith building situated thereon comprising of Wings A, B, C and D. The order dated 12 November 2024 passed by the Competent Authority is the subject matter of challenge in the present petition.

C. SUBMISSIONS

8) Mr. Samdani, the learned senior advocate appearing for the Petitioner-Promoters would submit that the Competent Authority has grossly erred in entertaining second application for deemed conveyance, which was *ex-facie* barred by the principles of *res-judicata*. He would submit that there is virtually no difference between the pleadings in previous Application No.28/2023 and fresh Application No.142/2024. That the Competent Authority had ruled in the order dated 25 September 2023 that, (i) Vijay-II CHS is not entitled for conveyance of land on ownership basis and that it is entitled to conveyance of only leasehold rights in the land as per the MOFA agreements, (ii) that there are three buildings in the layout, D-Wing being a separate and independent building entitled to separate conveyance of land, (iii) owners had reserved land admeasuring 222 sq.mtrs. in the layout, (iv) Wing-D building is not a part of Vijay-II CHS, and (v) Vijay CHS is entitled to leasehold rights of only 1399.04 sq.mtrs. plus recreational ground of 246.89 sq.mtrs (*total 1645.97 sq.mtrs*). He would submit that the findings recorded by the Competent Authority

on the above five points have attained finality by order dated 25 September 2023. If Vijay-II CHS is aggrieved by the findings on said five points, it ought to have challenged the order dated 25 September 2023. Having accepted the order dated 25 September 2023, Vijay-II CHS must also accept findings recorded on five points. He would submit that the liberty granted by the Competent Authority by order dated 25 September 2023 was for filing fresh application for deemed conveyance in the light of findings recorded on the above five points. That the liberty did not mean re-opening of findings on the above five issues. Additionally, Mr. Samdani would submit that Vijay-II CHS was also party to Application No.265/2022 passed in favour of Vijay-II CHS, in which also same findings are recorded on the above five issues. That therefore this is an additional ground why the finding recorded by the Competent Authority in the order dated 25 September 2023 would be binding on Vijay-II CHS.

9) Mr. Samdani would submit that the present case is squarely covered by recent judgment of the Apex Court in Faime Makers Pvt. Ltd. Versus. District Deputy Registrar, Co-operative Society (3), Mumbai and Others¹ in which Hon'ble Apex Court has held that fresh application for deemed conveyance is not maintainable if the earlier application is rejected. He would also rely upon judgment of the Apex Court in the case of Sulochana Amma Versus. Narayanan Nair² in support of his contention that a decision of Tribunal, though of limited and special jurisdiction, operates as a *res-judicata* in a subsequent suit or proceeding. He relies upon judgment of the Apex Court in Hope Plantations Ltd. Versus. Taluk Land Board, Peermade and another³ in support of his contention that legal principles of *estoppel* and *res-judicata* are squarely applicable in proceedings before the administrative

¹ 2025 SCC OnLine SC 688

² (1994) 2 SCC 14

³ (1999) 5 SCC 590

authorities. Mr. Samdani would submit that the principle of '*res-judicata*' and '*issue-estoppel*' would otherwise apply in respect of decision of the Competent Authority on above five issues and in support he would rely upon judgment of the Apex Court in *Bhanu Kumar Jain Versus. Archana Kumar and another*⁴.

10) Mr. Samdani would further submit that Wing-D is a separate and independent building, with absolutely no connection with Vijay-II CHS. That the occupants of the two flats in Wing-D are not members of Vijay-II CHS. That there is a separate electricity meter for Wing-D building. The property taxes are paid separately and water bill is issued separately. That there is separate underground tank, as well as overhead tank for Wing-D building. He would also take me through several documents relating to Vijay-II CHS to demonstrate as to how only 40 flats occupiers are members of Vijay-II CHS and that the two flat occupiers of Wing-D building are not part of Vijay-II CHS. He would submit that during the course of decision of Application No.142/2024, Vijay-II CHS made an interpolation in number of flats/members from '40' to '41' and by making an overwriting, number of flats are shown to be 41 in the application for registration of the Society. He would rely upon information received under Right to Information Act, 2005 from Deputy Registrar reflecting that the number of members of the Society is only 40. He would rely upon voter's list finalised for conduct of elections of Vijay-II Society with only 40 members. He would rely on public notice issued at the behest of Vijay-II Society again reflecting that Society's building has only 40 flats.

11) Mr. Samdani would submit that Vijay-II CHS made a false representation to the Competent Authority by illegally including Wing-D building as part of its building for the purpose of grabbing the land

⁴ (2005) 1 SCC 787

meant for construction thereof. He would take me through the relevant clauses of MOFA Agreement to demonstrate that land admeasuring 222 sq.mtrs. was retained by the landowners for construction of Wing-D building.

12) Mr. Samdani would further submit that the Competent Authority cannot grant unilateral deemed conveyance in exercise of jurisdiction under Section 11 of MOFA contrary to the Agreement executed under Section 4. That the jurisdiction under Section 11 can be exercised by Competent Authority only in accordance with the Agreement executed under Section 4 and that therefore if the agreement provides for conveyance of leasehold rights, the Competent Authority direct otherwise. That in exercise of jurisdiction under Section 11, the Competent Authority cannot hold that in particular clause of Agreement executed under Section 4 is void. He would further submit that while recording its satisfaction under the provisions of sub-section (4) of Section 11, the Competent Authority cannot adjudicate upon complicated issues relating to interpretation of clauses of the Agreement, nor it can hold that any clause is contrary to the statutory format prescribed under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Rules, 1964 (**MOFA Rules**). Mr. Samdani would submit that the Competent Authority is a Tribunal of limited jurisdiction created under Section 11 of MOFA and that therefore it must exercise jurisdiction strictly in accordance with the said provision. That it cannot act as if it is a Civil Court by interpreting or adjudicating upon the terms and conditions of MOFA Agreement. That it has to decide application for deemed conveyance strictly in accordance with the terms and conditions of MOFA Agreement. In support, he would rely upon judgments of this Court in *New Sonal Industries Premises Ltd. Versus.*

District Deputy Registrar (2) Co-operative Societies and others⁵, New Manoday Co-operative Housing Society Limited Versus. Uday Madhavrao Jagtap & Ors.⁶ and Mazda Construction Company and others Versus. Sultanabad Darshan CHS Ltd. and others⁷.

13) Mr. Samdhani would submit that the word 'shall' used under the provisions of Section 11(4) of MOFA is required to be interpreted as 'may' as the Competent Authority is neither obliged nor bound to issue certificate of unilateral deemed conveyance. In support, he would rely upon judgment of the Apex Court in Ammal Chandra Dutt Versus. Second Additional District Judge and others⁸. He would submit that satisfaction would necessarily mean legitimate inference drawn from material placed before the Authority, which is relevant for the purpose. In support, he would rely upon judgment of the Apex Court in the case of S. R. Bommai and others Versus. Union of India and others⁹.

14) Lastly, Mr. Samdhani would rely upon judgment of the Hon'ble Apex Court in Arunkumar H. Shah HUF Versus. Avon Arcade Premises Co-operative Society Limited and others¹⁰ in support of his contention that the Competent Authority, while following the summary procedure, cannot conclusively and finally decide the question of title. He would therefore pray for setting aside of the impugned order.

15) Mr. Shetye, the learned counsel appearing for Petitioner in Writ Petition No.4649 of 2025 (Vijay CHS) would submit that the Competent Authority has grossly erred in granting the benefit of

⁵ WRIT PETITION NO.10548 OF 2024 DECIDED ON 12 FEBRUARY 2025.

⁶ WRIT PETITION NO.1421/2024 DECIDED ON 30 APRIL 2024.

⁷ 2012 SCC OnLine Bom 1266

⁸ (1989) 1 SCC 1

⁹ (1994) 3 SCC 1

¹⁰ 2025 SCC OnLine SC 828

setback area and right of way from Main SV Road in favour of Vijay-II CHS. The Competent Authority cannot *suo moto* grant right of way to one Society in a layout. That the limited jurisdiction of Competent Authority under Section 11 of MOFA does not encompass an enquiry into anything other than conveyance of land and building in favour of the Society. That complex issue of right of way cannot be adjudicated upon by the Competent Authority and that the same can be decided only by a Civil Court. He would submit that after acquisition of portion of land in the layout for DP Road, a road has been constructed in East-West direction and Vijay-II CHS has an independent access from such 30-meter-wide DP Road. That therefore Vijay-II CHS has absolutely no concern with the access from main SV Road. He would submit that no prayer was made by Vijay-II CHS in Application No.142 of 2024 for grant of right of way from main S.V. Road and that therefore the Competent Authority has clearly exceeded the scope of Application filed by Vijay II CHS. He would therefore submit that the impugned order of the Competent Authority be therefore set aside.

16) Both the Petitions are opposed by Mr. Raheja, the learned counsel appearing for Vijay-II CHS, in whose favour impugned order dated 12 November 2024 has been passed by the Competent Authority. He would submit that the objection of *res-judicata* sought to be raised by the Promoters is totally misplaced. That specific liberty was granted in favour of Vijay-II CHS to file fresh Application for conveyance while rejecting earlier Application No. 28 of 2023 vide order dated 25 September 2023. That earlier Application No. 28 of 2023 suffered from inherent flaw as the same was filed by Administrator who did not have authority to take major policy decision of applying for deemed conveyance. That once the Competent Authority found the Application to be fundamentally flawed on account of it being filed by incompetent

person, it ought not to have recorded findings on other issues relating to lease as well as area of land to be conveyed. That the findings recorded on other issues are otherwise required to be ignored once the application was held to be not maintainable. In support, he would rely upon judgment of the Apex Court in *Municipal Corporation of Greater Mumbai Versus. Pankaj Arora (Secretary) and others*¹¹. That there is no final adjudication of the issues relating to lease and area of land to be conveyed in favour of Vijay-II CHS and therefore there is no question of application of principle of *res-judicata*. He would submit that the Competent Authority rejected first Application for deemed conveyance vide order dated 25 September 2023 only on account of the same being filed by an incompetent person. Otherwise, the Competent Authority would have proceeded to grant leasehold rights in favour of Vijay-II CHS as was done in the case of Vijay CHS. That Vijay CHS had also applied for conveyance of land on ownership basis, but the Competent Authority granted leasehold rights in its favour. Similar course of action was not adopted in favour of Vijay-II CHS and application was rejected only because the same was found to be not maintainable. That the Competent Authority merely expressed opinion on other issues relating to lease and area of land to be conveyed, which cannot be construed as authoritative determination of the said issues. That there is no '*decision*' by the Competent Authority on the said issues, which remained open to be canvassed and decided in the fresh Application. That therefore the principle of '*issue-estoppel*' cannot be invoked in the present case. He would therefore submit that fresh Application filed by Vijay II CHS for deemed conveyance in accordance with liberty granted in order dated 25 September 2023 was perfectly maintainable.

¹¹ (2018) 3 SCC 699

17) Mr. Raheja would further submit that the contention of Promoters that the Society is entitled to only lease of land is contrary to the spirit of Section 11 of MOFA. That the Promoter is under legal obligation to transfer his right, title and interest in the land and building. That since Promoters are landowners, they must transfer their entire right, title and interest in the land in favour of the Society. In support he would rely upon judgments of this Court in *Gayatri Constructions Versus. State of Maharashtra through the Ministry of co-operation and Textiles Mantralaya and others*¹² and *Sarayu Properties & Hotels Pvt. Ltd. Versus. The District Deputy Registrar, Co-operative Societies & Anr.*¹³.

18) Mr. Raheja would further submit that Wing-D is a part of Building No.2 of Vijay II CHS. That Wing D of the Building is connected to other parts of the building and that it is not an independent structure. He would rely upon judgment of this Court in *Ravindra Mutneja and Ors. Versus. Bhavan Corporation and Ors.*¹⁴ in support of his contention that once a Wing touches the other parts of the Building, the same forms part of the same Building. He would submit that Wing D does not have any open space between it and Wings A, B, C, which would clearly indicate that it is part of entire Building No.2 and not an independent building or structure. He would rely upon sanctioned plan to demonstrate that only two buildings viz. Building No.1 and Building No.2 were taken up for construction and that Building No.2 has been sanctioned by the Municipal Corporation as comprising Wings A, B, C and D. That Promoters made representations to the Planning Authority about Building No.2 comprising of Wings A to D and accordingly got the plan sanctioned. That the entire Building No.2 comprising of Wings

¹² 2024 SCC ONLINE BOM 438

¹³ WRIT PETITION NO.10404 OF 2024 DECIDED ON 29 JULY 2024

¹⁴ MANU/MH/0169/2003

A to D were shown to consist of 41 residential units, one unit being situated in Wing-D. That there is absolutely no document on record to indicate that the Promoters ever submitted any plans to the Municipal Corporation for construction of Building No.3 in the layout. He would further submit that reliance on Promoters on Clauses 14(a) and 14(b) of the MOFA Agreement dated 29 August 2003 showing alleged retention of land admeasuring 222 sq. mtrs. for construction of separate building is totally misplaced. That in any case, the Promoters utilised the alleged retained portion of land for construction of Wing-D in Building No.2. That irrespective of covenants of MOFA Agreement, the ground reality is that no separate structure is constructed by the Promoters apart from Building Nos.1 and 2. He would submit that under Section 11 of MOFA, what is required to be conveyed is not just land but also the Building. That the Building has to be constructed as per plans and specifications under Section 7 of MOFA. That therefore, the manner of construction of Building would ultimately be the determinative factor for deciding whether any separate conveyance could be made in respect of retained portion of land. That therefore building constructed in accordance with plans and specifications becomes the determinative factor and since the Promoters are under legal obligation to convey entire Building No.2 comprising of Wings A to D, the land used for construction of Wing D will have to be necessarily conveyed to Vijay-II CHS. That purchasers of flats in Wing D purchased the same with their eyes wide open that they were part of same Building No.2 as sanctioned by the Municipal Corporation. That merely because they have opted not to accept membership of Vijay-II CHS is an irrelevant factor. That membership can always be granted to them and right of conveyance would not depend on choice exercised by them of not becoming a member of Vijay-II CHS. He would rely upon judgment of the Hon'ble Apex Court in Jayantilal Investments Versus. Madhuvihar Coop. Housing Society

and others¹⁵ to demonstrate that an order of remand was made by the Hon'ble Apex Court for deciding the issue as to whether the project comprised of seven independent buildings are part of one building with seven Wings. That Co-ordinate Bench of this Court in Madhuvihar Cooperative Housing Society and others Versus. M/s. Jayantilal Investments and others¹⁶ ultimately held that the project comprised of single building comprising of seven Wings interlinked to each other. Following the dictum of the said judgment, in the present case as well, Wing D is required to be treated as part of Building No.2 since all the Wings are interlinked.

19) Mr. Raheja would further submit that the Promoters filed application for registration of Vijay-II CHS by making a declaration that Building No.2 comprises of 41 flats. That Promoters reside in one flat constructed in Wing-D, which is the 41st flat in Building No.2. That the very fact that the Promoters participated in formation of the Society would leave no manner of doubt that they always treated Wing-D as part of the same Building even for formation of the Society. That there is no interpolation with the Application made for registration as correction of number 40 to 41 has been countersigned. That certified true-copy of registration form was produced before the Competent Authority and therefore there is no question of any interpolation.

20) On the issue of scope of enquiry under Section 11 of MOFA, Mr. Raheja would contend that the enquiry is not restricted by covenants of the agreement and the Competent Authority can conduct requisite enquiry in order to ensure that the land and the building is conveyed in favour of the Society. That satisfaction to be recorded by the

¹⁵ (2007) 9 SCC 220

¹⁶ First Appeal No.786 of 2004, decided on 7 October 2010

Competent Authority under Section 11(4) of the MOFA is only with regard to the factor of construction of building in accordance with MOFA and once it is found that the building is subjected to the provisions of MOFA, the Competent Authority is bound to convey land and building as per the statutory scheme. That statutory right of Society to have deemed conveyance of land and building will prevail over contractual right created under MOFA Agreement. That Form-V under MOFA Rules mandates conveyance of land and building in favour of Society and that the Competent Authority is entitled to grant conveyance even it is noticed that the MOFA Agreement has not been executed in accordance with Form-V. He would submit that the expression '*in accordance with the agreement executed under section 4*' used under Section 11 (1) of the MOFA refers to the period specified for conveyance and that the same does not apply to promoter's right, title and interest in the land and building. Lastly, Mr. Raheja would rely upon judgment of the Apex Court in *Arunkumar S. Shah HUF* (supra) in support of his contention that this Court would be loathe in interfering in order of deemed conveyance in absence of any manifest illegality involved in the order of Competent Authority.

21) So far as Petition filed by Vijay CHS is concerned, Mr. Raheja would submit that access road to the entire layout from main S.V. Road has been sanctioned by the Planning Authority and mere creation of additional access from 30 meters wide DP Road would not mean that Vijay II CHS would lose right of access from main S.V. Road. That access from main S.V. Road connects all the Buildings in the layout and also grants access to Vijay CHS to recreational ground. He would therefore submit that Petition filed by Vijay CHS is grossly misconceived and liable to be dismissed. Mr. Raheja would accordingly pray for dismissal of both the Petitions.

22) In Rejoinder, Mr. Samdani would contend that mere interlinking of two buildings in a layout does not mean that they become part of a singular structure. That modern trend permits construction of multiple buildings with common podium, and formation of separate Societies in respect of each such buildings. That under the Circular dated 30 July 2004, it is permissible to form separate Co-operative Societies in respect of each wing of one singular Building. That therefore the flat occupiers of Wing-D are entitled to form their own Association of Apartments. He would therefore submit that attempt on the part of Vijay- II CHS in grabbing the Building of Wing-D and land proportionate to its built-up area is clearly illegal. That Wing-D is a bungalow, which has never been treated as part of Building No.2 of Vijay II Society and it is only at the time of seeking deemed conveyance, Vijay II CHS is attempting to grab both Buildings as well as land retained for construction of the said bungalow. He would submit that interpretation of the concept of additional structure made by Courts for application of provisions of Sections 7 and 7A of MOFA is totally irrelevant for deciding entitlement for deemed conveyance under Section 11 of MOFA as separate Societies can be formed in respect of different wings of same building. That though all wings may be treated as part of same building/structure for the purpose of application of Section 7 of MOFA, it is permissible to separate each wing for the purpose of seeking deemed conveyance by forming different Societies. He would disagree with contention of Mr. Raheja that use of expression '*in accordance with the agreement executed under Section 4*' is in the context of timeline for execution of deemed conveyance and would submit that use of the word '*and*' between the manner of execution of conveyance and period of execution of conveyance clearly shows that the two concepts are disjunctive. He would therefore submit that conveyance cannot be executed in any other manner than in accordance with agreement executed under Section 4 of the MOFA.

D. REASONS AND ANALYSIS

23) Having considered the rival submissions canvassed by the learned counsel appearing for parties, it is seen that the impugned order dated 12 November 2024 passed by the Competent Authority is sought to be assailed by the Promoters on three major counts of:

- (i) the application being barred by principles of *res-judicata*,
- (ii) the Competent Authority exceeding its jurisdiction under Section 11 of MOFA by granting conveyance of ownership rights in the land contrary to the covenant in the MOFA agreement for grant of leasehold rights, and
- (iii) erroneous area of land being conveyed in favour of Vijay-II CHS by treating Wing-D as a part of Society's building.

On the other hand, Vijay CHS has assailed the order of the Competent Authority on the limited issue of grant of benefit of setback area and right of way from main SV Road. Each of these points are taken up for consideration.

D.1 RES-JUDICATA

24) The impugned order dated 12 November 2024 passed by the Competent Authority is sought to be assailed by the Promoters on the ground of *res-judicata*. The objection of *res-judicata* is premised on previous Application No. 28/2023 filed by Vijay-II CHS and its rejection vide order dated 25 September 2023. It is contended on behalf of the Promoters that the Competent Authority has conclusively decided the issues relating to society's entitlement for assignment of only leasehold rights in the land and exclusion of Wing-D building and land utilised for its construction from deemed conveyance. It is contended that there

are conclusive findings recorded by the Competent Authority on the above issues which operate as *res-judicata* and the same could not have been agitated again in Application No.142/2024. It is the case of the Promoters that grant of liberty in favour of Vijay-II CHS vide order dated 25 September 2023 did not include liberty to re-agitate conclusive findings recorded on the above issues.

25) To consider the objection of *res-judicata* raised on behalf of the Promoters, it would be necessary to consider the order dated 25 September 2023 passed by the Competent Authority rejecting society's first application. Application No.28/2023 was filed by Vijay II CHS with following pleadings and prayer :

2.The said Society is in possession of a parcel of land Property bearing CTS No. 48, Survey No. 2, Hissa No.1, Behind Punjab National Bank, Opp. Punit Nagar, Borivali (W), Mumbai - 400092. of admeasuring area about 1919.00 sq.mtrs., as per the subdivision made by city survey office on 18-10-1984 (hereinafter referred to as "the suit Premises "). hereto annexed and as marked Ex. 'No. 1' is the certified copy of the Registration Certificate of the said Society.

6.Accordingly, this Competent Authority be pleased to issue a certificate of entitlement of unilateral conveyance of land Property bearing CTS No. 48, Survey No. 2, Hissa No.1, Behind Punjab National Bank, Opp. Punit Nagar, Borivali (W), Mumbai 400092. of admeasuring area about 1919.00 sq.mtrs., in favour of the Applicant as the same falls within jurisdiction of this Hon'ble Competent Authority.

8.The Applicant therefore prays that:

a)This Hon'ble Competent Authority be pleased to grant a Certificate that the Applicant Society is entitled to have an unilateral deemed conveyance of suit premises under section 11 (3) of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Rules, 1963 and to have it registered.

26) Vijay-II CHS thus sought unilateral deemed conveyance of land admeasuring 1919 sq.mtrs in the layout. The conveyance of land was sought on ownership basis. The application was filed by Bharat

Lalwani, authorised officer appointed by the Board of Administrators for Vijay-II CHS. Application No.28/2023 was opposed by the Promoters and Vijay CHS on various grounds. Application No.28/2023 was rejected by the Competent Authority vide order dated 25 September 2023 by recording following findings :

18. On perusal of the above submissions and documents submitted by the applicants/the concerned parties, it is observed that-

i.

ii.

iii. By an another Order 28.11.2022 passed by the Deputy Registrar Cooperative Societies R North Ward, the Board of Administrator was appointed on the applicant society and the applicant society has submitted a revised applicaton Form no. VII which is signed by the Board of Administrator. The Administrator/ board of administrator have a very limited role to play and that it cannot be authorized for filing an Application seeking Deemed Conveyance as its duty is very limited only concerning the day to day administration of the Society only to keep the society's affairs running and that too the Administrator's term is generally only for six months with only limited powers. On this ground, the present Deemed Conveyance Application is liable to be dismissed.

iv. I have carefully perused the approved plans of the Applicant Society building and the certificate of the Architect certifying the entitlement of the Applicant society building and the agreement for Sale in respect of one the flat holders in the Applicant Society building as also the certificate of the Architect Mr. Vijay Goradia.

v. It can be observed from the aforesaid documents as under:

a. That the approved plans show that there are three buildings on the larger land. The Applicant Society building known as Vijay II, the adjoining building being Vijay Apartment and the owners building known as wing 'D'.

b. That is expressly recorded in the flat Agreement that the Applicant Society would be granted a lease of 99 years at yearly rent of Re. 1/- .That the Owners have retained an area of 222 sq. mtrs for themselves.

d. That the certificate of the Architect of the Architect has issued the certificate of entitlement for the two building i.e. the Applicant Society building and adjoining building in that the third structure i.e.. owners/structure is not been considered.

e. That the Certificate of the Architect has not taken into account the retained area of the owners and has come to an erroneous conclusion and has certified the entitlement of the Applicant Society building and the adjoining building conveniently ignoring the 3rd connected building known as wing 'D'. Upon

careful examination of the Architect's report provided by Mr. Aniket Mathakar it has become evident that the calculation of certain key parameters, pivotal to the evaluation of the application, is erroneous.. This miscalculation has led to an inaccurate representation of the Applicant Society, and not in compliance with the GR dated 22nd June, 2018.

vi. The application submitted by the concerned party, which also includes the certificate of the Architect, is marred by significant legal shortcomings as wing D is not considered separately. However, the Certificate of the Architect Mr. Vijay Goradia shows the true and correct calculations and entitlement of all the stake holders in the property.

vii. The term "violation of the agreement" refers to a breach or contravention of a legally binding contract or agreement that governs the rights, obligations, and responsibilities of the parties involved. Such violations can range from failure to adhere to specific terms and conditions to actions that are expressly prohibited by the agreement. When an application is submitted in violation of an agreement, it suggests that the party may have acted in a manner inconsistent with the terms they had previously agreed to. Thus it can be surmised that the Applicant Society applied for conveyance of the land and building whereas they were entitled to a Lease in accordance with the individual Agreement and that too without considering the retained area of 222 sq.mtrs.

viii. Reliance is placed in the decisions of the Hon'ble Bombay High Court in Mazda Construction Vs. Sultanabad Darshan CHS Ltd., (2012 SCC OnLine BOM 1266), which reads thus:

"21. The first submission of Mr. Samdani must, therefore, fail as the guidance is inbuilt in the scheme of the statutory provisions. However there is much substance in the contentions of Mr. Samdani with regard to the Competent Authority over stepping its limits in this case. The Competent Authority ought to have seen the agreement with the members of the Respondent No. 1. It ought to have taken into account the entitlement of the parties in terms of that agreement. If that agreement stipulates the conveyance of right, title and interest of the promoters in the land and building, which was not crystallized therein, but clauses thereof contemplate sub-division of the plots and refers to a layout which enables the construction of further buildings, then, that is a stipulation which binds both sides and which cannot, therefore, be overlooked in this case.

ix. Thus, in light of what has been recorded in the aforesaid matter, the parties must adhere to the terms of the agreement.

x. It can also be observed that the bungalow was shown in the original OC Layout Plan dated 10th May 1989 as Wing D. Moreover, it was an undisputed position that members of Wing D which is in the rear side of the larger layout were not part of the Applicant Society building but since the entitlement of all the stake holders is based on the Agreement and the plan the calculations would impact the applicant Society.

xi. In view of the aforesaid observations, although the application of Unilateral Deemed Conveyance appears to be faulty, the Applicant Society

cannot be deprived of their legitimate right under the Agreement ie. the lease of the land. Several years have elapsed from the date of Registration. Thus, hold that that the Applicant Society would be entitled to Lease of the land to be worked out on prorata basis as per the GR dated 22nd June, 2018. However the entire retained area of 222 sq.mtrs cannot be deducted as there appears to be a setback area. The certificate issued by Mr. Vijay N. Goradia can be accepted. As regards the area to be leased to the Society the same can be worked out as under without depriving the rights of all stake holders in the property.

Sr. No	Building No.	FSI used	%	Prorata net plot (sq.mt)	15% RG	Total Land as available on site	Setback/DP Road area benefit
1	1	1524.77	44.603%	1230.45	217.14	1447.59	295.32
2	2 (Wing A, B and C)	1733.62	50.714%	1399.04	246.89	1645.97	335.78
3	2 (Wing D)	160.09	4.683%	129.18	22.80	151.98	31.01
		3418.48		2758.67	486.83	3245.50	662.11

Further, it is observed that the applicant society has not specified the correct/exact area in respect of which it is seeking order of unilateral deemed conveyance / lease and, therefore, it would not be advisable to entertain the aforesaid application for unilateral deemed conveyance. Thus it is clear that the the Applicant Society has sought incorrect area which is without considering the entitlement of Building No.2 (Wing D) and also the architect's certificate submitted by applicant society is based on assumptions and not on the basis of the approved plans as recorded in the certificate of the Architect. At the time of certification, duty is cast upon the Architect to enlighten this Authority at arriving at the true and correct areas and/or to verify the correct areas of the Applicant society and not grant random certificate without any basis.

27) However, while rejecting Application No.28/2023 by order dated 25 September 2023, the Competent Authority granted liberty to Vijay-II CHS to file fresh application for deemed conveyance by making following observations in para-19 of the order and by passing following operative order :

19. In view of the aforesaid observations, allowing aforesaid application of the applicant society on the basis of a faulty application and unreliable certificate of the Architect would tantamount to overlooking / ignoring the (inherent flaw in the aforesaid 'application and the architect certificate and, therefore, it would be in the fitness of things to reject the aforesaid application with liberty to applicant society to file afresh a new application after complying with the requisite formalities and 'documentation as also considering the observations made hereinabove.

Hence, I pass the following order.

ORDER

In exercise of the powers conferred upon me U/s 5A of the Maharashtra Ownership Flats Act, 1963, I, Kailas Jebale, the Competent Authority & District Deputy Registrar, Co-operative Societies, Mumbai City (4), hereby reject the Application No. 28 of 2023 of the Vijay II Co-op. Hsg. Soc. Ltd., CTS No. 48, Survey No. 2, Hissa No. 1, Behind Punjab National Bank, Opp. Punit Nagar, Borivali (W), Mumbai 400092 with liberty to file afresh

This Order is passed under my seal and signature.

28) Perusal of order dated 25 September 2023 passed by the Competent Authority would indicate that the principal reason for rejection of the application was incapacity on the part of Board of Administrators to file application for deemed conveyance. In para-18(iii), the Competent Authority specifically observed that the application was liable to be dismissed on the ground of Form-VII being signed by the Board of Administrators. The Competent Authority held that the Board of Administrator had very limited role to play and was not authorised to file application seeking deemed conveyance. The application was held to be '*faulty application*' in para-19 of the order.

29) However, after holding that the application was liable to be rejected on the ground of it being filed by the Board of Administrators, the Competent Authority also went into few other issues. It ruled that there are three buildings in the layout viz. Vijay, Vijay-II and owner's building known as Wing-D. It held that Wing-D could not be considered separately. That the members of Wing-D building were not part of Vijay-II CHS. That land admeasuring 222 sq.mtrs. was required to be excluded for owner's building Wing-D. The Competent Authority

further held that Vijay-II CHS was entitled to only lease in accordance with the agreements executed under Section 4 of MOFA. This is how the application filed by Vijay-II CHS was held to be '*faulty*' in para-19 of the order. However, the Competent Authority held that the Society could not be deprived of its legitimate right under the Agreement of securing lease of land on *pro rata* basis as per Government Resolution dated 22 June 2018. The Competent Authority however rejected objection of the Promoters that land admeasuring 222 sq.mtrs. needs to be deducted and held that there was a setback area in the layout. The authority proceeded to accept certificate issued by the Promoter's Architect-Mr.Vijay M. Goradia and worked out *pro rata* land area for each of the three buildings and held that Vijay-II CHS was entitled to lease of 1399.04 sq.mtrs. plus share in RG area of 246.89 sq. mtrs (*total land of 1645.97 sq.mtrs*), in addition to setback area/DP road area benefit of 335.78 sq.mtrs. The Competent Authority held that Vijay-II Society sought incorrect area without considering the entitlement of Wing-D building. This is how the Competent Authority proceeded to deal with on some of the issues on merits even though it found the application of Vijay II CHS to be not maintainable as the same was filed by the Board of Administrators.

30) The Competent Authority has undoubtedly granted liberty to Vijay-II CHS to file fresh application for deemed conveyance. The liberty is granted in para-19 of the order, as well as in its operative portion. It is contended by Mr. Samdani that qualified liberty was granted by the Competent Authority for filing of fresh application '*considering the observations made hereinabove*'. It is therefore contended that the application could only have been made for grant of leasehold rights in the land area determined by the Competent Authority in para-18(xi) of order.

31) There is thus no doubt that fresh application for deemed conveyance was maintainable in view of liberty granted by the Competent Authority. This leaves the issue as to whether such liberty was to be exercised for seeking only leasehold rights in the area of land determined in the order dated 25 September 2023 or whether all issues could be reagitated in the fresh application?

32) As observed above, Application No.28/2023 filed by Vijay II CHS was found to be faulty essentially on account of the Board of Administrators signing Form-VII. The Competent Authority proceeded to dismiss the application on the ground that Board of Administrator did not have authority to take major policy decision of filing application for deemed conveyance by holding that the Administrator could only take decision for managing day-to-day affairs of the Society. In my view, once the application was held to be not maintainable, the Competent Authority could not have gone into other contentious issues between the parties on merits. Once the application was found to be faulty and once it was held that the person signing the same did not have authority to do so, the Competent Authority ought to have dismissed the application on that ground alone. It could not have gone into merits of contentious issues raised by the parties. The approach of the Competent Authority in proceeding to deal with some of the contentious issues on merits after holding the application to be not maintainable creates confusion between the parties. The Competent Authority undoubtedly granted liberty to Vijay-II CHS to file a fresh application for deemed conveyance. Therefore, ordinarily there was no necessity for Vijay-II CHS to challenge order dated 25 September 2023. Though it is strenuously sought to be contended on behalf of the Promoters that findings are recorded by the Competent Authority in order dated 25 September 2023 against Vijay-II CHS on issues relating to conveyance

of leasehold rights and area of land and that therefore it ought to have challenged the said findings, in my view it was not necessary for Vijay-II CHS to do so in the light of peculiar facts and circumstances of the present case. The application of Vijay-II CHS was held to be not maintainable essentially on account of it being filed by Board of Administrator who did not have authority to do so. Otherwise, Vijay CHS had contemporaneously filed application for conveyance of land on ownership basis in its favour. Application No. 265/2022 filed by Vijay CHS was allowed 10 days prior to passing of order dated 25 September 2023. In order dated 15 September 2023 passed in the case of Vijay CHS, Competent Authority granted lease in its favour, even though the said Society had sought assignment of land on ownership basis. The Competent Authority could have followed similar course of action while deciding Application No. 28/2023 filed by Vijay-II CHS. The area calculations made in both the orders dated 15 September 2023 and 25 September 2023 are also same. Thus, the only thing that deterred the Competent Authority in deciding Application No. 28/2023 filed by Vijay-II CHS on merits was inherent flaw in the form of application being filed by an incompetent person. If the Competent Authority was to decide Application No. 28/2023 filed by Vijay-II CHS on lines of order dated 15 September 2023 passed in Application No. 265/2022 filed by Vijay CHS, the order dated 25 September 2023 could have been challenged by Vijay-II CHS both on the grounds of assignment of leasehold rights, as well as incorrect land area assigned. The Competent Authority however prevented Vijay-II CHS from challenging order dated 25 September 2023 as it granted liberty to the Society to file fresh application after removal of defect of signature on the application by unauthorised person. In the light of these peculiar facts and circumstances of the case, in my view, Vijay II CHS had full and complete opportunity to file a fresh application for deemed conveyance and nothing observed in order dated 25 September 2023 would operate

as *res-judicata* for deciding fresh Application No.142/2024. It appears that the Competent Authority has unnecessarily copied various findings of order dated 15 September 2023 passed in the case of Vijay CHS while rejecting application of Vijay-II CHS vide order dated 25 September 2023. This appears to have been done because of narrow gap of days in the two orders.

33) Strenuous reliance is placed by Mr. Samdani on judgment of the Apex Court in *Faime Makers Pvt. Ltd.* (supra) in support of the objection of *res-judicata*. The Apex Court has held in paras-7 to 14 of the judgment as under :

7. Having considered these submissions and having perused the order dated 22.02.2021, we have no hesitation to hold that there was no unconditional liberty granted to respondent No.2-Society to apply for the unilateral assignment of leasehold rights. The order dated 22.02.2021 is very clear that complications had arisen because of various transactions inter se parties at different points of time. The relevant facts have already been noted in the earlier part of this judgment.

8. The relevant extract of the order dated 22.02.2021, whereby the application was dismissed for the reasons given therein, with liberty to apply afresh after sorting out the issues, is reproduced hereunder:

“...Therefore, the petitioner has to appeal to the appropriate court in this regard. As there is a legal complication in this case, the authority will not be able to make a human transfer in the name of the applicant society. Due to this, the applicant society should only demand assignment of leasehold claim and also the competent court should resolve the legal issues related to the transfer of the name of the respondent No.3 of the rate of income.

It is not possible to transfer the leasehold right of the said property in the name of the applicant Society unless these matters are settled. Therefore, I am convinced that after the settlement of these matters, the applicant should be allowed to re-apply for the human transfer of the leasehold rights of the said property and the application submitted by the applicant Society should be rejected.”

9. A plain reading of the above findings of the Competent Authority in its order dated 22.02.2021 leaves no manner of doubt that respondent No.2-Society could approach the Competent Authority afresh for the unilateral assignment of leasehold rights only after getting the complications sorted out before the appropriate Court. The order clearly indicates that the competent authority could not grant leasehold rights under the existing set of facts until

and unless the complications were sorted out.

10. There is no explanation from the side of respondent No.2-Society with respect to the above findings of the Competent Authority recorded in the order dated 22.02.2021, as to why the same was not challenged before a superior forum. Once the said order has been accepted by the parties and has attained finality, the Competent Authority would not have jurisdiction to entertain a second application contrary to the findings and directions given by the Competent Authority in the first order.

11. It has been settled by this Court that the principle of *res judicata* applies to and binds quasi-judicial authorities. This Court in *Ujjam Bai vs. State of U.P.* has taken the view that principles of *res judicata* equally apply to quasi-judicial bodies. Whenever a judicial or quasi-judicial tribunal gives a finding on law or fact, its findings cannot be impeached collaterally or in a second round and are binding until reversed in appeal or revision or by way of writ proceedings. The characteristic attribute of a judicial act or decision is that it binds, whether right or wrong. Thus, any error, either of fact or law, committed by such bodies cannot be controverted otherwise by way of an appeal or revision or a writ unless the erroneous determination relates to the jurisdictional matter of that body.

12. This position has been further reinforced in *Abdul Kuddus vs. Union of India and others* which relies upon *Ujjam Bai* (supra). In *Abdul Kuddus* (supra), this Court held that the opinion by the Foreigners Tribunal is a quasi-judicial order. Therefore, it would be incorrect to hold that the opinion of the Tribunal and/or the consequential order passed by the Registering Authority would not operate as *res judicata*. Further, it was established that any quasijudicial Authority would not ordinarily have the power to unilaterally take a contrary view taken by a coordinate or predecessor authority at an early point in time.

13. From the foregoing discussion, it is evident that once a Competent Authority (quasi-judicial in nature) settles an issue, that determination attains finality unless it is set aside in accordance with law.

14. In our opinion, the High Court erred in giving a different interpretation to the above text of the first order dated 22.02.2021. The High Court had extracted the above findings, conclusions, and directions in its impugned order but still moves on to hold that unconditional liberty was given to respondent No.2-Society, which in our opinion, was not correct.

34) In *Faime Makers Pvt. Ltd.*, the Apex Court held that the Competent Authority had granted liberty to file fresh application in its previous order dated 22 February 2021 only after getting the complications sorted out before the appropriate Court. The case thus involved complicated issues of title and Society's entitlement to have leasehold rights conveyed in its favour was thus questionable. Therefore, the Competent Authority observed that the Society must get the legal complications resolved from Court of competent jurisdiction

and then file fresh application for unilateral deemed conveyance. In *Faime Makers Pvt. Ltd.* several suits were pending claiming rights in respect the land on which Society's building was situated. In the present case, admittedly there is no litigation pending in respect of the land in the layout. The case does not involve solving of any complicated issues relating to title between third parties by a Civil Court as was the case in *Faime Makers Pvt. Ltd.* In my view therefore, the judgment in *Faime Makers Pvt. Ltd.* would have no application to the facts of the present case where clear liberty is granted in favour of Vijay II CHS for filing fresh application after removal of defect of signing Form No. VII by unauthorised person.

35) Mr. Samdani has relied on judgment of the Apex Court in *Bhanu Kumar Jain* (supra) in support of his contention that findings recorded by the Competent Authority in order dated 25 September 2023 on the issues of assignment of leasehold rights, as well as area of land would operate as *issue estoppel*. The Apex Court held in paras-29, 30, 31, 32 as under :

29. There is a distinction between "issue estoppel" and "res judicata". (See *Thoday v. Thoday* [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] .)

30. Res judicata debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine issue estoppel is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of res judicata creates a different kind of estoppel viz. estoppel by accord.

31. In a case of this nature, however, the doctrine of "issue estoppel" as also "cause of action estoppel" may arise. In *Thoday* [(1964) 1 All ER 341 : (1964) 2 WLR 371 : 1964 P 181 (CA)] Lord Diplock held: (All ER p. 352 B-D)

"... 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous

litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given on it, it is said to be merged in the judgment.... If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam."

32. The said dicta was followed in *Barber v. Staffordshire County Council* [(1996) 2 All ER 748 (CA)] . A cause of action estoppel arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event the bar is absolute in relation to all points decided save and except allegation of fraud and collusion. [See *C. (A Minor) v. Hackney London Borough Council* [(1996) 1 All ER 973 : (1996) 1 WLR 789 (CA)] .]

36) The judgment in *Bhanu Kumar Jain* deals with the issue of permissibility for a Defendant to file a substantive Appeal under Section 96(2) of the Code of Civil Procedure, 1908 against *ex-parte* decree in the light of availability of remedy of setting aside the same under Order IX Rule 13 of the Code. In fact, the Apex Court has refused to apply the doctrine of *issue estoppel* in the facts of the case and has held that even after rejection of application for setting aside *ex-parte* decree under Order IX Rule 13 of the Code, the Defendant is entitled to file substantive Appeal challenging *ex-parte* decree under Section 96(2) of the Code. The judgment in *Bhanu Kumar Jain* in my view would not assist the case of the Promoters. It is difficult to hold that there is adjudication of issues relating to assignment of leasehold rights, as well as area of land in the order dated 25 September 2023. The application itself was held to be not maintainable. Ordinarily, the Competent Authority ought to have avoided dealing with the other contentious issues on merits. Therefore, though it has made observations relating to issues of assignment of leasehold rights and area of land to be conveyed, such observations would not operate either as *estoppel* or *res-judicata* against Vijay II CHS.

37) In *Municipal Corporation of Greater Mumbai Versus. Pankaj Arora* (supra), the Apex Court has held that once the case is held to be not maintainable, the Court does not have jurisdiction to make further observations on merits. The Apex Court held in paras-15, 16 and 19 as under :

15. There is no dispute that the rule of res judicata in common law, from *Ferrer v. Arden*, (1598) 77 Eng. Rep. 263, to recent precedents of this Court, has been accepted as a universal rule of law emanating from the public policy¹ to limit excessive and unnecessary litigation. It may not be an overstatement to state that the principle of res judicata is as old as the law itself. The extent of application of res judicata in a country, on a comparative analysis of foreign jurisprudence, depends on various considerations such as efficiency, fairness, and substantive policies, but across the board a minimal core seems to be well preserved.

16. We may note that 'issue estoppel or collateral estoppel', which is a part of principle of res judicata, has often been agitated resulting in bevy of decisions across Indian, English and American jurisprudence and has created large voluminous records of academic literature. It may not be beneficial herein to restate the entire law on this aspect, rather we restrict ourselves within the narrow scope in which this case falls.

19. It is apparent from the perusal of the impugned order that the High Court stretched the ambit of 'finality' for some observations to the saying (relating to collateral aspects) that every such observation was final unless reversed in appeal, which had an effect of throttling the substantive justice out of life. We cannot approve such reasoning of the High Court that the issue had attained finality, since the observations were made by a court which went against its own findings that the court did not have any authority/jurisdiction to do so. **Once the court concludes that a case is not maintainable under Section 378 of CrPC, it did not have any jurisdiction to make further observations on merits as has been done in this case.**

(emphasis added)

38) In my view therefore, the Competent Authority could not have made any observations on merits of the application in the order dated 25 September 2023 once it proceeded to dismiss the same on the ground of the same being filed by Board of Administrators, which had no authority to do so. The observations made in the order dated 25

September 2023 would therefore not apply as either *issue estoppel* or *res-judicata* against Vijay II CHS. Reliance is placed on judgment of the Apex Court in *Sulochana Amma* (supra) in support of the contention that principle of *res-judicata* would apply to the Competent Authority, which is a Tribunal of limited jurisdiction constituted under Section 11 of MOFA. There can be no dispute about this proposition that principle of *res-judicata* would apply to orders passed by the Competent Authority in exercise of jurisdiction under Section 11 of MOFA. The issue here is however slightly different. If no liberty was granted by the Competent Authority in order dated 25 September 2023, and if the application was rejected on merits, the same would have applied as *res-judicata* and would have barred subsequent application for deemed conveyance. However, the Competent Authority did grant liberty to file a fresh application and therefore subsequent Application No. 142/2024 was not barred by *res-judicata*.

39) The judgment in *Gulam Abbas* (supra) is relied upon in support of the contention that decision on concerned issues between the same parties must operate as a bar to any subsequent agitation of the same issues between the same parties on general principle of *res-judicata*. While there can be no dispute about this proposition, the issue for consideration in the present case is whether the Competent Authority could have decided merits of the case while passing order dated 25 September 2023 once it has held that the application itself was not maintainable. Therefore, it cannot be said that unnecessary observations made by the Competent Authority on few issues in order dated 25 September 2023 would tantamount to a '*decision*' on issues. The real and the only '*decision*' in the order dated 25 September 2025 was not to entertain the application due to defect in filing.

40) Reliance of the Petitioners on judgment of the Apex Court in *Hope Plantations Ltd.* (supra), far from assisting their case, actually militates against them. Reliance is placed on the observations of the Apex Court in para-26 of the judgment as under :

Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice.

41) As a matter of fact, the issue of applicability of legal principles of *estoppel* and *res-judicata* in proceedings before the administrative authorities is wholly irrelevant to the present case as the Competent Authority exercising jurisdiction under Section 11 of MOFA, no longer functions as a mere administrative authority but it exercises quasi-judicial powers by acting as a Tribunal of limited jurisdiction. However, what is relevant to note are the observations made by the Apex Court in para-31 of the judgment in *Hope Plantations Ltd.* wherein it has held that if the law is interpreted differently by a higher forum, the principles of *res-judicata* or *estoppel* do not apply. The Apex Court has held in para-31 as under :

31. Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum. But that situation does not exist here. Principles of constructive res judicata apply with full force. It is the subsequent stage of the same proceedings. If we refer to Order XLVII of the Code (Explanation to Rule 1) review is not permissible on the ground

“that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent

decision of a superior court in any other case, shall not be a ground for the review of such judgment”.

42) Relying on observations made by the Apex Court in para-31 of the judgment in *Hope Plantations Ltd.*, Mr. Raheja has contended that after rejection of first application by the Competent Authority on 25 September 2023 holding that Vijay-II CHS is entitled to only leasehold rights, this Court delivered judgment in *Gayatri Construction* (supra) and *Sarayu Properties & Hotels Pvt. Ltd.* (supra) on 5 February 2024 and 29 July 2024 respectively holding that if the Promoter is a land owner, assignment of leasehold rights is impermissible. This aspect is being dealt with in latter part of the judgment while dealing with the issue of assignment of leasehold rights. Thus, reliance by Mr. Samdani on judgment of the Apex Court in *Hope Plantations Ltd.* does not assist the case of the promoters.

43) The objection of *res-judicata* raised on behalf of the Promoters about maintainability of Application No.142/2024 filed by Vijay II CHS is accordingly rejected and it is held that the Competent Authority was entitled to decide all issues on merits in Application No. 142/2024 and nothing observed in previous order dated 25 September 2023 either operated as *res-judicata* or *estoppel* against the Society.

D.2 ASSIGNMENT OF LEASEHOLD RIGHTS OR OWNERSHIP RIGHTS IN LAND

44) It is contended on behalf of the Promoters that Vijay II CHS, at the highest, is entitled to assignment of only leasehold rights in proportionate portion of land in the layout. Reliance is placed on Clauses-14(a) and 14(b) of Agreement for Sale executed with flat

purchasers, who are members of Vijay II CHS. Clauses-14(a) and 14(b) of Agreement dated 29 August 2003 executed between M/s. Vijay Builders and Nandkumar Maruti Shilwant and Vadana Nandkumar Shilwant read thus :

14(a). It is agreed that the Developers shall demise the said property together with the buildings constructed thereon by the Developers namely Vijay Apartment No.1 and Vijay Apartment No.2 excluding an area on the backside of the said premises of 222 sq.mtrs. or thereabouts retained by the Developers for themselves to a Co-operative Society or a Limited Company or such other organisations of the flat holders of Vijay Apartment No.1 and Vijay Apartment No.2 for a period of 99 years at an yearly rent of Re.1/- provided that the Developers also shall have option to form two co-operative societies or limited companies or such other organisations of the flat holders of Vijay Apartment No.1 and the flat holders of Vijay Apartment No.2 and demise separately a portion of the said property together with Vijay Apartment No.1 to the Society or Limited Company or common organisation of flat holders of Vijay Apartment No.2 and another portion of the said property together with Vijay Apartment No.2 may be decided by the Developers in their absolute discretion. Provided that the lease or lesses as the case may be shall provide for a right of way to the Developers to pass and re-pass with or without vehicles to the said area of 222 sq.mtrs. on the backside of the said property but forming part of the said premises.

14(b). It is agreed that the said two buildings namely Vijay Apartment No.1 and Vijay Apartment No.2 will consume FSI of about 3673 sq.mtrs. The Co-operative Society or limited company or such other organisation of the flat holders of Vijay Apartment No.1 and Vijay Apartment No.2 shall not be entitled to any additional FSI then consumed in construction of Vijay Apartment No.1 and Vijay Apartment No.2 respectively. Any additional FSI that may be available in respect of the said premises namely 3673 sq.mtrs. of land or the said property will be owned and utilised by the Developers in development of the said area on the back side of the said premises of about 222 sq.mtrs. retained by them for construction of the building or buildings thereon as may be sanctioned by the Municipal Corporation. It is agreed that the said area on the back side of the said premises of 222 sq.mtrs. together with the building or buildings constructed thereon shall remain in exclusive possession and ownership of the Developers with the right to deal with or dispose of the same in such manner as the Developers may in their discretion deem fit.

45) It appears that the similar agreements were executed with other flat purchasers, who are members of Vijay-II CHS. Thus under agreements executed with the flat purchasers under Section 4 of MOFA, the Promoters agreed to demise the land together with buildings constructed thereon (*Vijay Building I and Vijay Building II*) excluding the

area admeasuring 222 sq.mtrs. in favour of a Co-operative Society for a period of 99 years on a yearly rent of Rupee 1/-. It is therefore contended that the Agreement executed under Section 4 of MOFA contemplates grant of lease in favour of Vijay-II CHS for a tenure of 99 years on yearly rent of Rupee 1/- and that therefore the Competent Authority has erred in directing conveyance of land on ownership basis in favour of the Society. It is contended that in earlier order dated 25 September 2023, the Competent Authority had accepted the contention of the Promoters that Vijay-II Society is entitled to only leasehold rights in the land. That in favour of Vijay CHS, only leasehold rights are granted vide order dated 15 September 2023. It is therefore contended that assignment of land on ownership basis by impugned order dated 12 November 2024 is contrary to the covenants of MOFA agreement, as well as contradictory to the order passed by the Competent Authority in favour of another Society in the same layout (*Vijay CHS*) who is granted only leasehold rights in the land vide order dated 15 September 2023.

46) Mr. Samdani has contended that the Competent Authority is a Tribunal of limited jurisdiction and cannot travel beyond the jurisdiction conferred under Section 11 of MOFA, under which it has to direct deemed conveyance of land and building '*in accordance with the agreement executed under section 4*'. It is therefore contended that if the agreement executed under Section 4 of MOFA contemplates only grant of lease, the Competent Authority does not have jurisdiction to rule that the covenant in the agreement is contrary to the provisions of Section 11 of MOFA and grant in favour of a Society something over and above the one provided for in the Agreement. In short, it is the contention of the Promoters that the Competent Authority must confine itself within the contours of agreement executed under Section 4 of MOFA and that the limited role that it plays is to substitute itself in the place of Promoter

while deciding the application filed under Section 11(3) and to grant unilateral deemed conveyance of land and building strictly in terms of the Agreement executed under Section 4 of MOFA. It is contended that if any covenant in the Agreement is found to be contrary to any provisions of MOFA or MOFA Rules, the remedy for the affected party is to file a suit to have such covenant declared void and thereafter file application for unilateral deemed conveyance under Section 11 before the Competent Authority. It is thus contended that the Competent Authority does not have jurisdiction while making an enquiry under Section 11 of the MOFA to rule that any particular covenant in the Agreement executed under Section 4 is contrary to the provisions of MOFA or MOFA Rules.

47) To appreciate the contentions raised on behalf of the Promoters, it would be necessary to take into consideration the statutory scheme of MOFA and MOFA Rules. MOFA has been enacted with the objective of regulating the promotion of construction, sale, management and transfer of flats on ownership basis in the State of Maharashtra. The same is enacted with the objective of preventing sundry abuses, malpractices and difficulties relating to promotion of construction, sale, management and transfer of flats. Under Section 2(c) of the MOFA, the term '*Promoter*' has been 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;

48) Section 3 of the MOFA deals with general liabilities of a Promoter. Section 4 mandates entering into an agreement with flat

purchaser and registration thereof by a promoter before accepting advance payment. Section 4 of the MOFA provides thus:

4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered. –

(1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent, of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act, 1908" and such agreement shall be in the prescribed form.

(1A) The agreement to be prescribed under sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b)-

(a) particulars-

- (i) if the building is to be constructed, the liability of the promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force;
- (ii) the date by which the possession of the flat is to be handed over to the purchaser;
- (iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;
- (iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;
- (v) the precise nature of the organisation to be constituted of the persons who have taken or are to take the flats;
- (vi) the nature, extent and description of limited common areas and facilities;
- (vii) the nature, extent and description of limited common areas and facilities, if any;
- (viii) percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;
- (ix) statement of the use for which the flat is intended and restriction on its use, if any;
- (x) percentage of undivided interests in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(2) Any agreement for sale entered into under sub-section (1) shall be presented by the promoter or by any other person competent to do so under section 32 of the Registration Act, at the proper registration office for registration, within the time allowed under sections 23 to 26 (both inclusive) to the said Act and execution thereof shall be admitted before the registering officer by the person executing the document or his representative, assign or agent as laid down in sections 34 and 35 of the said Act also within the time aforesaid:

Provided that, where any agreement for sale is entered into, or is purported to be entered into, under sub-section (1), at any time before the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment and of Validating Provisions) Act, 1983, and such agreement was not presented for registration or was presented for registration but its execution was not admitted before the registration officer by the person concerned, before the commencement of the said Act, then such document may be presented at the proper registration office for registration, and its execution may be admitted, by any of the persons concerned referred to above in this sub-section, on or before the 31st December 1984, and the registering officer shall accept such document for registration, and register it under the Registration Act, as if it were presented, and its execution was admitted, within the time laid down in the Registration Act:

Provided further that, on presenting a document for registration as aforesaid if the person executing such document or his representative, assign or agent does not appear before the registering officer and admit the execution of the document, the registering officer shall cause a summons to be issued under section 36 of the Registration Act requiring the executant to appear at the registration office, either in person or by duly authorised agent, at a time fixed in the summons. If the executant fails to appear in compliance with the summons, the execution on the document shall be deemed to be admitted by him and the registering officer may proceed to register the document accordingly. If the executant appears before the registering officer as required by the summons but denies execution of the document, the registering officer shall, after giving him a reasonable opportunity of being heard, if satisfied that the document has been executed by him, proceed to register the document accordingly.

49) Thus, the agreement to be executed with the flat purchasers under Section 4 of MOFA needs to be in the prescribed form (prescribed in the Rules) containing particulars specified and documents included as enumerated under Section 4.

50) Section 7 of MOFA prohibits alterations and additions once the plans and specifications of the building are approved by the local authority and mandates that the building must be constructed and completed in accordance with such plans and specifications. Section 10 of MOFA imposes obligation on the promoter to take steps for formation of Co-operative Society or Company and provides thus:

10. Promoter to take steps for formation of co-operative society or company.

(1) As soon as a minimum number of persons required to form a co-operative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a co-operative society or, as the case may be, as a company; and the promoter shall join, in respect of the flats which have not been taken, in such application for membership of a co-operative society or as the case may be of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act:

Provided that, if the promoter fails within the prescribed period to submit an application to the Registrar for registration of society in the manner provided in the Maharashtra Co-operative Societies Act, 1960 (Mah. Act 24 of 1961), the Competent Authority may, upon receiving an application from the persons who have taken flats from the said promoter, direct the District Deputy Registrar, Deputy Registrar or, as the case may be, Assistant Registrar concerned, to register the society : Provided further that, no such direction to register any society under the preceding proviso shall be given to the District Deputy Registrar, Deputy Registrar or, as the case may be, Assistant Registrar, by the Competent Authority without first verifying authenticity of the applicants, request and giving the concerned promoter a reasonable opportunity of being heard."

51) Section 11 of MOFA, which is the most vital provision for determination of issue in the present case, imposes an obligation on the promoter to convey his title in the land and building in favour of the Co-operative Society, Company or Association of apartment owners. It provides thus:

11. Promoter to convey title, etc., and to execute documents, according to the agreement.

(1) A promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid or to an association of flat takers [or apartment owners] , his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

(2) It shall be the duty of the promoter to file with the Competent Authority, within the prescribed period, a copy of the conveyance executed by him under sub-section (1).

(3) If the promoter fails to execute the conveyance in favour of the Cooperative society formed under section 10 or, as the case may be, the Company or the association of apartment owners, as provided by sub-section (1), within the prescribed period, the members of such Co-operative society or, as the case may be, the Company or the association of apartment owners may, make an application, in writing, to the concerned Competent Authority accompanied by the true copies of the registered agreements for sale, executed with the promoter by each individual member of the society or the Company or the association, who have purchased the flats and all other relevant documents (including the occupation certificate, if any), for issuing a certificate that such society, or as the case may be, Company or association, is entitled to have an unilateral deemed conveyance, executed in their favour and to have it registered.

(4) The Competent Authority, on receiving such application, within reasonable time and in any case not later than six months, after making such enquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard, on being satisfied that it is a fit case for issuing such certificate, shall issue a certificate to the Sub-Registrar or any other appropriate Registration Officer under the Registration Act, 1908, certifying that it is a fit case for enforcing unilateral execution, of conveyance deed conveying the right, title and interest of the promoter in the land and building in favour of the applicant, as deemed conveyance.

(5) On submission by such society or as the case may be, the Company or the association of apartment owners, to the Sub-Registrar or the concerned appropriate Registration Officer appointed under the Registration Act, 1908, the certificate issued by the Competent Authority alongwith the unilateral instrument of conveyance, the Sub-Registrar or the concerned appropriate registration Officer shall, notwithstanding anything contained in the Registration Act, 1908, issue summons to the promoter to show cause why, such unilateral instrument should not be registered as 'deemed conveyance' and after giving the promoter and the applicants a reasonable opportunity of being heard, may on being satisfied that it was fit case for unilateral conveyance, register that instrument as, 'deemed conveyance'.

52) The statutory scheme under Section 11 is such that the promoter first needs to take all necessary steps to complete his title in the land. This would postulate that in the event of the promoter deriving rights in the land under an Agreement for Sale, he must complete his title in the land by execution of a Sale Deed in his favour. Once the promoter completes his title in the land, he is under obligation to convey to the society his right, title and interest in the land and

building and execute all relevant documents therefor in accordance with the agreement executed under Section 4. The conveyance needs to be completed within the time prescribed in the agreement and in the event of the time being not prescribed in the agreement, the same needs to be conveyed within a period of 4 months as prescribed under Rule 9 of MOFA Rules. In the event of promoter failing to execute the conveyance in favour of the Society as provided for in sub-section (1) of Section 11 within the prescribed period, the Society can make an application to the Competent Authority for issuing the certificate that the Society is entitled to have a unilateral deemed conveyance executed its favour and to have it registered. Sub-sections (3) and (4) of Section 11 deal with the nature of enquiry to be conducted by the Competent Authority while issuing certificate of unilateral deemed conveyance. After the Competent Authority records a satisfaction that the case is fit for issuance of certificate of unilateral deemed conveyance, it can issue such a certificate to the Sub-Registrar that it is a fit case for enforcing and execution of conveyance deed conveying right, title and interest of the promoter in the land and the building in favour of the Society as deemed conveyance.

53) It would also be necessary to take stock of provisions of MOFA Rules made in exercise of powers under Section 15(2) of MOFA. Rule 3 of MOFA Rules deals with the manner of making disclosure by a promoter to a person intending to take or taking a flat. Rule 5 deals with particulars to be contained in the agreement to be executed under Section 4 of MOFA and provides thus:

5. Particulars to be contained in agreement.-

The promoter shall, before accepting any advance payment or deposit, enter into an agreement with the flat purchaser in Form V containing the particulars specified in clause (a) of sub-section (1A) of section 4

and shall attach thereto the copies of the documents specified in clause (b) of the said sub-section (1A).

54) Thus, the agreement to be entered with the flat purchasers under Section 4 needs to be in Form-V prescribed under MOFA Rules. Form-V prescribes model form of agreement to be entered into between the promoter and purchasers of flat. It would be necessary to consider the relevant clause in the Model Form-V relating to conveyance, which is as under :

13. Unless it is otherwise agreed to by and between the parties hereto the Promoter shall, within four months of registration of the Society or Limited Company, as aforesaid cause to be transferred to the Society or Limited Company all the right, title and the interest of the Vendor/Lessor/Original Owner/Promoter and/or the owners in the aliquot part of the said land together with the building/s by obtaining/ or executing the necessary conveyance/and or assignment of lease of the said land (or to the extent as may be permitted by the authorities) and the said building in favour of such Society or Limited Company, as the case may be such conveyance/assignment of lease shall be in keeping with the terms and provisions of this Agreement.

55) Thus, under Clause-13 of Form-V Agreement, which is mandatorily required to be executed with flat purchasers under Section 4 of MOFA, the promoter must agree to transfer to the Society all the right, title and interest of the vendor/lessor/original owner/promoter in the land together with the building by executing the necessary conveyance and/or assignment of lease of the land and the building in favour of the Society.

56) Thus, conjoint reading of provisions of Section 11(1) of MOFA, Rule 5 and Clause 13 of Form-V Agreement under MOFA Rules leaves no manner of doubt that the promoter is required to transfer and convey in favour of a society, *'his right, title and interest in the land and building'*. Thus, everything that is owned by a promoter must be

transferred and conveyed in favour of a Co-operative society or association formed by flat purchasers. Section 11 of MOFA does not permit a promoter to hold onto himself any part of right in the land and building. Thus, MOFA contemplates automatic divesting of ownership of promoter in the land and transfer thereof in favour of society formed by home buyers. What is performed by the Competent Authority is to issue a certificate recognizing and certifying such transfer, for the purpose of registration thereof for mutation of name of society in the revenue records.

57) Thus, if the promoter is the owner of the land, he has no option but to transfer and convey his ownership in the land and building in favour of society. Section 11 of MOFA does not permit a promoter, who is owner of land, to grant only leasehold rights in the land or building in favour of the society. Whatever is owned by the promoter must fall in the ownership of the society. This principle recognised under Section 11 of MOFA is premised on the concept that with sale of each flat in the building, the title of the promoter in the land gets diluted. Section 4 of MOFA seeks to strike at the root of the mischief that was being played by the promoters in retaining ownership in the land despite sale of all flats in the building. The promoters/developers were indulging in malpractices of retaining ownership in the land with the ulterior motive of carrying out further construction upon increase of FSI or monetizing ownership rights at the time of redevelopment of the building by denying transfer of ownership in the land in favour of association formed by flat purchasers. The promoters /developers were erroneously representing to the flat purchasers that what is being sold to them is only the constructed unit, without any title in the land on which building is constructed. Section 11 of MOFA seeks to nip in the bud this malpractice by promoters and

developers in seeking to segregate the concepts of '*ownership in the land*' and '*ownership of constructed unit*'. The mischief played by promoters/developers in transferring ownership of only constructed units in favour of flat purchasers was contrary to the fundamental principle that construction of such sold unit has a direct nexus with the land. Planning norms permit construction of units corresponding to the area of land by application of Floor Space Index (FSI). If permissible FSI is 1.00, construction of built-up area corresponding to the land area can be undertaken. If permissible FSI is 4.00, units totally admeasuring upto four times of land area can be constructed. Since flats/units are constructed utilizing FSI generated out of the land and transfer of ownership in constructed units under MOFA would necessarily dilute ownership right in the land as well. Merely because construction of multiple flats/units can be undertaken as per permissible FSI, the promoters/developers were misusing this concept by representing to the home buyers that sale of constructed flats would not entail transfer of ownership in the land, which would always be retained by them.

58) However, the mischief played by promoters/developers did not take into account the fundamental principle that with sale of each flat in the building, there was corresponding dilution of their title in the land. To understand this in better manner, it would apposite to take into consideration much simplified example. If a promoter owns land admeasuring 10,000 sq.ft with permissible 1.00 FSI, on which he constructs four flats of built-up area of 2,500 sq.ft each and sells them to four different home buyers. With sale of each flat admeasuring 2,500 sq.ft, the promoter dilutes and loses his title in respect of 25% ownership in the land. Once sale of all four flats is complete, the promoter loses his entire title in the land admeasuring 10,000 sq.ft. land. The four flat purchasers become owner of land to the extent of 25%

share each in the land. Thus, with sale of each flat, there is corresponding dilution of title of promoter in the land on which building is constructed. Section 11 of MOFA is premised on this concept and provides for a swift mechanism where the four home buyers need not have to run behind the promoter for transfer of ownership rights in the land. They can form an association of apartments and have the land transferred in the name of the association by way of issuance of certificate of unilateral deemed conveyance and by registering the same. Once the certificate is issued and registered, the same constitutes document of title in favour of such association of home buyers.

59) The above simple concept of proportionate ownership in the land by flat purchasers was being deliberately made complicated by the promoters by misrepresenting to the flat purchasers that what is being sold to them is mere constructed units and that they shall not acquire any rights in the land in question. Section 11 of MOFA seeks to strike at the root of this mischief and cures the same by providing that there is automatic loss of title of the promoter, the moment all flats in the building are sold. In that event, Society or association of flat purchasers becomes owners of the land on which building is constructed. If any flat remains unsold in the building, the promoter can be admitted as member of the Society and his right to sell such unsold flats remains unaffected under the provisions of Section 10. However, under no circumstance, a promoter can retain any semblance of right in the land once the building is constructed, Society is formed, and all flats are sold.

60) The *Mischief Rule* also known as *Heydon's Rule* is often applied by Courts in determining the true objective behind enacting a statute by identifying the exact '*mischief*' that the statute seeks to correct

or prevent. The rule is applied to surpass the mischief and to advance the remedy. Referring to seven judge bench decision in *Bengal Immunity Co. Ltd. v. State of Bihar*¹⁷, the Apex Court has held in *Municipal Corpn. of Greater Mumbai v. Ankita Sinha*¹⁸ as under:

31. While adequate clarity is discernible in the phraseology that is employed under Section 14 and other provisions of the NGT Act, as shall be discussed in the latter parts of the judgment, the intention behind the statute should receive our careful attention. Tracing the legislative history for creation of NGT it is seen that NGT is intended to address wide-ranging societal concerns and these have prompted us to opt for purposive interpretation. The statute will have to be read in its entirety and each provision of the Act must be given its due meaning by comprehending the mischief it intends to remedy. The chosen interpretive exercise is best understood from the treatise *Interpretation of Statutes*, authored by Justice G.P. Singh who explained thus:

“When the question arises as to the meaning of a certain provision in a statute, it is not only legitimate but proper to read that provision in its context. The context here means, the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute, and the mischief that it was intended to remedy. This statement of the rule was later fully adopted by the Supreme Court.

It is a rule now firmly established that the intention of the legislature must be found by reading the statute as a whole. The rule is referred to as an “elementary rule” by Viscount Simonds : a “compelling rule” by Lord Somervell of Harrow; and a “settled rule” by B.K. Mukherjea, J. “I agree” said Lord Halsbury, “that you must look at the whole instrument inasmuch as there may be inaccuracy and inconsistency; you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it”.”

32. The mischief that the NGT Act attempted to remedy were underscored in the legislative history, and the pronouncements of the constitutional courts flagging their environmental concerns.

33. The application of Heydon [Heydon Case, (1584) 3 Co Rep 7a : 76 ER 637] rule could adequately aid us here as the rule directs adoption of that construction which “shall suppress the mischief and advance the remedy” as was pertinently observed by S.R. Das, J. for a seven-Judge Bench in *Bengal Immunity Co. Ltd. v. State of Bihar*

“22. ... ‘4th. ... the office of all the Judges is to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief; and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.’ [Ed. : As observed in Heydon case, (1584) 3 Co Rep 7a (V).] ”

¹⁷ 1955 SCC OnLine SC 2

¹⁸ (2022) 13 SCC 401

61) Section 11 of MOFA is enacted to suppress the mischief by promoters and developers and to advance the remedy for the home buyers for securing title in respect of the land and building.

62) Thus, a statutory right is created in favour of a society or association of flat purchasers to have in its favour conveyance and transfer of every right which the promoter possessed in respect of the land on which building is constructed. If promoter is the owner of land, he must transfer and convey his ownership right in favour of the Society. If on the other hand, promoter is a mere lessee, he must transfer his leasehold rights in the building in favour of the Society. Promoter cannot provide for demise of only leasehold rights if he is the owner of the land.

63) It is difficult to accept the contention sought to be raised by Mr. Samdani that use of the expression '*in accordance with the agreement executed under Section 4*' in sub-section (4) of Section 11 of MOFA would preclude the Competent Authority from conveying in favour of the Society the land and building contrary to the covenants in the Agreement. If contention of Mr. Samdani is accepted, the same would completely render the provisions of Section 11 of MOFA otiose. If the Competent Authority is precluded from conveying in favour of the Society, the land and building contrary to the covenants in the agreement executed under Section 4, the promoters and developers would play the mischief of deliberately incorporating a covenant in the agreement that they would never convey any portion of the land in favour of the society. Every promoter would then incorporate a covenant in the agreement for not conveying land and building in favour of the Society and then oppose the jurisdiction of the Competent Authority to

decide application under Section 11 by placing reliance on the expression '*in accordance with the agreement executed under section 4*'. Such mischief cannot be permitted to be played by the promoters and developers. In fact, Section 11 of MOFA has been amended in the year 2008 with the objective of preventing mischief played by builders where it was observed that they were not conveying land and building in favour of the societies. It would be necessary to take into consideration the Statement of Objects and Reasons for Amendment Act-IV of 2008 which reads thus:

STATEMENT OF OBJECTS AND REASONS

The Maharashtra Ownership Flats (Regulation of the promotion, of construction, sale, management and transfer) Act, 1963 has been enacted by the Government of Maharashtra in the year 1963 to regulate for a certain period in the State, the promotion of the construction of, the sale and management, and the transfer of flats on ownership basis. The said Act has been enacted to effectively prevent the sundry abuses and malpractices which had been on increase, consequent upon the acute shortage of housing in the several areas of the State.

2. It has come to the notice of the Government that the objective behind enactment of the said law is not fully achieved and its implementation has not been effective enough to curb certain malpractices and sundry abuses by the promoters or developers of the properties. Therefore, to make provisions of the said Act more effective and to safeguard interests of the purchaser of the flats, the Government of Maharashtra considers it expedient to carry out certain amendments to the existing provisions of the said Act. The important amendments proposed to be carried out are as follows:-

(a) It is proposed to provide for appointment of one or more Competent Authorities for different local areas who would, on failure on the part of the promoter,-

(1) to form a co-operative society of the persons who have purchased the flats from the promoter, on application received from such purchasers, direct the District Deputy Registrar, Deputy Registrar or, as the case may be, the Assistant Registrar of Co-operative Societies to register the co-operative society of such flat owners:

(i) to execute a conveyance within the prescribed period as provided in section 11, on receiving an application from the flat owner members of a co-operative society, issue a certificate to such society certifying that the said society was entitled to have a conveyance registered and that it is a fit case for execution of a unilateral conveyance as a deemed conveyance in favour of the said society. by the Registration Officer under the Registration Act, 1908.-

(b) To serve as a deterrent, a provision is also being made for disqualifying a promoter, convicted under the said Act (except under section 12A), for a period of five years so as to debar him from being granted any permission by the local authorities under the relevant laws for undertaking construction of flats.

(c) The proceedings before the Competent Authority are given the status of judicial proceedings for the purposes of sections 193 and 228 of the Indian Penal Code and every Competent Authority is to be deemed to be a Civil Court for the purpose of sections 345 and 347 of the Code of Criminal Procedure, 1973.

3. The Bill seeks to achieve the above objectives.

64) Thus, the provision for deemed conveyance under Section 11 of MOFA is made by the Legislature after noticing failure on the part of the promoters and developers in the State of Maharashtra to convey lands in favour of the societies. The provision is beneficial to the flat purchasers and cannot be permitted to be defeated by misinterpreting the provisions of Section 11 to mean as if the Competent Authority, being a Tribunal of limited jurisdiction, cannot pass an order directing conveyance of land and building contrary to the covenants of the Agreement executed under Section 4 of MOFA. As observed above, if the contention of Mr. Samdani is accepted, the promoters and developers would defeat the whole statutory scheme under Section 11 by incorporating a covenant in the Agreement executed under Section 4 for not conveying land or building in favour of the Society. Therefore, interpretation that is sought to be placed on behalf of the promoters on expression '*in accordance with the agreement executed under section 4*' defeats the very legislative objective and needs to be necessarily avoided.

65) The expression '*in accordance with the agreement executed under section 4*' cannot be read in isolation in such a manner that the other words used in the same sub-section are rendered superfluous. If agreement provides for non-conveyance of land in favour of society and application for deemed conveyance is to be decided strictly in accordance with the covenants of that agreement, the words '*and convey his right, title and interest in the land and building*' used in Section 11(1) would be rendered otiose. In my view therefore, the expression '*in accordance with the agreement executed under Section 4*' needs to be harmoniously constructed with the words '*and convey his right, title and interest in the land and building*'. Thus while conveyance can be granted in accordance with MOFA Agreement, regard must be had to the provision which mandates conveyance of the whole of promoter's right, title and interest in the land and building. In that sense, the expression '*in accordance with the agreement executed under section 4*' is controlled and guided by the words '*and convey his right, title and interest in the land and building*' used in the same sub-section. Therefore, while granting conveyance in accordance with the MOFA Agreement, the Competent Authority must convey promoter's entire title in the land and building. In other words, the contractual covenant in MOFA Agreement cannot defeat the statutory right of association of flat purchasers to have promoter's title in the land and building conveyed in its name in entirety.

66) At the same time, I am not in agreement with the contention raised by Mr. Raheja that the expression '*in accordance with the agreement executed under section 4*' refers to only timeline for execution of conveyance. Use of the word '*and*' between the said expression and further words '*if no period for the execution of conveyance....*' makes the

two concepts disjunctive. In my view, the expression '*in accordance with the agreement executed under section 4*' has nexus with the manner in which conveyance is to be executed. The expression provides guidance about what shall be conveyed and not the time within which the conveyance must be made. However, as observed above, while conveyance may be strictly in accordance with the MOFA Agreement, it cannot be less than promoter's entire right, title and interest in the land and building. The expression may have significance in regard to the area of land to be conveyed, entitlement towards RG area, right of use of internal roads, right to use amenity spaces, etc. However, the said expression does not restrict the jurisdiction of the Competent Authority to convey the entire right of the promoter in the land and the building.

67) If above interpretation is not made, the same would result in incongruity and absurdity as statutory right of association of flat purchasers to have conveyance of promoter's title in entirety would get defeated by contractual covenant in MOFA Agreement. As observed above, Section 11 creates a statutory right in favour of societies to have conveyed to themselves promoter's '*right, title and interest in the land and building*' which would then get defeated by a contractual covenant in the Agreement providing for demise of lease or non-conveyance of any portion of land. It is well settled principle of law that any interpretation which leads to confusion or absurdity must necessarily be avoided.

68) The above interpretation of Section 11 for conveyance of promoter's right, title and interest in the land and building is beneficial to the home buyers, whereas the interpretation that is sought to be advanced by Mr. Samdani is prejudicial to their interest. It is settled position of law that when two interpretations are possible, the one which is more in consonance with the objective of enactment and for the

benefit of the person for whom the Act is enacted, must ordinarily be preferred. The Apex Court has held in Union of India Versus. Prabhakaran Vijaya Kumar and others¹⁹ as under:

11. No doubt, it is possible that two interpretations can be given to the expression "accidental falling of a passenger from a train carrying passengers", the first being that it only applies when a person has actually got inside the train and thereafter falls down from the train, while the second being that it includes a situation where a person is trying to board the train and falls down while trying to do so. Since the provision for compensation in the Railways Act is a beneficial piece of legislation, in our opinion, it should receive a liberal and wider interpretation and not a narrow and technical one. Hence, in our opinion the latter of the abovementioned two interpretations i.e. the one which advances the object of the statute and serves its purpose should be preferred vide Kunal Singh v. Union of India' (SCC para 9), B.D. Shetty v. Ceat Ltd.² (SCC para 12) and Transport Corpn. of India v. ESI Corpn.³

12. **It is well settled that if the words used in a beneficial or welfare statute are capable of two constructions, the one which is more in consonance with the object of the Act and for the benefit of the person for whom the Act was made should be preferred.** In other words, beneficial or welfare statutes should be given a liberal and not literal or strict interpretation vide Alembic Chemical Works Co. Ltd. v. Workmen (AIR para 7). Jeewanlal Ltd. v. Appellate Authority (AIR para 11), Lalappa Lingappa v. Laxmi Vishnu Textile Mills Ltd.⁶ (AIR para 13), S.M. Nilajkar v. Telecom District Manager (SCC para 12).

14. In our opinion, if we adopt a restrictive meaning to the expression "accidental falling of a passenger from a train carrying passengers" in Section 123(c) of the Railways Act, we will be depriving a large number of railway passengers from getting compensation in railway accidents. It is well known that in our country there are crores of people who travel by railway trains since everybody cannot afford travelling by air or in a private car. By giving a restrictive and narrow meaning to the expression we will be depriving a large number of victims of train accidents (particularly poor and middle class people) from getting compensation under the Railways Act. Hence, in our opinion, the expression "accidental falling of a passenger from a train carrying passengers" includes accidents when a bona fide passenger i.e. a passenger travelling with a valid ticket or pass is trying to enter into a railway train and falls down during the process. In other words, a purposive, and not literal interpretation should be given to the expression.

(emphasis added)

69) The MOFA being a beneficial legislation, enacted for protecting the interests of home buyers, provisions thereof must be interpreted in such a manner which upholds the legislative intent and

¹⁹ (2008) 9 SCC 527

any interpretation which leads to absurdity or total defeat of legislative object must necessarily be avoided. Here, it would be relevant to take note of observations made by the Apex Court in para-35 of the judgment in *Arunkumar S. Shah HUF* (supra) as under:

35. The MOFA is a beneficial legislation enacted to protect home buyers, considering the ever-increasing housing shortage in urban areas. The Legislature has noted the increasing malpractices by the developers. The provisions of Section 11 are for the benefit of the flat purchasers. In writ jurisdiction, the Court should not interfere with the order granting deemed conveyance under Section 11 (4), unless the order is manifestly illegal. The writ court should generally be slow in interfering with such orders. The reason is that, notwithstanding the order under Section 11(4), the remedy of aggrieved parties to file a civil suit remains open. In this case, substantial justice has been done by protecting the appellant's rights as a perpetual lessee with a right to develop the Arun plot. Therefore, interference in writ jurisdiction was not warranted.

(emphasis added)

70) The issue whether a promoter, who is the landowner, can agree to convey only leasehold rights in the land and building has also been decided by me in *Gayatri Construction* (supra) in which it is held in para-16 as under:

16. Thus in Grand Paradi, the issue was about Society's entitlement to get conveyance in accordance with Model Agreement in Form V even though the actual agreement was executed before introduction of that Form. This Court, by relying on Division Bench judgment in *Jamuna Darshan Co-op. Hsg. Society Ltd. v. J.M.C. & Meghani Builders* Appeal No. 253/2009, decided on 22nd June, 2009 held that the Society was not entitled to have conveyance in its favour in terms of amended section 4 and form of the agreement prescribed thereunder and that the conveyance would be in accordance with the agreement entered into between them and the defendant No. 1 therein. In Grand Paradi, the society desired transfer of ownership of a larger portion of land than the one agreed in the agreement as well as a transfer of 'ownership' instead of the grant of 'lease'. It is in the light of these peculiar facts that the division bench of this Court held that the agreement could not be disregarded and the society cannot be granted conveyance of the entire plot though the agreement does not contemplate so. **In the present case, the agreement does not provide for a transfer of ownership or even a lease in respect of any portion of the land. The agreement provides for lease only in respect of building and not of even an inch of land. If the Petitioner's contention is accepted the provisions of Section 11 of MOFA would be thrown to the winds and the promoter will not convey any portion of land in the name of society and continue to retain**

ownership of the land by executing only a lease in respect of the constructed building. The entire objective behind MOFA would be completely frustrated if the interpretation of Mr. Garewal is to be accepted. Therefore, Petitioner's contentions that conveyance must be executed strictly in accordance with clause 29 of the agreements executed with flat purchasers is required to be rejected.

(emphasis added)

71) The same view appears to have been taken by a coordinate bench of this Court in *Sarayu Properties & Hotels Pvt. Ltd.* (supra) in which it has been held in para-7 as under:

7. The language of Section 11 (1) of MOFA contemplates that a Promoter has to take all necessary steps to complete his title and convey to the organization his right, title and interest in the land and building. **This would indicate, that the title, which the Promoter, possesses, will in turn has to be transferred to the society of flat purchasers and therefore it is not necessary to go into the issue that Section 4 agreement contemplates a lease as Section 11 of the MOFA will prevail.** In the instant case, it is not disputed that the Promoter is the owner of the land and therefore, has a clear title to the land in question and not a lease, in view of which, the direction for deemed conveyance, vis-a-vis the title, which the respondent No.2 possesses, the order of the Competent Authority of the title of the respondent No.2 to be transferred to the society of the flat purchasers, cannot be faulted with. **The plea, that as the agreement, contemplates grant of lease and therefore, under Section 4 read with Section 11 of MOFA, nothing else could have been directed to be conveyed by the Competent Authority, is mis-conceived, as what is mandated in Section 11 (1) of MOFA, would hold the field.** This position, is equally supported by Form-V, clause 13, which is in pursuance to Section 4 of MOFA and Rule 5 of Rules framed thereunder and Note 1 appended thereunder, which says that clause 13 of Form-V is non-derogable. In that light of the matter, the grant of conveyance by the Competent Authority, by the impugned order cannot be interfered with.

(emphasis added)

72) In my view therefore, the Competent Authority possesses the necessary jurisdiction to direct conveyance of land and building on ownership basis where the promoter is owner of the land by ignoring covenant in the Agreement, which does not provide for conveyance of land on ownership basis or grant of mere lease thereof.

73) Mr. Samdani has relied upon judgment of coordinate bench of this Court in *Mazda Construction Company* (supra) in support of his contention that the Competent Authority can grant conveyance only as per agreement executed under section 4 of MOFA. This Court held in para-20 as under:

20. To my mind, reading of Sections 10 and 11 together with Section 5A would make it amply clear that what is to be performed by the Competent Authority is a duty and obligation which the promoter is to perform in law. That is to convey the title and execute the documents according to the agreement. If that is the duty which is to be performed by the promoter, but which he fails to perform, then, the Competent Authority steps in to fulfil it. That is a duty towards the flat purchasers and which duty cannot be avoided except at the cost and pains of legal proceedings including a criminal prosecution. In these circumstances and when sections 10 and 11 are read together and harmoniously with the preceding sections including those which contain the particulars of the agreement, then, it becomes absolutely clear that what has to be conveyed even by a deemed conveyance, which is an unilateral act and which enables the flat purchasers to acquire the Promoter's right, title and interest in the land and the building. Therefore, it cannot be said that an unilateral deemed conveyance conveys something more than what belongs to the Promoter. Section 11(1) provides for conveyance of Promoter's right, title and interest in the land and building as is clear from the words "his right, title and interest..." appearing therein. I am not in agreement with Mr. Samdani that there are no guidelines guiding and enabling the Competent Authority to grant a deemed conveyance and therefore, the powers are likely to be abused or exercised arbitrarily in every such case. There are inbuilt checks and safeguards inasmuch as what is to be issued is a certificate entitling a unilateral deemed conveyance. It is not a document which stands alone or is a distinct transaction. It is a grant or conveyance in terms of what the agreement between parties stipulates and provides for being conveyed to the flat purchasers. Therefore, the Applicant is permitted to apply to the Competent Authority u/s 11(3) and such application is to be accompanied by true copies of the registered agreements for sale executed by the Promoter with each individual member/flat purchaser and other relevant documents. It is to further that and to insist on the promoters fulfilling their obligations within the prescribed period, but noticing that their failure has resulted in hardship to flat purchasers, that the Legislature has stepped in. **To my mind, this is not a power which can be exercised by the Competent Authority in ignorance of or by brushing aside the earlier provisions and contents of the agreement with the flat purchasers.** Equally, the Competent Authority has to take into consideration the contents of other relevant documents.

(emphasis added)

74) No doubt in *Mazda Construction Company*, this Court held that power under Section 11 of MOFA cannot be exercised by the Competent Authority in ignorance of or by brushing aside the contents of the agreement with the flat purchasers. However, in *Mazda Construction Company*, this Court did not encounter a situation of promoter seeking to convey less than what is owned by him. Therefore, the findings recorded in *Mazda Construction Company* cannot be read to mean as if the Competent Authority cannot convey promoter's right, title and interest in the land and building because of covenant in the agreement postulating assignment of leasehold rights.

75) In support of his contention that the Competent Authority cannot travel beyond Section 4 Agreement, Mr. Samdani, has relied on judgment of this Court in *New Sonal Industries Premises Ltd.* (supra). This Court held in paras-26, 27, 30 and 32 as under:

26. When a covenant in the Agreement to convey entire land is pitched against the consideration of built-up area in the approved plans, the former would prevail. This is particularly when the entire FSI potential is not used and the promoter has made a conscious call to convey more land than the utilized built-up area despite availability of FSI potential. In such cases, the promoter will have to carve out or exclude any portion of the land corresponding to the unutilized FSI from the agreement. Whether a promoter fails to carve out or exclude any portion of the land from purview of the agreement and agrees to convey the entire land, mere availability of unutilized FSI is no answer to escape the liability to convey the entire land. However, there can be converse cases as well, where the covenant in the agreement provides for conveyance of lesser area of land than the utilized FSI for construction of building. To illustrate, the promoter constructs building using 10,000 sq. mtrs built-up area with FSI 1.00 requiring land at least admeasuring 10,000 sq. mtrs to sustain the building, but incorporates covenant that he would convey land admeasuring only 5000 sq.mtrs. In such a case, whether the Society would be entitled to conveyance of land which is required to sustain its building (10,000 sq.mtrs) contrary to the covenant in the Agreement? **In my view, though in limited remit of inquiry under Section 11 of MOFA, the Competent Authority may not be able to travel beyond the covenants of the agreement, the Civil Court surely can be approached in such cases to have conveyance of the due area of land required for sustenance of the building.** However, since this issue

does not arise in the present case, the same is left to be decided in an appropriate case.

27. In the present case, where there is unequivocal agreement to convey the leasehold rights in respect of the entire land admeasuring 8647.80 sq. mtrs, I do not see any jurisdictional difficulty for the Competent Authority to direct assignment of leasehold rights in accordance with the agreement and it is not necessary to drive the Petitioner-Society to lengthy litigation before a Civil Court for that purpose.

30. However, when the Competent Authority encounters a situation of only one Society being formed in respect of either one building or multiple buildings on a plot of land and if the entire plot of land is made subject matter of agreement executed under Section 4 of MOFA, there is no necessity for the Competent Authority to adopt the concept of proportionate area, ground coverage or plinth area and he can direct conveyance of promoter's right, title and interest in the entire land and building as per the terms and conditions of the Agreement. Therefore, reliance by Mr. Khan on the G.R. dated 22 June 2018 as well as on judgment of this Court in Marathon CHS Ltd. (supra) is clearly misplaced.

32. Even otherwise, I am unable to accept the contention of Mr. Khan that this Court has expounded the law in Solitaire CHS Ltd. that in every case, the Society must be driven to filing of the suit if it is not satisfied with the area of land conveyed in its favour. True it is that the certificate of unilateral deemed conveyance does not constitute an absolute document of title and that affected parties are not precluded from filing a suit challenging the area of land conveyed. However, there cannot be an absolute proposition of law that this Court cannot interfere in an order passed by the Competent Authority granting unilateral deemed conveyance of lesser area in favour of the Society and in every case, the Society must be driven to the remedy of filing a Civil Suit. The case where this Court arrives at a finding that the Competent Authority has failed to convey the land and building in accordance with the agreement executed under section 4 of MOFA, this Court would be justified in interfering in the order of unilateral deemed conveyance by directing the Competent Authority to convey the land as per actual entitlement of the Society. Mere existence of alternate remedy of filing suit cannot be a ground to deny relief in favour of a Co-operative Society, which feels aggrieved by conveyance of lesser area than the one contemplated as per the Agreement executed under Section 4 of MOFA. The objective behind enactment of provision for unilateral deemed conveyance of land and building in favour of a collective body must be appreciated. In several cases, promoters have failed to discharge their obligations to convey their right, title and interest in the land and building in favor of Societies, whose buildings have become dilapidated and require redevelopment. In the present case, construction of the building was undertaken vide Commencement Certificate dated 29 June 1973 and the construction was complete with issuance of Occupancy Certificate dated 11 June 1974. By now, period of 51 long years has passed. Therefore, in a case where this Court is in a position to conclude that the area of the land

conveyed in favour of the Society is not in consonance with the Agreement executed under Section 4 of MOFA, this Court would be justified in compelling the Competent Authority to convey correct area of land by setting aside the order of unilateral deemed conveyance. It is a settled position of law as expounded by this Court in *Mazda Construction Company v. Sultanabad Darshan CHS3 and ACME Enterprises v. Deputy Registrar, Co-operative Society*⁴ that the order of deemed conveyance does not confer absolute title or that title disputes are in the domain of civil courts. However when this Court encounters a case involving an apparent erroneous order of the Competent Authority, which does not involve determination of disputes over title, this Court would be justified in directing the Competent Authority to convey land as per the covenants of the agreement.

(emphasis added)

76) In *New Sonal Industries Premises Ltd.*, this Court has dealt with a situation where the entire plot of land was made subject matter of agreement executed under Section 4 of MOFA and the promoter had agreed to assign lease of the entire plot of land in favour of the Society. The promoter was not the owner of the land and was a mere lessee. However, while seeking development permission and carrying out construction, the promoter did not avail the entire available FSI and chose to carry out construction of only part of available FSI. In the light of this factual position, the issue before this Court was whether availability of balance potential FSI could have been a pretext for the promoter not to convey the agreed land under MOFA agreement in favour of the Society. There was thus contest between covenant in the agreement *vis-à-vis* built-up area sanctioned in the approved plan. The observations made in the judgment are in the context of the issue involved therein. As observed above, the expression used in Section 11(1) '*in accordance with the agreement executed under Section 4*' has nexus with the area to be conveyed. The dispute before this Court in *New Sonal Industries Premises Ltd.* was about area of conveyance. In my view therefore, the judgment cannot be cited in support of an abstract position of law that the conveyance of promoter's ownership rights in the land and building contrary to covenant in Section 4 Agreement

would result in jurisdictional defect in the order passed by the Competent Authority.

77) Reliance is placed on judgment of this Court in *New Manoday Co-operative Housing Society Limited* (supra) in which the issue before this Court was whether pendency of suit between landowners claiming title in respect of land on which Society's building is constructed, could have been a reason for non-exercise of jurisdiction under Section 11 of MOFA. This Court held that pendency of litigation between the person claiming ownership of land on which Society's building is constructed, cannot be a ground for Competent Authority refusing to exercise jurisdiction under Section 11. This Court has held that certificate of unilateral deemed conveyance could be issued ignoring pendency of suits between the parties claiming ownership of land conveyed in favour of the Society. The issue in *New Manoday Co-operative Housing Society Limited* being altogether different, the judgment would have no application to the instant case.

78) Thus, covenant in the flat purchase agreement for grant of lease would not tie the hands of the Competent Authority while granting conveyance of land on ownership basis. Even though it may be a Tribunal of limited jurisdiction, the Competent Authority would exercise jurisdiction under Section 11 of MOFA to ensure that the promoter is divested of whole of his title, which is assigned and conveyed in favour of the society. I therefore do not find any error on the part of the Competent Authority in directing conveyance of land on ownership basis in favour of Vijay-II CHS by the impugned order dated 12 November 2024.

D.3 NECESSITY OF FILING OF SUITS FOR CLAIMING CONVEYANCE

79) Before dealing with the issue of the exact conveyance that can be granted in favour of Vijay-II CHS, it is necessary to make few observations about the contentions raised on behalf of the Promoters in the instant case that filing of a Civil Suit is the only remedy for the society for seeking conveyance contrary to the MOFA Agreement. In several cases opposing deemed conveyance, it is often contended that since there are some legal issues involved, the Competent Authority must hold its hands and relegate the parties to the remedy of civil suit. Thus the trend of promoters and developers is to drive the societies to lengthy and expensive remedy of filing of civil suits for claiming conveyance of land and building.

80) A principle of law has been enunciated by various decisions of this Court that a certificate of unilateral deemed conveyance issued by the Competent Authority in exercise of jurisdiction under Section 11 of MOFA is not determinative of rights and entitlement of parties to the land in question. In *Mazda Construction Company* (supra), a coordinate bench of this Court has held in para-25 as under:

25. I have only noted the rival contentions with a view to appreciate the challenge to the impugned order and for scrutinizing whether the Competent Authority has exceeded its powers in terms of Section 5A r/w 11 of the MOFA. Beyond that any reference to the rival contentions or any observations in this order shall not preclude the parties from raising appropriate pleas or prevent the competent court from adjudicating the issues in the pending civil litigation. In none of the matters that are pending, the documents which would be produced or evidence which would be led, will be appreciated only in the light of what has been observed in this order. Equally this order does not prevent or preclude the Respondent Nos. 1 and 2 from filing any independent civil suit or other proceedings so as to assert their rights under the agreements which have been executed in their favour by the Petitioners. All contentions in such proceedings are also kept open.

81) The position that issuance of certificate of unilateral deemed conveyance does not preclude parties from filing independent civil suit to assert rights in the land has been reiterated in several subsequent decisions. Reference in this regard can be made to the judgments of this Court in ACME Enterprises and another Versus. Deputy Registrar, Co-operative Societies and others²⁰ and Tirupati Shopping Centre Premises Co-operative Society Ltd. Versus. Shabayesha Construction Company Pvt. Ltd.²¹. Even in the recent judgment in *Arunkumar H. Shah HUF* (supra), the Apex Court has summarised the principles in para-37 as under:

37. Our conclusions on the interpretation of subsections (4) and (5) of Section 11 of the MOFA are as under:

- i. It is no doubt true that quasi-judicial powers have been conferred on the competent authority while dealing with applications under Section 11(3) of the MOFA. However, proceedings before the competent authority under Section 11(3) are of a summary nature, as can be seen from the MOFA Rules. Therefore, the competent authority, while passing the final order, must record reasons;
- ii. The competent authority, while following the summary procedure, cannot conclusively and finally decide the question of title. **Therefore, notwithstanding the order under sub-section (4) of Section 11, the aggrieved parties can always maintain a civil suit for establishing their rights;**
- iii. The provisions of Section 11 are for the benefit of the flat purchasers. In writ jurisdiction, the Court should not interfere with the order granting deemed conveyance unless the same is manifestly illegal. The writ court should generally be slow in interfering with such orders. The reason is that, notwithstanding the order under Section 11(4), the remedy of aggrieved parties to file a civil suit remains open; and
- iv. The registering officer has no power to sit in appeal over the order of the competent authority while exercising the power under Section 11(5). He can refuse registration only on the grounds indicated in paragraph 23 above and not beyond. Thus, the scope of the powers conferred on the registering officer is limited.

(emphasis added)

82) The Apex Court has thus held that aggrieved parties can always maintain civil suit for establishing their rights notwithstanding passing of an order under sub-section (4) of Section 11. Filing of a suit

²⁰ 2023 SCC OnLine BOM 1102

²¹ 2021 SCC OnLine BOM 623

by a party aggrieved by order of deemed conveyance passed under Section 11(4) of MOFA is a different concept than the concept that seeks to drive societies to litigations before Civil Court for the purpose of securing ownership rights in the land on which their buildings are constructed. Seeking conveyance of land is an important facet for undertaking redevelopment of the buildings. In large cities like Mumbai, Pune, etc several old buildings are now in a dilapidated state. In fact, under the municipal laws, it is mandatory to conduct structural audit of buildings situated in Mumbai City after 30 years of their construction. Thus, the buildings constructed prior to 30 years often require redevelopment and reconstruction. The process of reconstruction of old buildings require that the societies formed by flat purchasers own a title to the land on which the old buildings are constructed. Section 11 of MOFA, as amended in the year 2008, is aimed at preventing the mischief of promoters deliberately not conveying title in respect of the land in favour of association of flat purchases. If land is not conveyed in favour of the Society, the erstwhile promoter(s) who continue to remain owners of the land would then seek to exploit their ownership rights by seeking a share in the redevelopment process. Thus, a promoter who has already exploited the entire potential in the land by selling flats in the building constructed on such land seeks to get another bite at the cherry when redevelopment of such buildings is taken up. The land in such a case becomes a milking cow for errant developers who deliberately refuse to convey the land in favour of the society. This mischief is sought to be suppressed by making provision for deemed conveyance under Section 11 of MOFA. Speedy remedy through summary proceedings under Section 11 is provided by the Legislature to ensure that the societies do not have to engage themselves in long legal battles against the promoters for seeking ownership rights in respect of the land on which their buildings are constructed. Therefore, the approach of the Competent Authority while exercising

jurisdiction under Section 11 of MOFA must be to ensure that the deemed conveyance of the land is granted as far as possible unless there are any serious legal complications. Societies cannot be driven to litigations before the Civil Court in a routine manner by accepting technical objections sought to be raised by promoters. On the other hand, promoters can always file civil suits for asserting their rights in the conveyed land notwithstanding issuance of certificate of deemed conveyance under Section 11(4) of the MOFA. This is a reason why the Apex Court in judgment in *Arunkumar H. Shah HUF* has held that Courts shall not interfere in the order of deemed conveyance unless there is a manifest illegality in the order.

D.4 AREA OF LAND TO BE CONVEYED

83) The next contentious issue between the parties is about the exact area of land which can be conveyed in favour of Vijay-II CHS. This controversy essentially hinges on the issue as to whether Wing-D is to be treated as a separate building or a part of building of Vijay-II CHS. It is the contention of Promoters that they have constructed a separate bungalow which is named as 'Wing-D' which has never formed part of the building of Vijay-II CHS, which comprises of only Wings A to C. It is therefore the Promoters' contention that since they/their family members own and occupy flats in Wing-D building, a separate conveyance needs to be executed in respect thereof and that therefore Vijay-II CHS is not entitled to be conveyed Wing-D building, as well as the land utilised for its construction. On the other hand, it is the contention of Vijay-II CHS that Wing-D is fused with the building comprising of Wings-A to C, that there is no open space between Wing-D and other part of the building and that that therefore Wing-D also forms part of the same building. This is how Society's entitlement for

conveyance of Wing-D, as well as land utilised for its construction is sought to be justified.

84) The building for which Vijay-II CHS is formed is referred to as Building No. 2 in the sanctioned plan. The Building's three Wings-A to C have ground + 4 upper floors each. Wing-D is attached to the other wings and does not stand out in that sense. However, Wing-D has only Ground+2 upper floors which distinguishes the same from other wings. While Wings-A to C have 40 flats in total, Wing-D has only two flats in which the promoters and their family member reside. Promoters believe that the structure in which they reside (*Wing-D*) is an independent bungalow, whereas Vijay-II CHS believes that Wing-D is a part of its building.

85) As observed above, in the previous order dated 25 September 2023 the Competent Authority had treated Wing-D as a separate building. It was ruled that there are three buildings on the layout viz. building of Vijay CHS, building of Vijay-II CHS and Wing-D building. The Competent Authority had separated land meant for Wing-D building while deciding entitlement of Vijay-II CHS for assignment of leasehold rights in the land in the layout. In the impugned order dated 12 November 2024 however, the Competent Authority has treated Wing-D as part of building of Vijay-II Society. The Competent Authority has now held as under :

(g) The Opponents contend that the Applicant Society is improperly seeking conveyance of the area occupied by certain owners in "D Wing." This assertion is factually inaccurate. The area in question, including "D Wing," was integrated into the Society at the time of registration, and the Statement A and B submitted to the Deputy Registrar Co-operative Societies appears to have been signed by the Opponent No. 03 for and on behalf of Vijay Developers, in respect of all unsold units. There is no legitimate basis to exclude "D Wing" from the conveyance, as it falls within the Society's established jurisdiction. As also, the opponents have certified that there are 41 units. The Applicant Society's A, B, C wing consist of 40 units and 1 unit in D

wing, aggregating to 41 units. Therefore, the issue raised by the Opponent that there is a non-joinder by not impleading the occupier of D wing does not sustain as they have been admitted as members of the society.

86) The flat purchase Agreement executed under Section 4 of MOFA contemplates construction of two buildings in the layout viz. Vijay Apt-1 and Vijay Apt-2 and land admeasuring 222 sq.mtrs was agreed to be carved out and excluded for construction of a separate structure by the promoters. Thus, third structure/building was clearly contemplated in the MOFA Agreement.

87) There is some degree of contradiction in covenants of MOFA Agreement providing for exclusion of land for construction of third building and the sanctioned plan which seeks to treat the third building as Wing-D of Building No. 2. While the conveyance needs to be *'in accordance with the agreement executed under Section 4'* regard must also be had to the sanctioned development plan. What needs to be conveyed is not just *'land'* but also the *'building'*. Therefore the manner in which the building is constructed as per sanctioned plan would also have nexus with the conveyance.

88) The sanctioned plan shows two separate components in the form of 'Line Area Diagram For Bldg. 2 (Wings-A, B, C)' and 'Line Diagram For Wing-D'. There is a separate computation of area calculation of Building No.2 (Wings-A, B and C) in which total built-up area of Building No.2 (Wings-A to C) is shown 18,653 sq.ft. The built-up area of Wing-D is separately computed at 1670.48 sq.ft. Thereafter, total built up area of Building No.2 (Wing-A to D) is shown as 20,323.68 sq.ft. It thus appears that initially Building No.2 was to comprise of only buildings A, B and C and the promoters apparently added Wing-D to it while getting the plan sanctioned. The manner in which Wing-D is

constructed as per sanction plan shows that Wing-D is linked to the balance portion of the building comprising of Wings-A to C. There is also no dispute to the position that there is no separation between the building comprising of Wings-A to C and Wing-D and both parts are fused together.

89) It is therefore sought to be contended on behalf of Vijay-II CHS that since Wings-A to D form part of one composite structure, the Society is entitled to have conveyance of even Wing-D as well as land utilized for its construction. Reliance is placed on provisions of Section 11(1) which mandates conveyance of not just land but also building in favour of Society. It is contended that since Wing-D is inseparable, the entire building comprising of Wings-A to D must be conveyed in favour of Vijay-II CHS. It is contended that construction of building as per sanctioned plan is a determinative factor while deciding entitlement of Society for conveyance of the constructed structure. Reliance is also placed on provisions of Sections 7 and 7A of MOFA, in support of the contention that the building constructed in accordance with the plans and specifications must be conveyed in favour of the Society. The Society has relied on judgment of the Apex Court in *Jayantilal Investments* (supra) by which the remand order was made for deciding the issue as to whether the project in question consisted of seven independent buildings or it was one building with seven wings. In para-20 of the judgment, the Apex Court made an order of remand as under :

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. [(2003) 5 Bom CR 695] 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.

90) After remand of the Appeals, this Court in *Madhuvihar Cooperative Housing Society Ltd.* (supra) answered the issue in paras- 31, 33 and 34 as under:

31. As directed by the Apex Court, I have verified the plans submitted by the promoter, from time to time, from 1985. The sanction plan dated 21st October, 1985, which is at Exhibit 28, would show that the plan consists of 7 wings which are interlinked to each other. The plan of 1987, which at Exhibit 33, consists of 5 wings which are again interlinked to each other. The sanction plan dated 12th April, 1989, which is at Exhibit 34, would again show that it consists of 5 wings which are interlinked to each other. The plan sanctioned on 20th May 1992, which at Exhibit 36, would show that it is a plan of 6 wings which are interlinked to each other. The plan dated 26th November, 1994, which at Exhibit 37, would again show that it is 6 wings interlinked to each other. Perusal of the sanction plan, dated 29th March 2001, which is at Exhibit 38, would reveal that for the first time, it shows 5 wings interlinked to each other with the construction of one additional proposed building. The plan also shows the plinth for wing." which was in accordance with the plans of 1992 and 1994, was proposed to be demolished. It is, thus, clear that though initially in the year 1985, the sanction plan was shown consisting 7 wings interlinked

to each other, and thereafter, vide amended plans sanctioned from time to time of 1994, the number of wings are changed from 7 to 5 and thereafter from 5 to 6, it is only the sanction plan of 2001, which shows the layout of 5 wings interlinked to each other along with one proposed additional building.

33. It is, thus, clear that the said permission also contemplates one building with 7 wings. Not only this, but the number of tenements constructed is also shown as 137 of various sizes. In the plan which was presented to the flat takers, representation was given that the amenities, that would be made available, were for occupants of 137 tenements. However, by the layout of 2002, not only the building is sought to be constructed on the area which was to be kept as open, but almost the same number of occupants are likely to be added in the layout, thereby depriving the members of the Society, the amenities that were already provided.

34. It is, thus, clear that there is no manner of doubt from the sanction plans, as well as, the permission granted by the Urban Land Ceiling Authority, that the project in question, as projected by the promoter and sanctioned by the Corporation in the year 1985, was of 7 wings which were interlinked to each other and not of 7 independent buildings. Not only this, but the perusal of the brochure would reveal that the layout which was presented by the promoter to the flat takers would show that the said project was one building with various wings interlinked to each other. Perusal of the plan which is annexed with the agreement between the promoter and the purchaser of the flat would also reveal that the plan shows one building with various wings interlinked to each other and it does not show the additional building which is shown in the plan of 2001. Perusal of the plan of 1985, with the plan of 2001, would reveal that there is a substantial change in the layout plan.

91) Thus, in remanded Appeals, this Court held that seven units of the building were connected to each other and that therefore the same could not be treated as seven independent buildings. Relying on judgments in *Jayantilal Investments* and *Madhuvihar Co-operative Housing Society*, it is sought to be contended on behalf of the Society that Wing-D cannot be treated as an independent structure and must be treated as part of Society's building.

92) Reliance is also placed on judgment of coordinate bench of

this Court in *Ravindra Mutneja* (supra) in support of the contention that Wing-D cannot be treated as a separate structure and must be treated as part of Society's building. The judgment in *Ravindra Mutneja* arises out of challenge raised by the flat purchasers to construction of additional building. Since the application for interim injunction to restrain the developer from constructing additional area was rejected by the City Civil Court, Appeal from Order was filed before this Court. The issue before this Court was whether additional construction was a separate unit of the same building or an independent building altogether. The issue was taken up for consideration in the light of provisions of Section 7 of MOFA. Section 7 of MOFA prohibits alteration in the structure of the building without previous consent of the flat purchasers. By way of amendment, Section 7A was inserted in the year 1986 for the purpose of clarifying that Section 7(1)(ii) would not apply in respect of construction of any other additional building or structure. Thus, for construction of an additional building in the layout, consent of flat purchasers under Section 7 of the MOFA is not required.

93) In my view, the concept of 'additional building' or 'additional structure' for application of provisions of Sections 7 and 7A of MOFA cannot be mixed with provision for conveyance of land and building under Section 11 of MOFA. This is because it is permissible to form multiple societies in respect of different wings of same building and such multiple societies can apply for separate conveyances in their favour. In this regard, reference can be made to Circular dated 30 July 2004 issued by Government of Maharashtra, Co-operation, Marketing & Textile Department of Maharashtra which reads thus :

Government of Maharashtra
Co-operation, Marketing & Textile Department,

Government Circular No SAGRUYO-2001/PRA.KRA234/14 SA
Mantralay Extension, Mumbai 400032. Dt 30th July 2004.

Circular

The Government is noticed that many a time the proposal for registering wing wise housing society in the case of the building having two or more wings received to the government. Some buildings among them were first registered as a co-operative housing society and the proposal is of their partition. And in many other cases, the proposal is that of wing wise registering of many societies while registering the building. The recommendation of the Commissioner, co-operation dt. 17-01-1985 one housing society for one building is accepted and accordingly informed to all Registrar. As per the said circular, wing wise registration of co-operative housing societies is not made. However, sometime such demand came from members.

By considering the said fact, permission may be granted for registering co-operative housing societies wing wise as per the re commendation received from the Commissioner, Co-operative on the following criteria.

1. Each society should have separate entrance for entering in the building.
2. Each society should have separate Electricity meter.
3. Each society should have separate water tank and water meter.
4. Each society should have to prepare tax assessment from Municipal Corporation.
5. Before commencement of the building, the builder/ promoter has to get the Layout of the building approved from the concerned Municipal Corporation by dividing electricity, water.
6. If some matters are common in the area of the building for e.g. compound wall, main gate, open space, swimming pool etc. then the promoter of the society should have to execute Indemnity Bond of Rs.50/- for executing partnership agreement with the societies of other wing under Section 20A of Maharashtra Co-operative Societies Act, 1960.
7. Builder, Promoter should have to give Indemnity Bond on Rs.50/- in respect of doing transfer of land wing wise in the proportionate of the area held by all wings.
8. If the proposals restoration of the society filled in the column builders non co-operation, then the promoter of the society should have to give Indemnity Bond on Rs. 50/- bond paper for the doing the transfer of land in the proportion of the area held by the society.

While registering the society wing wise, the proposal with rationale that why it is necessary that society to be registered after checking the criteria as mentioned above should have to be forwarded to the Government.

sd/-

Dy. Secretary, to the Government of the
Maharashtra co-operation,
Marketing and textile Department

94) Therefore, even in respect of singular building, multiple societies can be formed in respect of each wing. This Court takes judicial notice of the fact that multiple societies have indeed been formed in respect of different wings of the same building in Mumbai City. In several projects, the developers have joined together multiple buildings in the layout with each other with a view to maintain large open space/podium. However, though such multiple buildings/units are separately constructed, they appear as a part of same block/building. However, separate co-operative societies can be formed and have been formed in respect such multiple wings forming part of same block. Going further, it is also observed that in a layout development, multiple buildings are constructed with common podium. The parking levels and podium are joined together in respect of multiple buildings. Thus, the buildings are interconnected for the purpose of parking of vehicles and for amenities spaces on the podium upto particular floors and thereafter the buildings are separated above podium levels. There is interlinking of such buildings by common podium. This however does not destroy individual identity of each building for the purpose of formation of separate co-operative housing societies. In my view therefore for formation of cooperative society and for conveyance, mere interlinking of two buildings becomes an irrelevant factor and it is permissible to form multiple societies and to seek multiple conveyances even though the buildings may have been interlinked.

95) In my view, mere interlinking of Wing-D structure with the balance part of building of the Society would not make Wing-D as a part of Society's building. Sharing of common wall between Society's building with Wing-D would not *ipso-facto* make the Society entitled to claim ownership in respect of Wing-D building and land utilised for its construction.

96) In MOFA Agreement also, the promoters had carved out land admeasuring 222 sq.mtrs. for construction of an additional wing/building. It is common ground that said additional building is Wing-D. Vijay-II CHS does not dispute this position that the additional building contemplated under MOFA Agreement is Wing-D building. Thus, the members of Vijay-II CHS were always made aware that Wing-D building would not become a part of their building. Therefore, it is inconceivable that Vijay-II Society can claim ownership of building Wing-D or excluded portion of land utilized for its construction.

97) Mr. Raheja has attempted to salvage the situation by contending that though MOFA agreement sought to exclude land admeasuring 222 sq.mtrs. in the layout, the promoter opted for construction of additional building as a part of Wing-D of society's building and that therefore separate identity of excluded land got obliterated. It is contended that since 'building' is also required to be conveyed under Section 11 of MOFA, act on the part of the promoter in fusing an additional building in the form of Wing-D with society's building would make it part and parcel of same building, whole of which becomes conveyable in favour of the society. It is thus contended that the Promoters gave up their right of utilising retained land of 222 sq.mtrs. for construction of additional structure by adding Wing-D to the building of the Society. I find myself difficult to accept these contentions sought to be raised on behalf of Vijay-II Society. Apart from the fact that members of Vijay-II Society were always made aware that land admeasuring 222 sq.mtrs. on which Wing-D is constructed is excluded from conveyance of land in favour of the Society under MOFA Agreement, the Vijay-II CHS itself never treated Wing-D as a part of its building. This is clear from the following :

- (i) The two flat occupiers in Wing-D have not yet been admitted as members by Vijay-II CHS.
- (ii) Vijay-II CHS has never maintained Wing-D structure.
- (iii) There is a separate property tax account of Wing-D structure and the two flat occupiers of Wing-D bear the property tax in respect of Wing-D structure. At no point of time, Vijay-II CHS even paid property taxes in respect of Wing-D structure.
- (iv) There is a separate electricity connection and water connection for Wing-D structure which is independent of electricity and water connection of Society's building. Society has never paid charges towards consumption of electricity and water for Wing-D structure.
- (v) There is a separate underground tank and overhead water tank for Wing-D structure.
- (vi) In several documents of Vijay-II CHS, total number of flats are indicated as 40.
- (vii) In its statutory Audit Reports, Vijay-II CHS has always represented that it has only 40 flats and 40 members.

(viii) All elections to Vijay-II CHS are held by considering only 40 voters not permitting the two flat occupiers of Wing-D to participate in the election process.

(ix) Vijay-II CHS has made representations in various documents that it comprises of only Wings-A to C.

98) In short, Vijay-II CHS has never treated Wing-D as a part of its building. The two structures are maintained independently. Wings-A to C are maintained by the Society whereas Wing-D is maintained by the two flat owners therein. Having not treated Wing-D as a part of its building at any point of time, the Society cannot now conveniently claim ownership of Wing-D building and land utilised for its construction. In my view, therefore Vijay-II CHS is not entitled for conveyance of Wing-D building and the land utilised for its construction.

99) Though, land admeasuring 222 sq.mtrs. was sought to be retained under MOFA agreement in respect of Wing-D, the Architect of Promoters produced a certificate before the Competent Authority by seeking to divide the land in the layout proportionate to the built-up area utilised for the three building/structures. The land division indicated by Architect of Promoters is as under :

Sr.No	Building No.	FSI used	%	Prorata net plot (sq.mt)	15% RG	Total Land as available on site	Setback/DP Road area benefit
1	1	1524.77	44.603%	1230.45	217.14	1447.59	295.32
2	2 (Wing A, B and C)	1733.62	50.714%	1399.04	246.89	1645.97	335.78
3	2 (Wing D)	160.09	4.683%	129.18	22.80	151.98	31.01

		3418.48		2758.67	486.83	3245.50	662.11
--	--	---------	--	---------	--------	---------	--------

100) In my view therefore, the land admeasuring 129.18 sq.mtrs. plus proportionate share of 22.80 sq.mtrs. in recreational ground (total land of 151.98 sq.mtrs) alongwith Setback/D.P. Road benefit of 31.01 sq.mtrs. deserves to be excluded from land to be conveyed in favour of Vijay II CHS. Accordingly, Vijay II CHS shall be entitled to be conveyed on ownership basis land admeasuring 1399.04 sq.mtrs. plus proportionate share in the recreational ground area of 246.89 sq.mtrs (total land of 1645.97 sq.mtrs.) together with Setback/D.P. road benefit of 335.75 sq.mtrs. To this limited extent, the certificate of deemed conveyance issued vide order dated 12 November 2024 deserves modification.

D.5 RIGHT OF WAY FROM MAIN S.V. ROAD

101) Vijay CHS has filed Writ Petition No. 4649/2025 challenging the order dated 12 November 2024 to the limited extent of grant of right of way to Vijay-II CHS from main S.V. road as well as grant of benefit of setback area. So far as conveyance of benefit of D.P. Road/Setback area is concerned, I do not see any illegality in the order passed by the Competent Authority. It is noted that even Vijay CHS is granted set back benefit FSI advantage of DP road. Vijay CHS cannot therefore selectively question conveyance of proportionate share in the Setback/D.P. road area benefit in favour of Vijay II CHS. It appears that certain portion of the land on the northern side has been acquired for construction of 30-meter-wide D.P. road. It also appears that certain portion of land on eastern and western side is surrendered as setback

area. FSI is generated out of surrendered setback area. All the three structures in the layout must receive their share in the benefit arising out of D.P. road/Setback area proportionate to the built-up area utilised for construction of their respective buildings.

102) So far as the grant of right of way from main S.V. road is concerned, I find the objection raised by Vijay CHS to be totally misconceived. The layout has an access from main S.V. road on the western side. Towards the back portion on the eastern side, 15% Recreational Ground is maintained. The land connecting main S.V. road with Recreational Ground is kept open which is utilised by all the three buildings for accessing either S.V. road or Recreational Ground. Therefore, even if the Competent Authority was to maintain silence in respect of the road access from main S.V. road in the impugned order, such sanctioned road access in the layout would otherwise remain unaffected and Vijay II CHS would continue to enjoy such road access to main S.V. road. Therefore, I do not find any valid reason to interfere in that portion of the impugned order dated 12 November 2024 which grants benefit of setback area and right of way from main S.V. road to Vijay II CHS. Writ Petition No.4649/2025 filed by Vijay CHS is thus misconceived and liable to be dismissed.

E. CONCLUSIONS

103) The conspectus of the above discussions is that application No.142/2024 filed by Vijay-II CHS for deemed conveyance of land and building was perfectly maintainable and was not barred by principles of *res-judicata*. The application has rightly been entertained and

adjudicated by the Competent Authority. The Competent Authority has rightly held that Vijay-II CHS is entitled to conveyance of ownership rights in land and building and not merely lease thereof. The Competent Authority has however committed an error in conveying Wing-D building and land utilised for its construction in favour of Vijay-II CHS. Wing-D is a separate building/structure and occupants thereof are entitled to conveyance of land proportionate to the built-up area utilised for its construction. Therefore, Wing-D building, as well as land proportionate to its built-up area, as well as D.P. road/Setback area benefit deserves to be deducted from entitlement of Vijay II CHS. To this limited extent, order dated 12 November 2024 deserves modification. For effecting such modification, Application No.142/2024 deserves to be remanded to the Competent Authority for issuance of fresh certificate of unilateral deemed conveyance depicting correct land area of Wings-A, B and C of the building in favour of Vijay-II CHS.

F. ORDER

104) I accordingly proceed to pass the following order:

- (i) Writ Petition No.18739/2024 succeeds partly.
- (ii) Order dated 12 November 2024 passed by the Competent Authority is set aside and Application No.142/2024 is remanded to the Competent Authority for issuance of fresh certificate of unilateral deemed conveyance in favour of Vijay-II CHS conveying on ownership basis the land admeasuring 1399.04 sq.mtrs. plus recreational ground area of 246.89 sq.mtrs. totally aggregating to 1645.97 sq.mtrs.

together with Setback/D.P. road area benefit of 335.78 sq.mtrs. in favour of Vijay-II CHS.

- (iii) It is clarified that the proceedings are remanded only for the purpose of issuing certificate of unilateral deemed conveyance of land area and building indicated in the present judgment and it shall not be open for any of the parties to raise any fresh contentions before the Competent Authority.
- (iv) Writ Petition No.4649/2025 filed by Vijay CHS is dismissed.
- (v) With the above directions, both the petitions are accordingly **disposed of**. There shall be no order as to costs.

NEETA
SHAILESH
SAWANT

Digitally
signed by
NEETA
SHAILESH
SAWANT
Date:
2025.05.09
12:32:26
+0530

[SANDEEP V. MARNE, J.]