
(2015) 01 BOM CK 0057

In the Bombay High Court

Case No : Notice of Motion No. 62 of 2014 in Suit No. 54 of 2014

Eternia Cooperative Housing Society Ltd.

APPELLANT

Vs

Lakeview Developers

RESPONDENT

Date of Decision : 22-01-2015

Acts Referred:

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 10, 11, 3, 3(2), 3(2)(c)
Maharashtra Regional and Town Planning Act, 1966 — Section 154
Urban Land (Ceiling and Regulation) Act, 1976 — Section 21(1)

Citation : (2015) 2 ABR 314 : (2015) 5 BomCR 680

Hon'ble Judges : G.S. Patel, J.

Bench : Single Bench

Advocate : Rohit Kapadia, J.P. Sen, Senior Advocates, Sanjay Jain, Naushad Engineer, Dinesh Pednekar, Utkarsh Muzumdar, Rahul Hingmire and Malcolm Siganporia i/b Hariani and Co., for the Appellant; Aspi Chinoy, Senior Advocate, C.S. Kapadia, S.V. Doijode and P.A. Ka

Judgement

G.S. Patel, J.

I. SUMMARY OVERVIEW

1. Powai is a suburban area in north-east Mumbai. It lies about half Mumbai's north-western suburb of Jogeshwari and the northeastern suburb of Vikhroli. The Powai Lake is a large water body just south of the city's fabled Sanjay Gandhi National Park. To the north-east of this lake is the Indian Institute of Technology, Mumbai (IIT-B). On the south/south-eastern shore is an area known as the Powai Area Development Scheme ("PADS"). This is a sprawling development of some 230 acres, all of it being developed by one or more entities in the Hiranandani Group, a conglomerate of real-estate developers. Defendants Nos. 1 to 11 are all individuals or entities in that group. The PADS is divided into different sectors. One of these is Sector IV-A, a roughly trapezoidal area of some 30 acres. It does not directly abut the lake; it is a few hundred metres from the lakeshore. It is the proposed further development on Sector IV-A by Defendants Nos. 1 to 11

("the Hiranandanis") that is the heart of the present dispute.

2. The eight Plaintiffs and Defendant No. 12 are all co-operative housing societies of fully constructed residential apartment buildings in Sector IV-A (collectively, including Defendant No. 12, "the Societies"). Mr. Kapadia for the Plaintiffs argues that the buildings of the Societies were not all built simultaneously or in one go. They were constructed one by one, and as each was constructed, the Hiranandanis showed on the various building plans, a reducing Floor Space Index ("FSI") or quotient of build ability remaining available till, details aside, none was left. There is also one additional commercial building, named "Galleria", on Sector IV-A. What the Hiranandanis now propose is to erect several more buildings on Sector IV-A. This they cannot do, Mr. Kapadia says, without the Societies' consent, and there is, in any case no inherent or intrinsic FSI remaining available in Sector IV-A; it would have to be "imported" and "loaded on". At no point did the Hiranandanis indicate that Sector IV-A had any additional buildable potential, either with the importation and loading-on of Transferable Development Rights ("TDR"), slum re-development FSI, or any other form of additional building rights. Under the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA"), the Hiranandanis do not have any statutory entitlement to build any further on Sector IV-A without the Societies' consent. The failure to seek that consent is, he says, an estoppel against the Hiranandanis and an acquiescence. What they do have is a contractual and statutory liability to execute a conveyance in favour of a federation of these Societies (or an apex society). The right to develop further and the obligation to convey title are, Mr. Kapadia says, independent arguments.

3. Mr. Chinoy for Defendants Nos. 1 to 3 and Mr. Madon for Defendants Nos. 7 to 11 decry Mr. Kapadia's submissions. They come too late in the day, they say, for the Societies remained somnolent for a very long time: between 2005 and 2011 they said nothing, though aware since at least 2007 of the changing configuration of the development. The only trigger to the present cause of action, Mr. Chinoy argues, is that the Hiranandanis are now required by a binding decision of a Division Bench of this court to provide a large number of "middle-income group" ("MIG") housing. This is the Hiranandanis' obligation under its lease from the 13th Defendant, the Mumbai Metropolitan Region Development Authority ("MMRDA"). Such development is also the statutory intendment under MOFA. At no point was the Societies' consent necessary for this additional development; and, consequently, no question of estoppel or acquiescence arises. A public purpose is sought to be achieved by the additional development, and this cannot be allowed to be stymied by elitist arguments; and elitist it is, Mr. Chinoy insists, for the only cause for the suit is the proposed development of these additional MIG buildings. These will affect or perhaps even block the Societies' members' grand views of Powai Lake, but that is no reason to deny the fulfilment of a wider public objective. The Societies have no legal right to rooms with a view. That concern is irrelevant and must yield to the

Hiranandanis" proposed development, one that is now with a view to a room for those not as fortunate. This, Mr. Chinoy says, is the classic NIMBY syndrome: Not In My Back Yard. Carrying this further, Mr. Chinoy's arguments suggest that Mr. Kapadia's interpretation of the governing statute, MOFA, and in particular Sections 7 and 7A of it, would generate in a city like Mumbai yet another syndrome, and that is, though Mr. Chinoy does not use the word, the BANANA syndrome: Build Almost Nothing Anywhere Near Anyone. Mr. Chinoy does say that this is an entirely unviable situation in Mumbai. It would stifle and stymie all multi-building scheme-based development on large plots. This is not, he says, by any means the statutory intent. Nothing in MOFA prohibits additional development or additional buildings per se. MOFA does not deal with additional construction except in a positive sense in Section 7A. It does not restrict anyone to any particular layout or plan. That section is legislative policy, and in the context of a multi-building project or the development of a township, any rigid or fixed notions of aye or nay have no place. What the law requires is that a flat owner be informed of the probability or potentiality of additional construction. A builder may say to prospective flat purchasers, "this is my scheme, and, subject to my plans being approved, I may construct further buildings." He need say nothing further. To demand affirmation of every new construction is to revert the law to a position prior to its amendment, something that is wholly impermissible. Mr. Kapadia's case on representations being made, Mr. Chinoy argues, is a point sought to be made not under statute but under contract, two very different things.

4. Of course Mr. Kapadia refutes every one of these submissions. There is no question of elitism, he says, and it matters not whether the additional MIG flats are of 40 or 80 sq. mts. or ten times that size. If there exists a statutory liability, the developer will be held to it, and even if the additional flats were luxury flats he would still oppose them because every additional construction necessarily encroaches on the available amenities promised and given to the Societies. What Mr. Chinoy's submission amounts to, he says, is an estoppel against a statute, and there can be none. The statute requires the Societies' consent and this can neither be assumed nor open-ended. At no point were any of the members of any of the Societies shown any plans that even remotely indicated that additional buildings, MIG or not, would come up where they are now intended. Sector IV-A is admittedly not, he says, the only site available to the Hiranandanis for fulfilment of its "public purpose"; nor has the High Court order of which Mr. Chinoy speaks demanded that additional buildings be placed on Sector IV-A. Indeed, the representation as to this public purpose, if there was one, could only have been to the contrary: by never once showing any additional buildings (or in fact even any available FSI for those buildings) on Sector IV-A, the Societies were given to believe that the Hiranandanis would meet their obligations to provide those additional MIG buildings elsewhere, not on Sector IV-A.

5. A very considerable amount of precedent has been placed before me on the correct interpretation of Sections 7 and 7A of MOFA. A distinction is also sought

to be made on the applicability of that law as it relates to development on a single-building project and a multi-building scheme, the argument from Mr. Chinoy and Mr. Madon being that in the latter case, as long as the flat purchasers were put to notice and informed of the possibility of additional construction, that is enough.

6. This is how the battle-lines are drawn. I have considered the rival submissions. I am not persuaded, on the facts of the case, that Mr. Chinoy's arguments can be accepted. I have held that the "disclosure" required to be made under MOFA following its amendment cannot be in the terms that Mr. Chinoy suggests. I find these terms to be nebulous generalities, at some remove from the statutory intendment, particularly when contrasted with very specific representations as to FSI utilisation, layouts and configurations. The argument that the cause is "elitist" is, I believe, an over-simplification and perhaps even an unwarranted trivialisation. As a matter of law and equity, I find it exceedingly difficult to accept the proposition that any flat purchaser should find himself foisted with something so wholly unanticipated, and that his consent to, say, a concrete curtain outside his window should be presumed or taken for granted. This is true whether the purchaser is of a flat of 600 sq ft or 6000. The size of his own flat makes no difference, and certainly no person deserves to be pilloried only for having husbanded wealth. The question is one of a legal and statutory right, and that right is one that is wealth-agnostic. The MOFA is not a statute for the protection of the developer, let alone an errant developer. It is a statute for the protection of the flat purchaser and to ensure that he is not, for want of financial muscle in a given case, or because his is the one raised voice in an otherwise deafening silence, the victim of a developer's incessant vulpine machinations that materially damage the quality of his and his family's life and the sanctity of his home. A man's home is his castle. MOFA gives him the means to defend it.

7. One also cannot lose sight of the fact that the Hiranandanis acquired certain rights from MMRDA, which they chose to exercise in a certain way. Now confronted with a judicial declamation of the manner in which they used those rights, they cannot rectify matters at the cost of those they persuaded into believing that the Hiranandanis were acting in a permissible manner. The blame for this imbroglio lies at the Hiranandanis' door, not the Societies'.

8. It also lies at the door of the MMRDA, a public authority and about whose conduct throughout no condemnation is strong enough. It is one thing to have a statute that provides for the rights or the obligations of individuals. It is another to allow an authority to get away scot-free, absent any regulatory or statutory oversight, with what I can only describe as a complete abdication of its public and statutory function. At a minimum, this is a matter that cries out for a full-fledged enquiry into the working of MMRDA and its conduct in this particular case. To put it bluntly: without the active connivance and complicity of MMRDA at every stage, the Hiranandanis would never have been able to proceed with

delaying the construction of the MIG housing as they apparently did. As I have noted, even before me, during arguments that spanned several days, MMRDA said not a word. It has filed no affidavit. It has sat silently by, a mute spectator. All this when, as we shall see, it was undoubtedly the MMRDA's obligation to ensure compliance with what was undeniably a public purpose, the very object of the creation of the PADS.

II. FACTUAL

9. On 24th January 1977, the Bombay Metropolitan Region Development Authority (now the MMRDA) sanctioned the Powai Area Development Scheme. The lands comprised in the PADS included the lands in the villages of Powai and Tirandaz. On 2nd June 1979, the State Government directed the BMRDA to undertake the execution of the PADS. A Government Notification under Section 32(1) of the BMRDA Act proposing an acquisition of the lands followed on 12th May 1983. On 15th December 1983 and 12th June 1985, the original landholders entered into agreements for development-cum-sale with the 1st Defendant, Lakeview Developers. The 1st Defendant acquired development rights and the 3rd Defendant, a partner of the 1st Defendant, was given a power of attorney to carry out this development.

10. On 19th November 1986, the State Government, MMRDA and the 19 original landholders executed a Tripartite Agreement.¹ The landholders agreed to the acquisition of their lands for a nominal value of Rs. 1 per hectare. The State Government was to make the land available to MMRDA at the same rate. MMRDA in turn would lease the lands to the landholders for 80 years from 19th November 1986, upon the landholders agreeing to develop their lands in accordance with the PADS. There is no ambiguity about the fact that this agreement required the development to be of only two types of housing: half of it was to be flats of 40 sq. mts. (about 430 sq. ft.) and the remainder was to be flats of 80 sq. mts. (about 861 sq. ft.). Larger apartments were not contemplated: clause 7(iii) of the Agreement makes it clear that the units (by whatever name called) were not to exceed these sizes. Within 10 years, the landowners were to set up the necessary infrastructure and hand it over to MMRDA. Further, units equivalent to 15% of the FSI were to be sold to the Government at the rate of Rs. 135/- per square foot, and certain specified lands were to be offered to Central Government agencies. The Tripartite Agreement contained a power to sub-lease.² Annexed to it were several documents, including the Agreement of Development-cum-Sale, the power of attorney, the 1st Defendant's partnership deed and so forth. Also annexed was a pro-forma of the Lease Deed.³ This has a "note" appended at the end, and this note is of significance to the arguments on both sides. It reads:

"This Deed of Lease will be executed after the demised land is fully developed by the Lessee with such change or changes as may be necessary to include any Cooperative Society, Limited Company or Condominium of prospective purchasers of premises in the proposed development and in which event the

present Lessee will become a Confirming Party thereto."

(Emphasis supplied)

11. Mr. Kapadia's submission on this note must be noted straightaway. He says that the note is not a term of the pro-forma lease. It is limited to the demised lands, not the PADS, and the two were not the same; and it speaks of the demised lands being fully developed, not the PADS. Again, there is no exact equivalence between the PADS and the demised lands, though there is certainly an overlap and the latter is subsumed in the former, and Sector IV-A is admittedly a part of the lands so demised and, therefore, subsumed in the PADS. This is apparent from the schedule to the Agreement to Lease. In addressing the question of whether or not the Hiranandanis have an obligation to convey, independently of the argument of whether they have a right to develop further, the note is irrelevant. It only provides that the lessees will be a confirming party to any conveyance, and it specifies when the deed of lease, in terms of the annexed pro-forma, is to be executed; that is to say, it provides a trigger event. The note itself is inconsequential, and in any case, must yield to the statutory mandate under MOFA. It does not in any way limit what the lease should contain.

12. The actual Agreement to Lease was also executed on 19th November 1986.4 It granted them a license to enter on the land and agreed to grant them or their nominees an 80-year lease subject to the observance and fulfilment of the conditions set out in that document. There are in all six such agreements. The aggregate area covered by these is the PADS. Clause 6 of the Agreement to Lease speaks of the grant of the lease. It makes no reference to the note below the pro-forma lease deed annexed to the Tripartite Agreement, nor does it adopt its contents.

13. In the following years, the lands in question were exempted from the provisions of Chapter III of the Urban Lands (Ceiling and Regulation) Act, 1976. Under the terms of the Agreement to Lease, the landowners were to complete development within ten years.

14. By 1990, therefore, the situation seems to have been that the landowners had agreed to nominal compensation for the compulsory acquisition of their lands. They had been promised an 80-year lease in return. They had several obligations, including the obligation to develop the lands with all infrastructure and to build housing. Half of this housing was to be of 40 sq. mts. and the rest was to be of 80 sq. mts. In parallel, the landowners had entered into a development-cum-sale agreement with Lakeview Developers (for, I must note, not insignificant compensation). By 1990, therefore, it was Lakeview Developers that was taking on the work of development of the PADS. The landowners appear to have been nothing more than fronts.

15. It was at this time that the aggregate area of the PADS, some 230 acres, was divided into 22 different sectors, though numbered Sectors I through XIII. Sector IV-A, of about 28-30 acres, was one of these. Given the size of Sector IV-

A, development was carried out in phases. Various layouts and plans were sanctioned at different times. The plaint refers to each of these in great detail, and Mr. Kapadia, assisted by Mr. Jain, even made a presentation showing the different layouts over a period of nearly 17 years. I do not think it is necessary to set out each of these at length. A summary will serve the purpose.

16. There are 11 layout plans in all. Each of these has a reference number that ends with the code LOS or LON, signifying that it is a layout plan. These plans differ from the building plans for individual structures, each of which bore a unique reference number, and ended with the suffix AS, indicating that these building plans were "as submitted". The first of the buildings to be constructed was that of the 12th Defendant, Solitaire. Between 1990 and 2005 Occupation Certificates were obtained for the ten buildings constructed (i.e., the nine residential buildings of the Societies and the commercial building, Galleria). Mr. Kapadia and Mr. Chinoy have both made submissions on a compilation of the various layout plans.⁵ These show that, over time, the layouts changed considerably. The locations of individual buildings changed and were moved to different sites on Sector IV-A. Solitaire, having been built first, is static. The sites of the other buildings have, however, changed, sometimes dramatically. The 7th Plaintiff's building, Evita, for instance, was first shown at a north-western location on Sector IV-A in 1990. After some perambulation, it seems to have found its final resting place to the north-east. The following tabulation summarizes the key changes.

17. According to Mr. Kapadia, the layout plan of 2002, one that did not shown Belicia, Odyssey III, Odyssey IV, Tamara, Bianca and the two Adalia towers is the plan that is frozen and applicable, and none of the subsequent layout plans are permissible. According to him, this plan matches the Intimation of Disapproval ("IOD") of 12th March 2004 for Evita, the 7th Defendant's building, the last in time to be constructed. Construction was completed in 2007 and the Occupation Certificate for Evita was obtained on 15th June 2007. The subsequent layouts from 2005 onwards, Mr. Kapadia says, were never disclosed to any of the Societies' members and flat purchasers. In any case, as each construction progressed, the plans showed a diminishing FSI and its utilization. The 12th March 2004 IOD also reflected the loading of TDR of only 2217.50 sq. mts., but this had no relation to any additional buildings as it only showed the nine Societies' buildings and Galleria. Pamphlets and brochures of about this time correspond to the 2004 layout.

18. At this stage, I must note an argument that is central to Mr. Chinoy's case, and that is an argument that is based on a typical Flat Purchase Agreement ("FPA "). Between 1990 and 2005, the Hiranandanis (and by this I here mean the 1st Defendant and Defendants Nos. 8 to 11) sold apartments in the Societies' building to various flat purchasers. These FPAs referenced and disclosed the Tripartite Agreement (the one that included the pro-forma lease deed). The FPAs for four of these buildings (Odyssey-I, Odyssey-II, Evita and Tivoli) contain in

Clause 16 a condition that the lease of the property and transfer documents in favour of an organisation of the purchasers would be executed:

"only after the land covered under the PAD Scheme is fully developed."

19. The FPAs for Sovereign, Valencia, Eternia and Solitaire also refer to the Tripartite Agreement and speak in clause 16 of more than one building. Under MOFA, Mr. Chinoy says, the time for a conveyance is contractual, not statutory. Further, all the FPAs also record in clauses 43 and 49 that the flat purchasers are aware that the developers may or are likely to receive additional FSI or Transferable Development Rights and that these might be used on the plot at the developers' discretion as permissible in law. Thus, according to Mr. Chinoy, the entire PADS development was before each flat purchaser when they entered into their respective FPAs. There was no requirement, according to him--and this is central to his case--to separately seek any flat purchaser's consent thereafter for constructing any additional buildings in the course of developing the lands on approved plans. No such consent was ever sought. No grievance was ever made of it not being sought.

20. Mr. Chinoy further submits that the layout plan of 24th June 2005 proposed two additional buildings. The final building plans of June 2006 for Evita on the basis of which an occupation certificate was obtained on 15th June 2007 shows three additional buildings namely Belicia, Odyssey-III and Odyssey-IV. This occupation certificate for Evita (dated 15th June 2007) has been referred to in the Plaint. Thus the occupation certificate shows three new proposed buildings. He also points out that from the time of the first FPA for the first building to be constructed (Solitaire) onward, every flat purchaser knew and was informed that additional buildings may be constructed. In fact the members of some of the Societies are themselves purchasers of flats in the additional buildings. Consequently, Mr. Chinoy submits, there is no question of any of the Societies making any grievance about the further buildings that are now proposed to be constructed by the Hiranandanis comprising of 40/80 sq. mts. flats.

21. To complete the narrative sequence, from 2007 to 2013, as the table that I have set out above shows, three further layouts were approved. On 29th May 2006 the Hiranandanis obtained approval to an 11th building (Belicia). This plan also showed two other proposed constructions namely Odyssey-III and Odyssey-IV.

22. In 2007, one S. Tambawalla filed a Suit No. 265 of 2007 against the 1st Defendant (Lakeview Developers) and the 6th Plaintiff (Tivoli). The Suit was in relation to an alleged alteration in the original building plans of Tivoli. This Suit referred to a layout approved on 29th May 2006. According to Mr. Chinoy, Tivoli (Plaintiff No. 6) did not support Tambawalla. The Suit also sought a restraint against the construction of an 11th building (referred to in that Suit as Tivoli-II). Plaintiff No. 6 in fact resolved to permit access to this 11th building through its own podium or access area. An interim order in that Suit related to the

construction and provision of a club house and internal changes to a terrace flat. Mr. Chinoy points out that it is this very Mr. Tambawalla who has verified the present Suit on behalf of Plaintiff No. 6, a party against whom he had moved earlier. The conclusion that Mr. Chinoy invites me to draw is, first, that the Plaintiffs were aware of the possibility of construction of new buildings; and, second, that they had expressly accepted this position and acted on it. It does not therefore lie in the mouth of these Plaintiffs, Mr. Chinoy submits, to now demand that the Hiranandanis must obtain express consent from the Societies for the construction of additional buildings.

23. In continuation of this submission, Mr. Chinoy also points out that between 2008 and 2009 applications were made for tree-cutting for the construction of an 11th building, and that between 2009 and November 2010 there was correspondence between five of the Societies and MMRDA regarding a conveyance, ending with MMRDA clarifying that no conveyance could be executed till full compliance with the terms and conditions of the Tripartite Agreement.

24. Between 2008 and 2010 three Public Interest Litigations (PIL Nos. 131 of 2008, 91 of 2008 and 21 of 2010) were filed against the Hiranandanis group challenging the construction put up by the Hiranandanis on the 238 acres of villages Powai and Tirandaz. The PIL petitioners complained that this development violated the terms of the PADS and the exemption granted under the Urban Land Ceiling Act. On 22nd February 2012 the Division Bench of this Court passed an order on the three PILs. A copy of this order is Exhibit "P" to the Plaint. The Division Bench held that the Hiranandanis were expected to carry out the construction of only flats/units of 40/80 sq. mts. and nothing else. It found that this was the developers' obligation, one of which there was no compliance. In paragraph 42 of its order, the Division Bench observed that Clauses 7(iii) and 8(i) of the Tripartite Agreement had been wholly breached and the required flats (of 40/80 sq. mts) had not been constructed. The infrastructure network had not been provided within the required 10-year period. Open spaces for school, parks, service industries and hospitals as required under the Tripartite Agreement had not been preserved or provided. In the meantime, the Division Bench observed, massive construction had been put up. Seventy buildings had been constructed in PADS. Commercial premises were being constructed.

25. Before the Division Bench, the Hiranandanis contended that they were entitled to load TDR on the plots. Any utilization of the TDR would be outside the ambit of the PADS and the Agreement to Lease but, of course, in accordance with the Development Control Regulation. The Division Bench found that the construction already erected was completely violative of clause 7(iii) of the Tripartite Agreement. In paragraph 48 of its order, the Division Bench held that on a computation of available FSI, 2200 flats of 40 sq. mts and 2200 flats of 80 sq. mtrs were possible. Instead, only 689 flats of 40 sq. mts and 607 of 80 sq. mts. were said to have been constructed. No advertisement of brochures had been issued for these categories of housing. No attempts at further construction

of these two categories had been made. The remaining requirement i.e. of 1511 flats of 40 sq. mts. and 1593 flats of 80 sq. mts. would necessarily have to be constructed first, the Division Bench held, in accordance with clause 7(iii) of the Tripartite Agreement and this would have to be done "without any excuses, exception, allowances or reservations before any further construction of whatsoever nature, residential or commercial is put up." 15% of these 40/80 sq. mts flats would have to be sold to State Government at Rs. 135/- per sq. mt. as contemplated in clause 2(ii) of the Tripartite Agreement.

26. As regards the claims of the TDR, the Division Bench said that any additional TDR would be adjusted against the construction already erected, and which construction was, in the view of the Division Bench contrary to the conditions of the Tripartite Agreement. This is obviously a reference to the large flats (in excess of 40/80 sq. mts) that have been sold to the Societies. By the time of this order, 70 buildings have been constructed to larger specifications. Given this, the Division Bench said it was not possible to see how anything other than flats of 40/80 sq. mts. to take up the entire available FSI potential could be allowed in the PADS before any other construction was permitted.

27. Paragraph 53 of the Division Bench order contains directions. The sum and substance of these was that the Developers, the Hiranandanis, were required to put up 1511 flats of 40 sq. mts and 1593 flats of 80 sq. mts. without any amalgamation, exception or further allowance. No person or any member of his family (spouse or children) were entitled to purchase two flats in these MIG buildings. It was only thereafter that the Developer would be entitled to put up any further construction in accordance with law.

28. On 4th October 2013, an application was made for clarification. The Division Bench clarified that the location of the proposed 40/80 sq. mts. flats was to be determined by the Developer, i.e. that the Division Bench had not indicated where those flats were to be constructed. The Division Bench clarified that it had only directed the Municipal Corporation to expedite the process of granting building development permission.

29. It is on this basis that the Hiranandanis now claim that they are required by the order of the Division Bench to put up these 40/80 sq. mts. flats on Sector IV-A. Mr. Kapadia is at some pains to point out that the Hiranandanis have been candid enough to state that they are not required to build these additional buildings on Sector IV-A. Under the Tripartite Agreement, the Developers were bound to offer certain lands to the Central Government agencies i.e. Post and Telegraphic Department, MTNL and the Director General of Quality Assurances, Ministry of Defence. Except for MTNL which accepted only eight Ha of 31.8 ha offered to them, the other two departments failed to accept the offers within the prescribed time limit. Thus, a total of 42 hectares of the 50 hectares of the land offered to Central Government agencies lapsed and the land holders stood absolved of their obligations in that regard. The Developers were, therefore, entitled to use these lands in the same manner and to the same extent as the

other lands in the PADS. Mr. Kapadia submits that this necessarily means that the Developers had available to them a huge area of 42 hectares (105 Acres), about 3.5 times the size of Sector IV-A, for compliance with the High Court order in the three PILs. This is reflected in a letter dated 22nd February 1990 from the Land Officer to the 2nd Defendant in his capacity as the constituted attorney of the land holders. In fairness, Mr. Chinoy accepts that excluding Sector IV-A and the space reserved for the Regulation Training Centre, there is sufficient space and area where constructions directed by the Division Bench in the three PILs can be erected.

30. As to the present position on site, Mr. Chinoy states that construction of the additional buildings has progressed to the stage of the foundations/basements/plinths (or perhaps now well beyond). Various agreements of sale have been executed in respect of apartment blocks in these buildings.

31. According to Mr. Kapadia, the layout plan of 4th July 2012 shows at least seven major variations. First, four additional buildings are proposed in spaces previously marked as RG (recreational ground) in the 2004 layout plan. Second, the RG spaces are now not contiguous but are splintered. Third, the aggregate size of the RG area is possibly different. Fourth, the common club house, meant for use of the Societies, has been deleted altogether. Fifth and most importantly, the permissible floor area on the basis of an FSI of 1.00 is shown as 124,135.54 sq. mts. Sixth, the permissible gross built up area (proposed) is now shown as 204,280 sq. mts. Seventh, this proposed gross built up area for the first time now includes FSI loaded on the plot by invoking development rights under DC Regulation 33, DC Regulation 34, slum FSI and fungible FSI: 0.33 is claimed as additional FSI aggregating to 36,902 sq. mts: 47% is claimed under DC Regulation 34, amounting to 12,764 sq. mts; 20% is claimed under slum FSI, aggregating to 20,331.75 sq. mts; and a fungible FSI of 17,437.02 sq. mts is also included. It is Mr. Kapadia's case that this layout of 2012 was got approved by the Hiranandanis from the sanctioning authorities without the knowledge or consent of the Societies or any of their member-flat purchasers. This plan was never disclosed to them. At a minimum, the law requires full and complete disclosure, and informed consent. These changes, Mr. Kapadia says, reflect enormous increases in the aggregate FSI of Sector IV-A, especially in comparison to the layouts of 1994 and 2004.

32. As I have also noted, till late December 2012 there was correspondence between the Societies and the Developers. The Societies demanded the execution of a conveyance or lease in their favour. This demand was made with the response that no such conveyance or lease to be executed till the PADS was completed in its entirety.

33. On 31st January 2013, the 12th Defendant, Solitaire, the first building to be constructed, filed an application No. 112 of 2013 before the competent authority under the MOFA contending that there was a deemed conveyance in favour of that Defendant. This application was opposed by the Hiranandanis inter alia on

the ground that no such conveyance or lease could be executed till the entire development, being done in phases, was complete. On 4th July 2013 the competent authority, i.e. the Deputy Registrar, rejected the 12th Defendant's application. This suit was then filed on 30th July 2013. Affidavits in reply and rejoinder in relation to the application for ad-interim reliefs were filed in August of that year. A detailed Affidavit was filed on 24th October 2013. In the meantime the clarification, to which I have earlier referred, from the Division Bench hearing the PIL was sought.

34. On 30th August 2013, when directions were issued for the filing of Affidavits and for a listing of Notice of Motion for final hearing, this Court observed that any steps taken by the Defendants pertaining to the suit property would be subject to further orders passed by this Court. This order is of some significance. It has held the field till today. Evidently construction has been continuing apace. Given that I proposed to allow this Notice of Motion, I have very little doubt that the Societies will seek a restoration of the status quo ante i.e. not only restraining any further construction but directing the Hiranandanis to dismantle the work that they have done so far on the additional MIG buildings. I do not think it will be possible for me to pass so drastic an order at the interim stage.

35. What follows is a summary of the various contentions taken by the Hiranandanis in their Affidavits in reply filed between August and November 2013.

(a) Between 1990 and 2007 there were 11 layouts approved for the phased development of the PADS. In the seven years from 2007 to 2014, three additional layouts were approved. Throughout, the various layouts showed alterations in the number, location, type, dimensions, plinth and configuration of new or additional buildings.

(b) In Sector IV-A, 10 buildings (including Galleria) were constructed between 1990 and 2007. These received occupation certificates at different times between 1995 (Solitaire) and 2007 (Evita). The sanctioned layout plans for Sector IV-A were altered 10 times between 1990 and 2005. At no time did the flat purchasers complain about the amendments to these plans or the construction of additional buildings.

(c) The Final Building Plans for Evita dated 2nd June 2006 and 29 June 2006 show three additional or proposed buildings in Sector IV-A. What the Hiranandanis now propose is an additional four buildings. This is, they say, in fulfilment of their obligation to develop the PADS, a precondition to the grant of a lease by MMRDA. These 40/80 sq. mts. flats are, therefore, being constructed as required by the Tripartite Agreement. In any case, the Hiranandanis are bound by the Division Bench order to do so before carrying on any further development; the more so since an SLP against this order did not succeed. In furtherance of these avowed objectives, Defendant No. 1, Lakeview Developers, has already spent over Rs. 130 crores.

(d) The Hiranandanis claim that Sector IV-A indubitably has area available for

construction on which FSI/TDR can (and is) required to be loaded to construct the four additional MIG housing buildings.

(e) According to the Hiranandanis, the plaint itself shows that the Societies were aware of the proposed additional buildings on Sector IV-A as shown, inter alia, in the amended plans dated 29th May 2006 for Evita.

(f) No question arose or arises of execution of any conveyance or lease till the entire lands under the PADS is fully developed.

(g) All flat purchasers were shown the "relevant" approved layout and buildings plans in force at the relevant time. Importantly, the Hiranandanis in their replies do not comment on the various brochures and promotional materials annexed to the plaint and which, according to the Societies, were the basis on which the flat purchasers were persuaded to buy flats in the buildings in Sector IV-A.

(h) There are ample amenities provided. There are two club houses on Sector IV-A, and two additional ones ("Forest Club House" and "Eden Club House") for common use by occupants of buildings in the PADS (including the Societies' members). There are, in addition, gardens and parks, and these are already being used by the Societies' members. The remaining open areas in Sector IV-A are buildable areas, not meant for gardens, parks or RG areas.

(i) As regards the layout plan of 2004, this, according to the Hiranandanis, is a plan annexed to the 12th March 2004 IOD for Evita. It is not, they say, "an approved layout plan".

(j) Given that changes in layouts have been made this often (totally about 13 times), no question arises of the Societies' members' "consent" being required to the erection of additional buildings. It is immaterial, the contesting Defendants claim, that there are other sectors in the PADS where land is available for these 40/80 sq. mts. units of MIG housing.

36. In short, between their various affidavits, the Hiranandanis claim that the Societies were at all times aware of the modifications made periodically in the layout plans for Sector IV-A. They never contended that their consent was required to these changes. That being so, and given the terms of the Tripartite Agreement, their further consent for the additional buildings is unnecessary and not required by law; and there can be no conveyance or lease until the entire development under the PADS is completed.

37. There are comprehensive Affidavits in Rejoinder. In these, the Societies contend that there is admittedly sufficient space elsewhere for the construction of the additional buildings. What the Hiranandanis seem to be doing is to utilize the unbuilt on land in Sector IV-A for the additional buildings, so that they can use lands in other sectors to build profit-making constructions. But in Sector IV-A, the Societies and their members were throughout led to believe that a certain number of buildings would be constructed, not more. This was reflected by the demonstrated utilisation of FSI at various stages; and, till the construction of

Evita, there was no loading or importation of FSI for any purpose. The FSI said to be available was fully consumed by the existing ten buildings. The Hiranandanis did not, therefore, have any entitlement to any additional, fungible or other FSI on Sector IV-A, the FSI of which was fully exhausted and consumed in the ten buildings already constructed.

38. Mr. Kapadia's case, in essence, runs thus: The various members/flat purchasers of the nine Societies were promised certain amenities. They were told that additional buildings would be constructed. In the documents and plans they admit seeing, the utilisation of the FSI of Sector IV-A was shown as each building was constructed. Although it is true that the various FPAs contain various clauses that speak of the developer being entitled to additional FSI to build additional buildings, these additional buildings were among those of the nine Societies. Belicia, an additional building, was shown very early on; it was then removed; and was then sought to be brought back in a different form. This, according to Mr. Kapadia, is impermissible in law and in equity. In any case, the Hiranandanis admittedly have space elsewhere for these additional buildings and they do not need to locate these on Sector IV-A.

39. Mr. Chinoy places his case in the most straightforward, and, if I may with respect say so, daring fashion. He constructs his submissions on two postulates. First, that the law does not require the Societies' consent for the additional buildings. As long as the Societies and their members knew and were informed of the possibility of additional buildings, that is enough. Second, while it is true that the additional buildings can be located elsewhere, this is immaterial. The Hiranandanis have a right to locate them in Sector IV-A and to exploit that sector's building and development potential. This cannot be obstructed or stopped by the Societies, having got their flats in the buildings that were promised to them, with the additional on-ground amenities (such as the club house etc).

40. Despite the apparent complexity of legal developments at different stages, the various agreements, the very many layouts and differing figures, the controversy before me, at least as I understood the submissions of Mr. Kapadia and Mr. Chinoy, is simply whether or not the Hiranandanis and, in particular, Lakeview Developers required the consent of the Societies and their members before putting up any additional construction on Sector IV-A beyond the nine buildings of the Societies and Galleria, the commercial building. Mr. Chinoy's argument arises from his exposition of the law; specifically, the provisions of MOFA. Mr. Kapadia's canvas is somewhat wider: he deals not only with the law but on equitable principles, the manner in which parties conducted themselves, and contractual rights. For instance, it is also his case that the Societies have a right in praesenti to a conveyance or a lease. An apex federation or society of societies is entitled to a lease or a conveyance in respect of Sector IV-A, and if that be so, that right cannot be compromised by the introduction of additional buildings. He is careful to keep both issues (whether the Hiranandanis can

develop further and whether the Societies are entitled to a conveyance) separate. Following different paths, both arguments coalesce in the nature of interim reliefs sought. The primary prayers in the suit are to compel a conveyance.

41. Mr. Kapadia points out that the expression "phase wise" has been used by the Hiranandanis as if it is a catch-all and in itself a complete answer. It is not, he says, and I think correctly. The phrase is undefined and no one quite knows what it is supposed to mean. Does it mean the construction at different times of different buildings in Sector IV-A? IODs at various stages? Does it refer to the whole of the PADS? Or perhaps the area known as Hiranandani Gardens? It is on such nebulous terms that the Societies' rights, both statutory and contractual, are sought to be negated. There is another such expression, too, one that rears its head every so often in these papers: "developable land". Again, in what sense is this used? All land is, axiomatically, developable. All land has an FSI. The building and zoning regulations may increase or decrease the amount of build ability (even down to zero), but the fact is that all land is inherently capable of being developed. What matters is vacant land, i.e., land on which construction is possible within the existing rules of FSI. If, therefore, on any given plot, the entire FSI has been consumed, there remains no vacant land that can lend itself to development, even though there may be areas without any construction on them. What the Hiranandanis seem to have done is to have consumed the entire inherent FSI on the land. There are, after constructions, portions of "vacant land". They have no remaining available inherent FSI. They are shown in white on the various plans. Merely by dubbing these "developable" and loading on FSI via TDR or other avenues, these lands are now sought by some process of development or building alchemy to be turned into plots for further construction.

42. The note below the pro-forma lease deed is, Mr. Kapadia says, of no consequence at all. For all intents and purposes, the Hiranandanis own the PADS, however one chooses to describe it and no matter what mask they choose to wear at any given time. None of the named landholders is doing any development: it is all the Hiranandanis alone. That is a mere accident. The Hiranandanis are ostensibly doing all this development "for the landowners". If some other promoter failed to complete a development then, on the Hiranandanis' interpretation of the note, no one could ever get a conveyance till every single square inch of the PADS was "fully developed"; and that would mean never, because, on their interpretation, all land, even vacant land, is almost infinitely developable as more and more FSI is afforded to them. There is not a word of explanation as to why that note applies. It is sited in the document after the execution clause as a note below a draft lease deed. MMRDA refers to it not at all. Indeed, MMRDA maintains a studied silence throughout. It is only the promoter who refers to the note and it is not hard to see why: for the law was that till the society was registered, the FSI was that of the developer; thereafter, it belonged to the society. Now, after the amendment, a conveyance must be executed within four months of registration of the society. The FSI then belongs

to the society. Sector IV-A is a subdivided plot and has a separate property card, and in respect of which the agreement contemplates leases of portions and parcels of land. Every plan and calculation shown to the flat purchasers showed a successive utilization of the FSI, thus reducing the inherent FSI to zero for Sector IVA-A. After all this "exploitation" is done and dusted, the promoter claims there is "vacant land". The Hiranandanis' argument that since their lessor, MMRDA (also a promoter) will not execute a title document, claiming that the "whole of the PADS is not yet developed" in accordance with the note below the pro-forma lease, therefore the Hiranandanis cannot and are not obliged to execute any conveyance to the Societies is incapable of acceptance. For, by this reasoning, till every inch of land is "developed", the PADS will never be "completed" and "fully developed" and, till that mythical day arrives, none can get title. This can never be a statutory intent, Mr. Kapadia says.

43. In the PIL court, the Hiranandanis, wanting to load TDR on Sector IV-A, attempted to show that the Societies' buildings and Galleria were constructed with TDR. That is demonstrably incorrect, Mr. Kapadia says, and self-defeating, because it would mean that the entirety of the inherent FSI is still available. This is contrary to the very many representations made and the figures shown on the different plans at different times.

III. SUBMISSIONS ON MOFA

44. The preamble to MOFA says it is:

An act to regulate for a certain period, in the State of Maharashtra, the promotion of the construction of, the sale and management, and the transfer of flats on ownership basis

45. The preamble specifically notes that there have been reports of abuse and malpractices by developers, leveraging the housing shortage in the State's cities. Difficulties are said to exist and these are said to relate to "the promotion of the construction of, and the sale and management and transfer of flats taken on ownership basis", and are said to be increasing. The Government commissioned a report, one that it received in June 1961 and which was published. The MOFA therefore seeks to "make provision during the period of such shortage of housing, for the regulation of the promotion of the construction, sale and management and transfer, of flats taken on a ownership basis."

46. As I read it, this suggests that the legislative intent was to prevent the malpractices and instance of abuse by developers. I do not think it is possible to suggest that the purpose of the MOFA was to give developers an even wider latitude or to allow them privileges that they may not have had before. Indeed, as the following discussion shows, the entire focus of the MOFA is on ensuring that flat purchasers are not misled or caught unawares.

47. Section 3 deals with the general liabilities of a promoter. Section 3(2)(c), Mr. Chinoy says, only requires a builder or developer to disclose a building plan,

never a layout plan. Similarly, in Section 4, which requires a builder to enter into an agreement and have it registered before accepting any payment, contains Section 4(1A)(b)(iii), and that requires that plans and specifications of the flat in question are to be annexed to the agreement. Between them, Mr. Chinoy says, Sections 3 and 4 do not require any disclosure beyond the building plans. This argument is of some consequence; I will return to it a little later, for it is fundamental to one of the struts to Mr. Chinoy's case.

48. Between them, Mr. Kapadia and Mr. Chinoy have cited about a dozen authorities, ten of which deal with MOFA. The pivotal case was, of course, the 1985 decision in *Kalpita Enclave Co-operative Housing Society Ltd. and Others Vs. Kiran Builders Pvt. Ltd.*, This decision by a learned single Judge of this Court interpreted inter alia Section 7 of the MOFA prior to its amendment in 1986. The Court held that if the plans shown to the purchaser and on which basis the purchaser took a flat did not show additional proposed construction in future, the consent of the flat purchaser was necessary before any such construction was undertaken, even if the subsequent plans were sanctioned by the local or planning authority, and irrespective of whether that additional sanction was based on a change in the applicable rules or the exercise of some administrative discretion. Section 7 of the MOFA, the learned single Judge held, imposed an "an obligation on the promoter to construct the buildings and otherwise develop the property strictly in accordance with the agreements entered into with the flat purchasers and the plans and specifications upon the basis of which the agreement" was entered into. The contravention contemplated in Section 7(1) and Section 7(2) of the MOFA extended to the construction of any additional structure not in the original plans and specifications as approved by the local authority.

"Thus if the original plans and specifications on the basis on which the persons were persuaded to purchase the flats disclosed that certain areas will be kept open, it would be a clear contravention of the agreements as well as of law if the promoter proceeds to construct additional structure on those open spaces even with the sanction of the Municipal Corporation."

49. This led to the amendment of Section 7 of the MOFA, and the introduction of Section 7A. These now read:

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

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

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

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

(2).....

[7A. Removal of doubt.--

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

(Emphasis supplied)

50. I must explain how I have reproduced Section 7(1)(ii). The words "or construct any additional structures" were in the unamended section. These were removed by the Maharashtra Amending Act 36 of 1986 following Kalpita Enclave. The words "or additions" were added. The whole of Section 7A was added, and it gave retrospective effect to Section 7, nullifying Kalpita Enclave, and saying that the amended Section 7(1)(ii) would be deemed to be the section as originally enacted.

51. In *Jayantilal Investments v. Madhuvihar Co-operative Housing Society and Ors.* the Supreme Court had occasion to consider the MOFA as amended. The matter arose out of an order of this Court in a First Appeal, by which this Court allowed the cooperative society's appeal and dismissed that of the promoter (the appellant before the Supreme Court). This Court directed the promoter to execute a conveyance in favour of the society and restrained further construction on the suit plot. This Court held that the promoter was not entitled to put up further construction on the plot. It appears that the impugned construction in that case was of additional wings. The Supreme Court observed that the purpose of the 1986 amendment to the statute was to remove the basis of the Kalpita Enclave decision, and the object of the amendment was to maximise the

exploitation of development rights that existed in the land in question. However, the Supreme Court also noticed Section 3 of the MOFA, which imposes a statutory obligation on the promoter to make a "full and true disclosure" of the particulars mentioned in Section 3(2), including the nature, extent and description of common areas and facilities. Further, in Section 4(1-A) of the MOFA, also introduced in 1986, a form of the flat purchase agreement was prescribed, and this form required inter alia a declaration of the FSI available in respect of that land. The promoter is also required to disclose that no part of that FSI has been used elsewhere and, if used, particulars of that utilisation are to be set out. Paragraphs 16 to 20 of this decision of the Supreme Court read:

16. Therefore, the legislature has sought to regulate the activities of the promoter by retaining Sections 3 and 4 in the Act. It needs to be mentioned at this stage the question which needs to be decided is whether one building with several wings would fall under amended Section 7(1)(ii). Section 7-A basically allows a builder to construct additional building provided the construction forms part of a scheme or a project. That construction has to be in accordance with the layout plan. That construction cannot exceed the development potentiality of the plot in question. Section 10 of MOFA casts an obligation on the promoter to form a cooperative society of the flat takers as soon as minimum number of persons required to form a society have taken flats. It further provides that the promoter shall join the society in respect of the flats which are not sold. He has to become a member of the society. He has the right to dispose of the flats in accordance with the provisions of MOFA. Section 11 inter alia provides that a promoter shall take all necessary steps to complete his title and convey the title to the society. He is obliged to execute all relevant documents in accordance with the agreement executed under Section 4 and if no period for execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period. Rule 8 inter alia provides that where a cooperative society is to be constituted, the promoter shall submit an application to the Registrar for registration of the society within four months from the date on which the minimum number of persons required to form such society (60%) have taken flats. Rule 9 provides that if no period for execution of a conveyance is agreed upon, the promoter shall, subject to his right to dispose of the remaining flats, execute the conveyance within four months from the date on which the society is registered.

17. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the layout plan on the one hand vis-a-vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1-A) in Section 4 of MOFA by Maharashtra Amendment

Act 36 of 1986. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Form V of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, etc.) Rules, 1964 are quoted hereinbelow:

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

4. The promoter hereby declares that the floor space index available in respect of the said land is... square metres only and that no part of the said floor space index has been utilised by the promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the promoter elsewhere, then the promoter shall furnish to the flat purchaser all the detailed particulars in respect of such utilisation of said floor space index by him. In case while developing the said land the promoter has utilised any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the promoter to the flat purchaser. The residual FAR (FSI) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the society the residual FAR (FSI), shall be available to the society."

(emphasis supplied)

18. The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject-matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one-building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.

19. In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations, etc.

20. In the light of what is stated above, the question which needs to be examined in the present case is whether this case falls within the ambit of amended Section 7(1)(ii) or whether it falls within the ambit of Section 7-A of MOFA. As stated above, under Section 7(1) after the layout plans and specifications of the building, as approved by the competent authority, are disclosed to the flat takers, the promoter shall not make any other alterations or additions in the structure of the building without the prior consent of the flat takers. This is where the problem lies. In the impugned judgment, the High Court has failed to examine the question as to whether the project undertaken in 1985 by the appellant herein was in respect of construction of additional buildings or whether the project in the layout plan of 1985 consisted of one building with 7 wings. The promoter has kept the requisite percentage of land open as recreation ground/open space. Relocation of the tennis court cannot be faulted. The question which the High Court should have examined is: Whether the project in question consists of 7 independent buildings or whether it is one building with 7 wings? The answer to the above question will decide the applicability or non-applicability of Section 7(1)(ii) of MOFA, as amended. The answer to the above question will decide whether the time to execute the conveyance has arrived or not. This will also require explanation from the competent authority, namely, Executive Engineer, "R" South Ward, Kandivali, Mumbai-400067 (Respondent 8 herein). In the dates and events submitted by the appellant promoter, there is a reference to the permission granted by ULC Authorities dated 16-11-1984 which states that the owner/developer shall construct a building with 7 wings. One needs to examine the application made by the promoter when he submitted the layout plan in 1985. If it is the building with 7 wings intended to be constructed in terms of the layout plan then the High Court is also required to consider the effect of the judgment in Ravindra Mutneja, Rajendra Mutneja, Chandraprakash Menda, Kalpesh Patel, Kamal Aggarwal, Divya Sippy, Gurvinder Singh, Monthchand Parul and Vinod Narang Vs. Bhavan Corporation, Wescan Housing (India) Pvt. Ltd., Mrs. Pushpaben Rasiklal Parekh, Mr. Rasiklal Manilal Parekh, Mr. Sanjay Patel, Mohan Vijan and Shri Gupta, 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.

(Emphasis supplied)

52. The Supreme Court remitted the matter back to the High Court for a re-consideration. As I read it, there are some cardinal principles that emerge from *Jayantilal*.⁶ First, the effect of the 1986 MOFA amendment is clear. There must be a full and complete disclosure, and once that is done, further consent of flat purchasers is not necessary. There is a distinction between a project that is of, say, a single building with or without multiple wings, and a scheme or layout with multiple buildings. As the Supreme Court says, that determines the applicability or non-applicability of Section 7(1)(ii) of the MOFA. But all of this is predicated on the completeness and accuracy of the disclosure that is made.

53. Before considering the High Court decision that followed *Jayantilal*, I must make reference to the 2003 decision in *Ravindra Mutneja, Rajendra Mutneja, Chandraprakash Menda, Kalpesh Patel, Kamal Aggarwal, Divya Sippy, Gurvinder Singh, Monthchand Parul and Vinod Narang Vs. Bhavan Corporation, Wescan Housing (India) Pvt. Ltd., Mrs. Pushpaben Rasiklal Parekh, Mr. Rasiklal Manilal Parekh, Mr. Sanjay Patel, Mohan Vijan and Shri Gupta*, to which the Supreme Court referred. The dispute in that case was whether the construction in question was of several wings of one building or several buildings under one scheme. Mr. Justice Rebello, as he then was, said:

12.... What is relevant therefore, is that there can be construction of additional building or structure constructed or to be constructed by the owner/developer under a scheme or project of development in the lay out after obtaining the approval of local authority. The real question therefore, is, if the building in the lay out plan were constructed and there was no F.S.I. available and the purchasers have been put in possession but Society is not registered or conveyance effected in favour of the society, can it mean the builder because of subsequent events can alter the lay out and construct additional building, in accordance with the Building rules or building Bye-laws or Development Control Rules made under any law for the time being in force. The Court in my opinion is not precluded from examining whether the construction prima facie being put up is as per the development plan as filed and registered under Section 4 of the MOFA Act. If it is the case of the defendant Nos. 3 to 5 that building is an independent building then the developer-defendant No. 3 to 5 must show that the building plans, as approved and sanctioned are in terms of the lay out plan and confirm to the requirements of the building rules and bye-laws when there is an existing building on the plot. This will require leaving open space and as also recreational areas. The Mumbai Municipal Corporation, the licensing authority under Section 302, is also the development authority under the provisions of the Maharashtra Regional Town Planning Act 1966. The lay-out plan would have be approved under the M.R.T.P. Act, Regulation and bye-laws. Therefore, the builder

must obtain the permission both under the Development Regulation as also licence under the Mumbai Municipal Corporation Act, 1888.

13. The real issue as has been noted earlier is what is the stage up to which the developer/owner can put up additional construction after the building in terms of the registered plan has been constructed and occupied. In my opinion, once the buildings shown in the approved plan submitted in terms of the regulations under an existing scheme filed before the authorities under MOFA Act, have been completed and possession handed over, the builder/owner cannot contend, that because he has not formed the society and/or not conveyed the property by sale deed under the Act he is entitled to take advantage of any additional F.S.I. that may become available because of subsequent events. That would be so at the stage the building is under construction or the building is not completed and/or purchasers are not put in occupation provided such building forms part of the development plan and/or lay out plan already approved. Subsequent amendment of the lay out plan after the building plan is registered under MOFA, without the consent, prima facie, of the flat purchasers would not be permissible. It may be possible to accept that the development plan could be modified as long as the right of the purchasers and the benefits which they are entitled to including recreational and open areas are not affected by the revised development plan. Once the building is completed and the purchasers are put in occupation in terms of plan filed and the time to form the society or convey the property in terms of the agreement or the rules framed under MOFA is over, the permission of such purchasers would be required.

In the instant case, the building completion certificate for the plaintiff's building, was issued in the year 1997. The builder/owner Defendant Nos. 1, 3 and 4 had to put up the construction, based upon the permission/license granted. The defendant Nos. 1, 3 and 4 had to construct the building and to convey the title by sale deed in terms of Rule 9. If property had been conveyed, prima facie the remaining FSI or FSI which become subsequently available on the facts of the case, would be to the society to whom the land had to be conveyed. The record shows that the building was approved in December, 2001. It cannot prima facie, be said that defendant Nos. 1, 2, 4 and 5 have any rights under which they are entitled to put up an additional building contrary to Section 7A of the Act.

(Emphasis supplied)

54. I see the present situation very like the one Mr. Justice Rebello contemplated: buildings having been completed, possession having been granted and societies formed, FSI having been shown to be exhausted, promised or assured layouts having been followed, but no conveyance having been executed, the developers now contend that new changes in the building and development law (fungible FSI or additional FSI, for instance, which were unavailable when the project began) can now be deployed on the same site, and the hapless flat purchasers have no say in the matter.⁷

55. Mr. Chinoy then cites the Division Bench decision of this Court in *Manratna Developers Vs. Megh Ratan Cooperative Housing Society Limited, Rushabh Rikhav Enterprises, Neelkanth Mansions Pvt. Ltd. and Municipal Corporation of Greater Mumbai*. There, the case of the plaintiff was that modified plans reduced the area of the RG meant for flat owners; that additional FSI was illegally permitted by the planning authority; and lastly that without the consent of flat purchasers, no additional structures could be developed if these were not shown in the original sanctioned plans on which the flat purchasers agreed to purchase the flats. On a reading of Section 7 and Section 7A of the MOFA, the Division Bench held that no such consent was required. *Jayantilal* was referred to and followed. The plaintiff argued that additional FSI (TDR or floating FSI) had not been initially disclosed and could not now be used. Since TDR did not exist at the time of the flat purchase agreement, the other side contended, no question arose of disclosure. The decision makes it clear that this, too, was a phased development. The peculiarity in that case lies in its special circumstances and facts: only one wing was constructed; the rest could not be taken up in the phases planned because of some sitting tenants. That area became free for development only after some tenants vacated. It was on that basis that the development potential of the land got then unlocked and the plans were modified and permitted. The Court found, as a matter of fact, that the developer had satisfied the overarching condition noted by the Supreme Court to be an essential part of the MOFA, viz., the requirement of full and true disclosure. *Manratna* was carried to the Supreme Court. The order dated 22nd January 2009 on the SLP is unreported. It directs that an application under Order 39 Rules 1 and 2 be heard and finally decided by the trial court. The developers were permitted to continue construction, but without claiming equity, and the matter was thus remitted, the trial court being directed to decide the matter uninfluenced by either the Division Bench decision or the order on the SLP.

56. But let us turn *Jayantilal* in its second iteration when it once again came before a learned single Judge of this Court: *Madhuvihar Cooperative Housing Society and Others Vs. Jayantilal Investments, A Registered partnership firm, The Municipal Corporation of Greater Bombay and The Executive Engineer, Building Proposal (WS)*, . This is actually the starting point of Mr. Kapadia's arguments. In paragraph 22, Mr. Justice B.R. Gavai noted the three points that fell for consideration: first, whether the project in question was of seven independent buildings or one building with seven wings; second, whether the promoter had a liability to execute a conveyance in favour of the society; and third, whether the promoter was entitled to erect additional constructions on the plot without the consent of the existing flat purchasers. After setting out some of the legislative history and provisions, the learned single Judge noted Section 11 of the MOFA cast an obligation on the promoter to convey title to the society or association of flat purchasers. Rule 9 stipulates that where no period is specified by agreement for the conveyance, it is to be done within four months from the date on which the cooperative society, company or association of flat purchasers

is registered.

57. As a finding of fact, the learned single Judge found that the project was of one building with seven wings. This was reflected in various plans as also in the promotional materials and brochures. Jayantilal was extensively quoted (paragraphs 15 to 19 of the SCC report). In paragraph 37, Mr. Justice Gavai once again reiterated the imperative of true and full disclosure, following the interpretation given to Sections 3 and 4 of the MOFA by the Supreme Court in Jayantilal. Paragraph 39 of Madhuvihar refers to the decision of the learned single Judge in Manratna, though that decision was overturned by the appeal court (the decision to which I have referred above). Although Mr. Chinoy submits that this has led to an error in the Madhuvihar decision, I do not think that is so. For when Mr. Justice Gavai in Madhuvihar refers in paragraph 40 to a settled position in law, he is not referring to the overruled decision of the learned single Judge at the ad-interim stage in Manratna; he is referring to the line of authority from Jayantilal onward. This is clear from the wording of para 40 itself:

40. It can, thus, be seen that it is settled position of law, as laid down by the Apex Court, that a prior consent of the flat owner would not be required if the entire project is placed before the flat taker at the time of agreement and that the builder puts an additional construction in accordance with the layout plan, building rules and Development Control Regulations. It is, thus, manifest that if the promoter wants to make additional construction, which is not a part of the layout which was placed before flat taker at the time of agreement, the consent, as required under Section 7 of the MOFA, would be necessary.

(Emphasis supplied)

58. The learned single Judge in Madhuvihar then went on to consider the effect of Ravindra Mutneja (again, in terms of the Supreme Court order in Jayantilal).

59. Turning to the question of consent, Mr. Justice Gavai held that the "consent" contemplated by the "true and full disclosure" mandated by the MOFA necessarily had to be an informed consent. It could not be a blanket or omnibus consent. The Court held:

46. Thus, there is consistent view of this Court, that the blanket consent or authority obtained by the promoter, at the time of entering into agreement of sale or at the time of handing over possession of the flat, is not consent within the meaning of Section 7(1) of the MOFA, inasmuch as, such a consent would have effect of nullifying the benevolent purpose of beneficial legislation.

47. It is, thus, clear that it is a consistent view of this Court, that the consent as contemplated under Section 7(1) of the MOFA has to be an informed consent which is to be obtained upon a full disclosure by the developer of the entire project and that a blanket consent or authority obtained by the promoter at the time of entering into agreement of sale would not be a consent contemplated under the provisions of the MOFA. I am in respectful agreement with the

consistent view. The interpretation placed by the learned Single Judges of this Court is in consonance with the benevolent provisions of the MOFA which have been enacted for protecting flat takers.

(Emphasis supplied)

60. A decision of a Division Bench of this Court in Grand Paradi Co-operative Housing Society Ltd. v. Mont Blanc Properties and Industries Pvt. Ltd. and Anr. was also cited before Mr. Justice Gavai, who found that far from supporting the promoter, the decision assisted the society before him:

54. In so far as the reliance placed by the learned Counsel appearing for the promoter, on the judgment of this Court, in the case of Grand Paradi Cooperative Housing Society Ltd. v. Mont Blanc Properties and Industries Pvt. Ltd. and Anr. Appeal No. 599 of 2002, is concerned, in my view, the said judgment would not be applicable to the facts of the present case.... It is further to be noted that as a matter of fact, the observations of the Division Bench, in paragraph 10 of the judgment, would rather support case of the Society than the promoter, which reads thus:

"It is, thus, clear that the builder is always entitled to raise additional structures if he discloses the additional structures in the layout plan itself at the time when he sales the flats. No consent of the flat owners is necessary for raising additional structures. But if the additional structures are not disclosed in the layout plan then previous consent of the flat owners is necessary."

(emphasis supplied)

61. Mr. Chinoy then places the decision of another learned single Judge of this Court (Mr. Justice S.C. Dharmadhikari) in Jamuna Darshan Co-operative Housing Society Ltd. and Others Vs. J.M.C. and Meghani Builders and Others, That was an order on a Notice of Motion by the plaintiffs. The principal relief sought, and on which both sides addressed the Court, was the prayer for an injunction restraining further construction. The two decisions considered were Jayantilal and Kalpita Enclave, and, it seems, though not referred to by name, the decision of the Division Bench in Manratna. Paragraph 43 of Jamuna Darshan expressly notes that the additional construction impugned was shown in the layout plans and that these were annexed to the flat purchase agreements. The plaintiff in that case had annexed only the agreement, not its annexures; these were produced before the learned single Judge by the defendants, who were found to be correct in their submission. I do not see how this case assists Mr. Chinoy in the matter at hand. It seems to me to have turned narrowly on the facts of that case and it is not, I think, possible to import that case to the present one.

62. Finally, there is the decision of Malad Kokil Co-Operative Housing Society Ltd. Vs. The Modern Construction Co. Ltd. and Others, The project in question had several buildings. There seems to have been a contractual clause not to construct further without prior consent. The learned single Judge referred to the

various provisions of the MOFA, and the decision in Jayantilal and other cases, and then held:

33. It is thus clear that relying on the judgment of the Apex Court in the case of Jayantilal Investment it has been held that at the time of execution of the agreement with the flat takers, promoters are statutorily obliged to place before the flat taker the entire project scheme be it one building scheme or multiple number of building scheme. It has been further held by the Apex Court that obligations remains unfettered because the concept of developability has to be harmoniously read with concept of registration of Society and conveyance of title. It has been held that once the entire project has been placed before the plaintiff at the time of agreement then the promoter is not required to obtain prior consent of the flat takers as long as builder makes additional construction in accordance with the lay out plans, building rules and DC Regulations etc. It has been held that if the construction which is sought to be made was not a part of layout which was placed before the flat taker at the time of agreement, the consent as required under Section 7 of the MOFA would be necessary.

(Emphasis supplied)

63. The Court went on to say:

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

36. It will, therefore, have to be seen as to whether the impugned construction which the developer desires to construct is in accordance with the full disclosure that he is required to make and as to whether it is in accordance with the layout plan which was presented to the flat purchasers at the time of execution of the agreement. As already discussed herein above, the disclosure that the developer made to the members of the plaintiff-society regarding the proposed S-5 building, which also was to be constructed if permitted by the Corporation, was to have ground + one floor. The same was located in one corner of the open plot abutting S-4 building. Insofar as the members of the appellant-society is concerned, in the agreement which have been entered into in 1982, there is a reference to S-5 building of ground + one floor. Insofar as members who have

entered into agreement in 1984, there is no mention in so far as S-5 building is concerned. It is pertinent to note that in neither of the layouts annexed to 1982 agreement or 1984 agreement the proposed S-5 building is shown. On the contrary the area which is parallel to S.V. Road on one side and is surrounded by paved pathway on all other sides is shown as an open area. It is thus clear that the lay out placed before the flat takers either does not show S-5 building or if it shows S-5 building, the same is shown to consist of ground + one floor. In my considered view, therefore, in view of the law laid down by the Apex Court in Jayantilal Investment, since the construction which is sought to be made is not in accordance with layout plan presented to the flat takers, the same cannot be permitted unless there is a consent of the members of the plaintiffs and the appellant-society.

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

38. The very purpose that the entire layout should be presented to the flat purchasers and that there should be full disclosure made to him is with the purpose that he should be aware as to what is the entire layout of the scheme in which he is going to purchase the property. Suppose the original layout shows only the proposed building of ground + one, the flat taker would purchase the same with the knowledge that only few more persons are likely to join the Society and there would not be much effect on the facilities, amenities etc. provided to the members of the Society. However, if a structure of ground + one is converted in a towering structure of 28 storeys, the entire scenario would change. The number of additional members that would reside on the said plot would increase by substantial number, thereby putting an additional load on the infrastructure, amenities, facilities etc. available on the said plot. In any case, if this is permitted, the very purpose of requiring a developer to make full and complete disclosure would stand frustrated. I am, therefore, unable to accept the contention of the learned Counsel for the developers in that regard.

(Emphasis supplied)

64. Finally, on the question of utilisation of the FSI and the loading of additional FSI, Mr. Justice Gavai said:

56. The another contention of learned counsel appearing for the developers that the TDR is not in respect of the suit plot and the same is purchased from some other property and, therefore, no prejudice is caused to the plaintiff/appellant is also without any substance. Though the TDR sought to be loaded is in respect of some other property, it cannot be forgotten that insofar as TDR potentiality is concerned, the suit plot is a relevant factor. It cannot be forgotten that the TDR

loaded cannot be more than inherent FSI available on the suit plot. It is not in dispute that the only remaining inherent FSI available on the suit plot is 0.7% inasmuch as 0.93% has already been utilised. Had the developers executed conveyance in favour of the plaintiff and the appellant to comply with statutory obligations, the TDR potential in respect of land on which buildings of plaintiff and defendants are already constructed would have been available to the plaintiff/appellant. Under the impugned plan the developers are using TDR potential which could have been otherwise available to the plaintiff/appellant society. In that view of the matter, the contention in that regard is rejected.

(Emphasis supplied)

65. Before I conclude, and turn to my findings, there is one final, and very recent, decision that I believe I must mention, and that is the decision of Zircon Venture Co-operative Housing Society Ltd. Vs. M/s. Zircon Ventures and Others, The issue for consideration was "whether the Promoter/Developer has made a true and full disclosure of the scheme? Or whether the Promoter/Developer is liable to take prior consent of the flat purchasers now represented by the Plaintiff No. 1 Society for putting up a 10th Building?" Jayantilal, Madhuvihar, Malad Kokil and, another decision cited in Madhuvihar, viz., White Towers Co-op. Hsg. Society Ltd. Vs. S.K. Builders and Others, were all considered. As a matter of law, the learned single Judge found that:⁸

As indicated above in the judgments cited (supra) on behalf of the Petitioner-Society the common thread running can be crystallized thus:-

The prior consent of the flat owner would not be required if the entire project is placed before the flat taker at the time of agreement and that the builder puts an additional construction in accordance with the layout plan, building rules and Development Control Regulations. It is, thus, manifest that if the promoter wants to make additional construction, which is not a part of the layout which was placed before flat taker at the time of agreement, the consent as required under section 7 of the MOFA, would be necessary.

66. Mr. Kapadia submits that, on any reading of these decisions, the Societies' silence cannot equate to consent. That consent must be, as Mr. Justice Gavai said, an informed consent with a full disclosure. This means that even if there is an express consent, which there is not, it would make no difference, simply because the new plans showing the additional buildings were never shown to the Societies or their flat purchaser members. Express representations made to the flat purchasers were that since the intrinsic or inherent FSI was exhausted, no FSI could be loaded on any longer. No Development Plan indicated the importation of FSI, but ever only the utilisation of intrinsic or inherent FSI. Mr. Chinoy's response is that consent was never necessary, and therefore never demanded nor sought, this being what he calls a "pure MOFA Section 7A case". A flat purchaser need only be told that there exists a scheme, and, subject to plans being approved, further buildings may or may not be constructed. Nothing

further, Mr. Chinoy says, is needed. To demand consent is to revert the position to the time prior to the 1986 amendments and to negate them entirely, taking us back to Kalpita Enclave. Till that decision, Section 7(1)(ii) meant that when a flat was sold, the concerns of both flat purchaser and promoter extended to the flat and the entirety of the property; hence, consent for even a single additional structure was necessary. It was to overcome this that Section 7(1)(ii) was substituted and the deeming fiction of Section 7A introduced. Jayantilal did not negate Section 7A. It recognized a scheme of disclosure and the only disclosure required is of the FSI and the possibility of further TDR. Once that is done, there is no question of additional consent. The terms "scheme" and "layout plan" appear nowhere in the MOFA except in Section 7A. MOFA only speaks of building plans and the plans for the flats in question. The disclosure requirements, Mr. Chinoy says, cannot be used to circumvent the plain legislative intent of Section 7A. Further, it is impossible to predict precise amounts of "additional" or loadable FSI such as fungible FSI or TDR because they are uncertain and unquantified. It is only the inherent FSI that can be specified. It is important, he says, to keep separate the point of the so-called representations made, for that is an argument in contract, not under MOFA.

IV. FINDINGS

67. I believe there is a clear line from Jayantilal to Zircon. I understood Mr. Chinoy's submissions to be an invitation to hold that Madhuvihar and Malad Kokil were per incuriam (or something very like it) because those decisions did not follow the Division Bench in Manratna. But that decision was in an appeal against an ad-interim order (which it reversed), and in an SLP from the Division Bench order in Manratna, the Supreme Court directed the Order 39 Rr. 1, 2 application to be heard and also directed that the trial court hearing that application would be uninfluenced by the Division Bench judgment and the observations of the Supreme Court itself. Now if the Division Bench judgment in Manratna did not bind the trial court in that very matter, I find it difficult to see how it could have bound Mr. Justice Gavai in either Madhuvihar or Malad Kokil. The Division Bench judgment in Manratna can constitute no precedent.⁹ I do not think it is even remotely possible to find that Mr. Justice Gavai's decisions in Madhuvihar and Malad Kokil were incorrect, per incuriam or do not constitute binding law. As to the reference in Madhuvihar to the ad-interim (over-ruled) order in Meghratan, it is of no moment, as we have already seen. The frame of the law that Madhuvihar enunciated was based, in express terms, on the decision in Jayantilal.

68. How should Jayantilal be read? Mr. Chinoy's submission seems to me to suggest that so long as the possibility of future loading of TDR and future additional construction is mentioned in the FPAs, that is sufficient compliance with the law and the promoter or developer has no further obligation. He is not required to be specific about the additional buildings or the TDR, and any layouts or representations that he may have made or shown to the flat purchasers are all inconsequential. I find this a very problematic formulation. When Mr. Kapadia

says, therefore, that the promoter must be held to the development potential that he showed, without the TDR, I think that is the correct position in law. To hold otherwise would necessarily mean accepting the position that the Division Bench order in Meghratan holds the field and Gavai J's decisions in Madhuvihar and Malad Kokil are plainly wrong. I can do no such thing.

69. Paragraph 15 of the SCC report in Jayantilal strikes a very delicate balance: the promoter's right to land development versus the imperative of a "full and true disclosure". There must, therefore, be a point in time after which the development is frozen; and it is this requirement of "disclosure" and what that constitutes that Gavai J has interpreted to mean informed consent and not blanket consent. This balancing is expressly recognized in paragraphs 17 and 18 of Jayantilal (in the SCC report).

70. What exactly does the typical FPA say? Clause 11 says that the promoters are constructing multi-storeyed buildings and then references a specific sanctioned plan and commencement certificate. Then clause 13 contains a confirmation by the promoters that they are developing "the said property" in accordance with sanctioned plans and that the FSI available on the said property is not utilized elsewhere. Clauses 16 and 35 contain an obligation to convey upon the flat purchasers paying all dues and complying with their obligations under the FPA in question. Clause 21 is most interesting. It speaks of additional constructions being done at the promoters' discretion, but seems to me to limit these to club houses, cinemas, hotels or "such other activity or activities" as the promoter may desire on professional "and/or commercial basis". It is difficult to see how this clause lends itself to the construction of additional residential structures by utilizing undisclosed loaded-on FSI. Clauses 43, 48 and 49 of the FPA read:

43. The Promoter/s shall always have a right to get the benefit of additional F.S.I. for construction from B.M.C. and also to make the addition, alterations, raise storeys or put up additional structures as may be permitted by the Municipal Corporation of Greater Bombay and other competent authorities such additions structures and storeys will be the sole property of the Promoter/s alone who will be entitled to use the terrace including the parapet wall for any purpose including display or advertisements and sign boards and the Purchaser shall not be entitled to raise any objection or claim or any abatement in the price of the premises agreed to be acquired by him/her/them and/or claim any compensation or damage on the ground of inconveniences or any other ground whatsoever from the Promoter/s.

48. It is agreed that the Promoter/s shall be entitled without affecting the rights of the Purchaser to the said premises including the area thereof to revise the building plans in respect of the said building and to utilise the total F.S.I. and the development rights available in respect of the said property by suitably modifying the building plans in respect of the said premises as the Promoters may desire and the Purchaser hereby irrevocably consents to the right of the Promoter to

revise and modify the building plans in respect of the said premises time to time.

49. It is expressly agreed between the Promoters and the Purchaser and the Purchaser confirms that he/she/they are aware that the Promoters are likely to receive additional F.S.I. and/or Development rights and likely to be received by the Promoters and the said property from the adjoining property and in the event of such Promoters receiving additional F.S.I. and/or development rights the Promoter shall be entitled to construct either additional floor or floors on the said building or any part thereof or construct any additional structure on or any part thereof or construct any additional structure on the said property in the open compounds may be permissible either as Annexe structure or as an independent structure as the Promoters may desire and in the aforesaid event the Promoter shall be entitled to deal with, dispose of, alienate, encumber or transfer such additional floor or floors or premises and building or buildings or structures for such consideration to such party as the Promoters may desire without reference or recourse or consent of the Purchaser in any manner whatsoever and the Purchaser agrees not to dispute or objects to the same.

71. To say that these clauses are anything but the blanket consent that Gavai J said was impermissible is to do violence to the language. These are by no means instances of the "informed consent" required in Jayantilal and the later decisions of this court. Clause 49, for instance, speaks of development rights acquired from "adjoining property". It is not possible to read this to mean development rights of whatever provenance. It simply cannot be that the promoters' rights are continuously expansive while those of the flat purchasers are restricted in this manner; nor is it possible to accept that such a one-size-fits-all consent is sufficient compliance with the requirements of true and full disclosure. It does not, prima facie, appear that even these requirements of disclosure were met. There is no specification anywhere of the extra FSI under DCR 32, 33 or 34. Nowhere do we find a mention in specifics that the developer will fully consume the inherent FSI of a certain amount and then tack on additional or further FSI of a definite amount. These clauses are totally devoid of particulars and specifics.

72. This assumes some importance when one sees the plans as disclosed. Till the construction of Evita, they show no TDR at all. They show only the consumption of inherent FSI. But before the PIL Court, the Hiranandanis produced a statement 10 in which he claimed that Solitaire, Odyssey, Odyssey-II, Tivoli, Evita and Sovereign were all allegedly constructed by the utilization of TDR, not inherent FSI; and that, therefore, the inherent FSI was available for exploitation. Prima facie, this statement is misleading and possibly deliberately so. It is impossible to reconcile it with the plans disclosed and which Mr. Kapadia, assisted by Mr. Jain, has assiduously shown to reflect only the consumption of inherent FSI (except for a trivial amount of TDR at the time of Evita). In paragraph 10 of an Affidavit in Rejoinder dated 3rd February 2014, the Plaintiffs have set out at some length the errors and, if I may be permitted the license, the misdirection in the Hiranandanis' note before the PIL Court. Other than a general denial in

paragraph 8 of the Affidavit in Sur-Rejoinder dated 26th February 2014, and the admission or clarification that the TDR potential of Sector IV-A was "inadvertently" shown to be 2600 sq. mts. instead of 4123.9 sq. mts., there is no explanation at all for nature of FSI (inherent as against TDR) shown in the note.

73. In Malad Kokil, Gavai J referred to a government notification regarding the amount of TDR that can be used. There is also an order or notification dated 10th April 2008 and another of 7th December 2007. These are Exhibits "F-1" and "F-2" to the Affidavit in Rejoinder dated 3rd February 2014. The latter, issued under Section 154 of the Maharashtra Regional and Town Planning Act, 1966, specifically recognizes precisely such problems, where after construction is complete, additional TDR is sought to be loaded. In its office translation, this notification of 200711 says:

It is brought to the notice of the Government that, while sanctioning plan in the beginning from the Planning Authority for development of any land by the Developer, at that time no inclusion of T.D.R. use therein and after completion of some construction, then the Housing Society is formed. But the conveyance deed was not made in the name of society with structures thereon. Thereafter, again Developer demands permission for amalgamation of surround area with vacant plot and the construction was made on that site without taking approval of the Housing Society or Plot holder and T.D.R. of said land was utilized on vacant plot and carried out construction of multi storied building. Therefore, the right of plot holders are affected. Now, the Government is giving direction to all Municipal Corporations and all other planning authorities having provisions of T.D.R. as per Section 154 of the Maharashtra Regional and Town Planning Act, 1966 as follows.

DIRECTION

1) While granting building permission along with use of T.D.R. by all Municipal Corporations and other Planning Authorities having provision of T.D.R., T.D.R. of all land should be permitted in the ratio of balance potential area of the concerned Housing Society without permitting at same place.

2) The said order is in force immediately for the date of this Government Order.

74. As Gavai J notes in paragraph 55 of Malad Kokil, this limits and restricts the TDR potential to such land as is vacant, not already constructed. If this be so, then there is no question of the Hiranandanis having both TDR for the Societies' buildings and inherent FSI available. It follows, therefore, that if the inherent FSI is, prima facie, shown to have been exhausted, there exists no "vacant land" that is properly "developable": its FSI has already been consumed. Mr. Kapadia is, therefore, correct in saying that the developers must be held to the development potential shown, without the TDR; they cannot retrospectively load this TDR and change the very basis on which construction of the Societies' buildings and Galleria was completed.

75. Let me consider now the two reports of the Plaintiffs' architects. These are of

24th June 2014 (relating to layout plans and building plans of Sector IV-A) and 28th May 2014 (pertaining to a survey of Sector IV-A conducted on 16th May 2014). These are annexed to an additional Affidavit dated 25th June 2014 filed by the Plaintiffs. Table A in that Affidavit lists the very many amended plans that were not disclosed to the Societies and their members. Table B shows in summary the various changes made periodically. Paragraph 6 of that affidavit claims that the last disclosed building plan of the last building to be constructed (Evita) is the IOD plan of 12th March 2004, and with this, the "scheme" on Sector IV-A stood completed. The entire development potential of that sector was exhausted. This last-disclosed plan was then modified by the Hiranandanis without notice to the Societies. Table C then shows how these plans were "amended" to show additional buildings on Sector IV-A. Prima facie, the two reports, annexed to that Affidavit, show how changes were made without any disclosure to the Societies at different times. RG areas have been re-dimensioned (presumably to create this so-called "vacant land"): a driveway is shown as a RG, for instance, and included in the computation of those areas; built structures are shown on RG areas, and so forth.

76. I find Mr. Kapadia's submission that by this process of constantly shifting the goal-posts and achieving some sort of developmental transmogrification, where FSI entirely used is now shown as available, and TDR never deployed is now claimed to have been used, flat purchasers are sought to be deprived of very valuable rights. Mr. Kapadia calls this "cheating". It might be that, and more. As I have noted, there is a clear and direct line of authority from Jayantilal to Zircon via Ravindra Mutneja, Madhuvihar and Malad Kokil. All of these, in different words, require one thing above all: complete and true disclosure. A general or blanket consent is no consent at all; and, absent a specific consent, it is simply not open to the developer to contend that no consent is ever required, and additional structures can be put up willy-nilly by deploying some prestidigitation in development potential. Gavai J has repeatedly said that the MOFA is a beneficial legislation. Not only do I most respectfully agree, for the preamble to that Act leads to no other conclusion, but all these decisions bind me. Indeed, I would venture to suggest that even Jamuna Darshan is an authority for the propositions Mr. Kapadia canvasses, for in that case, the Court found that there was active suppression by the applicant-plaintiff of the fullest disclosure required.

77. I also cannot accept Mr. Chinoy's submission that an acceptance of Mr. Kapadia's submissions would take us back in time to the pre-Kalpita Enclave days, before the 1986 amendment to MOFA. Indeed, Jayantilal and its emphasis on a "true and full disclosure" will not admit of any such reversion. It is, I think, a mistake to read Jayantilal as granting developers an unrestricted panoply of development rights with no safeguards at all for the flat purchasers. The subsequent decisions of this Court make it clear that there is no such wide-ranging and unrestricted latitude granted to the developer under MOFA. As Gavai J says, to accept that argument would be to render the beneficial legislation that is MOFA almost entirely otiose and nugatory.

78. The distinction that is sought to be made between a multi-building layout and a proposal for a single building with several plots is, in the context of the present case, and given the requirement of an accurate disclosure (not a blanket and uninformed consent), a distinction that makes as good as no difference. Let me take a step back and assess the situation at its broadest. The landholders were, in terms of the Tripartite Agreement, required to (a) build 40 sq. mts. houses on 50% of the PADS, 80 sq. mts. houses on the rest; and (b) to develop the necessary supporting infrastructure. Neither they nor the persons or entities through whom they chose to act, viz., the Hiranandanis, were at liberty to put up the kind of construction that they did on Sector IV-A. This is a problem entirely of the Hiranandanis' making. Evidently, they conceived their rights to include putting up high-end housing and paid little or no heed, till the three PILs were filed, to their contractual obligations. In Sector IV-A, they repeatedly made representations to the Societies that indicated, prima facie, the construction of nine buildings and Galleria. They do not at any time seem to have explicitly shown either the loading of additional FSI or the construction of MIG housing. It seems to me entirely unjust and inequitable to say now, as the Hiranandanis do, that their representations and the problems of these Societies on account of the Hiranandanis' proposed additional construction amount to nothing. It is, I think, the sheerest happenstance that the Societies' members are evidently well-heeled. One cannot damn or deride them merely for that. Indeed, it is perhaps all to the good that they are what they are, for it is they that have been able to sustain this battle. What if they were not? What if they were middle or lower income families with nothing of the wherewithal to litigate against a developer? Would the result have been any different? Should any such result be predicated on the income or wealth of the flat purchaser? The MOFA makes no such distinction. Nor should we. What the Hiranandanis' argument amounts to is this: "We may have told you that you would be sold splendid houses with enviable views, and we may have shown you brochures to that effect. We may have in the agreements between us, made mention of some generalised consent without specifics. Today, that generalized consent robs you of all rights. Any rights that remain are ours and ours alone, and we are now at liberty to act in a way directly contrary to our earlier representations, and, in fact, the very representations on which we persuaded you that these apartments were worth a sizable investment." This is an argument conceived in inequity and nurtured in illegality. There is, admittedly, ample land outside Sector IV-A on which the Hiranandanis can fulfil their contractual obligations for MIG housing: for example, Sector IX-A. What seems to be intended is that erecting a large number of MIG buildings in Sector IV-A, the developers will then use the other genuinely vacant land for further profit. I do not see how or why the price of the Hiranandanis' actions in pursuing a course not contemplated by the Tripartite Agreement should be paid by the Societies. A man must be held to the bargain he made. He may say, "I will build you a house of these dimensions, with these facilities, and with these unique features as I have depicted in my layout plans and brochures." He will be bound to that. He cannot later turn around and say "it matters not a

bit what I said then to you or how or why; I will now invoke my "legal" rights to take away the very thing I promised." This is patently inequitable. It cannot possibly be the intent of the MOFA.

79. Consider the statements made by the Hiranandanis in their brochures, samples of which are at Exhibits I-1 to I-4 to the plaint. These are very much part of the representations made by the Hiranandanis and there is nothing in law or on facts to suggest that these do not form part of the "disclosures" made by the Hiranandanis or that they lie entirely outside the MOFA. In these documents, the Hiranandanis promise state-of-the-art amenities, a well-preserved habitat, lakes, greenery, forests, gardens, playgrounds, recreational facilities, the best in commercial establishments, entertainment and leisure, restaurants, and shopping centres. All said to be "cradled in the lap of luxury". Evita is said to overlook the scenic Nirvana Pond and the idyllic Powai Lake. Annexed to some of these are the layout plans (Exhibit I-4) and these show an area larger than Sector IV-A. In that sector, however, no additional buildings are to be shown. How is this to be entirely ignored? And why? It is, I think, no answer at all to say that all of this is irrelevant and inconsequential simply because the amended MOFA allows additional buildings. That is a gross over-simplification. It is not the legislative intent, and cannot have been, because it is ex-facie inequitable and unjust.

80. For a city like Mumbai, the consequences of the Hiranandanis' stand are possibly catastrophic. Every single flat purchaser on any given large project in Mumbai, especially in its suburbs, is a potential victim. He or she will purchase a flat on an effulgent representation, a resplendent portrait with glossy images and ecstatic text. In a few short months, those dreams will turn to dust as the developer invokes these so-called "development rights", nullifies all that went before and proceeds to construct new structures never before indicated, taking away in the bargain every promised benefit. This, according to the Hiranandanis, is fair and equitable. Indeed it is not, and it makes no difference whether the flat purchasers are wealthy or hoi polloi. In fact, for those with lesser means, the consequences of the Hiranandanis' arguments are possibly even more damaging. This is a situation where size emphatically does not matter.

81. I also do not think it is possible to accept Mr. Chinoy's argument that to accept the Societies' case would mean that no large scheme could ever come up anywhere. It could; but it would require the developer to commit himself to something specific and not in the generalized terms of the clauses of the FPAs in this case. Mr. Justice Gavai's findings are the law and are as yet undisturbed: if the consent is to be informed and not blanket, it must be precise and complete in every respect. It cannot be left to vague generalisations. Brochures and promotional materials are part of the disclosure, just as much as layout and building plans, and it is, I think, no argument to say that the "consent" must be limited to the clauses of the FPA in question and perhaps the plans, but ignoring altogether the other material on which individuals are induced into taking flats,

no matter what their size or value.

82. In the three PILs, the Division Bench said that any additional TDR would be adjusted against the construction already erected. But that assumes that there is TDR that can be properly loaded on the site in question. If there is no TDR or additional FSI, the inherent FSI having been exhausted, and having been shown to be exhausted, there arises no question of any adjustment on the site, sector or plot in question. The Division Bench was not concerned with Sector IV-A specifically, and it later said so. That observation or finding or direction of the Division Bench cannot be used (or, to put it more sharply, misused) to load on TDR and additional or fungible FSI where this is impermissible. This, I think, is precisely what the Hiranandanis attempted vide their undated note before the Division Bench and, as Mr. Kapadia points out, this is entirely incorrect, misleading and dishonest. That note, claiming that some of the Societies' buildings were constructed with TDR, is irreconcilable with the FSI utilization shown in the building plans. If there is one thing that the MOFA demands, it is certainty. The Act does not lend itself to such constantly shifting goalposts.

83. Is there any vacant land at all on Sector IV-A? I do not believe so. As I have noted, all the FSI has been consumed in the erection of these ten buildings. Merely because there is some additional land not built upon does not and cannot mean that it is vacant land capable of development. Its development potential is exhausted. Absent any specific or informed consent, therefore, no additional construction is possible on this land, nor can it receive any additional TDR or other form of FSI. This seems to me clear not only from the decisions cited but also the government notification to which I have earlier referred. Applying the test in *Zircon*, can the Hiranandanis be said to have made a true and full disclosure of the scheme as they now propound it? The answer must, I think, be firmly in the negative. There is far too much material brought on record by the Plaintiffs, including in particular the unexplained discrepancy between the Hiranandanis' undated note before the PIL court and the figures in the various plans, and the compelling analysis in the Plaintiffs' architect's report.

84. Finally, what of the right to a conveyance? Here again, Mr. Kapadia's submissions must prevail. His deconstruction of the Hiranandanis' argument is, I think, not just persuasive; it is determinative. By this process of FSI legerdemain, the whole of the PADS will never be developed, for there will always be some pocket of "vacant land" somewhere that can be taken under development. This cannot ever have been the contractual intent. The terms of the FPAs to which I have referred do not so indicate. This is also clearly not the mandate of the MOFA, especially the provisions of its Rules regarding conveying of title. It follows, therefore, that if the development of Sector IV-A is complete, *prima facie*, the Plaintiffs and the 12th Defendant must be entitled to a conveyance or lease. Of course, this cannot be the subject of an interim order, and this view is only *prima facie*. I will, of necessity, have to leave contentions open in this regard.

85. Hiranandani Gardens¹² is undoubtedly lavish, with wide avenues and broad sidewalks, large open spaces, extensive recreational facilities and more. It is possibly a city within a city. It is certainly an enclave and a haven, set apart from the noise and dust and the hurly-burly of the functioning chaos (or chaotic functioning) of the rest of Mumbai. Here one sees the lush green areas of which the rest of the city is so starved. One sees well designed and well built roads and infrastructure. It is true, as the Division Bench in the PILs said, that the Hiranandanis can be justly proud of what they have wrought in Sector IV-A; and there is no reason why every other class of housing, of whatever area, should not have these facilities. That MIG housing must undoubtedly be built. It just does not need to be built on Sector IV-A.

V. MMRDA'S CONDUCT

86. I cannot end this judgment without expressing my very great dismay at MMRDA's conduct. It has not once filed an affidavit in these proceedings. Although represented, it made no submissions. A very large part of the blame, if I may call it that, lies at MMRDA's door. It is a public and statutory authority. It was a co-developer with the landholders and their Constituted Attorney. It was a party to the Tripartite Agreement. It did nothing whatever to stop the Hiranandanis in their tracks as they went about their constructions, though it could not have been unaware of these and, too, that these were not the constructions that the Tripartite Agreement mandated. Yet, all those constructions are legal, with proper sanctions. The MMRDA's sloth, indolence or worse, its complicity with the developers, cannot undo rights that have accrued to the Societies. MMRDA has much to explain. I would venture to suggest that if there was ever a fit case for the award of exemplary costs against a public authority, coupled with a thorough investigation into its role in this matter, this is it. I have not done so in this case for one solitary reason: the Division Bench hearing the PILs too commented adversely on MMRDA's conduct but did not think it fit to award costs.

VI. CONCLUSION and ORDER

87. At the interim stage, the three determinative issues must be answered in favour of the Plaintiffs. They have undoubtedly made out a strong, perhaps even overwhelming, prima facie case. There is also no doubt that if reliefs are not granted, irretrievable prejudice will be caused to them. Indeed, it is likely that such prejudice is already being caused to them since there has been no ad-interim stay so far, and the construction on the additional buildings is continuing. Moreover, given that the Hiranandanis admittedly have land and space elsewhere to construct the additional MIG housing, and there is no imperative need to construct these on Sector IV-A, I do not see how it is possible to hold that the balance of convenience is in favour of the Hiranandanis. In my view, it is surely in favour of the Societies. The mere fact that the Hiranandanis have spent money is no answer, and there the ad-interim order saying that their construction is subject to further orders prohibits them from invoking any such argument of

costs incurred in these additional buildings.

88. In the result, the Notice of Motion succeeds and is made absolute in terms of prayer clauses (a), (b) and (c). All further construction on all additional buildings of 40/80 sq. mts units on Sector IV-A is to cease forthwith, save and except the club house which Defendants Nos. 1 and 8 to 11 have agreed to provide as an amenity to the Plaintiffs and Defendant No. 12. As to the matter of the conveyance, there can be no interim relief in that regard and, quite rightly, none is sought. All contentions in that behalf are expressly kept open to the final hearing of the suit.

89. Given the fact that this Notice of Motion has been pending for some time, and since ad-interim injunction was earlier refused, it only being clarified that all development would be subject to further orders, the operation of this order is stayed for a period of 12 weeks from today. Costs in the Motion to be costs in the cause.

1 Exs. B to the Plaint; a full facsimile copy is p. 241 of the Motion.

2 I must note that the landowners were, by all accounts, not villagers. At least one was a firm or a company, and many of the others were well placed individuals from Mumbai's society of the day, including the Viren Shah family which controlled Mukund Iron and Steel.

3 P. 277 of the Notice of Motion.

4 Ex. C to the Plaint.

5 The compilation shows more than 11 layouts, because it includes plans after 2010 as well.

6 I use this abbreviation to distinguish the Supreme Court decision from the High Court decision that followed on a remittal.

7 Ravindra Mutneja has been widely cited in other decisions. Mr. Chinoy cited an unreported Division Bench decision in Sudhir Shetty and Anr. v. Dharma v. Desle, Judgment dated 2nd December 2003 in Appeal No. 844 of 2003 in Arbitration Petition No. 171 of 2003. I do not believe this carries the matter much further and have therefore not thought it necessary to consider it in any detail.

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10 At page 429 of the Notice of Motion papers.

11 Which I believe to be substantially similar to the one before Gavai J in Malad Kokil.

12 An area of about 200 acres, not restricted to Sector IV-A alone. There are different types of housing. Not all of it is as high-end as Sector IV-A.