
(2015) 03 BOM CK 0224

In the Bombay High Court

Case No : Appeal (L) No. 189 of 2015 in Notice of Motion No. 62 of 2014 in Suit No. 54 of 2014 and Appeal (L) No. 128 of 2015 in Notice of Motion No. 62 of 2014 in Suit No. 54 of 2014 with Notice of Motion (L) No. 321 of 2015 in Appeal (L) No. 128 of 2015

Lakeview Developers and Others

APPELLANT

Vs

Eternia Co-operative Housing Society Ltd. and Others

RESPONDENT

Date of Decision : 25-03-2015

Acts Referred:

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 10, 11, 3, 3(2), 4
Urban Land (Ceiling and Regulation) Act, 1976 — Section 21(1)

Citation : (2015) 03 BOM CK 0224

Hon'ble Judges : V.M. Kanade, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Aspi Chinoy, Senior Counsel a/w. D.D. Madon, Senior Counsel, C.S. Kapadia, S.V. Doijode, P.A. Kabadi and F.J. Thakkar i/b. Doijode Associates, for the Appellant; Rohit Kapadia, Senior Counsel a/w. J.P. Sen, Senior Counsel, Sanjay Jain, Naushad Engineer, U

Final Decision : Disposed off

Judgement

V.M. Kanade, J.

Brief facts and gist of arguments on behalf of the Appellants/developer and Respondents/Plaintiffs:

1. These two appeals are filed; one by the original Defendants (hereinafter referred to as the "Hiranandanis") and the other by the original Plaintiffs (Hereinafter referred to as the "Societies") challenging the judgment and order passed by the learned Single Judge, who was pleased to grant an order of injunction restraining Hiranandanis from carrying out any construction on Sector IV-A of the Powai Area Development Scheme (For Short "PADS"). The Societies have filed their appeal challenging the stay granted by the learned Single Judge to his own order for a period of 12 weeks. Their principal objection is that having

observed that Hiranandanis and MMRDA had in collusion with each other violated the provisions of the MOFA and the original condition imposed by the State Government, the learned Single Judge ought not to have permitted Hiranandanis to carry on the construction on Sector IV-A for a period of three months.

2. The questions which fall for consideration before us are: (1) Whether this Court should interfere with the impugned order passed by the learned Single Judge while exercising the appellate powers under Clause 15 of the Letters Patent; (2) Whether prima facie case was made out by the Plaintiffs for grant of interim relief in their favour and whether the balance of convenience lies in favour of Hiranandanis or the Societies and (3) To what extent a developer can construct additional buildings in the light of the law laid down by the Supreme Court and this Court after taking into consideration the provisions of Section 7 and 7-A and other relevant provisions of MOFA and the Rules framed thereunder.

3. Plaintiffs are 8 Societies which were formed after buildings were constructed by Hiranandanis at Sector IV-A of the PADS. According to the Plaintiffs, after the existing buildings were constructed, potential of the development/Floor Space Index as disclosed by Hiranandanis was exhausted and a suit was filed for direction, directing Hiranandanis to execute conveyance/assignment of the suit land in favour of the Societies and also seeking injunction restraining Hiranandanis from carrying out any further construction on Sector IV-A.

4. Hiranandanis, on the other hand, have argued that they are entitled to construct four additional buildings on Sector IV-A because the development potential on the said land is not yet exhausted. Secondly, the members of the Societies were made aware that Hiranandanis would be entitled to use additional FSI through TDR if it was sanctioned by the Corporation and lay out was approved and the members of the Societies were informed that till the land is fully developed Hiranandanis were entitled to carry on the construction on Sector IV-A.

5. Hiranandanis have relied on Section 7-A and urged that they are entitled to carry on the construction till the entire land is fully developed and till that time question of conveyance/assignment in favour of the Societies does not arise.

6. Mr. Chinoy, the learned Senior Counsel appearing on behalf of the Hiranandanis has tried to distinguish all the judgments while dissecting them for the purpose of advancing his submissions. He has strenuously urged that, later on, three buildings of the Societies were constructed on the basis of TDR and, therefore, Societies are estopped from now saying that Hiranandanis cannot construct four new buildings on the basis of TDR or contending that development potential/Floor Space Index has been fully exhausted. It has also been vehemently urged that the Hiranandanis were constructing four buildings for the purpose of accommodating/providing housing to middle income group people and the area of the flat was 40 meters and 80 meters only, which was the main condition imposed by the Government and MMRDA on the Hiranandanis and,

therefore, Societies should not seek an injunction restraining Hiranandanis from doing what they were expected and supposed to do in the first place. This, in brief, is the gist of the controversy between the parties at the interim stage.

Scope of power of the Appellate Court under Clause 15 of the Letters Patent Act:

7. The scope and power of the Court in deciding the appeal filed under Clause 15 of the Letters Patent Act has been succinctly stated by the Apex Court in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, (1990) 2 ARBLR 399 : (1990) 1 SCC 727 Supp : (1990) SCC 727 Supp The Apex Court in the said judgment has observed in para 14 as under:-

"14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. As appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Ganendragadkar, J. in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, AIR 1960 SC 1156 : (1960) 3 SCR 713

"..... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton and Co. v. Jhananton* 1942 AC 130 ".....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case."

The appellate judgment does not seem to defer to this principle."

From the above observation, it is apparent that the power of the appellate court, therefore, is limited and is circumscribed to a very large extent and only if the Court comes to the conclusion that the order passed by the learned Single Judge is perverse or if the finding is contrary to the settled position in law, then the appellate court can interfere with the said finding.

8. In the present case, appeal has been filed against the interim order in a suit, restraining Hiranandanis from carrying out further construction. The suit is still pending. The learned Single Judge, therefore, has arrived at a prima facie conclusion that the Plaintiffs had made out a case for grant of interim relief and

that the balance of convenience and hardship was in favour of the Plaintiffs/ Societies and not in favour of Hiranandanis.

9. We will have, therefore, to keep in mind the aforesaid principles and then look at various submissions which are made by either side.

10. One peculiar feature of litigation which is filed on the Original Side of this Court is that because stakes are very high, very often, at each stage, both the parties bitterly and resolutely contest every application which is filed and, therefore, detailed arguments are made at the ad-interim stage and at the interim stage and at each stage the matter travels up to the Supreme Court. This is one of the peculiar features of litigation, particularly in suits which are filed on the Original Side of this Court.

11. The present appeals were also argued at length on both sides. We may, therefore, deal with relevant submissions which have been made by both sides and may not refer to each and every submission and judgment relied upon by either side, though, as far as possible, we will try to deal with all the points raised in both these appeals.

FACTS:

12. In 1977 Bombay Metropolitan Region Development Authority ("BMRDA") formulated and sanctioned a scheme called "Powai Area Development Scheme" ("PADS") for development of the lands situated at Villages of Powai and Tirandaz of Taluka Kurla in the registration district and sub-district of Bombay and Bombay Suburban. The State Government issued a Notification dated 2/6/1979 directing the authority to undertake execution of PADS. A Notification was issued by the Government of Maharashtra on 12/05/1983. The lands in the said Villages were acquired, which included the suit lands under Section 32(1) of the BMRDA Act and the lands vested in the authority.

13. There were in all six land holders who owned the entire area under PADS. The area of the land was comprising approximately 230 acres.

14. The landholders entered into agreement dated 15/12/1983 for development-cum-sale with Defendant No. 1 granting development rights in respect of the land admeasuring 209,025 square meters in the said two villages. Power of Attorney was also executed in favour of Defendant No. 3, partner of Defendant No. 1, giving him rights to carry out the proposed development on behalf of the landholders. The third agreement was executed on 12/6/1985 between the landholders and Defendant No. 1 whereby the area of the land under development was increased to 3,34,454.14 square meters. They also executed Declaration-cum-Indemnity in favour of Defendant No. 1 giving them a right to deal with and dispose of the said land subject to provisions of law including BMRDA Act. A Tripartite Agreement dated 19/11/1986 was entered into between the Maharashtra State Government and Defendant Nos. 13 and 19 which included the landholders and an agreement to lease was entered into between

Defendant No. 13 and the landholders. Defendant No. 13 granted to the landholders license and permission to enter into, deal with and develop the land admeasuring 364,760 square meters on terms and conditions mentioned in the said agreement to lease for a period of 80 years from the date of possession and such lease was to be executed in favour of the landholders or their nominees.

15. By an order dated 12/2/1987, Government of Maharashtra exempted the said land from the provisions of Chapter III of the Urban Land (Ceiling and Regulation) Act, 1976 and directed the licensees (i.e. the landholders) to complete the development including construction of the buildings within a period of 10 years from the date of receipt of the order.

16. Sometime in 1990, the lands forming part of the Scheme were sub-divided into various sectors and numbers from Sector I to Sector XIII. Sometime in April 1990, a separate layout plan for Sector IV-A was approved by the Municipal Corporation of Greater Mumbai ("MCGM") and the Planning Authority. A separate file number was allotted to the layout plan for Sector IV-A.

17. Defendant No. 1, sometime on/or about 22/8/1990, proposed to construct the building "Solitaire" on a part of the suit lands and obtained the IOD from MCGM for construction of the said building. Flats were sold to flat purchasers of the building "Solitaire" from 1993.

18. On 21/7/1994, changes were made in the building construction plans of the said building and also in the approved layout plan of 1992. This layout of 1994 was disclosed to the flat purchasers of the building "Solitaire", who entered into agreement for sale with Defendant No. 8 after 21/7/1994. Between 3/8/1992 and 3/3/2001 IOD was obtained from MCGM for construction of the buildings being "Florentine", "Eternia", "Sovereign", "Valencia", "Odyssey I", "Odyssey II" and "Tivoli". The layout plan of 1994 was disclosed to the Plaintiff Nos. 1, 2, 3, 4, 5, 6 and 8 and its members/flat purchasers.

19. On 11/5/2004, IOD was obtained from MCGM for construction of building "Evita". On 12/3/2004, the layout plan was disclosed to the flat purchasers of various other buildings which were earlier proposed and were to be constructed on the suit land. This was further changed and the amendments were finally crystallized into a layout plan sanctioned by the MCGM under IOD dated 11/5/2004 for the building "Evita" and on 11/5/2004 layout plan for building "Tivoli" was approved which is in accordance with layout of 12/3/2004.

20. *1On 12/3/2004, the layout plan shows total permissible FSI of 1,26,353.04 square meters and the total area of the then proposed construction of 1,26,164.295 square meters. The RG areas and locations were broadly maintained as in the earlier layout of 1994. A common Club House was marked and shown on the said layout plan of 2004 in the RG area at the same location as was shown in the layout of 1994.

21. *2Between 1990 and 2004, on the basis of disclosure of the plans.

Specifications and representations, the flat purchasers of various buildings executed agreements of sale with and paid consideration to the respective developers viz. Defendant Nos. 1 to 10. They were put in possession after full consideration and other amounts were paid. Their agreements were registered. The flat purchasers formed their respective Co-operative Housing Society building-wise from time to time.

22. The last building "Evita" was completed and the Occupation Certificate was obtained on 15/6/2007 and thus, in all, 9 residential buildings and one commercial building according to the layout of 2004 were constructed. In respect of 9 residential buildings Co-operative Housing Societies were registered.

23. It is the case of the Plaintiffs that Defendant Nos. 1 to 11 were duty bound and under obligation and were liable to form a Federation comprising of 10 Co-operative Housing Societies and convey the title of the common areas and facilities including RG to such a Federation of Co-operative Societies. The property in Sector IV-A was not conveyed/assigned to the Societies.

24. *3 It is an admitted position that in the layout plan of 12/3/2004, no reference is made for the construction of four additional buildings on the suit plot. Sometime, in or about 2012, Defendant Nos. 1 to 11 proposed and received approval of MCGM for construction of four additional buildings on the suit plot as per the purported layout plan dated 4/7/2012 by utilizing additional FSI allegedly under various Regulations such as DCR 33, DCR 35(4) etc. which has been issued by way of amendments to the existing Development Control Regulations.

Question for consideration and rival claims:

25. The moot question which falls for consideration before this Court is: whether the developer can construct these four additional buildings on Sector IV-A though they were not shown in the layout plan of 12/3/2004 by utilizing additional FSI under various Regulations such as DCR 33, DCR 35(4) etc. or whether Societies are entitled to get fungible FSI under the relevant provisions of DCR and consequently whether the Plaintiffs/Societies are entitled to seek direction to the developers to convey/assign the properties in Sector IV-A to them?

26. According to the Plaintiffs, changes made to the layout of 2004 by the developers by the purported layout plan of 2012 were without the knowledge and consent of the Cooperative Housing Societies and their members and the said changes were done behind their back.

27. *4 Three PILs were filed in this Court viz. PIL No. 131 of 2008, PIL No. 91 of 2008 and PIL No. 21 of 2010 in which alleged illegalities committed between Defendant Nos. 1 to 11/developers and MMRDA were brought to the notice of this Court. It was pointed out in the said PIL that the developers were supposed to construct the flats on the entire 230 acres for middle income housing group, the area of which was to be 40 square meters and 80 square meters. However, in gross violation of the said condition, it was alleged that the developers had

amalgamated the two Flats and constructed buildings which were far above the agreed area of 40 square meters and 80 square meters and flats were falling under luxurious flats segment. The PIL court deprecated acts of the developers and MMRDA and directed the developers to construct flats admeasuring 40 square meters and 80 square meters only on the remaining vacant land. An application for clarification of the said order was filed by the Plaintiffs and it was clarified by PIL Court that they had not stated in their order that these flats should be constructed on Sector IV-A.

28. It is the case of the Plaintiffs herein that taking advantage of the said order passed in PIL and under the pretext of compliance of orders of this Court in the said PIL, developers misrepresented to the authorities that they are bound to carryout such construction on certain part of the Scheme including the suit land and the plans were got approved from the authorities. Plaintiffs, therefore, filed the present suit since the property was not conveyed/assigned in favour of the Societies or federation of Societies and that the proposed four new buildings were constructed in the RG area on the suit plot in breach of and contrary to the layout of 2004. It is the case of the Plaintiffs that developers are not entitled to alter the layout of 2004 without the consent of Societies and individual flat purchasers of new buildings and cannot construct building/s on the remaining plot of land which was reserved for RG and Common Club House.

29. Plaintiffs also took out Notice of Motion seeking interim relief's. Developers/Defendants filed their affidavit-in-reply. Plaintiffs filed their rejoinder. Sur-rejoinder was filed by the developers. Additional affidavit in reply was filed by the developers.

DEFENDANTS CASE IN AFFIDAVIT IN REPLY:

30. In the affidavit-in-reply, in para 2 it is mentioned that area of Sector IV-A excluding reservation is about 1,11,710.85 square meters. Reference is made to the tripartite agreement dated 19/11/1986 between Defendant No. 1, MMRDA and State of Maharashtra. It is stated that flats of 40 and 80 square meters were required to be constructed on the said land. It is also stated that It is an admitted position that layout plans were altered eight times from 1992 to 2004 which was to the knowledge of the Plaintiffs. It is further stated that Plaintiffs were aware that phase-wise development of the land in Sector IV-A was being done by the developer from 1990 and this fact was made known to the Plaintiffs. It is then stated that the developer in a similar manner proposed to construct four additional buildings in order to fulfill their obligation under the tripartite agreement of construction of 40 square meters and 80 square meters flats. It is contended in the affidavit-in-reply that the Plaintiffs are beneficiaries of the additional construction carried out of 10 buildings over a period of 17 years. It is contended that the Plaintiffs tried to prevent the construction of smaller size flats i.e. 40 and 80 square meters in the vicinity of their buildings. It is then contended in para 4 as under:-

"4.....The construction of buildings with said smaller size tenements of 40 and 80 square meters are an express requirement of the Agreements/Tripartite Agreements of which Plaintiffs and their members were and are full aware. Moreover the same are also being constructed pursuant to and in accordance with the orders of this Hon"ble Court dated 22nd February, 2012, read with further Orders dated 19th April, 2012 and 4th October, 2012, made in PIL Nos. 131 of 2008, 91 of 2008 and 21 of 2010."

(Emphasis supplied)

It is then contended that the Plaintiffs were not entitled to get conveyance in view of the clause in the tripartite agreement. It is further contended that (i) the promoters would be entitled to put up further constructions/building on the said lands by modifying the building plans/layouts and (ii) that the Lease Deeds will be executed in favour of the said Cooperative Housing Societies "only after the land covered under the Powai Area Development Scheme is fully developed". It is further stated that this has been duly pointed out to the diverse Plaintiffs and confirmed by MMRDA vide its letter dated 12/11/2010. It is then pointed out that Defendant No. 12 which is also one such Society out of 9 Societies, had applied to the Deputy Registrar for a Deemed Conveyance and the Deputy Registrar by an order dated 4/7/2013 rejected the application.

31. Further, a detailed affidavit-in-reply has been filed by the developer in which further details regarding the buildings constructed by the developer on Sector IV-A have been given which included area of construction, changes made in the layout plan from time to time and the phase-wise development made by the developer in Sector IV-A

32. The learned Single Judge by his judgment and order which was pronounced on 22/1/2015 restrained the developer from constructing the buildings. The learned Single Judge, however, granted stay to his own order for a period three months.

Relevant provisions of MOFA including following of judgment in Kalpita Enclave:

33. Before taking into consideration the rival submissions, it would be appropriate to see the relevant provisions of the MOFA.

34. The Maharashtra Ownership flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 was passed to regulate promotion of construction, sale, management and transfer of flats on ownership basis. The said Act was passed pursuant to the report submitted by the Committee which was appointed by the Government Resolution regarding several matters of abuses, malpractices, difficulties faced by the flat purchasers in respect of sale, management and transfer of flats. The basic purpose behind the Act was to ensure that shortage of housing is reduced by proper cooperation and coordination between the promoter and the flat purchasers. The Act sought to ensure transparency in the intention of the promoter to develop a plot under a

particular scheme or layout by making true and correct disclosure to the flat purchasers and also to ensure that the land is conveyed to the Society comprising of flats purchasers within a reasonable period of time.

35. One of the first judgments delivered by the Bombay High Court was in *Kalpita Enclave Co-operative Housing Society Ltd. vs. Messrs Kiran Builders Pvt. Ltd.* (1985) 88 BLR 100. In the said judgment, the learned Single Judge of this Court interpreted the provisions of Section 7 and the learned Judge summarized the propositions which emerged from the discussion of law which are as under:-

"Now I may proceed to summarise the propositions that have emerged from the discussion of law made by me above.

1) Section 7 of the Ownership Flats Act imposes 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 agreements are entered into.

2) The said provision, therefore, also bestows a corresponding right upon the flat purchaser to compel the discharge of this obligation on the part of the promoter.

3) If a breach of this obligation is noticed in the flats or buildings possession of which has been given to the flat purchaser or to the body corporate representing the flat purchasers, then that breach can be remedied only in the manner provided by sub-section (2) of section 7.

4) If, however, the breach of the obligation or the contravention of section 7(1) is noticed or apprehended before the possession is given, action or its prevention can be brought in a Civil Court; section 7(2) operates only after the possession is given; apprehended contravention is not covered by that provision.

5) Since section 7(2) applied to completed structure, any act towards further contravention even after the possession is given can be prevented by filling a suit in the Civil Court.

6) The contravention contemplated in section 7(1) or in section 7(2) which includes alteration in the structure or the construction of the additional structure is not confined to the construction of the buildings only; this contravention may extend 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.

7) If, however, the property is conveyed to the flat purchaser or to the body corporate representing them, then naturally the promoter cannot and will not meddle with the property because such an act on his part will amount to an act

of trespass making him liable for both civil and criminal action."

36. After the said judgment was delivered, MOFA was amended by amending Act of 1986 in order to get over certain observations made by the learned Single Judge in Kalpita Enclave Co-operative Housing Society Ltd. (supra). In the Statement of Objects and Reasons, it was observed as under:-

".....Such an interpretation of these provisions would result into the flat purchasers in one building objecting to the additions and alterations being made in any other buildings although such alterations and additions are consented to by the persons who have taken or who are to take flats in such other buildings or even if they are permissible under the building rules or building bye-laws or development control rules and are approved by the local authority. This would further result into retarding the growth of construction of buildings and increasing the housing stock. If the total layout permits construction of more buildings in accordance with the building rules or building bye-laws for the time being in force, there should be no impediment in construction of the additional buildings. While approving any proposals for construction of additional buildings in the layout the local authority will, no doubt, see to it that the open spaces, etc to be provided under the building rules or building bye-laws or development control rules are, in fact provided. It is, therefore, proposed to amend section 7(1)(ii) suitably and also to make a suitable provision for removal of doubt in respect thereof."

Section 7 and 7-A of MOFA, post 1986 Amendment read as under:-

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

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

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

(ii) any other alternations [or additions] 5 in the structure of the building [or construct any additional structures] 6 without the previous consent of all the persons who have agreed to take the flats in such building.

(Emphasis supplied)

(2)..... "

"7A. Removal of doubt

For the removal of doubt, it is hereby declared that clause (ii) of sub-section (1) of section 7 having been retrospectively substituted by clause (a) of section 6 of the Maharashtra Ownership Flats (Regulation of the promotion of construction,

sale, management and transfer (Amendment) Act, 1986 (hereinafter in this section referred to as "the Amendment Act"), it shall be deemed to be effective as if the said clause (ii) as so substituted had been in force at all material times; and the expression "or construct any additional structures" in clause (ii) of subsection (1) of section 7 as it existed before the commencement of the Amendment Act and the expression "constructed and completed in accordance with the plans and specifications aforesaid" and "any unauthorized 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)

As a result of the amendment of 1986, Section 7 was amended retrospectively and it permitted the promoter to construct additional buildings in a scheme or layout and as a result flat purchasers in one building could not then take objection to the promoter constructing other buildings in the scheme and there was no obligation on the part of the promoter/developer to take prior consent of such flat holder in the first building and in view of what is observed in Section 7A, it was clarified that the expression "constructed and completed in accordance with the plans and specifications aforesaid" and "any unauthorized change in the construction" was 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.

37. The learned Senior Counsel appearing on behalf of the developer invited our attention to various judgments which are mentioned hereinabove and urged that the learned Single Judge had erred in applying the ratio of these judgments in favour of the Plaintiffs and not in favour of the developer. On the other hand, the learned Senior Counsel appearing on behalf of the Plaintiffs urged that the ratio of these judgments including the judgment of the Apex Court support and directly cover the case of the Plaintiffs.

38. It has to be remembered, as stated hereinabove, that the judgment of the Apex Court should not be read as a statute and ratio of the judgment of the Apex Court or the same High Court will become binding precedent only if facts in the said case and the case at hand are more or less identical. The facts in the present case are very peculiar and in many ways different from the judgments which are cited before us and, therefore, ratio of these judgments which are

cited before us will not be strictly applicable to the facts of the present case.

39. Section 7A, therefore, was inserted to overcome the view expressed by the Bombay High Court in Kalpita Enclave Co-operative Housing Society Ltd.

Ratio of judgment in Jayantilal Investments, paras 15 to 19, including the facts of the said case:

40. The Apex Court in Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, AIR 2007 SC 1011 : (2007) 2 JT 368 : (2007) 2 SCALE 81 : (2007) 9 SCC 220 : (2007) 1 SCR 677 : (2007) AIRSCW 796 : (2007) 1 Supreme 694 had an occasion to take into consideration the effect of insertion of Section 7A. Facts of the said case are stated in paras 2, 3, 4, 5, 6, 7 and 8 of the said judgment. Briefly stated, on 26/8/1980, an agreement was entered into between the developer and the vendors in respect of the land at Kandivili, Greater Mumbai. Subsequently, under a revised draft development plan, a 44 ft wide road was indicated and therefore total land stood divided. On account of this division, a plot emerged as the suit land. Permission was obtained by the promoter under section 21(1) of the Urban Land (Ceiling and Regulation) Act, 1976 permitting it to construct a building with 7 wings and 137 tenements for weaker section. Plan was sanctioned which indicated one building with 7 wings. At the relevant time, the promoter was entitled only to FSI of 0.75. This plan was amended from time to time from 1986 to 1994. In 1986, layout was revised and approved with 5 wings having additional floors as well as FSI of 1.00 due to construction of 44 ft wide DP road on the original plot and the FSI of 1.00 was made available to the promoter.

Flats were sold from time to time to the flat purchasers. In the meantime, MOFA was amended retrospectively on 12/11/1986 and Section 7A was inserted permitting additional buildings to be constructed etc.

Again on 25/3/1991, Development Control Regulations were framed and FSI was increased from 1 to 1.8 on account of the introduction of the concept of TDR and sanction was obtained by the developer thereafter for construction of building in question with 6 wings. The layout was again amended on 26/11/1994 after the co-operative society of flat purchasers was registered on 20/1/1993. This plan was duly sanctioned. This was done on account of additional TDR by the developer/appellant. The developer again amended the plan on 29/3/2001 and the competent authority sanctioned 5 + 2 wings in view of the TDR which was made available.

The Co-operative Society and five flat takers filed a suit in the City Civil Court in the said case of Jayantilal (supra) seeking conveyance and injunction restraining the promoter from putting up further constructions and also questioning the validity of the sanction given by the competent authority dated 29/3/2001. Trial Court partly decreed the suit, permitting the promoter to complete the construction as per amended plan dated 29/3/2001 and further period of three years was given to the promoter for executing conveyance in favour of the

Society. Society filed an appeal in the Bombay High Court being aggrieved by the grant of three years time to the promoter to execute the conveyance. Promoter also filed a cross appeal in the Bombay High Court. It was contended that under the agreement between the promoter and the flat takers, no time limit for execution of the conveyance could be set as the promoter was entitled to exploit full potential of the plot in question and as long as this was not done, he was not statutorily obliged to execute conveyance in view of provisions of Section 7A of the MOFA. Bombay High Court allowed the appeal of the Society and dismissed the appeal filed by the developer. The High Court held that the scheme stood completed with the construction of the flats/shops and the garden and under Rule 8 of the said Rules, the promoter/appellant was obliged to convey the title to the Society. The High Court held that there was an implied trust created and the promoter was the trustee and that the beneficiaries were the flat purchasers and the promoter could not make additions in the structure of the building without prior consent of the Society. It held that prohibition was not to apply in respect of the construction of any other additional building or structure constructed or to be constructed under a scheme or a project of development in the layout plan. It further held that no additional wings like the one proposed in the plan approved on 29/3/2001 was ever included in the layout plans between 1985 and 1989 and, therefore, the promoter was not entitled to derive any benefit from Section 7A of MOFA.

Against the said judgment and order, the developer preferred an SLP. The Apex Court observed in para 13 as under:-

"13. Looking to the importance of the matter in which we were required to harmoniously construe the provisions of Sections 3 and 4 on one hand with Sections 7 and 7-A on the other hand as also Sections 10 and 11 of MOFA..... "

Para 15 to 19 of the said judgment, in our view, spell out the ratio of the judgment of the Apex Court and the interpretation which was given by the Apex Court to Section 7, 7-A read with sections 3 and 4 including Clauses 3 and 4 of Form V of the said Rules. Apex Court, thereafter, taking into consideration facts of the said case finally came to the conclusion that the High Court had failed to examine the question as to whether the project undertaken in 1985 by the appellant 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 Apex Court, therefore, in para 20 of its judgment has observed as under:-

"20. 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..... "

For the purpose of deciding the said questions and the other questions, it remanded the matter back to the High Court.

Ratio of the judgment in Jayantilal:

41. The fact remains that the Apex Court in Jayantilal Investments (supra) interpreted the provisions of amended Section 7-A and tried to harmoniously construe it with other provisions of the said Act. The observations made by the Apex Court, therefore, to that extent, are binding on the High Court and, therefore, any observations which are contrary to the said observations made by the High Court would stand automatically overruled and the interpretation given by the Apex Court shall prevail. In this context, therefore, it will be necessary to reproduce said paragraphs 15 to 19 from the said judgment of Apex Court in Jayantilal Investments (supra). The said paras 15 to 19 read as under:-

"15. The judgment of the Bombay High Court in Kalpita Enclave case was based on the interpretation of unamended Section 7 of MOFA. Consequently, it was held that a promoter was not entitled to put up additional structures not shown in the original lay out plan without the consent of the flat takers. Thus, consent was attached to the concept of additional structure. Section 7 was accordingly amended. Section 7-A was accordingly inserted by Maharashtra Amending Act No. 36/86. Section 7-A was inserted in order to make the position explicit, which according to the legislature existed prior to 1986, implicitly. Section 7 of MOFA came to be amended and for the purpose of removal of doubt, additional Section 7-A came to be added by Maharashtra Act 36/86. By this amendment, the words indicated in the parenthesis in the unamended Section 7(1)(ii) namely, "or construct any additional structures" came to be deleted and consequential amendments were made in Section 7(1)(ii). Maharashtra Act No. 36/86 operated retrospectively. Section 7-A was declared as having been retrospectively substituted and it was deemed to be effective as if the amended clause had been in force at all material times. Further, it was declared vide Section 7-A that the above quoted expression as it existed before commencement of the Amendment Act shall be deemed never to apply in respect of the construction of any other additional buildings/structures, constructed or to be constructed, under a scheme or project of development in the lay out plan, notwithstanding anything contained in the Act or in any agreement or in any judgment, decree or order of the court. Consequently, reading Section 7 and Section 7-A it is clear that the question of taking prior consent of the flat takers does not arise after the amendment in respect of any construction of additional structures. However, the right to make any construction of additional structures/buildings would come into existence only on the approval of the plan by the competent authority. That, unless and until, such a plan stood approved, the promoter does not get any right to make additional construction. This position is clear when one reads the amended Section 7(1)(ii) with Section 7-A of the MOFA as amended. Therefore, having regard to the Statement of Objects and Reasons for substitution of Section 7(1)(ii) by the Amendment Act 36/86, it is clear that the object was to

make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act No. 36/86 was to change the basis of the judgment of the Bombay High Court in Kalpita Enclave case. By insertion of Section 7-A vide Maharashtra Amendment Act 36/86 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, if the total lay out allows construction of more buildings, subject to compliance of the building rules or building bye-laws or Development Control Regulations. At the same time, the legislature had retained Section 3 which imposes statutory obligations on the promoter to make full and true disclosure of particulars mentioned in Section 3(2) including the nature, extent and description of common areas and facilities. As stated above, Sub-section (1A) to Section 4 was also introduced by the legislature by Maharashtra Act 36/86 under which the promoter is bound to enter into agreements with the flat takers in the prescribed form. Under the prescribed form, every promoter is required to declare the FSI available in respect of the said land. The promoter is also required to declare that no part of that FSI has been utilized elsewhere, and if it is utilized, the promoter has to give particulars of such utilization to the flat takers. Further, under the pro forma agreement, the promoter has to further declare utilization of FSI of any other land for the purposes of developing the land in question which is covered by the agreement."

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

registration of the society within four months from the date on which the minimum number of persons required to form such society (60%) have taken flats. Rule 9 provides that if no period for execution of a conveyance is agreed upon, the promoter shall, subject to his right to dispose of the remaining flats, execute the conveyance within four months from the date on which the society is registered."

"17. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the lay out plan on the one hand vis-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 of 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 (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36/86. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of 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 concerned local authority at the time sanctioning the said plans or thereafter and shall, before handing over possession of the Flat to the Flat Purchaser, obtain from the concerned local authority occupation and/or completion certificates in respect of the Flat.

4. The Promoter hereby declares that the Floor Space Index available in respect of the said land issquare metres only and that no part of the said floor space index has been utilized by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilized by the Promoter elsewhere, then the Promoter shall furnish to the Flat Purchaser all the detailed particulars in respect of such utilization of said floor space index by him. In case while developing the said land the Promoter has utilized any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the Promoter to the Flat Purchaser. The residual F.A.R. (F.S.I.) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after

the registration of the Society the residual F.A.R. (F.S.I.), shall be available to the Society.

(emphasis supplied)"

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

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

Analysis of the judgment in paras 42 to 45:

42. From the above observations, it can be seen that the Apex Court has not construed the amendment in Section 7(1) and insertion of Section 7-A in isolation but has interpreted it in the light of other relevant provisions viz. Sections 3 and 4 of MOFA and Clauses 3 and 4 of Form V of the said Rules and the obligation of the developer of registration of Society and conveying the title. In a nutshell, therefore, though object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land by construction of additional buildings subject to total layout allowing construction of more buildings and subject to complying with the building rules or building bye-laws or Development Control Regulations, at the same time this could be done only after full and true disclosure of particulars mentioned in Section 3(2) is made incorporating the same as provided under sub-section (1-A) to Section 4 in the agreements with the flat purchasers, which has to be harmoniously read with Section 10 of the MOFA which cast obligation on the promoter to form a Cooperative Housing Society of the flat takers and under Section 11 complete his title and convey the title to the Society within a prescribed time under Rule 8 of the said Rules.

43. In our view, therefore, from the aforesaid judgment, it is clear that the developer cannot claim that he can continuously exploit the building potential for eternity without conveying the land in favour of the Society. The obligation to convey the land in favour of the Society within a prescribed time and the obligation to make true and full disclosure under Clauses 3 and 4 of Form V remains unfettered. If the full development potential of the land is exhausted and the obligation for conveyance of land in favour of the Society has arisen as per the Act and Rules and if the developer fails to do so then any further benefit which would accrue to the developer on account of any additional TDR or FSI made available, cannot be used by him for the purpose of construction of additional buildings. For example, recently, the Government of Maharashtra has announced that the FSI which would be available in the City of Greater Mumbai would be increased by 0.6. The benefit of this announcement cannot be availed by a developer who has not conveyed the property in favour of the Society though he was under legal obligation to do so, having fully developed the building potential of the land under building as per true and full disclosure under Section 3 and 4 of the said Act and Clauses 3 and 4 of Form V of the said Rules. He, therefore, cannot having failed in his obligation to convey the property within the time prescribed thereafter claim that full building potential has not been utilized and claim right to construct further buildings.

44. In our view, from the facts and circumstances of the present case, it can be seen that though the developer/promoter had fully utilized the full FSI/potential of the land and was under an obligation to convey the property after construction of the 10th building on Sector IV-A, he is now trying to construct four other buildings by claiming additional TDR and trying to load it on the four additional buildings. In our view, prima facie, it can be seen that full development potential/FSI has already been utilized by the developer and his claim that additional buildings were constructed by utilizing the additional TDR prima facie does not appear to be correct if the layout plan produced by the Plaintiffs/Societies is taken into consideration.

45. Since the judgment of the Apex Court in *Jayantilal Investments* (supra) is the only judgment on the point under the MOFA, ratio of the said judgment will prevail and will be binding on this Court for that purpose. In our view, it is not necessary to minutely scrutinize the ratio of the judgments which have been shown to us by Mr. Aspi Chinoy the learned Senior Counsel appearing on behalf of the developer, though we can observe that the facts in most of these cases are different and, therefore, even otherwise the ratio of these judgments will not apply to the facts of this case. The contention of the developer that he is entitled to carry on the construction till the entire land i.e. the land not only in Sector IV-A but in all Sectors 1 to 13 is developed, is not correct. Neither the tripartite agreement nor the lease agreement executed between the land owners and developer nor the individual agreement between the developer and the flat purchasers can be construed in this manner as it would render the statutory provisions of MOFA nugatory. Even if such contractual conditions are mentioned

in the contract, statutory obligation would override the contractual clauses in the agreement. Reliance on the note below the pro forma of the lease therefore is misconceived and it cannot be used to interpret the meaning which is sought to be given by the developer that till the entire land is fully developed in all sectors, he is entitled to exploit the development potential in the land in Sector IV-A.

The facts in detail pertaining to the tripartite agreement, individual agreements with the flat purchasers and the relevant clauses:

46. Keeping in view the law laid down by the Apex Court and the observations made by the High Court in different cases, it will be necessary to examine the facts of the present case.

47. The BMRDA which is now known as MMRDA formulated a Scheme for the development of lands situated at villages Powai and Tirandaz at Taluka Kurla and the Scheme was called Powai Area Development Scheme (PADS). A notification was issued by the State Government directing MMRDA to undertake execution of the Powai Area Development Scheme. Lands were then acquired under section 32(1) of the BMRDA Act. The Government of Maharashtra on 12/2/1987 exempted the lands from the provisions of Chapter III of Urban Land (Ceiling and Regulation) Act, 1976 and directed the landholders to complete the development within a period of ten years from the date of receipt of the order. Surprisingly, even after the lands vested in the BMRDA, on 15/12/1983 landholders entered into agreement for development-cum-sale with the developer in respect of entire land in the said area. Thereafter, tripartite agreement was entered into between the Maharashtra State Government, landholders and the developer-Defendant No. 13 and 19. Simultaneously agreement of lease was entered into between Defendant No. 13-Developer and the landholders and by the said agreement of lease, license/permission was granted to the landholders to develop the entire land and the lease was for a period of 80 years and should be executed in favour of the licensees i.e. the landholders or their nominees. All the six landholders entered into agreement with Hiranandanis for the development of the entire land which was sub-divided into Sectors 1 to 13. Hiranandanis, thereafter, entered into separate agreements with flat purchasers. Out of 80 years, 26 years have already elapsed till the Plaintiffs/Societies filed a suit seeking conveyance/assignment of the land in favour of the Societies. It will be necessary, therefore, to quickly examine the relevant clauses in the tripartite agreement, agreement of lease and individual agreements between Hiranandanis and the flat purchasers.

48. Tripartite agreement was entered into between the Government of Maharashtra, the MMRDA and the land owners and by the said agreement (i) the land owners agreed to surrender their lands to the Government for a nominal amount of Rs. 1 per hectare, (ii) the Government made the lands (aggregating to 230 acres) available to the MMRDA and the MMRDA agreed to demise the lands back to the erstwhile owners for a term of 80 years at a nominal premium of Rs. 1 per hectare, subject to the landowners having developed the said lands in accordance with the PADS, by providing at their own cost the necessary

infrastructure and constructing flats of 40 and 80 sq. mtrs thereon. Under Clause 7(iii) of the tripartite agreement an undertaking was given by the landholders that each of 50% of such units shall not exceed 40 sq. meters and each of the remaining 50% of such units shall not exceed 80 sq. meters. Under clause 8(ii) the landowners were under an obligation to sell to the Government flats etc equivalent to 15% of the Floor Space Index consumed by the landholders and under Clause 8(iii), they had undertaken to offer to the Central Government to grant sub-lease or sub-leases of the lands described in the Fourth Schedule and the Central Government was to give their acceptance within three months.

The form of lease deed to be executed by the MMRDA was annexed to the said tripartite agreement and there was a note at the end of the pro forma lease agreement which mentions as under:-

"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 Co-operative Society, Limited Company or Condominium of Apartments of prospective purchasers of premises in the proposed development and in which event the present Lessee will become a Confirming Party thereto."

49. It will now be necessary to examine individual agreement between the developer and the flat purchasers and more particularly Clauses 43 and 49. Clause 43 reads as under:-

"43. The promoter/s shall always have a right to get the benefit of additional FSI for construction from BMC and also to make the addition, alteration, 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."

Clause 49 reads as under:-

"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 of recourse or consent of the Purchaser in any manner whatsoever and the Purchaser agrees not to dispute or objects to the same."

50. From the aforesaid clauses of the tripartite agreement and the individual agreement and the note which has been appended to the draft form of lease which was annexed to the tripartite agreement, it was contended that till the entire land in the PADS was fully developed by the promoter/developer, the question of conveyance/assignment of the property by lease in favour of the Societies did not arise.

Findings from para 51 onwards:

51. In our view, the said submission is fallacious and without any substance. A clause in the agreement between the flat purchasers and the developer cannot be construed to mean that the developer can continue to develop the land for eternity and on the basis of some clause in the agreement refuse to convey the property which is contrary to the provisions of Section 7 read with Section 7-A and Sections 3 and 4 of the said Act and Rules 3 and 4 of Form V of the said Rules. As observed in *Jayantilal Investments (supra)*, all these provisions have to be construed harmoniously. The clauses in the agreement cannot be construed in such a way as to make the obligations cast on the developer under Sections 3 and 4 and Rules 3 and 4 and Rule 8 and 9 of Form V redundant. If these clauses are read in such a manner, the purpose of the Act would be defeated. The provisions of the Act and Rules seek to strike a balance between the right of the developer to develop the property to its full potential and, at the same time, protect the rights of the flat purchasers (i) to ensure that there is no alteration in the building and (ii) within a prescribed period title of the property is conveyed in favour of the Society. In the present case, the developer is trying to interpret clauses in the flat purchasers' agreement and the note annexed to the lease deed in such a manner as to defeat the rights of the Societies in getting the land conveyed in their favour. If the interpretation which is sought to be made by the promoter/developer is accepted then till the entire 230 acres of land is not constructed/developed, the flat purchasers would not get the land conveyed in their favour. A lease was to be executed for a period of 80 years out of which 26 years have already been over. There is a large part of the vacant land in all the 13 Sectors. The promoter will continue to develop the said property and refuse to convey the land in favour of the Societies.

52. From the layout charts which have been shown to use, it can be seen that prima facie the Plaintiffs have made out a case that the entire consumable FSI has already been consumed after 10th building was constructed. The additional FSI and TDR which was utilized for construction of last two buildings was made available to the developer from the road set back area and other amenities which were provided and out of that these 10 buildings have been constructed. Prima

facie, promoter/developer has not been in a position to show that the buildings were constructed out of additional TDR such as Slum TDR or TDR which is purchased by the developer. The development potential therefore, prima facie, in our view, has been fully consumed after the 10th building was constructed and, therefore, even otherwise, promoter/developer was under an obligation to convey the land in Sector IV-A in favour of the Societies.

53. As we have pointed out hereinabove, we do not propose to deal with each and every judgment of this Court which has been cited by the learned Senior Counsel appearing on behalf of the developer. All those judgments are distinguishable on facts. Much emphasis was laid on the Division Bench Judgment 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*, (2008) 6 ALLMR 550 : (2008) 110 BOMLR 3571 : (2009) 2 MhLj 115. It was contended that the Supreme Court had not set aside the order passed by the Division Bench when it remitted the matter back to the Trial Court for deciding the Notice of Motion. This submission was vehemently opposed by the learned Senior Counsel appearing on behalf of the Plaintiffs. Reliance was placed on the observation made by the Division Bench more particularly on the observations that after the amendment of Section 7 MOFA and introduction of Section 7-A, consent of flat holders in building is not necessary in respect of construction in the scheme, after obtaining approval of the local authority in accordance with the building bye-laws or Development Control Rules.

In our view, there cannot be any dispute regarding the said observation. However, the said observation cannot be read in isolation as laid down in the case of *Jayantilal Investments (supra)* and the said provisions of the Act will have to be harmoniously construed with the other provisions with reference to facts and circumstances of each case. We are of the view, therefore, that nothing much turns on the observations made by the Division Bench in *Manratna Developers (supra)* and these observations are not of much assistance to the promoter/developer.

54. Mr. Chinoy, the learned Senior Counsel appearing on behalf of the developer also strenuously urged that the judgment delivered by Gavai, J. in *Malad Kokil Co-Operative Housing Society Ltd. Vs. The Modern Construction Co. Ltd. and Others*, (2013) 2 BomCR 414 did not lay down the correct law. The same submission was made in respect of the judgment delivered by the learned Single Judge of this Court in *Megh Ratan Co-operative Housing Society Ltd. Vs. Rushabh Rikhav Enterprises and Others*, (2009) 1 BomCR 361. We are really not inclined to dissect these judgments to say whether they lay down the correct proposition of law, as we have noted hereinabove that the Apex Court in *Jayantilal Investments (supra)* has considered the various provisions of MOFA and has laid down the law and the ratio of the Apex Court judgment, therefore, is binding.

Similarly, reliance was also placed by the learned Senior Counsel appearing on

behalf of the Developer on the judgment of the learned Single Judge of this Court in Harsharansingh Pratapsingh Gujral and Others vs. Lokhandwalla Builders Ltd. and Others 1996(1) Bom. C.R. 516. In the said judgment the observation is made that a perusal of the agreement itself would show that the plaintiffs were aware that the plot had to be developed in a phased manner and the plaintiffs could take an objection only when there was a change in the plans of their buildings and it was further observed that Plaintiffs could not insist that the Society must be registered because as per the agreement the Society shall be registered only after the full development of the land had been completed. In our view, these observations have been made in the context of the facts of the said case and, therefore, the observations made by the learned Single Judge in the said case cannot be of any assistance to the promoter/developer in this case.

55. We are, therefore, not inclined to interfere with the order passed by the learned Single Judge and we concur with the view taken by the learned Single Judge that the prima facie case has been made out by the Plaintiffs for grant of interim relief.

56. PRIMA FACIE CASE THEREFORE MADE OUT BY THE SOCIETIES:-

(i) Contention of Hiranandanis that unless the land is fully developed conveyance/ assignment cannot be executed and TDR still could be loaded prima facie appears to be incorrect.

(ii) Contention of the Societies prima facie appears to be correct that FSI which was available was fully exhausted after the construction of the 10th building.

(iii) Contention of Hiranandanis that last three buildings were constructed on TDR prima facie not correct because TDR used for these three building was utilized from the set back area and the FSI which was made available for construction of these three buildings was in view of Clauses 41 and 49 of the Agreement of Hiranandanis with the members of the Societies,

(iv) On the plain reading of provisions of Sections 7, 7A of the MOFA and the Rules framed thereunder, there was no full disclosure in that sense to the members of the Societies.

(v) PIL Court had clarified that construction of the building of 40 square meters and 80 square meters flat was not directed to be made on Sector IV-A but on available land.

(vi) As rightly pointed out by Mr. Rohit Kapadia, the learned Senior Counsel appearing on behalf of the Societies, there are number of vacant lands on the entire plot of 230 acres and Hiranandanis can construct buildings of 40 square meters and 80 square meters of flats on the remaining land but not on Sector IV-A.

Judgments cited by Appellants/developer:

57. The learned Senior Counsel appearing on behalf of the developer/

Hiranandanis invited our attention to all the following judgments on this point.

1. Kalpita Enclave Co-operative Housing Society Ltd. vs. Messrs Kiran Builders Pvt. Ltd. (1985) 88 BLR 100
2. The Mohatta Nagar Co-operative Hsg. Soc. Ltd. Vs. Vishram Khimji and Sons and Others, (1994) 1 BomCR 444 : (1994) 96 BOMLR 906
3. Harsharansingh Pratapsingh Gujral and Others vs. Lokhandwalla Builders Ltd. and Ors. (1996) 1 BCR 516
4. 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, (2003) 3 ALLMR 521 : (2003) 5 BomCR 695
5. Mr. Sudhir Shetty and Anr. vs. Dharma V. Desle Judgment dated 2.12.2003 in Appeal No.844 of 2003
6. Ralph D'souza and Others Vs. Danny D'souza and Others, (2006) 4 ALLMR 519 : (2006) 3 BomCR 326 : (2006) 3 MhLj 497
7. Jayantilal Investments Vs. Madhuvihar Co-operative Housing Society and Others, AIR 2007 SC 1011 : (2007) 2 JT 368 : (2007) 2 SCALE 81 : (2007) 9 SCC 220 : (2007) 1 SCR 677 : (2007) AIRSCW 796 : (2007) 1 Supreme 694
8. Megh Ratan Co-operative Housing Society Ltd. Vs. Rushabh Rikhav Enterprises and Others, (2009) 1 BomCR 361
9. Manratna Developers vs. Meghratan Cooperative Housing Society Ltd. (2008) 110 (10) BLR 3571
10. Megh Ratan Co-operative Housing Society Ltd. vs. M/s. Maratha Developers and Ors. Judgment dated 22.1.2009 in Civil Appeal No.373 of 2009
11. Jamuna Darshan Co-operative Housing Society Ltd. and Others Vs. J.M.C. and Meghani Builders and Others, (2011) 4 BomCR 185
12. 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), (2010) 6 BomCR 517 : (2011) 1 MhLj 641
13. Malad Kokil Co-Operative Housing Society Ltd. Vs. The Modern Construction Co. Ltd. and Others, (2013) 2 BomCR 414
14. Zircon Venture Co-operative Housing Society Ltd. Vs. M/s. Zircon Ventures and Others, (2014) 4 ABR 284 : (2014) 4 ALLMR 580 : (2014) 5 BomCR 158 : (2014) 4 MhLj 481

He has tried to distinguish the judgments which are not in favour of the

developer and has contended that some of the observations made by Gavai, J. in two judgments are per incuriam since they are contrary to the observations made by the Supreme Court. On the basis of the observations made in these judgments, he has contended that as long as the plot of Sector IV-A is not fully developed, Hiranandanis are not under obligation to make any conveyance/assignment in favour of the Societies till such time the TDR can be loaded on the other buildings which could be constructed on Sector IV-A, if permission was granted by the Planning and Local Authority. It is contended that the plans having been sanctioned, it is not open now for the flat purchasers of other buildings to take an objection to the development of the remaining plot.

58. On the other hand, Mr. Rohit Kapadia, the learned Senior Counsel appearing on behalf of Societies submitted that the Judgment of the Supreme Court in Jayantilal's case lays down the law and, therefore, the entire FSI on Sector IV-A having been consumed, it was not open for the developer to further carry on the construction on the plot by loading TDR.

59. In our view, it is quite well settled that ultimately ratio of the judgment can only apply if the facts in each case are identical and there cannot be any strait jacket formula for the purpose of applying the observations made in a particular case to the facts of any other case. The judgments delivered in each of these cases therefore differs slightly to some extent or other on facts.

The law of precedents:

60. The law of precedent is quite well settled. The Apex Court in Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, AIR 2005 SC 2677 : (2005) 4 CompLJ 283 : (2005) 2 JT 8 : (2005) 4 SCC 649 : (2005) 2 SCR 913 : (2005) AIRSCW 2985 : (2005) 1 Supreme 886 has observed in paras 254, 255 and 256 as under:-

"Precedent

254. Are we bound hands and feet by Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, (2002) 4 JT 146 : (2002) 3 SCALE 638 : (2002) 5 SCC 111 : (2002) 3 SCR 100 ? The answer to the question must be found in the law of precedent. A decision, it is trite, should not be read as a statute. A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. (See Punjab National Bank Vs. R.L. Vaid and Others, AIR 2004 SC 4269 : (2004) CriLJ 4246 : (2004) 172 ELT 24 : (2004) 8 JT 200 : (2004) 7 SCALE 97 : (2004) 7 SCC 698 : (2004) 3 SCR 692 Supp : (2004) AIRSCW 5553 : (2004) AIRSCW 4708 : (2004) 6 Supreme 443 : (2004) 7 Supreme 756 .

255. Although decisions are galore on this point, we may refer to a recent one in State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others, AIR 2004 SC 3894 : (2004) 4 JT 470 : (2004) 4 SCALE 487 : (2004) 5 SCC 155 : (2004) 1 SCR 956 : (2004) 2 UJ 1121 : (2004) AIRSCW 3665 : (2004) AIRSCW 1178 : (2004) 5 Supreme 87 wherein this Court held: (SCC p. 172, para 19)

"It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which it was used."

256. It is further well settled that a decision is not an authority for a proposition which did not fall for its consideration. It is also a trite law that a point not raised before a court would not be an authority on the said question. In M/s. A-One Granites Vs. State of U.P. and Others, AIR 2001 SC 1203 : (2001) 5 JT 9 : (2001) 2 SCALE 85 : (2001) 3 SCC 537 : (2001) 1 SCR 1085 : (2001) AIRSCW 848 : (2001) 2 Supreme 27 it is stated as follows: (SCC p. 543, para 11)

"11. This question was considered by the Court of Appeal in Lancaster Motor Co. (London) Ltd. v. Bremith Ltd. (1941) 1 KB 675 and it was laid down that when non consideration was given to the question, the decision cannot be said to be binding and precedents sub silentio and without arguments are of no moment"

[See also State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, (1993) 41 ECC 326 : (1991) 3 JT 268 : (1993) 2 SCALE 65 : (1991) 2 SCALE 110 : (1991) 4 SCC 139 : (1991) 3 SCR 64 : (1992) 87 STC 289 : (1991) 2 UJ 396 , Arnit Das Vs. State of Bihar, AIR 2000 SC 2264 : (2000) CriLJ 2971 : (2000) 6 JT 320 : (2000) 4 SCALE 515 : (2000) 5 SCC 488 : (2000) 1 SCR 69 Supp : (2000) 2 UJ 1062 : (2000) AIRSCW 2037 : (2000) 4 Supreme 186 , Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, AIR 2003 SC 511 : (2002) 10 JT 55 : (2003) 2 SCC 111 : (2003) 1 UJ 80 , Cement Corporation of India Ltd. Vs. Purya and Others, (2004) 8 JT 327 : (2004) 8 SCALE 558 : (2004) 8 SCC 270 : (2004) AIRSCW 5534 : (2004) 7 Supreme 711 , Bharat Forge Co. Ltd. Vs. Uttam Manohar Nakate, AIR 2005 SC 947 : (2005) 104 FLR 812 : (2005) 1 JT 303 : (2005) 1 LLJ 738 : (2005) 2 SCC 489 : (2005) SCC(L&S) 298 : (2005) 1 SCR 545 : (2005) 2 SLJ 286 and Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, AIR 2005 SC 921 : (2005) CriLJ 944 : (2005) 1 CTC 783 : (2005) 1 JT 482 : (2004) 10 SCALE 427 : (2005) 2 SCC 42 : (2004) AIRSCW 6868 : (2004) 7 Supreme 6 .]"

Observations on provisions of MOFA:

61. The object and reason behind passing of the MOFA can be seen from the Preamble of the said Act and it was passed because it became necessary to protect the interest of buyers/flat purchasers.

62. Division Bench of this Court in Kalpita's case (supra) has held that if the building plans are to be altered or changes are made after the agreements were executed with the flat purchasers, their consent was necessary. The said

judgment, essentially, was given in a case where there was one building constructed by the developer. There were several schemes where developer had planned to construct buildings on one lay out and very often the flat purchasers in one building were not entitled to raise an objection about construction of another building in the layout. In order to resolve the said anomaly which was arisen because of the judgment in Kalpita's case, Section 7-A was inserted.

63. In view of addition of Section 7A obligation which was cast on the developer to give true and proper disclosure continued in the form of Section 3 and 4 continued.

64. Section 7-A was therefore inserted to reconcile the conflicting interest of the developer and the flat purchasers. The principal idea appears to be that the flat purchaser should not be deprived of the rights which were promised to him when he purchased the flat not only in respect of the plan which was shown to him in respect of the existing building but also the other amenities could not be reduced or taken away by obtaining permission from the Planning Authority or Local Authority and, at the same time, right of the developer to construct the additional buildings which was permissible under the law and after true and proper disclosure was made by him to the flat purchaser is also protected. These conflicting interests therefore have been reconciled by Section 7 and Section 7A. What was noticed by the legislature was that the developer, after construction of the building and formation of the Societies continue to carry on the construction unabatedly and did not convey the property in time and, therefore, restriction was put on him by the MOFA to convey the property as per terms of the contract or within four months or the competent authority could direct deemed conveyance to be made in respect of the said property under section 11 of the said Act. The developer in most of the cases was found to impose heavy maintenance charges on the members and would also continue with the development of the plot without proper and true disclosure and, therefore, the said restriction was imposed. The Apex Court, therefore, in the case of Jayantilal has observed that provisions of completion of conveyance/assignment by the developer and the provisions for construction of additional buildings as provided under Section 7A have to be construed harmoniously.

Law laid down by the Supreme Court on grant of injunction:

65. In the present case, developer on the pretext that he has right not to convey till the plot is fully developed by relying on note to the pro forma lease agreement is trying to postpone the conveyance/assignment to eternity and continue to exploit the land despite exploitation of FSI which was available to him on the land and, therefore, the learned Single Judge, in our view, has rightly come to the conclusion that prima facie case had been made out by the Societies and the point of hardship was also in their favour. We concur with the view which has been taken by the learned Single Judge. The Apex Court in Gangubai Bablya Chaudhary and Others Vs. Sitaram Bhalchandra Sukhtankar and Others, AIR 1983 SC 742 : (1983) 1 SCALE 775 : (1983) 4 SCC 31 has observed in para 6 as

under:-

"6. When an interim injunction is sought, the court may have to examine whether the party seeking the assistance of the court was at any time in lawful possession of the property and if it is so established one would prima facie ask the other side contesting the suit to show how the plaintiffs were dispossessed? We pin-pointed this question and heard the submission. We refrain from discussing the evidence and recording our conclusions because evidence is still to be led and the contentions and disputes have to be examined in depth and any expression of opinion by this court may prejudice one or the other party in having a fair trial and uninhibited decision. Having given the matter our anxious consideration, we are satisfied that this is not a case in which interim injunction could be refused. Similarly we are of the opinion that if respondents are allowed to put up construction by the use of the F.S.I. for the whole of the land including the land involved in dispute, the situation may become irreversible by the time the dispute is decided and would preclude fair and just decision of the matter. If on the contrary injunction is granted as prayed for the respondents are not likely to be inconvenienced because they are in possession of about 9000 sq. metres of land on which they can put up construction."

Ultimately, the Court will grant order of injunction and consider those factors which, in our view, have been rightly considered by the learned Single Judge. The Apex Court in *Zenit Mataplast P. Ltd. Vs. State of Maharashtra and Others*, (2009) 12 JT 240 : (2009) 12 SCALE 432 : (2009) 10 SCC 388 : (2009) 15 SCR 403 : (2009) 10 UJ 4706 has observed in paras 30 and 31 has observed as under:-

"30. Interim order is passed on the basis of prima facie findings, which are tentative. Such order is passed as temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial (vide *Anand Prasad Agarwalla Vs. Tarkeshwar Prasad and Others*, AIR 2001 SC 2367 : (2001) 1 JT 139 Supp : (2001) 4 SCALE 149 : (2001) 5 SCC 568 : (2001) AIRSCW 2221 : (2001) 4 Supreme 69 and *State of Assam Vs. Barak Upatyaka D.U. Karmachari Sanstha*, AIR 2009 SC 2249 : (2009) 4 JT 127 : (2009) 4 LLJ 279 : (2009) 4 SCALE 355 : (2009) 5 SCC 694 : (2009) 2 SCC(L&S) 109 : (2009) 4 SCR 467 : (2009) 2 SLJ 449 : (2009) 6 SLR 355 : (2009) 3 UJ 1110 : (2009) AIRSCW 5411 ."

"31. Grant of an interim relief in regard to the nature and extent thereof depend upon the facts and circumstances of each case as no straitjacket formula can be laid down. There may be a situation wherein the respondent-defendant may use the suit property in such a manner that the situation becomes irretrievable. In such a fact situation, interim relief should be granted (vide *M. Gurudas and*

Others Vs. Rasaranjan and Others, AIR 2006 SC 3275 : (2006) 12 JT 447 : (2006) 144 PLR 724 : (2006) 9 SCALE 275 : (2006) 8 SCC 367 : (2006) 6 SCR 103 Supp : (2006) AIRSCW 4773 : (2006) 7 Supreme 289 and Shridevi and Another Vs. Muralidhar and Another, (2007) 12 SCALE 234 : (2007) 14 SCC 721 : (2007) 11 SCR 375 . Grant of temporary injunction is governed by three basic principles i.e. prima facie case; balance of convenience; and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case. But it may not be appropriate for any court to hold a mini-trial at the stage of grant of temporary injunction [vide M/S S. M. Dychem Ltd. Vs. M/S Cadbury (India) Ltd., (2000) ECR 1 : (2000) 7 JT 151 : (2000) 4 SCALE 713 : (2000) 5 SCC 573 : (2000) 1 SCR 86 Supp : (2001) 1 UJ 181 and Anand Prasad Agarwalla Vs. Tarkeshwar Prasad and Others, AIR 2001 SC 2367 : (2001) 1 JT 139 Supp : (2001) 4 SCALE 149 : (2001) 5 SCC 568 : (2001) AIRSCW 2221 : (2001) 4 Supreme 69 ."

Final Verdict:

66. In the present case also, if the construction goes unabated the rights of the Plaintiffs would be permanently affected and, therefore, it is necessary to grant an order of injunction. Appeal of Hiranandanis is therefore dismissed.

67. So far as the appeal filed by the Societies is concerned, in our view, no reasons have been assigned by the learned Single Judge for granting stay to his own order for a period of three months (12 weeks). The Court after having come to the conclusion that prima facie case was made out by the Plaintiffs for grant of interim relief and after having made strong observations against the MMRDA and developer could have granted four weeks time to the developer to prefer an appeal. Be that as it may, since we have already dismissed the appeal filed by the developer and since the period of stay granted by the learned Single Judge expires at the end of April 2015, we do not propose to change the said order granting stay for 12 weeks. The appeal filed by the Societies also therefore dismissed. The question, therefore, of staying the order passed by us in appeal filed by the developer does not arise since he has sufficient time within which he can approach the higher court if he is so advised.

68. Both the appeals are accordingly disposed of. Since the appeals are disposed of Notice of Motion (L) No. 321 of 2015 in Appeal (L) No. 128 of 2015 would not survive and the same is also disposed of.

*1 *2 *3 *4 Important event. 5 Inserted by the 1986 Amendment 6 Deleted by the 1986 Amendment