
(2016) 08 BOM CK 0146

In the Bombay High Court

Case No : Appeal From Order No. 272 of 2016 With Civil Application No. 816 of 2016

M/s. Shree Parshwa Heights

APPELLANT

Vs

Smt. Nirmala Dhandukhlal Thakkar

RESPONDENT

Date of Decision : 05-08-2016

Acts Referred:

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 7, 7-A

Citation : (2016) 5 AIRBomR 370 : (2016) AIRCC 2994 : (2016) 5 BCR 326

Hon'ble Judges : R.M. Savant, J.

Bench : Single Bench

Advocate : Mr. D.D. Madon Senior Advocate a/w Mr. Sandeep Dadwal i/b Mr. Prakash Mahadik, Advocates, for the Appellant; Mr. Pravin Samdhani Senior Advocate a/w Mr. Sanjay Jain a/w Mr. Hemant Mehta i/b Mehta & Co., for the Respondent Nos. 2 to 8; Mrs. M.R. Bhoir, Adv

Final Decision : Dismissed

Judgement

R.M. Savant, J.—Admit. With the consent of the Learned Counsel for the parties taken up for hearing forthwith.

2. The grant of injunction to the Plaintiffs by the impugned order dated 31-10-2015 passed by the Learned Judge of the City Civil Court, Borivali Division, Dindoshi Mumbai, has given rise to the filing of the above Appeals From Order.

3. The Respondent No.1 herein is the original Plaintiff. The Respondent Nos.2 to 5 are the original Defendant Nos.1 and 9 to 11. The Appellants in Appeal From Order No.272 of 2016 are the original Defendant Nos.2 to 7. Appellant No.1 is a partnership firm and the Appellant Nos.2 to 7 are its partners. By the impugned order the Appellants have been restrained from carrying out construction work on the plot of land identified as C-6 till final disposal of the Suit. The Appellant in Appeal From Order St No.35261 of 2015 is the original Defendant No.1. Since

both the Appeals From Order involve a challenge to the same order, they are heard together.

4. The facts involved in the above Appeals can in brief be stated thus:

The Defendant No.1 herein is the owner of lands totally admeasuring 43621.40 sq.yds equivalent to 36472 sq.mt. The said lands bore various survey numbers, however it seems that since the said lands are of the ownership of the Defendant No.1, the said survey numbers have been given a common CTS No.104 of Village Gundavli, Taluka Andheri, Mumbai Suburban District. It seems that the Defendant No.1 got a lay out sanctioned in respect of the said CTS No.104 and the said CTS No.104 was on account of the same divided into CTS Nos.104/1 to 104/5 as per the lay out sanctioned in the year 1968. The Defendant No.1 it seems divided the entire lands i.e. 43621.40 equivalent to 36472 sq.mt into three distinct plots identified by alphabets A, B and C. The Defendant No.1 sold and conveyed the entire land to one Keshavlal K. Verma (for short K.K. Verma) vide agreement dated 23-11-1971. The Defendant No.1 put the said K.K. Verma in possession of the plots including possession of plot C1, C3 and C6. The said K.K. Verma who was a developer entered into agreements with the promoters of the proposed societies. In the instant case the societies being the Defendant Nos.10 and 11, the sanctioned lay out plan and the proposed building plans for the entire plot C were disclosed to the said Chief Promoters. In the sanctioned lay out plan, plot C is shown as consisting of plot C1 to C-6 and plot No.C6 is shown to be for parking. In so far as the plot C is concerned, building Nos.7 and 8 are constructed on plot C1 and C3. The construction of the said building Nos.7 and 8 is over which are the buildings of the Defendant Nos.10 and 11 societies which are situated on the said plots. It seems that the Defendant No.1 terminated the agreement dated 23-11-1971 entered into with the said K.K. Verma by issuing a public notice in that regard. It seems that after the sanctioned lay out of 18-8-1972, the said K.K. Verma had got sanctioned revised lay out on 17-9-1974 showing the said plot C-6 which was earlier shown for parking as open land. Thereafter there was a further revision of this plan on 12-1-1975 wherein also plot C-6 was shown as open land. A further revision took place on 16-5-1975 in which plan for the first time plot C-6 was shown as open land for construction of a building. The promoters of the societies after entering into an agreement dated 29-1-1972 with the said K.K. Verma which is the package deal agreement in respect of sale of 82 flats, issued allotment letters to the flat purchasers on 11-10-1976. The Defendant Nos.10 and 11 which as indicated above are the societies registered in respect of plot C1 and C3, on 12-10-1987 and 8-8-1988 under the Maharashtra Cooperative Societies Act. It seems that on 13-11-2002 the Defendant No.1 executed a registered agreement for perpetual lease together with sale of development rights in favour of the ICICI Bank Ltd, in respect of plot C-6 admeasuring 950 sq.mtrs with development rights to use road FSI of 1473.74 sq.mt and Transferable Development Rights (TDR). The Defendant No.1 handed over possession of the said plot to the said ICICI Bank Ltd. The ICICI Bank Ltd in turn executed

registered Deed of Assignment and Sale in favour of the Defendant No.2 i.e. the Appellant No.1 herein on 4-9-2006 and handed over possession. The Defendant No.2 thereafter applied for amendment of the lay out which was sanctioned by the Municipal Corporation of Greater Mumbai (for short MCGM) on 20-9-2013. The MCGM also sanctioned the amended plan for construction of a building on the suit plot as also issued the IOD to the Defendant No.1 which was in respect of the road FSI of 1473.74 sq.mts., TDR FSI of 950 sq.mt and FSI for staircase. The MCGM issued a commencement certificate to the Defendant No.1 on 7-3-2014. It seems that the Defendant Nos.10 and 11 had applied for their amalgamation before the Deputy Registrar of Cooperative Societies. The said amalgamation was allowed by the Deputy Registrar by order dated 15-12-2014.

5. In so far as the agreement dated 23-11-1971 is concerned, entered into between the Defendant No.1 and the said K.K. Verma, the said agreement finds reference in the Deed of Assignment dated 26-03-1993 for Sale of a flat in respect of a society situated in the same layout wherein the Defendant No.1 is the confirming party. The same is the case in respect of a Deed of Confirmation dated 7-5-2004 between the Defendant No.1 and one Sharad Shah for Sale of flat on ownership basis to which Deed also the Defendant No.1 is a confirming party and wherein also there is a reference to the agreement dated 23-11-1971 in the recitals.

6. The commencement of construction by the Defendant No.1 in the matter of digging up trenches for the purposes of putting up a building on plot C. 6 has triggered of the filing of the instant suit being LC Suit No.2978 of 2014. The principal relief sought in the Suit is a declaration that the original lay out plan dated 10-8-1972 sanctioned by the MCGM being Exhibit B to the Plaint cannot be amended without the written consent of the Plaintiff being the society member and the societies being Defendant Nos.10 and 11. A declaration that amendment if any to the original sanctioned lay out plan dated 10-8-1972 is without the written consent of the Plaintiff being the society member and the societies being Defendant Nos.10 and 11, the same is not binding upon the Plaintiff and their respective members. A further declaration that plot C-6 is part of plot C and the act of showing it as an independent plot without written consent of the Plaintiff and the societies, is illegal, unlawful and contrary to the Maharashtra Ownership of Flats Act (for short MOFA). For a declaration that the plan dated 20-9-2013 being Exhibit I to the plaint is contrary to the MOFA and not binding upon the Plaintiff. The aforesaid reliefs are founded on the facts which have been stated herein above. It is the case of the Plaintiff in the Suit that plot C-6 which is shown as parking is liable to be conveyed to the Defendant Nos.10 and 11 and that the Defendant No.2 cannot utilise the said plot for the purposes of putting up construction by way of a building. It is the case of the Plaintiff that the Defendant Nos.10 and 11 societies are entitled to the said plot C-6 and that the Defendant No.2 is not entitled to enter upon, remain and put up any construction on the suit plot contrary to the wishes of the Plaintiff and the societies. It is the case of the Plaintiff that the Defendant No.2 has by misguiding the MCGM by not

disclosing the right of the Plaintiff and the societies has got the plan sanctioned in respect of the said proposed construction. It is further the case of the Plaintiff that none of the society members have ever consented to the Defendant Nos.1 and 2 for amending the original sanctioned plan of the year 1972 and that the act of the Defendant Nos.1 and 2 to get the plan sanctioned without the consent of the Plaintiff and the other society members, is in violation and contrary to MOFA. In the plaint, the Plaintiff has referred to the agreement dated 23-11-1971 entered into between the Defendant No.1 and the said K.K. Verma pursuant to which agreement the said K.K. Verma had undertaken development of the lands which were of the ownership of the Defendant No.1. In the said Suit, the Plaintiff filed the instant Notice of Motion for temporary injunction for restraining the Defendant No.1 from proceeding with the construction on plot No.C-6.

In so far as the Defendants are concerned, the Defendant No.1 filed an affidavit-in-reply to the Notice of Motion. It was the case of the Defendant No.1 in the said Affidavit in reply that there is no duly stamped and registered agreement executed in terms of MOFA in favour of the Plaintiff. It was the case of the Defendant No.1 that it is not a promoter within the meaning of the said term in the MOFA. The Plaintiff is also not a party to the agreement dated 23-11-1971 executed between the Defendant No.1 and K.K. Verma and that there is no privity of contract between the Plaintiff and the Defendant No.1. It is the case of the Defendant No.1 that the Plaintiff has though relied upon the sanctioned plan dated 10-8-1972 to show that plot C-6 is shown as meant for parking, the Plaintiff has suppressed the subsequent revised sanctioned plan wherein Plot C-6 has been shown as open land for construction of the building. The Defendant No.1 has further contended that the agreement dated 23-11-1971 entered into between the said K.K. Verma and the Defendant No.1 has been terminated and hence the Defendant Nos.10 and 11 could not lay a claim to any rights under the said agreement. It is further stated in the said reply that on account of surrender of land required for road to the MCGM the Defendant No.1 has become entitled to FSI of 1936.20 sq.mt. out of which an area of 1163.27 sq.mtrs is proposed to be loaded on plot C-6 as per approved plan. It is further stated that the Defendant No.1 has executed a registered Indenture of Lease in perpetuity in respect of said FSI and plot C-6 in favour of the ICICI Bank Ltd., on 13-11-2002 and the ICICI Bank in turn has executed the Indenture of Assignment and Sale of those rights in favour of the Defendant No.2 on 4-9-2006.

7. The Defendant No.2 to 8 have also filed their reply to the said Notice of Motion. It was the case of the said Defendants that the agreement dated 23-11-1971 executed between the Defendant No.1 and K.K. Verma is not in respect of the subject matter of the suit property i.e. plot C-6 in the lay out of CTS No.104/5A. It was contended that the Defendant No.1 or the Defendant Nos.2 to 8 are not promoters in respect of the two buildings of the Defendant Nos.10 and 11 societies. It is contended that the Defendant No.1 being the sole and absolute owner of the entire property including the suit plot C-6, the

Defendant No.1 has executed Deed of Indenture in perpetuity in favour of the ICICI Bank on 13-11-2002 and the ICICI Bank has transferred those rights in favour of the Defendant No.2 on 4-9-2006. It is therefore contended that the Defendant No.2 is a bona fide lessee and transferee of interest of the Defendant No.1 in respect of plot C-6. It was contended that the MCGM has sanctioned and issued IOD on 20-6-2000 and it was amended on 24-7-2002. It is further contended that revised plan was sanctioned by the MCGM on 26-11-2013 with IOD and the MCGM has issued commencement certificate dated 7-3-2014 for construction of the building on plot C-6. It is contended that the Defendant No.2 commenced the construction on the said suit plot C-6 in the month of April 2014 but had to stop the construction on account of the ad interim order dated 16-12-2014. The Defendant Nos.2 to 8 have denied all the contentions of the Plaintiff and have sought the dismissal of the Notice of Motion.

8. In so far as the Defendant Nos.10 to 11 are concerned, they have supported the Plaintiff's case and have referred to the agreement executed by the said K.K. Verma in favour of the Chief Promoters. It was contended that since the agreement dated 23-11-1971 has been acted upon by the said K.K. Verma by constructing the buildings and entering into an agreement with the Chief Promoters of the Societies, the said agreement could not have been cancelled after the said development has taken place. The Defendant Nos.10 and 11 contended that since the development is complete, they are now entitled to the conveyance of the said plot C-6. The Defendant Nos.10 and 11 have adverted to the application for deemed conveyance filed by them under Section 11 of the MOFA. It was stated that the societies have never given consent or permission in respect of the development on plot C-6 and that the entire attempt of the Defendant No.1 is to grab plot C-6. The said Defendant Nos.10 and 11 are societies of which the Plaintiff is a member have therefore unequivocally supported the case of the Plaintiff.

9. The Trial Court considered the said Notice of Motion and by the impugned order dated 31-10-2015 has partly allowed the same to the extent of restraining the Defendant Nos.1 and 2 or their servants, agents and persons claiming through them from carrying out any construction on the plot of land C-6 till the final disposal of the Suit. The Trial Court however rejected the relief sought vide prayer clause (b) of the Notice of Motion. The gist of the reasoning of the Trial Court was that in view of the agreement dated 23-11-1971 executed between the Defendant No.1 and K.K. Verma, the Defendant No.1 who is the owner of the property in question can be said to have caused the construction of the buildings through the said K.K. Verma and therefore having regard to the definition of "promoter" as postulated in Section 2(c) of the MOFA, the Defendant No.1 qualifies as promoter within the meaning of the said term in the MOFA. The Trial Court has further observed that under the agreement dated 23-11-1971 the Defendant No.1 was obligated to execute a Conveyance in favour of the societies having regard to Section 4 of the MOFA. The Trial Court also observed that prima facie the agreement dated 23-11-1971 cannot be terminated legally as the said

agreement can be said to be an irrevocable agreement considering the object and intent of the said agreement. The Trial Court in respect of the termination of the said agreement has observed that since K.K. Verma had already constructed the buildings and sold them to the Chief Promoters of the cooperative societies, it was not necessary for the said K.K. Verma to file a Suit challenging the said termination. The Trial Court has also observed that the said K.K. Verma had utilised the entire FSI of the said plot C. In so far as whether the consent of the Plaintiff and the Defendant Nos.10 and 11 societies are concerned, the Trial Court referred to the agreement entered into by the said K.K. Verma with the promoters of the Defendant Nos.10 and 11 in which agreement number of buildings with floors and number of flats to be constructed as per the plan were mentioned. The Trial Court further observed that in the said agreement it was mentioned that the said K.K. Verma will construct separate additional floors to the buildings and not a separate building if additional FSI became available. The Trial Court on the said basis concluded that the said development carried out by the said K.K. Verma could not be termed as a phase wise development.

10. The Trial Court thereafter adverted to the approved plan dated 10-8-1972 and the amended plan dated 16-5-1974 in which plan for the first time plot C-6 earlier shown for car parking was shown for building. The Trial Court observed that there was nothing on record to show that the said plan was amended after the consent of the flat purchasers i.e. the Plaintiff and the Defendant Nos.10 and 11. The Trial Court having regard to the approved plan dated 10-8-1972 as well as the approved plan dated 8-10-1972 wherein the plot C-6 is not shown for the purposes of construction of additional building held that the consent of the Plaintiff and the Defendant Nos.10 and 11 was necessary for carrying out construction on plot C-6. The Trial Court found fault with the Defendant No.1 in not conveying the property to the Defendant Nos.10 and 11. The Trial Court observed that if the Defendant No.1 had conveyed the said plot C-6 and the two buildings thereon in time, the Defendant No.1 could not have any right or interest therein. The Trial Court lastly observed that K.K. Verma had already utilised the full FSI while constructing the two buildings on plot C1 and C3 and that as per the agreement dated 23-11-1971 the entitlement of the Defendant No.1 was only to the price on the basis of the built up area as per FSI and that the said agreement does not in any manner show that the Defendant No.1 had right to use the FSI of the plot or even to claim the same save and except to claim interest on the due consideration amount from the said K.K. Verma if he failed to pay the price as agreed upon. The Trial Court therefore concluded that at the prima facie stage there is no document/agreement to show that K.K. Verma had kept the right to construct the building on plot C. The Trial Court therefore held that the Plaintiff had proved prima facie case that without the consent of the Plaintiff and the Defendant Nos.10 and 11 the additional building could not be constructed on plot C including plot C-6. In so far as the grant of interim reliefs is concerned, the Trial Court was of the view that the interim injunction was required to be granted to see to it that the situation does not turn

irreversible and that the Plaintiff's rights are protected pending the Suit. The Trial Court has accordingly as indicated above partly allowed the Notice of Motion.

Submissions on behalf of the Defendant No.2 by the Learned Senior Counsel Mr. P.K. Samdhani-

(i) That in the instant case there is only an allotment letter in favour of the Plaintiff and there is no agreement entered into between the K.K. Verma and the Plaintiff which can be referable to the provisions of MOFA.

(ii) That the allotment letter issued to the Plaintiff is in the year 1976 and since at the said time, the amended sanctioned plan dated 16-5-1975 was on record. The case of the Plaintiff would have to be considered in the context of the said amended sanctioned plan and not as per the plan which was prevailing in the year 1972. In the amended sanctioned plan plot C-6 is shown for the purposes of a building and therefore the consent of the Plaintiff or the Defendant Nos.10 and 11 was not required to be taken. Reliance is placed on the Judgment of this court in Zircon Venture Cooperative Housing Society Ltd. v. M/s. Zircon Ventures reported in 2014 (4) Mh.L.J. 481.

(iii) That there is no privity of contract between the Plaintiff and the Defendant No.2 so as to create a right in the Plaintiff qua the Defendant No.2

(iv) Since the agreement dated 23-11-1971 entered into between the Defendant Nos.1 and 2 has been terminated by the Defendant No.2, the Plaintiff cannot claim any right on the basis of the said agreement dated 23-11-1971.

(v) That the Defendant No.2 is seeking to avail of the TDR which has been generated on account of the development plan reservations which were in the layout and not seeking to bring any TDR from outside for the purposes of putting up construction on plot C-6 and therefore the Plaintiff cannot have any objection to the utilisation of the TDR by putting up a building on the said plot C-6.

Submissions on behalf of the Appellant in A.O.St. No.35261 of 2015 by the Learned Senior Counsel Mr. D.D. Madon:

Since the Appellant in the above Appeal has filed the same challenging the findings recorded in the impugned order in so far as the Defendant No.1 are concerned, the Learned Senior Counsel made the following submissions :

(i) That the findings recorded by the Trial Court that the full FSI of plot C has been utilised is erroneous.

(ii) That the Trial Court has erred in recording the finding that the agreement dated 23-11-1971 has not been terminated properly.

(iii) That the finding of the Trial Court in respect of the possession of plot C-6 is erroneous having regard to the fact that the Defendant No.2 had commenced construction on the said plot, which had given rise to the filing of the suit.

(iv) That the Trial Court had erred in holding that the Defendant No.1 is a

promoter within the meaning of Section 2(c) of the MOFA. Submissions made on behalf of the Respondent No.1 i.e. the original Plaintiff by the Learned Counsel Mr. G.S. Godbole :

(i) That it is in terms of the agreement dated 23-11-1971 that the development was carried out and since in the plan annexed to the said agreement plot C-6 was shown for parking and thereafter even in the sanctioned plan of the year 1972, the purposes of plot C-6 was shown for parking, the Defendant No.1 cannot be permitted to construct a building on plot C-6 without the consent of the Plaintiff and the Defendant Nos.10 and 11.

(ii) That the package deal agreement dated 10-7-1972 under which the Chief Promoter of the Defendant Nos.10 and 11 had agreed to purchase 82 flats governs the relationship between the parties and the said agreement is therefore referable to Section 4 of the MOFA. Since as per the said agreement additional FSI could only be used by putting up additional floors on the existing building, the Defendant No.2 cannot be permitted to construct an independent building on plot C-6.

(iii) That the utilisation of plot C-6 for the construction of building amounts to breach and violation of the package deal agreement dated 10-7-1972 as the Defendant No.2 has not obtained the consent of the Plaintiff and the Defendant Nos.10 and 11.

(iv) That the Deed of Assignment dated 1993 and thereafter the Deed of Confirmation executed in the year 2004, refer to the agreement dated 23-11-1971 entered into between the Defendant No.1 and the said K.K. Verma and hence there is an acceptance of the fact by the Defendant No.1 that the development including the construction of the buildings on plot C1 and C3 was as a result of the said agreement dated 23-11-1971 and therefore the contention raised on behalf of the Defendant No.1 that the said agreement dated 23-11-1971 was terminated is of no avail in so far as the obligations under MOFA are concerned.

Submissions on behalf of the Defendant Nos.10 and 11 by the Learned Counsel Mr. S.D. Patil.

The Learned Counsel appearing for the Respondent Nos.10 and 11 i.e. the Defendant Nos.10 and 11 supported the contentions raised by Mr. G. S. Godbole, however in addition the Learned Counsel submitted as under:

(i) That the plan annexed as Exhibit B to the Suit in question i.e. the sanctioned plan dated 10-8-1972 shows that the entire FSI of plot C has been utilised for construction of the building on plot C1 and C3 and therefore no FSI was remaining to be utilised in so far as plot No.C is concerned. The package deal agreement dated 10-8-1972 entered into between the said K.K. Verma and the Defendant Nos.10 and 11 contains covenants governing the construction of the buildings on plot C1 and C3, the utilisation of the additional FSI if becomes

available, and the conveyance to be executed in favour of the Defendant Nos.10 and 11 societies. The Defendant No.2 is therefore not entitled to put up a building on plot C-6.

Consideration:

11. Having heard the Learned Counsel for the parties, I have considered the rival contentions. The substratum of the case of the Plaintiff in the above proceedings is that the Defendant No.2 cannot put up construction on plot C-6 without the consent of the Plaintiff and the Defendant Nos.10 and 11. In the aforesaid background the two agreements which are in contention i.e. the agreement dated 23-11-1971 entered into between the Defendant No.1 and the said K.K. Verma and the package deal agreement dated 10-7-1972 entered into between the said K.K. Verma and the promoters of the Defendant Nos.10 and 11 societies would have to be looked into. In so far as the agreement dated 23-11-1971 is concerned, clauses 1, 2, 6, 11, 12, 17(a), 17(b) and 17(c) are relevant and are reproduced hereinunder for the sake of ready reference :

(1) The vendors shall sell to the purchaser and the purchaser shall purchase from the Vendor ALL THOSE pieces or parcels of land or ground together with the buildings and structures standing thereon situate lying and being at Andheri in the Registration Sub-District Bandra District, Bombay Suburban (within Greater Bombay) containing by admeasurement 43621.40 square yards equivalent to 36472 square meters or thereabouts and more particularly described in the schedule hereunder written delineated on the plan hereto annexed and thereon surrounded by a red coloured boundary line free from all encumbrances.

(2) The purchase price payable by the purchaser to the Vendor shall be determined at the rate of Rs. 18,000/- (Rupees Eighteen) per square foot of the built up area as may be available to the Purchaser (on the basis of the FSI (floor space index) applicable to the said land hereditaments and premises described in the schedule hereunder written) for the purpose of additional construction or constructions to be made thereon as or the Rules of the Municipal Corporation for Greater Bombay including the floor space index, if any available in respect of the area covered by the internal roads.

(6) The Vendor had submitted to the Municipal Corporation of Greater Bombay for sanction in the year 1967, a layout of the Vendor's entire property described in the schedule hereunder written and much layout has been duly approved by the Municipal Corporation of Greater Bombay. The said layout is as appearing on the said plan hereto annexed. The area of the said land described in the schedule hereunder written shall be ascertained by survey to be made jointly by the Architects or Surveyors of the Vendor and the Architects or Surveyors of the Purchaser. If the area determined on such joint survey shall be less than the area of the said land on the basis aforesaid approved layout the purchaser shall accept the area of the said land on the basis of the aforesaid approved lay to be correct. If the area of the said land ascertained on such joint survey is more than

the area thereof on the basis of the aforesaid approved layout, the purchaser shall get the correct area sanctioned by the Municipal Corporation so as to get the said approved layout property modified and shall thereupon be bound by the area to determined by the joint survey. Soon after the execution of this Agreement the purchaser shall submit to the Municipal Corporation Greater Bombay for sanction plans for the construction of building as per the requirements of the purchaser. However, since the property stands in the name of the Vendor, such plans will be submitted in the name of the Vendor but all costs, charges and expenses for the preparation of such plans and for obtaining the sanction (including payment of any deposit) shall be borne and paid by the Purchaser alone. The Vendor shall be entitled to have such plans scrutinised by their own Architects. The purchase price will be calculated at the rate mentioned in clause 2 above on the built up area that may be sanctioned by the Municipal Corporation of Greater Bombay on the basis of such plans.

(11) The Vendor and all other necessary parties shall make and execute a proper Conveyance and all other necessary documents to complete the title agreed to be given in respect of the said property and such conveyance shall be in favour of the purchaser or his nominees including a Cooperative Housing Society.

(12) The Purchaser shall be entitled to the proper Conveyance and all the muniments of title relating to the property in possession of the Vendor.

(17)(a) On completion of the sale, the Vendor shall put the purchaser in vacant possession of the following portions of the property agreed to be sold namely :

(i) Plot A sub division Nos.9, 10, 11, 12 and 13 and sub division Nos.14 and 15 (shown as gardens);

(ii) Plot B sub division Nos.4m 7 and 9 and sub division No.10 (shown as garden)

(iii) Plot C sub division Nos.1m 3 and 6

(b) Simultaneously with the completion of the sale, the person or persons in whose favour two Conveyance of the said land, hereditaments and premises described in the schedule hereunder written is granted shall execute in favour of the Vendor separate Leases for a period of 98 years in respect of the existing buildings forming part of the said property hereby agreed to be sold and the land appurtenant to each of such buildings as shown on the said plan hereto annexed by yellow colour boundary lines. Such issues shall be at a nominal rent of Rs. 1/00 per year, with an obligation on the Lessee to pay all Municipal taxes and other outgoings, cesses etc. in respect of the aforesaid buildings and the respective and appurtenant thereto. Such Lease shall contain an option to the Lessee to renew the same for one further period of 98 years at the same rent and on the same terms and conditions.

(c) The Vendor as Lessee of the said existing buildings and the land appurtenant hereto shall have the option to negotiate with the tenants and occupants of the said buildings and to sell to them on what is known as ownership basis, with the

ultimate aim and object that if any of the said building is so sold on ownership basis the purchaser thereof shall be taken in as member by the Cooperative Society or other Corporate body that is to be formed in respect of rest of the property described in the schedule hereunder written. The Vendor shall be entitled to the full purchase price of all such premises.

12. A reading of the aforesaid clauses of the agreement dated 23-11-1971 discloses that the Defendant No.1 had agreed to sell to the said K.K. Verma the entire land admeasuring 43621.40 sq. yards equivalent to 36472 sq.mtrs. with the right to construct upon the said land. The entire land was carved out into three parts and the said three parts were identified by the alphabets A, B, and C in the said agreement. In so far as the present case is concerned, we are concerned with part "C". The price to be paid by the said K.K. Verma was to be calculated on the basis of Rs. 18 per sq. foot of built up area that would be considered on the basis of the available FSI. It was mentioned in the said agreement that the Defendant No.1 submitted a layout plan of the entire plot of land to the MCGM which was duly approved. The agreement provided that the Defendant No.1 was to execute a proper conveyance in favour of the said K.K. Verma or his nominee, including a Cooperative Society/Societies, who would purchase the flats from the said K.K. Verma.

13. In so far as the package deal agreement dated 10-7-1972 is concerned, the relevant clauses of the said agreement are the recital clauses (a), (b), (f) and (h) then clauses 1, 3, 5, 7, 9, 12 and 14 of the main agreement are relevant and are reproduced hereinunder :

(a) The Wallace Four Mills Company Limited (hereinafter called "the said Company") are the absolute owners of a large property consisting of land admeasuring approximately 36,470 square meters (equivalent to 43,600 square yards) together with the bungalows and other structures standing thereon situate at Old Nagardas Road, Andheri (East) Bombay 69 more particularly described in the First Schedule hereunder written.

(b) By and under an Agreement for sale dated 23rd November 1971 made between the said company as the Vendors and Keshavlal K. Verma (one of the partners of the Builders) as the purchaser, the said company agreed to sell and the said Mr. Verma agreed to purchase the said land, hereditaments and premises described in the first schedule hereunder written at the price and on the terms and conditions therein contained.

(f) The builders have already started the development and construction of four buildings in Block A out of the aforesaid large property and the said four buildings together with the land of Block A is sold by the builders by package deal dated 29th January 1972, to the promoters of the proposed cooperative society tentatively named as Laxmi Estate Cooperative Housing Society at the terms and conditions mentioned in the said agreement dated 29th January 1972. The builders have further started the development of three buildings in Block B

and the said three buildings in Block B are also sold by the builders by a package deal dated 10th day of July 1972 to the promoters of the proposed Cooperative Society tentatively named as Varma Nagar Cooperative Housing Society, at the terms and conditions mentioned in the said Agreement dated 10th July 1972. The builders have also started the development of two buildings in Block "C" out of the above said large property (the property comprised in the said Block "C" consisting of land admeasuring approximately about 6683.82 square meters equivalent to about 7995 square yards including the Bungalows and structures standing thereon) being more particularly described in the Second schedule hereunder written which is shown on the plan hereto annexed thereon surrounded by brown colour lines.

(h) The promoters desire to get registered a Amita Mandir Cooperative Housing Society and the promoters have requested the builders to sell and convey to such society, by way of package deal, the said property known as Block "C" together with the aforesaid two new buildings to be constructed thereon (but subject to the obligations to give a lease in perpetuity at a nominal rent of Rs. 1/ per year in respect of the existing bungalows in favour of the said company and the land appurtenant thereto as also the obligations to admit as members the occupants of the existing bungalows if they desire to become members of the cooperative housing society) and subject to the other terms and conditions hereinafter set out.

(1) The builders have agreed to sell and the promoters have agreed to purchase the said land, hereditaments and premises referred to as Block "C" more particularly described in the Second schedule hereunder written (but subject to the reservations and conditions contained in the aforesaid Agreement for Sale dated 23rd November 1971 and the conditions terms and provisions hereinafter contained) together with the two new buildings to be constructed by the builders on the existing vacant portion of the said Block "C" at or for the lumpsum price of Rs. 25,82,000/- (Rupees Twenty five lacs and eighty two thousand only). The sale of the said property, being Block "C" together with the two new buildings to be constructed thereon, is by way of package deal and consequently the promoters shall not be entitled to require or obtain a conveyance of the said land without being bound and liable to take the aforesaid two new buildings to be constructed by the builders as aforesaid. If for any reason the promoters or their successors, fail or neglect to pay the builders the full consideration money therein mentioned in respect of the aforesaid package deal, the builders shall be entitled to refuse to perform the other obligations of the builders hereunder unless and until the promoters or their successors pay to the builders the full consideration money of Rs. 25,82,000/- in the manner provided for in the agreement.

(3) The builders have got prepared, through their Architects Messrs. N.N. Parikh and Company of Meadows Street, Fort, Bombay 1, plans for the construction of the aforesaid two new buildings. A set of such plans, which have been seen and

approved by the promoters are hereto annexed for the sake of identification. The location of the proposed two new buildings is also shown on the layout plan hereto annexed. The specifications of the said two new buildings and the amenities to be provided therein are set out in the Fourth Schedule hereunder written.

(5) Messrs. Kanga and Co., attorneys for the said Company who have investigated the title to the said property, have issued their certificate of Title dated 10th December 1971. A copy of the said certificate of Title is set out in Fifth Schedule hereunder written. The promoters and their successors viz., the society to be got registered by the promoters, shall accept the certificate of Title issued by Messrs. Kanga and Co. and will not require the builders to make out a marketable title to the said property.

(7) It is contemplated that a Cooperative Housing Society is to be got registered by the promoters and in whose favour the conveyance of the said property described in the Second Schedule hereunder written is to be obtained.

(9) It is clearly understood and agreed that subject to the First Legal Mortgage in favour of the financial institution referred to in clause 8 above, the builders shall have a paramount charge and lien over the entire property described in the Second Schedule hereunder written including the two new buildings to be constructed thereon (subject of course to the Lease to be granted as aforesaid) and until the time the promoters or the society, as the case may be pay to the builders in full the consideration money referred to in clauses 1 and 2 above. The builders shall be entitled to retain possession of the two new buildings and all the flats and other portions thereof as also the garage and the car parking spaces in the compound. Neither the promoters nor the Cooperative Housing Society nor the members of such society shall be entitled to claim, demand or take possession of such two new buildings or any portions thereof or of any garage or car parking spaces in the compound, until the time the aforesaid consideration money referred to in clause 1 and 2 above is paid to the builders in full.

(12) The package deal contemplated by this Agreement is in respect of a total of 82 flats of different sizes, in the aforesaid proposed two new buildings of the type shown in the aforesaid plan hereto annexed. No dispute shall be raised nor objection raised as regards the exact dimensions or the area of the flats.

14. It is possible that the builders may be able to plan and construct additional flats in the proposed two new buildings, over and above the 82 flats contemplated by the annexed plans. Similarly it may be possible that the builders may be able to plan and construct garage and or car parking spaces in the compound. The builders shall be entitled to charge and the promoters and the successors - Society, as the case may be, shall pay to the builders price in respect of such additional flats and garage and or car parking spaces at the rates mentioned in the sixth schedule hereunder written.

14. In the said agreement as can be seen a reference to the said plot "C"

wherein two buildings are to be constructed, one building being ground + 6 floors and other building being ground + 8 floors on the said plot of land. The plot of land mentioned in block C is admeasuring 6683.82 sq. ft. equivalent to about 7995 sq.yards. The said agreement provides for registration of the societies of the Chief Promoters and conveyance of the said plot of land to be granted to the societies. The said agreement is a package deal agreement in respect of 82 flats. It is provided in the said agreement that it may be possible for the builders to put up additional flats in the proposed new buildings or to plan and construct garages and car parking for which the promoters/society shall pay for such additional flats and garages and or car parking spaces. To the said agreement the plan which has been seen and approved by the promoters was annexed. It was also stated in the said agreement that the location of the proposed two buildings is also shown on the layout plan annexed to the said agreement. It was also provided in the said agreement that a Cooperative Housing Society is to be got registered by the promoters in whose favour the conveyance of the property described in Schedule - II, was to be executed. Schedule-II is the property admeasuring 6683.82 sq.ft. i.e. plot notified as block C. The said agreement is the package deal agreement entered into between the promoters of the Defendant Nos.10 and 11 with the said K.K. Verma in respect of the purchase of 82 flats. The said agreement identifies the plot on which the new buildings were to be constructed wherein 82 flats were to be provided. The said agreement mentions the consideration to be paid by the promoters for the said 82 flats, the amenities that would be provided in the said buildings/flats. The said agreement refers to the sanctioned plan, the location of the proposed buildings, the location of the car parking, the formation of the societies and the execution of the conveyance in favour of the said societies. If the agreement dated 10-7-1972 is read as a whole, the said agreement is referable to an agreement under Section 4 of the MOFA and the Plaintiff and the Defendant Nos.10 and 11 are therefore entitled to seek its enforcement. Hence the issuance of the letter of allotment to the Plaintiff in the year 1976 would not have any significance in so far as the obligations under MOFA that are required to be fulfilled are concerned. In so far as the putting up of the construction on the plot of land in question is concerned, there can be no dispute about the fact that the said K.K. Verma had constructed the building pursuant to the agreement dated 23-11-1971 entered into by him with the Defendant No.1 who was the owner of the said property. Once that be so, the Defendant No.1 can be said to have caused the construction of the buildings put up on plot C and therefore can be said to be a promoter as postulated in Section 2(c) of the MOFA. The said finding of the Trial Court at the prima facie stage therefore cannot be found fault with.

15. Now coming to the contentious issue as to whether the Defendant No.2 i.e. the Appellant herein is entitled to put up a building on plot C-6. In the said context the judgments of the Apex Court and this Court would have to be seen. In *Jayantilal Investments v. Madhuvihar Co-op Housing Society & Ors.* reported in (2007) 9 SCC 220, the Apex Court was seized with the issue as to whether

prior consent of the flat takers was required to be taken to put up additional construction. The Apex Court in the said judgment held that 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 lay out plan, Building Rules and Development Control Regulations etc., The relevant paragraphs of the said judgment are paragraphs 15, 16, 17, 18 and 19 which for the sake of ready reference are reproduced hereinunder.

"15. The judgment of the Bombay High Court in Kalpita Enclave case (supra) 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 7A was accordingly inserted by Maharashtra Amending Act 36 of 1986. Section 7A 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 7A 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 of 1986 operated retrospectively. Section 7A 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 7A 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 7A 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 7A 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 of 1986, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act No. 36 of 1986 was to change the basis of the judgment of the Bombay High Court in Kalpita Enclave

case. By insertion of Section 7A vide Maharashtra Amendment Act 36 of 1986 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, if the total lay out allows construction of more buildings, subject to compliance of the building rules or building bylaws 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, subsection (1A) to Section 4 was also introduced by the legislature by Maharashtra Act 36 of 1986 under which the promoter is bound to enter into agreements with the flat takers in the prescribed form. Under the prescribed form, every promoter is required to declare FSI available in respect of the said land. The promoter is also required to declare that no part of that FSI has been utilised elsewhere, and if it is utilized, the promoter has to give particulars of such utilisation to the flat takers. Further, under the proforma agreement, the promoter has to further declare utilisation of FSI of any other land for the purposes of developing the land in question which is covered by the agreement.

16. Therefore, the legislature has sought to regulate the activities of the promoter by retaining Sections 3 and 4 in the Act. It needs to be mentioned at this stage the question which needs to be decided is whether one building with several wings would fall under amended Section 7(1)(ii). Section 7A 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 visavis 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 7A 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 subsection (1A) 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 herein below:

"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 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 put up additional construction in accordance with the lay out plan, building rules and Development Control Regulations etc."

16. The judgment in Jayantilal Investments (Supra) has been referred to in a catena of decisions of this Court. A few of the said decisions can be gainfully referred to as under:

(i) Malad Kokil Cooperative Housing Society Ltd. v. The Modern Construction Co. Ltd. reported in N.M. No.1359 in Suit No.1005 of 2011 dated 07.09.2012.

(ii) Zircon Venture Cooperative Housing Society Ltd. v. M/s. Zircon Ventures reported in 2014 (4) Mh.L.J. 481.

(iii) Lakeview Developers & Ors. v. Eternia Cooperative Housing Society Ltd & Ors. reported in 2015 (5) BCR 680.

(iv) White Towers Coop Hsg. Society Ltd. v. S.K. Builders & Ors..

This Court in Zircon Ventures Cooperative Housing Society Ltd. (Supra) had crystalised the proposition laid down in the said decisions as under :

" 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."

17. Hence the test laid down is that the prior consent of the flat taker is not required if the entire project is placed before the flat taker at the time of the agreement and that the promoters/developer puts up additional construction in accordance with the lay out plan Building Rules and Development Control Regulations. The converse of it would be if the builder/developer wants to put up additional construction which is not part of the lay out which was placed before the flat taker at the time of agreement then the consent as required under Section 7 of the MOFA would be necessary.

18. It is in the light of the test as aforesaid that the facts of the present case would have to be seen. As indicated above the package deal agreement dated 10-7-1972 entered into between the said K.K. Verma and the promoters of the Defendant Nos.10 and 11 is an agreement which is referable to Section 4 of the MOFA. Under the said agreement the promoters had agreed to purchase 82 flats in two buildings which were to be put up on plot C1 and C3. The agreement vide clause (3) refers to a lay out plan. The said lay out plan was thereafter sanctioned and is the plan which is at Exhibit B to the above paper book wherein buildings are shown on plot C1 and C3 and plot C-6 is shown for parking. The sanctioned lay out plan was revised from time to time and ultimately by the revision which was sanctioned on 10-6-1975 plot C-6 was shown for building. In so far as the rights of the parties are concerned, the crucial plan for the purposes of Section 7 would be the sanctioned plan of the year 1972 wherein plot C-6 is shown for parking. The representation or the disclosure made to the promoters of the Defendant Nos.10 and 11 societies would therefore stand frozen in terms of the said sanctioned plan of the year 1972 and the promoters/developer would be bound by the said representation or disclosure made in the said lay out in so far as the development to be carried out is concerned. The contention of the Learned Senior Counsel appearing on behalf of the Appellant that since the allotment letter is issued to the Plaintiff in the year 1976, the situation of the year 1976 would prevail and thereby the revised sanctioned plan dated 16-6-1975 would be applicable, in my view, cannot be accepted. The acceptance of such a contention would militate against the safeguards provided by Section 7 of the MOFA resulting in there being an unfettered right in the promoter/developer to put up additional construction as per the revised plans which is not the intent/object of the MOFA. The judgment in Zircon Venture (supra) would therefore not aid the Defendant No.2 to support the contention that it is entitled to put up construction on plot C-6 in terms of the revised plan of the year 1975. To extricate the Defendant No.2 from the situation of it being unable to utilise plot C-6 for the purposes of putting up a building it was sought to be contended on behalf of the Appellants that since the agreement in the instant case is of the year 1972 which is pre the amendment to the MOFA by which Section 7(1)(ii) was amended and Section 7A was introduced which amendment took place in the year 1986, there can be no such fetter by way of seeking consent of the flat purchasers which can be applied to the Defendant No.2. In the light of the judgments of the Apex Court in Jayantilal Investment (Supra) as also the

judgments of this Court which have been referred to herein above, the said submission would have to be rejected outright.

19. A contention was raised on behalf of the Appellant that since the agreement dated 23-11-1971 has been terminated the Plaintiff is not entitled to any reliefs on the basis of the said agreement or the package deal agreement dated 10-7-1972 entered into between the said K.K. Verma and the promoters of the Defendant Nos.10 and 11. In so far as the agreement dated 23-11-1971 is concerned, there can be no dispute about the fact that the construction of the two buildings on plot C1 and C3 which are the buildings of the Defendant Nos.10 and 11, is pursuant to the said agreement dated 23-11-1971. By the agreement dated 10-7-1972 which is the package deal agreement, 82 flats to be constructed in the proposed buildings were agreed to be sold to the promoters of the Defendant Nos.10 and 11. Hence in so far as the flat purchasers are concerned, the said agreement dated 23-11-1971 has already been acted upon by the construction of flats, which flats have been sold by the package deal agreement dated 10-7-1972 to the promoters of the Defendant Nos.10 and 11. Hence in so far as the flat purchasers are concerned, the position has become irreversible and therefore assuming that the agreement dated 23-11-1971 has been terminated, the same would not make any difference to the flat purchasers, so far as their rights under MOFA are concerned. They would be entitled to seek the enforcement of the statutory obligations which the promoter/developer owes to them under the MOFA. Significantly in the Deed of Assignment of a flat dated 26-03-1993, as also the Deed of Confirmation dated 07-05-2004 in respect of the Agreement dated 10-12-1993 to which the Defendant No.1 is a confirming party, in the recital thereof there is a mention of the agreement dated 23-11-1971 which is evidence of the flats covered by the said documents having been constructed pursuant to the said agreement dated 23-11-1971. Hence the Defendant No.1 also accepts the position that it is under the said agreement dated 23-11-1971 that the buildings have been constructed in the lands owned by it. The Trial Court having regard to the covenants of the agreement can be said to have taken a prima facie view that the said agreement dated 23-11-1971 has not been properly terminated.

20. In so far as the aspect of utilisation of FSI is concerned, in view of the fact that it is the case of the Defendant No.1 that the FSI became available on account of reservations on the plot of land owned by the Defendant No.1 that is now sought to be utilised for the construction of the building on plot C-6 the finding of the Trial court at the prima facie stage that the entire FSI of plot C-6 has been utilised cannot be faulted with.

21. In so far as possession of plot C-6 is concerned, the Competent Authority i.e. the District Deputy Registrar Cooperative Societies (3), Mumbai by order dated 27.11.2015 in the proceedings initiated by the Defendant Nos.10 and 11 has granted deemed conveyance of the land in block "C" by keeping the rights of the Respondent No.5 to the land admeasuring 950 sq.ft. with rights of development

of the carpet area of 15863.32 sq.ft. under the Deed of Assignment unaffected. Hence in so far as the plot C-6 is concerned, the Defendant Nos.10 and 11 may have to file appropriate proceedings to seek conveyance of plot C-6.

22. In so far as the contentions raised on behalf of the Appellant in Appeal From Order St.No. 35261 of 2015 are concerned, in my view since the findings rendered by the Trial Court in the impugned order can be said to be the prima facie view of the Trial Court and since this court is in agreement with the said prima facie view, it is not necessary to set aside the said findings. However, it would be open for the Defendant No.1 to urge the said contentions at the hearing of the Suit.

23. For the reasons afore stated, the exercise of discretion by the Trial Court in the matter of grant of injunction cannot be faulted with. There is therefore no merit in the above Appeals from Order. The same are accordingly dismissed.

24. Needless to state that the findings recorded and the observations made in the instant order are only for the purposes of considering the reliefs sought by way of the instant Notice of Motion. The suit in question would undoubtedly be tried on its own merits and in accordance with law. In the facts and circumstances of the case, the hearing of the suit is expedited.