(1983) 02 BOM CK 0027

In the Bombay High Court

Case No : Appeal No''s. 575 and 875 of 1982

Neena Sudarshan Wadia (Smt.) — APPELLANT

Vs

Venus Enterprises
 Kunjan Construction Co. Vs Deepakbhai R. Shah and Others — RESPONDENT

Date of Decision : 09-02-1983

Acts Referred:

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 4, 7, 7(1)
Registration Act, 1908 — Section 17

Citation : (1984) 2 BomCR 505

Hon'ble Judges : R.L. Aggarwal, J

Bench : Single Bench

Advocate : Party in Person in A.O. No. 575 of 1982, C.J. Sawant and J.B. Chinoy, for Shah and Sanghavi, in A.O. No. 875 of 1982, for the Appellant; M.G. Kikla in A.O. No. 575 of 1982 and M.U. Pandey in A.O. No. 875 of 1982, for the Respondent

Final Decision : Allowed

Judgement

R.A. Aggarwal, J.—Both these appeals involve chiefly the interpretation of the provisions of section 7(1)(i) and (ii) of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "the said Act") and the relevant rules made thereunder in 1964, and therefore, they have been heard together and can be disposed of by a common judgment along with the subsidiary points.

2. In Appeal No. 575 of 1982 from Order a learned Judge of the Bombay City Civil Court has construed the provisions of section 7(i) and (ii) of the said Act against the flat-owner i.e. the plaintiff and in favour of the promoter i.e. the defendants, while in Appeal No. 875 of 1982 from Order another Judge of the Bombay City Civil Court has held in favour of the flat owner and against the promoter.

3. Facts in Appeal No. 575 of 1982 from order.

Briefly stated, the plaintiff purchased from the defendants Flat No. 503 in ''Jaldarshan'' situated at Cimbai, Bandra, Bombay, for a consideration of Rs. 1,23,200/-. The defendants showed a sanctioned plan dated 17th April, 1978 to the plaintiff, on the basis of which the defendants were to construct a seven-strayed building with shops on the ground floor. Thereafter, the plaintiff booked flat No. 503 on the fifth floor of the proposed building and made various payments. The defendants by their letter dated 25th June, 1979 addressed to the plaintiff confirmed having sold flat No. 503 in ''Jaldarshan'' at a price of Rs. 1,23,200/- and recorded the receipt of the three payments aggregating to Rs. 31,000/-. As the construction work proceeded, the defendants called upon the plaintiff to make further payments and she accordingly paid in all a sum of Rs. 1,26,000/- inclusive of security deposit etc. The occupation certificate was issued by the Bombay Municipal Corporation on or about 20th December, 1980. Thereafter, the defendants had put the plaintiff in possession of the said flat. The plaintiff contended that once a sanctioned plan for seven-strayed building and 14 shops on the ground floor was shown at the time of the purchase and various flat-owners have purchased the respective flats on the basis of that sanctioned plan dated 17 the April, 1978, it was not open to the defendants to construct additional structures without the previous consent of all the persons who had agreed to take the flats. Her case is that at no time her consent was obtained by the defendants and hence the action of the defendants in putting up additional construction or structures is in contravention of the provisions of the said Act. The plaintiff further stated that 16 flat owners had filed a suit against the defendants for the same relief and, therefore, she awaited for the decision in that suit. It is in these circumstances that the plaintiff approached the Court for a permanent injunction to restrain the defendants from construction additional structures and for mandatory injunction directing the defendants to demolish the additional structures constructed by the defendants without the consent of the plaintiff, and for other interim reliefs. The plaintiff also took out a Notice of Motion for interim relief and in the affidavit in support made by her husband Sudershan Wadia as her constituted attorney, she reaffirmed the statements made in the plaint.

4. On behalf of the defendants, their partners filed an affidavit in reply taking up various legal contentions, to which reference will be made hereafter. But on merits, it was contended that the plaintiff does not have the agreement for sale of the flat as required by the mandatory provisions of section 4 of the said Act. Therefore, in the absence of any written agreement duly registered as required by section 4, the agreement between the plaintiff and the defendants is wholly invalid and altogether void creating no rights in favour of the plaintiff. This submission was based on a decision of the Division Bench of this Court in the case of the Association of Commerce House Block Owners'' Ltd. v. Vishndas Samaldas 83 Bom.L.R. 339 (hereinafter referred to as "Commerce House Owners, case"). It was pointed out that following the said decision the Bombay

City Civil Court had dismissed all the Notices of Motion for interim reliefs taken out in various suits filed by those who had agreed to purchase the flats from the defendants. Reference was made to Notice of Motion No. 5629 of 1981 in Bombay City Civil Court Suit No. 6788 of 1981 and the judgment dated 18th December, 1981 dismissing the said Notice of Motion. The defendants, therefore, submitted that the present Notice of Motion was also liable to be dismissed. With regard to the allegations in the plaint and the affidavit in support for the limited purpose of the present Notice of Motion, the defendants contended that the plaintiff''s husband Sudarshan Wadia came to the defendants'' office and was introduced as an investor by a common friend one O.P. Kapila. The plaintiff''s husband wanted to keep two flats, flat No. 502 in the name of his father and flat No. 503 in the name of his wife. The defendants further contended that in December 1978 the said Sudershan Wadia again came and he was shown proforma of the agreement which the defendants had got prepared for entering into with various persons to whom the defendants might agree to sell flats in the said building. The said Sudarshan approved the said agreement and agreed to all the terms and conditions thereof). supplied). The plaintiff''s husband was told that two separate agreements would have to be signed for the two flats. The plaintiff''s husband, however, told him that he was an officer of the Government of India working in the Customs Department and since he would not be in a position to account for the investments being made by him in the name of his father and wife, the defendants should not insist on signing the agreements. He further stated that he would be re-selling the flats and making profit and nothing would therefore come on record. Therefore, on the request of the plaintiff''s husband, no agreements were signed but two typed letters were issued to him for the flats booked by him. Later on, he informed the defendants that he had decided to come and stay in flat No. 502 himself and hence the agreement for the said flat be made in the name of his father. Accordingly, the agreement in respect of flat No. 502 was duly prepared, averred the defendants in paragraph 14 of the affidavit, and signed on 21st April, 1979. The defendants relied upon the said agreement which was duly executed after it was approved by the plaintiff''s husband. Thereafter, the plaintiff''s husband took possession of flat No. 502 some time in May 1981 and he along with the plaintiff has been staying in flat No. 502. The defendants denied that they had put the plaintiff in possession of flat No. 503. In this connection, the defendants'' case, as set out in paragraph 18 is that the plaintiff''s husband had taken the suit flat No. 503 for the purpose, of re-selling the same and hence at his request all the formalities of executing the agreement, giving possession and signing papers therefore were kept pending. The plaintiff''s husband had approached the deponent of the affidavit in reply on several occasions for giving him one of the keys of flat No. 503 as and when he wanted to show the same to a prospective purchaser or a broker and at his request instructions were given to the site supervisor, R. Shukla who used to give him one of the keys of the latch of outer door of flat No. 503, which the plaintiff''s husband used to return after showing the flat to the prospective purchasers. In or about the last week of May 1982, the plaintiff''s husband requested the said R. Shukla to give him the key of the said flat for showing it to a prospective buyer and accordingly the said Shukla gave him one of the keys. The plaintiff''s husband, however, did not return the key and after the notice of the filing of the present suit was given to the defendants by the plaintiff''s Advocate, it was found that the plaintiff''s husband had put up a lock on the Aldrop of the main door of flat No. 503. Thus, according to the defendants, flat No. 503 is vacant and unoccupied and that the possession thereof has not been given to the plaintiff and the same is still in the possession of the defendants. The defendants denied that the plans of the building were at any time seen by the plaintiff. According to the defendants, a sum of Rs. 1.24.700/- was paid towards flat No. 503 and further amounts remain payable on possession. With regard to the proforma agreement approved by the plaintiff''s husband, as averred in paragraph 20 of the affidavit, the defendants'' case that they have a right to make any additions or alterations in the structures as mentioned in the said agreement and the said terms are binding on the plaintiff. The work of putting up the additional structures was commenced in July 1981 and in law the defendants are entitled to put up the same. The structures are put up above the shop in a wing and that wing is different from the one in which flat No. 503 is situate. According to the defendants, they have got every right to put up the said structures as per the plans duly approved by the Municipal Corporation of Greater Bombay. The structures are on the other columns and as such there is no change whatsoever in the existing structures.

5. It may be mentioned that the affidavit in support of the Notice of Motion was made by the plaintiff''s husband Sudarshan Wadia as her constituted attorney. He made an affidavit in rejoinder. He referred to some new facts, namely, about the statement made on behalf of the defendants in the Bombay City Civil Court Suit No. 6788 of 1981 at the time of hearing of the Notice of Motion therein, that the additional construction on shops Nos. 8 to 14 was restricted only to two the additional floors, for which alone the Municipal sanction had been obtained. Contrary to that statement, the defendants started putting up additional structure on the third floor in the second week of June 1982. With regard to the allegations about the booking of the two flats the plaintiff''s husband stated that both his wife and his father have independent source of income and payment in respect of their respective flats had been made by them by cheques and that the defendants have indulged in these allegations to create prejudice. He denied the allegations about the circumstances in which, according to the defendants, he had taken possession of flat No. 503 and submitted that towards the end of November 1981 the plaintiff was put in possession of the said flat by the defendants. The defendants thereafter forwarded to the plaintiff bills claiming maintenance and other charges.

6. The defendants have made an affidavit in surrejoinder, in which reliance is placed on the two permissions given by the Municipal Corporation, one under I.O.D. dated 6th July, 1981 for construction of two additional floors and the other under I.O.D. dated 6th May, 1982 for construction of another two additional

floors.

7. Facts in Appeal No. 875 of 1982 from Order :

In this matter, the plaintiffs are the flat-owners. The building constructed by the defendants is know as "Kunjan Apartments". This Kunjan Apartments consists of ground and four upper floors and there are in all 21 flats including of those persons who get the flats as alternative accommodation to their existing tenements. Six of the flat owners have filed the present suit. Their case is that the defendants have completed the construction of the building on the said land bearing C.T.S. No. 644 and put the acquires of the various flats in possession. According to the plaintiffs, the defendants handed over the management of the said building and the and to the various acquirers of the flats and/or the tenements in the said building and confirmed the same by their letter dated 23rd December, 1980, Ex. A to the plaint. According to the plaintiffs, since then they and other acquirers of the flats in the said building are managing the affairs of the said building. The plaintiffs also referred to the agreement of sale to the said land executed by the defendants with the various acquirers of the flats and/or tenements in the said building. It is the plaintiffs'' case that the acquirers of the flats and/or tenements in the said building have formed a committee consisting of the plaintiffs and authorised them to manage the affairs of the said building in the land. According to the plaintiffs, since 23rd December, 1980, the defendants were left with no right title and interest in the said land, save and except the obligations to form a co-operative society of the acquirers of various flats and/or tenements in the said building and/or to convey the said land with the said building. The plaintiffs alleged that the defendants in collusion and/or connivance with the Municipal Corporation officers had succeed in getting some plains for construction of two garages sanctioned on the said land bearing C.T.S. No. 644. On or about 9th July, 1982, the defendants slumped some building materials on a portion of the said land. On 10th July, 1982, some workers were sent by the defendants and they have started digging operation on the said land and on enquiries from the said labourers the plaintiffs learnt that the defendant had got sanction for construction of two garages in the said land. The plaintiffs were shocked and surprised to get the said information and they immediately attempted to contract the defendant but failed in their attempts. The plaintiffs, therefore, by their Advocates''s letter dated 11th July, 1982 addressed to the defendants complained against the said high-handed action on the part of the defendants. The plaintiffs further pointed out that the possession of the said building having been given to the occupants of the said flats and the building having been constructed and completed according to the sanctioned plans, the defendants were not entitled to construct any structure on the said land including the said garages without the consent of the plaintiffs and that none of the occupants of the flats were interested in acquiring the garages. It was learnt that the defendants were contemplating to dispose of the said garages to some outsider who would be utilising the same for commercial purposes. It was further stated that even according to the agreement entered into between the defendants and the acquirers of the flats, there was no covenant with regard to the defendants being entitled to construct any garages on the said land. The plaintiffs further stated that the defendants were not entitled to construct and/or let the said garages for being utilised for any purpose other than parking a motor vehicle. The plaintiffs also contended that the defendants have handed over the possession of the said land and the building and the management thereof to the plaintiffs and, therefore, they are not entitled to construct any structure without the previous consent of the plaintiffs. It was also contended that no plans can be amended and/or no additional construction can be availed by the defendants without the prior consent or permission of the plaintiffs and other acquirers of the flats and/or tenements in the said building as per the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "the said Act") and the Rules made thereunder.

8. The defendants'' case is set out in their affidavit in reply to the Notice of Motion. According to them, they are constructing two garages on the said land after obtaining sanction from the Municipal Corporation of Bombay on 7th March, 1981. The defendants rely upon Clause 34 of the agreement for sale and according to them, under that clause they have a right to make additions and alterations as may be permitted by the Bombay Municipal Corporation and other competent authorities. The defendants have constructed one building i.e. the suit building, and with regard to the remaining building the defendants are negotiating with the tenants to vacate the occupied land to enable the defendants to consume full available balance F.S.I. by constructing the second building on the said land. As soon as the construction of the second building on the said land is over, the defendants will execute conveyance in favour of the proposed society. Till then the defendants were and are the absolute owners of the entire property. According to the defendants, merely the management of the 21 flats is given to the Committee as per the letter dated 23rd December, 1980. The defendants have denied that they have handed over the possession of the said land and the building and the management thereof to the plaintiffs. The defendants inter alia deny that the garages cannot be constructed around a building and let out and/or sold to any strangers or outsiders not occupying any portion of the said building and/or the land as alleged. The defendants also deny that they are not entitled to construct any structure on the said land without the previous consent of the plaintiff.

9. The plaintiffs made an affidavit in rejoinder. According to them, the agreements have been entered into by the defendants with the occupiers only after handing over possession of the respective flats and it was represented to the plaintiffs that the said agreements were on usual terms. The plaintiffs have thus signed and executed the said agreements on the said assurance and without reading the contents of the same.

10. Decision of the lower Court appealed against in A.O. No. 575 of 1982.

In view of the fact that the plaintiff did not have an agreement in writing for sale of the suit flat, the learned Judge Shri Cazi did not accept her case that she had become owner of flat No. 503. According to the learned Judge the plaintiff could not have become the owner of Immovable property of the value of more than rupees one hundred without any conveyance in her favour by the defendants, and as there is no conveyance of the property by the defendants, the title of the defendants has not passed either to the society or to the plaintiff. With regard to the provisions of section 7 of the said Act, the learned Judge took the view that the agreement that is referred to in section 7 is the one which u/s 4 of the said Act has to be a written agreement and that written agreement has to be registered under the Indian Registration Act, 1908. But in the present case, the plaintiff does not have any written agreement for sale of the flat and if the plaintiff is relying upon any oral agreement or any unregistered written agreement for sale of the flat to her, such agreement would be totally void as held in Commerce House Owners'' case. Further, section 7 contemplates previous consent of these parties who have properly registered agreements in their favour and since it is not the case of the plaintiff that there are other persons who have properly registered agreements in their favour, the question of the defendants action being contrary to the provisions of section 7 of the said Act did not arise. On the question of delay in taking out the present proceedings, the learned Judge held in favour of the defendants. For these reasons, the Notice of Motion was dismissed.

11. Decision of the lower Court appealed against in A.O. No. 872 of 1982.

The learned Judge Shri Ratnaparkhi accepted the contention of the plaintiff that the defendants could not raise additional structure without the previous consent of all the purchasers as provided u/s 7(1) of the said Act. The learned Judge rejected the contention of the defendants based on the provisions of Clause 34 of the agreement which did not speak about the express consent to a particular act, but contemplated a blanket consent without knowing what the fact is. The agreement in question was executed on 5th December, 1979. At that time, the plans sanctioned by the Municipal Corporation showed that there were no garages and only some open space was kept for parking the cars and it was not clear from the record as to when this idea of constructing garages struck the mind of the defendants, because it was not a subject-matter of the original plan and it must have struck the mind of the defendants some time thereafter. However, in December 1979, a blanket consent was obtained from all the intended purchasers that they would grant their consents to all the actions of the builders, whatever the nature thereof would be. Thus, according to the learned Judge this was a consent without knowing the nature of the Act. What section 7 contemplates is a free consent by the purchasers to a particular act of which they are conscious, and therefore, the consent referred to in Clause 34 of the agreement is a blanket authority given to the Builder and is not a consent contemplated u/s 7 of the said Act. The defendants submitted the plans on 7th March, 1981, and the same were sanctioned on 26th November, 1981 and, therefore, such a consent could not be fastened on the plaintiffs without the knowledge of such a plan. Since the construction of the garages was not shown in the plans which were got approved by the defendants and never contemplated or asked for at the beginning, the consent embodied in Clause 34 of the agreement could not be a substitute for the consent contemplated u/s 7(1) of the said Act.

Submission in both matters :

12. The first matter, A.O. No. 575 of 1982 was argued in person by Shri Sudharshan Wadia, the husband of the plaintiff. He contended for sale envisaged u/s 4 in respect of the flat purchased by the plaintiff and its registration under the Indian Registration Act, 1908, as mentioned section 4 does not debar the plaintiff from preventing the defendant promoters from contravening the provisions of section 7, by constructing additional structures without the previous consent of the plaintiff. The submission was that after a promoter has disclosed or furnished to a purchaser of the flat the plans and specifications of the flat and the building, the promoter has not right either to make alterations in the float without the previous consent of the purchaser concerned or to make any alterations in the structures of the building or construct additional structures without the previous consent of all the persons who have purchased the flats, it was also submitted that in the present case, the building has been constructed as per the sanctioned plans and, therefore, the promoters could not start with the work of construction of additional structures without first obtaining consent of all flat owners. It was also contended that the provisions of section 7 are independent of section 4 and the Court can give effect to the same even if the required agreement for sale has not been executed and duly registered; as otherwise the protection granted to the flat owners and the malpractice sought to be eradicated by section 7 would be rendered meaningless. As against this, Shri Kikla, learned Counsel appearing for the defendant-promoters, submitted that having regard to the ratio of the decision of Commerce House Owners'' case, unless there is a written agreement duly registered under the Indian Registration Act, no right can accrue in favour of the plaintiff for invoking the provisions of section 7. Since admittedly the plaintiff has no written agreement, the defendant are not required to obtain her consent. Shri Kikal''s submission was that a promoter is required to obtain previous consent u/s 7 of those persons only who have valid and enforceable agreements u/s 4.

In the second matter, Shri Sawant, learned Counsel appearing for the promoters appellants, submitted that the right contemplated u/s 7 would be available only when the agreements are registered u/s 4 even though the flat owners and the promoter might have entered into the required agreement for sale in respect of their respective flats. Unless such agreements are duly registered the flat owners cannot avail of section 7. According to Shri Sawant, the Act presents a composite scheme and section 7 is not an independent right. Shri Pandey, learned Counsel appearing for the respondents-plaintiff in the second matter, referred to the various provisions of the said Act to show the various stages of the application of the Act to building and that for the purpose of section 7, non-registration of an agreement for sale cannot come in the way of the flat owners from claiming the relief.

13. Now, in order to appreciate these rival contentions in both the matters, which principally involve the interpretation of the provisions of section 7(1)(ii) of the said Act, one has to bear in mind the relevant provisions. It is a short Act consisting of 18 sections. The title and preamble of the Act are sufficiently clear. The title and preamble refers to the reasons which led the State Government to enact this law. This Act regulates, in the State of Maharashtra, the promotion of the construction of, the sale and management, and the transfer of flats on ownership basis. It says that---

"WHEREAS it has been brought to the notice of the State Government that, consequent on the acute shortage of housing in the several areas of the State of Maharashtra, sundry abuses, malpractices and difficulties relating to the promotion of the construction of, sale and management and transfer of flats taken on ownership basis exist and are increasing;

"AND WHEREAS, the Government in order to advise itself as respects the manner of dealing with these matters, appointed a committees by Government Resolution in the Urban Development and Public Health Department No. 6.248/79599-F, dated the 20th May, 1960, to inquire into and report to the State Government on the several matters referred to aforesaid with the purpose of considering measures for their amalioration;

AND WHEREAS, the aforesaid committee has submitted its report to Government in June 1961, which report has been published for general information;

AND WHEREAS, it is now expedient after considering the recommendations and suggestions made therein to make provisions during the period of the such shortage of housing for the regulation of the promotion of the construction, sale and management and transfer, of flats taken on ownership basis in the State of Maharashtra;"

In Commerce House Owner''s case, it is observed that the Act was intended to regulate the activities of a promoter. 83 Bom.L.R. 339, it is observed that the very purpose of the Act is to prevent malpractices rampant in the business of construction of flats which were sold to intending purchasers on ownership basis. In order to prevent such malpractices, which were increasingly being practised, according to the Legislature, the Ownership Flats Act was made to regulate the activities of promotion of the construction of, the sale and management and transfer of flats taken on ownership basis. While considering the policy of the said Act and the intention of the Legislature in enacting section 4, the view expressed is that section 4 is intended to prevent any bogus sales and it is also intended to safeguard the interests of the purchasers. It is also opined that it was a part of public policy to see that people are not cheated out in the bargain for flats on ownership basis and that is why the agreement has been specifically required to be made in writing u/s 4 and also required to be registered. To my mind, as discussed hereafter, the same policy and intention of the Legislature runs in enacting the provisions of section 7 and it is a part of the same public policy to see that flat owners are not cheated by the promoters by making changes in the flats and the structures of the building without the previous consent of the persons who made the bargain with the promoters.

14. Section 2(a) defines "flat."

"Promoter" is defined u/s 2(c).

Section 3 speaks of general liabilities of promoter. Sub-section (1) of section 3 says that notwithstanding anything in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, in all transactions with persons intending to take or taking one or more of such flats, be liable to give or produce, or cause to be given or produced, the information and the documents mentioned in sub-section (2). Sub-section (2) last down the following eleven liabilities of a promoter :---

"(2) A promoter, who constructs or intends to construct such block or building of flats, shall---

(a) make full and true disclosure of the nature of his title to the land on which the flats are constructed, or are to be constructed; such title to the land as aforesaid having been duly certified by an Attorney-at-law, or by an Advocate of not less than three years standing;

(b) make full and true disclosure of all encumbrances on such land including any right, title, interest or claim of any party in or over such land;

(c) give inspection in seven days'' notice or demand, of the plans and specifications" of the building built or to be build on the land"; such plans and specifications having been approved by the local authority which he is required so to do under any law for the time being in force;

(d) disclose the nature of fixtures, fittings and amenities (including the provision for one or more lifts) provided or to be provided;

(e) disclose on reasonable notice or demand if the promoter is himself the builder, the prescribed particulars as respects the design and the materials to be used in the construction of the building, and if the promoter is not himself the builder disclose, on such notice or demand, all agreements (and where there is no written agreement, the details of all agreements) entered into by him with the architects and contractors regarding the design, materials and construction of the buildings;

(f) specify in writing the date by which possession of the flat is to be handed over (and the shall have over such possession accordingly);

(e) prepare and maintain a list of flats with their numbers already taken or agreed to be taken, and the names and addresses of the parties, and the price charged or agreed;

''to be charged therefore, and the terms and conditions if any on which the flats are taken or agreed to be taken'';

(h) state in writing, the precise nature of the organisation of persons to be constituted and to which title is to be passed, and the terms and conditions governing such organisation of persons who have taken or are to take the flats;

(i) not allow persons to enter into possession until a completion certificate, where such certificate is required to be given under any law, is duly given by the local authority (and no person shall take possession of a flat until such completion certificate has been duly given by the local authority);

(j) make a full and true disclosure of all outgoings (including ground rent, if any, municipal or other local taxes, taxes on income, water charges and electricity charges, revenue assessment, interest on any mortgage or other encumbrances if any;

(k) make a full and true disclosure of such other information and document in such manner as may be prescribed; and give on demand true copies of such of the documents referred to in any of the clauses of this sub-section as may be prescribed at a reasonable charge therefore."

Reading of section 3 shows that the obligations are cast on a promoter who may intend to construct a building on ownership basis. These obligations are of a far reaching nature. It is made obligatory on the part of a promoter to place all the cards mentioned u/s 3(2)(a) to (k) before the intending purchasers even though he may not have started the construction of a building of flats or blocks. These provisions intend to safeguard the interest of intending purchasers as well as actual buyers of flats.

So far as section 4 is concerned, it has been interpreted in Commerce House Owner''s case, to which reference will be made hereafter.

Under section 5, a promoter is made a trustee, inter alia, of the amounts received as advance or deposit from persons intending to purchase or who have purchased flats. The promoter is enjoined upon to hold such moneys for the purposes for which they were taken. These provisions make it imperative on the part of the promoter to apply and use the moneys for the purpose for which he obtained the same from the purchasers of the flats. u/s 13, punishment upto four years has been fixed for committing original breach of trust of the money received under the section. For unspecified classes of criminal breach of trust, Indian Penal Code provides for imprisonment upto three years u/s 406, I.P.C. But under this Act, a new category of criminal breach of trust by a promoter is enacted. Even the State Government has acquired power u/s 5 to appoint an officer by general or special order, who can demand from the promoter information about the application of the money u/s 5 and a promoter is required to make full and true disclosure of all transactions in respect of the account maintained by him. Section 5 also requires a promoter not to keep moneys in his private coffers but to put them in a Bank. Such an account has to be a separate account and cannot be mixed with the other bank account of the promoter.

By section 6, a promoter is made responsible for payment of outgoings till the property is transferred.

Section 7, with which we are mainly concerned, will be considered separately.

Section 8 makes provision for refund of amount with interest in case the promoter fails to give possession in accordance with the terms of the agreement.

Section 9 debars a promoter from mortgaging or creating charge on a flat or land without the previous consent of the persons who take a agree to take the flats, and if a promoter creates any mortgage or charge without such previous consent after the agreement referred to in section 4 is registered, the right and interest of such persons are protected.

Sections 10 and 11 relate to steps to be taken for formation of a Co-operative Society or a Company and to convey title etc.

Section 12 casts liabilities on a flat-taker. Sub-section (1) thereof says, every person who has executed an agreement to take a flat shall pay at the proper time and place the price, his proportionate share of the Municipal taxes, water and electricity charges, ground rent (if any) and other public charges, in accordance with his agreement with the promoter. By sub-section (2) of section 12, any person who has executed an agreement to take a flat and who, without reasonable excuse, fails to comply with or contravenes sub-section (1), on conviction, is liable to pay fine which may extend to two thousand rupees.

Section 13 speaks of offences by a promoter. Any promoter who, without reasonable excuse, fails to comply with a contravenes any provisions of this Act for of any rule made thereunder, shall, where no other penalty is expressly provided for, on conviction, be punished with imprisonment for a term which may extend to one year or with fine which may extend to two thousand rupees or with both, and a promoter who commits criminal breach of trust of any amount advanced or deposited with him for the purpose mentioned in section 5, on conviction, is liable to jail sentence upto four years or with fine or with both.

By section 17, various provisions of the Act are made applicable to flats which had already been constructed before the coming into force of the said Act, i.e. 10-2-1964.

15. Going back to the left out section 4, as stated earlier, the same has been interpreted in Commerce House Owners'' case and, therefore, I am bound by that interpretation. Section 4 runs in the following terms :---

"4. Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent, of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Indian Registration Act, 1908 and such agreement shall contain the prescribed particulars, and to such agreement there shall be attached, such documents or copies thereof, in respect of such matters as may be prescribed."

The Division Bench in Commerce House Owners'' case has held that these provisions are mandatory and the learned Judges have observed 83 Bombay L.R 357. as following :---

"An agreement for sale of immovable property need not necessarily be in writing nor is it one of the documents which u/s 17 of the Registration Act is required to be registered. Notwithstanding the law that an agreement in respect of Immovable property need not be registered, section 4 provides that the agreement shall be a written agreement and the agreement shall be registered. Section 4 appears to us to be really in four parts and the non obstante clause will govern the first three parts of the section. The first part of the section omitting the positive prohibition of to accepting more than 20% of the sale price requires that notwithstanding anything contained in any other law, a promoter shall ''enter into a written agreement of sale''. The second part with regard to the registration will show that ''Notwithstanding anything contained in any other law the agreement shall be registered under the Indian Registration Act, 1908.'' These are the two principal parts of the section which will be governed by the non obstante clause. Thus inspite of the fact that under the general law an agreement of sale of Immovable property is not required to be registered, under the Ownership Flats Act it is specifically required to be registered."

While speaking of the consequence of non-compliance with the provisions of section 4, it is observed at page 359 :---

"The very purpose of the Act is, as already pointed out, to prevent malpractices rampant in the business of construction of flats which were sold to intending purchasers on ownership basis. In order to prevent such malpractices which were increasingly being practised, according to the Legislature, the Ownership Flats Act was made to regulate the activities of promotion of the construction of, the sale and management and transfer of flats taken on ownership basis. If this bee the object of the Legislature in enacting the provisions of the Ownership Flats Act, then it is obvious that section 4 is a statutory provision intended to prevent any bogus sales and it was also intended to safeguard the interests of the purchasers. As a matter of fact, it was a part of public policy to see that people are not cheated out in the bargain for flats on ownership basis. That is why the agreement has been specifically required to be made in writing, the amount of the advance deposit has been restricted, the agreement is required to be registered and the agreement has to contain such details as are necessary to ensure that the purchaser gets a flat in accordance with what he had bargained for with a clear title in respect of the property.

"If section 4 is not held to be mandatory, one of the important propose of the Act will be defeated inasmuch as the purchasers will be at the mercy of the promoter, if he cannot insist upon all the necessary details with regard to the intended purchase of flat and if he wants to avoid any further disputes, he cannot insist upon a written agreement of sale which has to be registered. On a careful scrutiny of the provisions of section 4 of the Ownership Flats Act, therefore, we are inclined to take the view that section 4 contains an absolute enactment which must be obeyed absolutely. It such absolute enactment is not obeyed, the consequence will be that the agreement between the promoter and the purchaser will be wholly invalid and altogether void creating no rights between the parties. It is no doubt true that in a given case, it will be the intending purchaser who might suffer if he connives at the failure of the promoter not to have the agreement registered but for that, the intending purchaser will himself have to be blamed because there is enough provision in the Registration Act which will enable the intending purchaser to have the document registered. Once section 4 is held to be mandatory and the consequence of non-compliance with the provisions of section 4 will be to invalidate the transaction, there is no question of such a transaction being binding between the parties......"

At page 360, the learned Judges, before proceeding to the next contention conclude with the following remarks :---

"Having taken the view that the provisions of section 4 are mandatory and the agreement was, therefore, statutorily required to be registered, the plaintiff cannot found any rights on such an agreement and the agreement must be treated as invalid and ineffective."

The result in that case was that the plaintiff''s suit for specific performance of an agreement dated 31st October, 1964 in respect of certain property, which was decreed by the trial Court and confirmed by the learned Single Judge of this Court was dismissed.

16. We now go to section 7. Shri Sawant, learned Counsel appearing in the second matter submitted that though in Commerce House Owners'' case, provisions of section 7 have been considered, but the full implications of section 7(1)(ii) of the Act have not been considered, especially the effect of section 4 on section 7, in a case where a purchaser of a flat has entered into an agreement for sale but that agreement is not registered. In the appeal in which Shri Kikla appears, in that case there is not even a written agreement for sale. Now section 7(1) is in these terms :---

"7(I) 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 alterations 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) make any other alterations in the structure of the building, or construct any additional structures, without the previous consent of all the persons who have agreed to take the flats." (underlined words are emphasised).

17. These provisions are couched in simple and plain language and present no difficulty in understanding their meaning and import. A mere reading of these provisions brings home the central theme thereof. After the plans and specifications of the building are approved by the local authority, and after such plans and specifications have been disclosed or furnished to the person who has agreed to take one or more flats, the promoter is enjoined by law not to make alterations in the structure of the flats without the previous consent of the person in respect of whose flat the alteration is to be made by the promoter. Like-wise, the promoter is prohibited from making any alterations to the structure of the building, or construct any additional structures, without the previous consent of all the persons who have agreed to take the flats, it is obvious that the purchaser of a flat gets a picture of the building built or to be built on the land, from the plans approved by the local authority. It is on the basis and faith of that plan that he contracts to buy the flat from the promoter. It seems to me that in order that the promoter should adhere to the approved plans that these provisions are enacted. Before the enactment of these provisions, one of the malpractices and irregularities that was found out in the building industry in this metropolis was that the promoter or builder, without the consent of the flat owners, could put up additional storeys or structures on the building itself or erect additional building or shops or garages on the land. This left the flat-owners high and dry. The flat-owners were thus never sure of what the ultimate structures of the building and the land adjoining thereto would be. It appears that these provisions are intended to eradicate such malpractices and irregularities. In the Commerce House Owners'' case the scope of the provisions of section 7 fell for consideration. At page 346 of (1980)83 Bom.L.R., the following observations are to be found :---

"Under section 7 there is prohibition against the promoter from making any alterations in the structures described in the plans and specifications of the building sanctioned by the local authority. This cannot be done without the previous consent of the person who takes one or more flats. Sub-clause (i) thus prohibits the promoter from making any alteration in the flat once the flat-owner has agreed to purchase that flat. Sub-clause (ii) deals with the alteration in the structures of the building or construction of any additional structures and section 7 has the effect of prohibiting the promoter from constructing any additional structures or altering the structure of the building unless previous consent of all the persons who have agreed to take the flats is taken."

Again at page 374, it is stated this :

"If the amended definition of promoter is read into the provisions of section 7 then it is obvious that even in respect of a building which is completed, if a person has agreed to take one or more flats after the coming into force of the Act, the promoter, that is, the person who has constructed the building will have the liabilities or the obligations specified in sub-clause (i) or (ii) of section 7(1) fastened on him. In other words, if there is a building which is fully constructed on the date on which this Act has come into force, the promoter is disabled from making any alterations in the structures in respect of flat or flats which are agreed to be taken by a person or persons without the consent of that persons or persons. Similarly the promoter that is, the person who has constructed the building is disabled from making any other alterations in the structure of the building or from constricting any additional structure without the previous consent of all the persons who have agreed to take the flats."

Thus the view taken by the Division Bench in the above case is that a promoter is not entitled to make any other alteration or construct any additional structure without the previous consent of all the persons who have agreed to take the flats.

18. Before dealing with the question of the effect of section 4 on section 7 in cases where there is no agreement for sale of the flat at all or the agreement for sale is not registered under the Indian Registration Act, it is convenient to consider the aspect of the consent of the flat-owners for the purpose of alteration in the structure of the building or constructing any additional structures as laid down under Clause (ii) of sub-section (1) of section 7. In this connection in the first matter, in which Shri Kikla appears for the promoters, there is a dispute about the proforma agreement for sale having been approved by Shri Sudharshan Wadia, the husband of the plaintiff but it seems to me prima facie, that the promoters'' would in this behalf is more reliable at this stage because it is unlikely that Shri Sudharshan was not shown the proforma agreement for sale got prepared by the promoters for execution with persons who may agree to purchase flats. Moreover, at about the same time, Shri Sudharshan had dealt on behalf of his father for the purchase of another flat in the same building. Among the clauses referred, reliance was placed on Clauses 3 and 15 which are in these terms :---

"3. The Builders have informed the purchaser/s that the said building plans and specifications in respect of the said multi-storeyed building have been duly sanctioned by the Municipal Corporation of Greater Bombay subject to the terms and conditions imposed by the Municipal Corporation of Greater Bombay. It is agreed by and between the parties hereto that the Builders shall be entitled to make such changes and/or alterations and additions in the said building plans as required by the Municipal Corporation of Greater Bombay which the Builders may deem fit and proper and the Purchasers hereby irrevocable consents to the Builders for carrying out such changes and/or alterations and additions."

"15. The Builders shall have a right until the execution of the said conveyance in favour of the proposed Society or Limited Company or otherwise as aforesaid to make additions or put up additional structures, floors and storeys on the said building which shall be the property of the Builders and the Builders will be entitled to dispose of the same in such manner as they may deem fit as aforesaid."

The promoters were also obtaining a letter from the purchasers of the flat at the time of handing over possession and concluding paragraph of the proforma letter is as follows :

"I declare that I will not raise any objection on your starting any additional construction by building additional floors on the building or by constructing any extension as per B.M.C. Rules & Regulations. I further agree to your forming the Co-operative Society after the completion of your additional floors and extension."

19. In the second matter, Shri Sawant referred to Clause 34 of the agreement for sale, the material portion whereof runs as follows :---

"The Builders shall have a right until the execution of the conveyance in favour of the proposed Society or Limited Company to make additions, alterations, raise storeys or put up additional structures as may be permitted by Municipality and other Competent Authorities. Such additions, alterations, structures and storeys will be the sole property of the Builders who will be entitled to dispose it off in any way they choose and the flat-holder hereby consents to the same........"

20. It may be mentioned in fairness to Shri Kikla that this aspect of the matter had been argued in the beginning, but when the matter was re-argued after the second matter was also taken up for hearing along with the first one. Shri Kikla did not refer to the same.

21. Now, we have to under stand the meaning of the word ''consent'' as used in Clause (ii) of sub-section (1) of section 7. After the plans and specifications of the building as proved by the local authority are disclosed or furnished to a person who agrees to take a flat from the promoter, a prohibition is claimed on the promoter not to make any alterations in the building or constructed additional structures. This prohibition can be lifted if before the promoter carries out the alterations in the building or before he starts the work of additional construction, the promoter obtains the consent of all the persons who have agreed to take the flats. For the purpose of obtaining consent, a promoter must ask the flat-owners for their permission and reveal to them the nature of the proposed alterations to the building or of the additional structures to be constructed as, without such disclosure, the flat-owners cannot know for what work the permission is sought and for what work they are required to consent. Again in response to a request for consent, there must be an affirmative acceptance from all the persons who have agreed to take the flats. The word "consent" in the context of the section does not mean implied consent such as by conduct or acquiescence or circumstance that might be consent. Consent in this section is to be understood to mean as positive consent to specific items of work or alteration to be carried out or particular additional structure to be built by a

promoter. This seems to be the object of enacting these provisions of obtaining precious consent of the flat-owners as otherwise the malpractices and irregularities intended to be eradicated by this enactment would continue to flourish and the promoters would not be deterred by the penal provision of section 13. A blanket consent or authority obtained by a promoter at the time of entering into an agreement for sale or at the time of handing over possession is not the consent contemplated by section 7(1)(i) or (ii) for such a blanket consent or authority would sew up or nullify these provisions. Now in the first matter the original sanction on the basis of which the flats were sold by the defendants-promoters, was obtained from the local authority on 17th April, 1978. Thereafter these defendants started putting up additional structures on the basis of plan sanctioned by the local authority on 6th July, 1981. This work was carried on by these defendants without the previous consent of the plaintiff as well as sixteen other persons who had purchased the flats. These sixteen persons had filed a suit being Bombay City Civil Court Suit No. 6788 of 1981 against these defendants. In that suit, these defendants had stated that the additional structures on shops Nos. 8 to 14 were restricted to two additional floors as per plans dated 6th July 1981. Contrary to this, these defendants obtained further sanction from the local authority for constructing additional structures on shops Nos. 8 to 14 under plans approved on 6th May, 1982. It is patent that the additional work carried out on shops Nos. 8 to 14 under the plans dated 6th July, 1981 and 6th May, 1982 is without the consent of the plaintiff and other persons who have purchased the flats. These defendants cannot under the cloak of the blanket consent obtained under the proforma agreement for sale carry out the work of additional structures and thus set at naught the provisions of section 7(1)(ii). Likewise, in the second matter also, the original sanctioned plan dated 5th December, 1979 was the sectioned plan on the basis of which the flats were sold. The defendants in the second matter had also sought to build garages on the strength of Clause 34 of the agreement for sale without previously obtaining the consent of all the persons for constructing garages in the open space of the building.

Therefore, there is no manner doubt that the additional structures constructed or intended to be constructed are in breach of the provisions of section 7(1)(ii).

22. This takes me to another submission of Shri Sawant According to Shri Sawant the word "additional" means extension either vertical or horizontal to the structure of the building. In this connection, Shri Sawant made reference to the meaning of the word "additional" as contained in New Webster Dictionary of the English language, 1981 edition, page 13 where the meaning of the word "additional" is given as "supplementary, more, added, extra." Shri Sawant also referred to the meaning of the word "additional" as contained in Random House Dictionary of the English language, unabridged edition, page 17, where the meaning mentioned is "added, supplementary". To my mind the meaning "more, added, extra" of he word "additional" appears to be more appropriate. It is difficult to accept the meaning suggested by Shri Sawant, that the word

"additional" means only extension either vertically or horizontally to an existing structure.

23. Shri Sawant next submitted that if any unauthorised work of putting up additional structure is carried out, then a promoter is liable to compensate the flat-owners and for that purpose a machinery is provided under sub-section (2) of section 7. Now, the provisions of section 7(2) make reference to the defects in a building of material used or any unauthorised change in the construction. The unauthorised change mentioned here does not cover case of making alterations in the building or constructing additional structure, the construction whereof is barred under sub-section (1) of section 7. Therefore, I do not find any merit in this submission.

24. The last contention of Shri Kikal and Shri Sawant was that unless there is a written agreement for sale duly registered under the Indian Registration Act, the flat-owner cannot avail of the provisions of section 7. Shri Kikla also emphasised that in such case, a promoter is not required to obtain previous consent u/s 7, as there is no valid and enforceable agreement between the flat-owner and the promoters. In other words, the promoters can carry out the work of additional construction at their sweet Will so long as they succeed in obtaining sanction of the local authority. Now, I have quoted above the observations in the Commerce House Owners''s case on which reliance was placed by learned Counsel and Shri Sudarshan Wadia. In my view, section 4 and section 7 are independent. These provisions are intended to safeguard the interest of the flat-owners in different ways. The effect of want of a registered agreement for sale, as I understand by the decision in the Commerce House Owners'' case, is that a flat-owner may not be able to enforce a contractual obligation or succeed in a suit for specific performance or claim protection from encumbering his rights and interest in the flat or the land u/s 9, but the absence of a registered agreement u/s 4 cannot deprive a flat-owner of his right title and interest in the flat or the land or prevent him from enforcing the provisions of the Act. In the first matter, though the plaintiff does not have an agreement for sale, but she has paid the price of the flat, she has obtained a letter recording the sale of the flat to her and she is also in possession of the flat. In the second matter, there are agreements for sale and the flat-owners are in possession of their respective flats and are managing the affairs of their flats. Shri Sudharshan Wadia also referred to the provisions of section 17 of the Act, which make applicable certain provisions of the Act to flats which are already in existence and relied upon the observations in Commerce House Owners''s case at page 347 quoted earlier. In that case, it has been observed that a promoter in respect of a building standing on the date of the coming into force of the Act is also disabled from making any alteration in the structure of the building or from constructing any additional structure without the previous consent of all persons who have agreed to take the flats. In case of such flat-owners to whom the provisions of section 17 are applicable, the existence of a registered agreement for sale u/s 4 is not a condition precedent to the enforcement of the obligations u/s 7. The liabilities or obligations, as

fastened on a promoter as observed in the Commerce House Owners'' case, squarely apply to the present case. Therefore, to my mind, the absence of the registered agreement for sale cannot came in the way of the plaintiffs in both the matters in invoking the provisions of section 7(1)(ii) nor are the promoters in the first matter absolved from obtaining the consent of the plaintiff in that case because of her not possessing a registered agreement for sale.

Remaining discussion in A.O. No. 575 of 1982:

25. In the matter, by a letter dated 5th June, 1979, the defendants-promoters have sold flat No. 503 to the plaintiff for Rs. 1,23,200/-, out of which a sum of Rs. 31,000/- was received on the date of the passing of the said letter. Prima facie, receipt of Rs. 31,000/- was in excess of 20 per cent of the sale, price, which was the maximum advance money which the defendants could receive from the plaintiff. It is not in dispute that the plaintiff-appellant has made further payments by cheques, though according to her, she has paid in all Rs. 1,26,000/- whereas according to the defendants they have received Rs. 1,24,700/-. There is, however, a dispute between the plaintiff and the defendants about handing over possession of Flat No. 503 to the plaintiff. Prima facie, it appears that there is a great deal of doubt in the explanation of the defendants on the circumstances in which the plaintiff took possession. It does not appear that the plaintiff has purchased the flat for the purpose of investment through her husband, as made out by the defendants. The plaintiff has made all the payment by cheques. As soon as the defendants agreed to sell the flat to the plaintiff on 25th June, 1979, the defendants must have, in the registers required to be maintained under the Act and the Rules made thereunder i.e. Rule 18(2), made entries about the name of the purchaser, address of the purchaser, whether, purchased or agreed to be purchased, date of agreement, the price settled, etc. as required by Form II prescribed by Rule 18(2). Again, under Form III prescribed by or the same Rule, the defendants must have recorded in the register the amounts received and the disbursements made. Having regard to these provisions, it is difficult, prima facie, to take the view that the plaintiff''s husband was intending to screen the transaction as a Government servant, as contended.

26. About the circumstances leading to the taking of possession, I am only dealing with one or two circumstances for taking a prima facie view. One circumstance is that if the plaintiff of her husband had taken possession of the flat in illegal manner as contended by the defendants, the defendants, as promoters would not have slept over this illegal act. Shri Kikla submitted that the defendants came to know of the plaintiff''s husband taking possession in an illegal manner only when the suit was filed. This also, prima facie, does not appeal to me because, according to the defendants, their supervisor Shukla was on the scene throughout and if Shukla had given the key to the plaintiff''s husband and the plaintiff''s husband has failed to return it, he could not have ignored the matter for months together. The other circumstance is that the

defendants have preferred bills upon the plaintiff and claimed maintenance charges for the period from May 1981 to October 1981. One bill is dated 10-12-1981 claiming payment of Municipal taxes, water tax and maintenance charges for two months of November and December 1981. The other bills dated 10-1-1982 claiming the same kind of charges for the months of January and February 1982 and also for the months of May 1981 to October 1981. The present suit was filed in the middle of June 1982. Having regard to these circumstances, prima facie, it is not possible to disentitle the plaintiff from seeking the interlocutory relief if she is otherwise entitled to it in law.

27. Shri Kikla contended that the plaintiff is not entitled to an interlocutory relief on account of the latches on her part. In this connection, what is material to bear in mind is that after the original plans were approved by the Municipal Corporation on 7-4-1978, which was the basis on which the defendants had agreed to construct the flats and the building and the shops, the defendants had twice obtained further Municipal permission for construction. The first sanction dated 6-7-1981 related to construction of two floors and shops Nos. 8 to 14. In this connection, the defendants had made a statement to the Court, to which reference has been made above, whereby the defendants even made the Court believe that the sanction obtained by the defendants was only upto two additional floors. On behalf of the defendants, it could not be shown, prima facie, that the defendants had obtained the consent of the plaintiff or the other purchasers of the flats in respect of the second sanction dated 6-5-1982 for further two additional floors. The defendants have, prima facie, contravened the provisions of section 7. The latches pointed out by Shri Kikla were that the plaintiff was aware of the developments in the earlier suit and was watching and waiting for the result of that suit and it is only after the disposal of the Notice of Motion in that suit that the plaintiff has filed the present suit. I do not think that in the circumstances of this case the plaintiff''s conduct in awaiting the outcome of a suit involving the same points could be a ground for refusing the relief. The defendants are guilty of misleading the Court in the previous suit. After the passing of the order dated 18-12-1981 in the previous suit the defendants again sought to obtain sanction from the local authority on 6-5-1982 for raising two additional storeys.

Order in A.O. No. 875 of 1982 :

28. For these reasons, the appeal is allowed. The order of the trial Court dismissing the plaintiff''s Notice of Motion is made absolute in terms of prayers (a) and (b) with costs throughout.

Order in A.O. No. 875 of 1982 :

29. In view of the above discussion; this appeal must fail. However, in the view that I have taken, the defendants are not entitled to construct additional structure, i.e. the two garages or any other structure on the open land around ''Kunjan Apartments''. Accordingly, the injunction granted by the trial Court is

modified and pending the hearing and final disposal of the suit, the defendants, their servants and agents and any person or persons claiming through or under them are restrained from constructing any garages and or any structure on the land around the building knowing as ''Kunjan Apartments'' on C.T.S. No 644, Kasturba Cross Road, Malad (West), Bombay 400 064. The defendants will, however, be at liberty to construct the second building on the said plot of land without affecting the rights of the flat-owners of Kunjan Apartments in any manner in order to utilise F.S.I. if any. Subject to this modification, the appeal is dismissed with costs.

30. At this stage of the passing of the final order, Shri Kikla makes an oral application on behalf of the respondents for leave to appeal to the Supreme Court. In the absence of Shri Sawant. It was indicated that the appellants in the other matter were also seeking leave to appeal to the Supreme Court. Later, Shri Sawant indicated that he was not making such an application.

31. Shri Kikla submitted that this case involves a substantial question of law of general importance and that many builders in the city would be affected by this judgment. Shri Kikla further indicated that some matters are pending in this Court, but he was not very sure. In view of this, final order on the oral application is served. Shri Sudarshan Wadia submits to the orders of the Court.

32. Shri Kikla states that there are about 20 appeals pending, in which the decision appealed against is either in favour of the purchasers of flats, flat-owners or in favour of the promoters-builders. Now it, therefore, seems that two views are possible and some learned Judges have taken one view and others a different view. The question becomes more important and significant by virtue of the decision of the Division Bench Commerce House Owners'' case, 83 Bom.L.R. 339, holding that the consequence of non-compliance with the provisions of section 4 is that it invalidates the transaction and there is no question of the transaction between the purchaser of the flat and the promoter being binding between them. It is further held that the provisions of section 4 being mandatory, the agreement of sale is, therefore, statutorily required to be registered and if the same is not registered, a plaintiff cannot found any rights on such an agreement and the agreement must be treated as invalid and ineffective. That being the position of the law as laid down by the Division Bench of this Court, the question posed on behalf of the respondents seeking leave was that since there is no registered agreement for sale of the suit flat, the plaintiff can not avail of the provisions of section 7 and in such a case the defendants were not required to obtain the previous consent of the plaintiff u/s 7 as there is no valid and enforceable agreement between the parties. As discussed above, the absence of the agreement for sale and its non-registration does not take away the right of the purchaser of a flat to avail of the statutory prohibition contained in section 7(1)(ii). A promoter cannot carry out any additional construction or make any alteration in the building without the consent of all the flat-owners u/s 7(1)(ii), notwithstanding the non-execution of the agreement for

sale or non-registration therefore, nor can he by obtaining blanket consent of the purchasers of the flats at the time of entering into the agreement for sale or at the time of delivering possession of the flat set at nought the provisions of section 7(1)(ii).

33. Therefore, the case involves a substantial question of law of general importance and, in my opinion, the same needs to be decided by Their Lordships of the Supreme Court. The required certificate be issued accordingly.

