

JAYANTILAL INVESTMENTS

v.

MADHUVIHAR CO-OPERATIVE HOUSING SOCIETY AND ORS.

JANUARY 10, 2007

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 with Amending Act 36/86; ss. 3, 4, 7(1), 7(A), 10 and 11/Maharashtra Ownership Flats (Regulation of the Promotion of Construction) Rules, 1964; Clauses 3 and 4:

Rights and obligation of a promoter—Sale of flats—Agreement between promoter and buyers of flats—Construction of additional structure—Consent of flat owners—Requirement of—Held: Amendment in Section 7 made and s. 7-A introduced by amending the Act to make position explicit which according to Legislature existed implicitly before amendment—Obtaining of prior consent by flat owners not required for constructing any additional structure—However, approval of the plan by competent authority necessary—In terms of clauses 3 and 4 of Rules, it is statutory and mandatory on the part of promoter to give details of land amenities, facilities and also to make full and true disclosure of development potentiality of the plot—High Court has failed to examine the question as to whether the promoter had undertaken the project in question for construction of additional building or for construction of one building with 7 wings—Answer to the question would decide about applicability of amended provisions of the Act, as amended and also as to whether time to execute the conveyance arrived at or not—Hence, matter remitted to High Court for reconsideration—Urban Land Ceiling Act, 1976—s. 2(1).

Respondent no.1, a Co-operative Society and its members instituted a suit against the appellant-promoter for conveyance, injunction restraining the promoter from putting up further constructions and questioning the validity of the sanction given by the competent authority to the amended plan under which the competent authority sanctioned additional 2 wings applying the newly available norms. Trial Court partly decreed the suit, permitting the appellant-promoter to complete construction as per the amended plan.

A The trial court gave a period of three years to him for executing conveyance in favour of the Co-operative Society under the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA). Aggrieved, the Co-operative Society preferred an appeal before the High Court. A cross appeal was preferred by the appellant-promoter. High Court allowed the appeal filed by the Co-operative Society and dismissed the appeal filed by the appellant directing him to convey right, title and interest and execute all relevant documents in respect of Madhu Vihar Scheme in favour of the Co-operative Society and appellant was restrained permanently from making any construction over the suit plot situated at Kandivali (West), Mumbai *inter alia* holding that under section 7 of MOFA the appellant was prohibited from putting up additional constructions after the plan stood disclosed to the flat takers; that the promoter was not entitled to make any alteration in the structure without prior consent of the flat takers; that the promoter could not make any additions in the structure of the building without the prior consent of the society and that under Section 7A of the amended Act, the prohibition was not to apply in respect of the construction of any other additional building or structure constructed or to be constructed under a scheme or a project of development in the lay out plan; and that the appellant-promoter was not entitled to derive any benefit from Section 7A of MOFA and, he was not entitled to construct additional building in the suit plot. Hence the present appeal.

E Appellant contended that Section 7 of MOFA enjoined the promoter, *inter alia*, not to construct any additional structure without the consent of the flat takers; that the State Legislature imposed such a restriction on the promoter contrary to the object of the Act and, consequently, the legislature stepped in to change it by enacting the Amending Act No. 36/86 and making it effective retrospectively; that the Amending Act deleted the restriction and left the promoter free to construct any additional structure without obtaining the consent of the flat takers in the building; that the underlying purpose of the amendment is that maximum possible housing as per the prevailing by-laws should be available to enable the maximum number of members of the public to be accommodated therein and that the individual rights of flat takers should not be allowed to come in the way of achievement of this public purpose; that the object behind amending Section 7 and Section 7A is to enable the promoter to construct an additional structure; that the object behind the amendment is to ease the problem of shortage of housing; that any other interpretation would defeat the very

purpose of the amendment to Section 7 and Section 7A of the Act; that on facts, relying on the lay out plans, that even under the initial lay out plan of 1985, 7 wings were to be constructed; that the sanction obtained by the appellant for construction of 5 + 2 wings on the suit plot was in terms of the original Plan sanctioned when 7 wings stood sanctioned; and that in the facts and circumstances of this case, the amended provisions of Sections 7 and 7A of MOFA were applicable and, consequently, the appellant was not obliged to execute a conveyance in favour of the society till the appellant is in a position to fully exploit the development potentiality of the suit plot.

Respondent no.1-Society submitted that under MOFA there are two concepts, namely, developability and conveyance; that the two concepts operate in different fields and, therefore, Section 7 and 7A cannot override Sections 10 and 11 read with the relevant rules; that under Section 3(m)(iii) and (iv) a promoter is required to disclose the nature, extent and description of the common areas and facilities in its advertisement/ brochure; that section 4(1) requires a promoter to enter into a written agreement in the prescribed form; that the residual FSI in the plot or the lay out not consumed will be available to the promoter till the registration of the society. However, after registration of the society the remaining FSI shall be available to the society; that Section 7A stood inserted in MOFA *vide* Maharashtra Amending Act 36/86 and by the same Amending Act Section 4(1A) was also inserted and, therefore, Section 7A has to be read with Section 4(1A); that Section 7A does not give to the promoter the right of developability in eternity; that the lay out plan as well as the NOC obtained by the promoter from the authorities was to construct a building with 7 wings; that Section 7A was not applicable to the present case since in the present case the scheme consisted of one building with 6 to 7 wings; that Section 7A applies when there is a project or scheme which indicates phase wise development of a large plot made known to the intending flat takers; that Section 7A in such cases does not empower the intending flat takers to prevent construction of additional building according to such scheme; that Section 7A does not confer any additional benefits or rights to a promoter to construct additional building which did not form part of the scheme/project in the lay out disclosed to the flat takers; that the NOC obtained by the promoter from the Urban Land Ceiling Authorities (ULC) read with the lay out plan/ block plan of 1985 as well as the agreements with the flat takers showed that the scheme/ project/ lay out was in respect

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A of only one building with different wings; that the lay out plan does not indicate phase wise development; and that the agreement with the flat takers indicated the scheme for only one building and in the circumstances, Section 7A is not attracted.

B *Amicus Curiae* submitted that it is not open to the builders to insert clauses in the agreement with the flat takers stating that conveyances will be executed only after the entire property is developed; that the contention of the promoter in the present case is that its obligation to form society and execute a conveyance only after completion of the scheme is misconceived because under Sections 10 and 11 when the builder enters into an agreement with the flat takers he is required to form a co-operative society as soon as the minimum number of flat takers is reached and, thereafter, the conveyance has to be executed in favour of the society within four months after the formation thereof in terms of Section 11; that MOFA has been enacted to regulate the activities of the builders and not to confer benefits on them; and that the builder could construct any additional structure without the consent of the flat purchasers. However it is pointed out that Section 7A does not have the effect of conferring any rights on builders to claim an exemption from their obligations under Sections 10 and 11 of MOFA.

E Allowing the appeal, the Court

F HELD: 1.1. Judgment of the Bombay High Court in *Kalpita Enclave* case was based on the interpretation of unamended Section 7 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act (MOFA). 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 and Section 7A was accordingly inserted by Maharashtra Amending Act No. 36/86 in order to make the position explicit, which according to the legislature existed prior to amendment in the 1986 Act, implicitly. Section 7 of MOFA came to be amended and for the purpose of removal of doubt, additional Section 7A came to be added. 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.

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[Para 17] [692-B-D].

Kalpita Enclave Co-operative Housing Society Ltd. v. Kiran Builders Private Ltd., (1986) MhLJ 110, referred to.

1.2. Reading Section 7 and Section 7A of MOFA, 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. [Para 17] [692-F-G]

1.3. By insertion of Section 7A, 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 by-laws or Development Control Regulations. At the same time, the legislature had retained Section 3 which imposes statutory obligations on the promoter to make full and true disclosure of particulars mentioned in Section 3(2) including the nature, extent and description of common areas and facilities. Sub-section (1A) to Section 4 of the Act was also introduced by the same amending Act under which the promoter is bound to enter into agreements with the flat takers in the prescribed form. [Para 17] [693-A-D]

1.4. Obligation of the promoter under MOFA to make true and full disclosure of 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 sub-section (1A) in Section 4 of MOFA by the Amendment Act. 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 of Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964 (MOFA) shall be statutory and shall be retained. It shows the intention of the legislature. Clauses 3 and 4 of the Rules are declared to be statutory and mandatory by the legislature

A 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. [Paras 20] [694-D-F, 695-F]

B 1.5. 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. 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. [Para 21] [695-H, 696-A-B]

D 2.1. In the impugned judgment, the High Court has failed to examine the question as to whether the project undertaken in 1985 by the appellant-promoter was in respect of construction of additional buildings or whether the project in the lay out plan consisted of one building with 7 wings. The question which the High Court should have examined is as to whether the project in question consists of 7 independent buildings or whether it is one building with 7 wings. The answer to the above question will decide the applicability or non-applicability of Section 7(1)(ii) of MOFA, as amended. The answer to the above question will decide whether the time to execute the conveyance has arrived or not. This will also require explanation from the competent authority/respondent no. 8. [Para 22] [696-D-F]

F 2.2. In the dates and events submitted by the appellant-promoter, there is a reference to the permission granted by Urban Land Ceiling authorities which states that the owner/developer shall construct a building with 7 wings. One needs to examine the application made by the promoter when he submitted the lay out plan in 1985. If it is the building with 7 wings intended to be constructed in terms of the lay out plan then the High Court is also required to consider the effect of the judgment in the case of *Ravindra Mutneja and Ors. v. Bhavan Corporation and Ors.* in which the single Judge has held that if a building is put up as a wing of an existing building, it cannot be constructed without the prior permission of the flat takers. In that connection, the High Court shall also consider permission

dated 16.11.1984 under section 21(1) of ULC Act, application made to the competent authority when initial lay out plan was sanctioned, applications for amendments to lay out plans made from time to time and also agreements between promoter and flat takers. For the aforesaid reasons and in view of the law enunciated in this judgment, the impugned judgment is set aside and the matter is remitted to the High Court for reconsideration. [Paras 22-23] [696-F-H, 697-A-C]

Ravindra Mutneja and Ors. v. Bhavan Corporation and Ors., (2003) 5 Bom. CR 695, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3233 of 2006.

From the Final Judgment and Order dated 16.3.2006 of the High Court of Judicature at Bombay in F.A. Nos. 786 and 989/2004.

G.E. Vahanvati, S.G. Sunil Gupta, Kavin Gulati, Nakul Diwan, Avinash Pandey, Ms. Rashmi and T. Mahipal, with them for the Appellant.

M.K. Gilani, Harshad V.H., Pratap Venugopal, E. Venukumar (for M/s. K.J. John & Co.), Pallav Shishodia, Atul Y. Chitale, Suchitra Atul Chitale, Sujeeta Srivastava and Madhup Singhal for the Respondents.

The Judgment of the Court was delivered by

KAPADIA, J.: 1. What are the rights and obligations of a promoter under the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA") is the question which has arisen for determination in this civil appeal.

2. On 26.8.1980 an agreement was arrived at between the vendors and the appellant herein (M/s Jayantilal Investments-Promoter) in respect of 8559.57 sqm. of land in CTS No. 1068 village Kandivili, Tehsil Borivili, Greater Mumbai. Subsequently, under a Revised Draft Development Plan, a 44 ft. wide road was indicated and; consequently, the area admeasuring 8559.57 sqm. stood divided. On account of this division, a plot admeasuring 6071 sqm. emerged as the suit land. On 16.11.1984 the appellant-promoter obtained

A NOC under Section 21(1) of the Urban Land Ceiling Act, 1976 ("ULC Act") permitting it to construct a building with 7 wings and 137 tenements for weaker section. The construction was to be made in accordance with the prevailing Municipal Regulations, Town Planning requirements and Statutory Regulations. On 21.10.1985 the lay out plan was sanctioned. It indicated 1 building with 7 wings. At that time, due to existence of a narrow road as access, the promoter was entitled only to FSI of 0.75. This plan was amended in 1986, 1987, 1989, 1992 and 1994 without any objection from the flat takers. At this stage, it may be mentioned that on 6.5.1986 the lay out plan was revised and approved with 5 wings having additional floors as well as FSI of 1.00 due to construction of 44 ft. wide DP road on the original plot admeasuring 8559.57 sqm. of land.

3. From time to time, agreements stood entered into between the appelland and the flat takers for sale of flats. These agreements are dated 7.12.1985, 11.4.1987, 18.1.1989, 30.4.1989, 27.7.1991 etc.

D 4. On 12.11.1986 MOFA was amended retrospectively. Under that amendment Section 7A was inserted excluding 'additional structures' from the scope of Section 7(1)(ii) and thereby lifted the requirement of consent of flat takers. However, the said amendment was restricted to the plots falling under a scheme or a project under the lay out plan. The object behind enacting Section 7A was to overcome the judgment of the Bombay High Court in the case of *Kalpita Enclave Co-operative Housing Society Ltd. v. Kiran Builders Private Ltd.*, (1986) MhLJ 110. On 12.4.1989 on receiving occupation certificate, possession of flats was handed over to the flat takers. Some flats remained to be sold. They stood in the name of the appelland-promoter.

G 5. On 25.3.1991, the Development Control Regulations were framed which resulted in an increase of FSI from 1 to 1.8 on account of the introduction of the concept of TDR. For the first time under this concept, lands stood separated from the development potential of the plot. Consequently, the lay out plan stood amended and the appelland obtained sanction on 25.5.1992 for construction of the building in question with 6 wings by consumption of the balance FSI of 1.00. The appelland accordingly issued an advertisement for commencement of construction in accordance with the amended plan. However, it is the case of the appelland that on account of financial paucity the construction got stuck.

6. Respondent No. 1 is the Co-operative Society registered on 20.1.1993. The lay out plan was once again amended on 26.11.1994. The building in question with 6 wings was shown in the amended plan. The plan was duly sanctioned. It is important to note that this plan of 1994 was sanctioned in favour of the appellant on account of purchase of additional TDR by the appellant.

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7. In 1997 on account of Slum TDR, the permissible FSI stood increased to 2 from 1.8.

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8. On 12.8.1997 the Co-operative Society-respondent No. 1 and five flat takers (members) instituted suit no. 4385/97 against the appellant-promoter for conveyance, injunction restraining the promoter from putting up further constructions and questioning the validity of the sanction given by the competent authority to the amended plan dated 29.3.2001 under which the competent authority sanctioned 5 + 2 wings applying the newly available FSI.

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9. By judgment and order dated 31.3.2004 the Bombay City Civil Court at Mumbai (trial court) partly decreed the suit, permitting the appellant to complete construction as per the amended plan dated 29.3.2001. The trial court gave a period of three years to the appellant for executing conveyance in favour of the Co-operative Society under the provisions of MOFA. Being aggrieved by the grant of three years time to the appellant, the Cooperative Society (Respondent No. 1 herein) preferred to the Bombay High Court First Appeal No. 786/04. A cross appeal was preferred by the appellant-promoter being First Appeal No. 989/04 in which the appellant contended that under the agreement between the appellant and the flat takers no time limit for execution of the conveyance could be set as the appellant was entitled to exploit the full potential of the plot in question and till such time as the development potentiality of the plot in question stood exhausted, the appellant was not statutorily obliged to execute a conveyance in favour of the Co-operative Society. In this connection reliance was placed on the provisions of Section 7A of MOFA.

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10. By impugned judgment dated 16.3.2006 the Bombay High Court allowed First Appeal No. 786/04 filed by the Co-operative Society and simultaneously dismissed First Appeal No. 989/04 filed by the appellant herein. By the impugned judgment, the High court directed the appellant to

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A convey right, title and interest and execute all relevant documents in respect of Madhu Vihar Scheme in CTS No. 1068/1 admeasuring 6071 sqm. situated at Village Kandivali (West), Mumbai in favour of the Co-operative Society. By the impugned judgment, the appellant was restrained permanently from making any construction over the suit plot bearing CTS No. 1068/1 admeasuring 6071 sqm. situated at Kandivali (West), Mumbai. By the impugned judgment the High Court held, that the appellant was a promoter; that it had floated Madhu Vihar Scheme on the said plot; that Madhu Vihar was the Scheme/ Project undertaken for development of the plot in accordance with the lay out plan; and, that the said Scheme stood completed with the construction of the flats/ shops and the garden. By the impugned judgment,

C it was further held that the Society was registered on 20.1.1993 and under Rule 8 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, etc.) Rules, 1964 (“the Rules”), the appellant was statutorily obliged to convey the title to the society which they failed to do even after the Scheme got completed and possession of the flats stood handed over to the flat takers. By the impugned judgment the High Court held, that there was an implied trust created; that the promoter was the trustee and that the beneficiaries were the flat takers. By the impugned judgment it was further held, that under section 7 of MOFA the appellant was prohibited from putting up additional constructions after the plan stood disclosed to the flat takers; that the promoter was not entitled to make any alteration in the structure without the prior consent of the flat takers; that the promoter could not make any additions in the structure of the building without the prior consent of the society and that under Section 7A, the said prohibition was not to apply in respect of the construction of any other additional building or structure constructed or to be constructed under a scheme or a project of development in the lay out plan. By the impugned judgment it has been held, that the construction of Madhu Vihar started in 1985; that section 7A was inserted in 1986 and that Madhu Vihar Scheme got completed in 1989. According to the impugned judgment, between 1985 and 1989, the plans were changed at least four times and that no additional wings like the one proposed in the plan approved on 29.3.2001 was ever included in the lay out plans between 1985 and 1989 and, therefore, the appellant-promoter was not entitled to derive any benefit from Section 7A of MOFA and, consequently, the appellant was not entitled to construct additional building in the above suit plot. Hence this civil appeal.

H 11. Mr. Sunil Gupta, learned senior counsel appearing on behalf of the

appellant submitted that Section 7 of MOFA enjoined the promoter, *inter alia*, not to construct any additional structure without the consent of the flat takers in the agreed building. This provision was applied by the Bombay High Court in the case of *Kalpita Enclave* (supra). The said judgment prohibited the developer from constructing the additional structure *in the agreed building*. Learned counsel submitted that the State Legislature imposed such a restriction on the promoter contrary to the object of the Act and, consequently, the legislature stepped in to change the basis of the judgment of the Bombay High Court in *Kalpita Enclave* case (supra) by enacting the Amending Act No. 36/86 retrospectively. According to the learned counsel, the said Amending Act deleted the said restriction and left the promoter free to construct any additional structure without obtaining the consent of the flat takers in the agreed building. Learned counsel submitted that the underlying purpose of the said amendment is that maximum possible housing as per the prevailing by-laws should be achieved to enable the maximum number of members of the public to be accommodated therein and that the individual rights of flat takers should not be allowed to come in the way of achievement of this public purpose. Learned counsel emphasized that the object behind amending Section 7 and Section 7A is to enable the promoter to construct an additional structure; that the object of Section 7 and Section 7A is to bring at par a promoter who has sought and has been granted permission to construct building consuming the maximum FSI available under the by-laws prevailing on the given date and a promoter who had sought and was given permission to construct building consuming the maximum FSI available under the by-laws as prevailing on earlier date and who otherwise on the given date stands in the same class as the abovementioned promoter insofar as the question of consumption of the total FSI available is concerned. Learned counsel submitted that the object behind the amendment is to ease the problem of shortage of housing. Learned counsel further submitted that if the above interpretation of the amended Section 7 and 7A is not accepted, it would give rise to discrimination between two sets of persons, namely, flat takers who are party to a new agreement and a new construction plan and those flat takers who have been party to an earlier agreement in an earlier construction plan. According to the learned counsel, if the interpretation given by him is not accepted, persons interested in the former piece of land shall stand facilitated whereas persons interested in the latter piece of land shall stand vetoed, though the building by-laws, rules etc. treat them equally. Learned counsel, therefore, submitted that any other interpretation would defeat the very purpose of the

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A amendment to Section 7 and Section 7A. On facts, learned counsel submitted, relying on the lay out plans, that even under the initial lay out plan of 1985, 7 wings were to be constructed; that the said plan was revised on 6.5.1986 under which the construction was restricted to 5 wings having additional floors; that this was prior to the inclusion of Section 7A and, therefore, when the D.C. Regulations were enacted in 1991 and the concept of TDR was introduced, the appellant got increased FSI of 1.8, consequent upon which the plan was amended and 6 wings came to be sanctioned on 25.5.1992. Similarly, when the FSI was increased to 2, the plan was got amended and accordingly the appellant obtained a sanction for construction of 5 + 2 wings. Learned counsel, therefore, urged that the sanction obtained by the appellant on 29.3.2001 for construction of 5 + 2 wings on the suit plot was in terms of the original Plan sanctioned on 21.10.1985 when 7 wings stood sanctioned. In the circumstances, learned counsel urged that the appellant was entitled to construct 5 + 2 wings which was contemplated even in the original Plan dated 21.10.1985. Accordingly it was submitted that, in the facts and circumstances of this case, the amended provisions of Sections 7 and 7A of MOFA were applicable and, consequently, the appellant was not obliged to execute a conveyance in favour of the society till the appellant is in a position to fully exploit the development potentiality of the suit plot. In the alternative, it is urged that, in any view of the matter, the appellant is not entitled to execute the conveyance in favour of the society till the appellant exhausts the FSI of 2.

12. Mr. M. K. Ghelani, learned counsel appearing on behalf of the society submitted that under MOFA there are two concepts, namely, developability and conveyance. It was urged that Section 7 and 7A deal with developability of the project, while Sections 10 and 11 read with Rules 8 and 9 deal with the subject of formation of Society and transfer of title. Learned counsel urged that each of the above two concepts operate in different fields and, therefore, Section 7 and 7A cannot override Sections 10 and 11 read with the relevant rules. It was urged, that under Section 3(m)(iii) and (iv) a promoter is required to disclose the nature, extent and description of the common areas and facilities in its advertisement/ brochure; that section 4(1) requires a promoter to enter into a written agreement in the prescribed form and Section 4(1A) *inter alia* provides that such agreements shall contain the nature, extent and description of common areas and facilities and, consequently, it is not open to the promoter to contract out of the prescribed form of the agreement in form V. Learned counsel pointed

out that Section 4(1) provides that such agreement shall be in Form V, that Form V gives a model form under which the promoter has to declare the FSI (inherent) available in respect of the land. Under Rule 5 read with the model form of agreement, the promoter has to declare all relevant particulars in respect of utilization of FSI and in cases where the promoter has utilized any FSI of any other land or property by way of floating FSI then the particulars of such floating FSI has to be disclosed by the promoter to the flat purchasers. The residual FSI in the plot or the lay out not consumed will be available to the promoter till the registration of the society. However, after registration of the society the remaining FSI shall be available to the society. Learned counsel submitted that Section 7A stood inserted in MOFA *vide* Maharashtra Amending Act 36/86 and by the same Amending Act Section 4(1A) was also inserted and, therefore, Section 7A has to be read with Section 4(1A). Learned counsel, therefore, urged that Section 7A does not give to the promoter the right of developability in eternity. In the present case, learned counsel submitted that the lay out plan as well as the NOC obtained by the promoter from ULC authorities was to construct a building with 7 wings. Learned counsel urged that Section 7A was not applicable to the present case since in the present case the scheme consisted of one building with 6 to 7 wings. Moreover, it was further pointed out that Section 7A applies when there is a project or scheme which indicates phase wise development of a large plot made known to the intending flat takers. Section 7A in such cases does not empower the intending flat takers to prevent construction of additional building according to such scheme. As a corollary, it was urged that Section 7A does not confer any additional benefits or rights to a promoter to construct additional building which did not form part of the scheme/project in the lay out disclosed to the flat takers and, in any event, not after the obligation to convey has become operative and enforceable under Sections 10 and 11 read with Rules 8 and 9 of the Rules. Learned counsel urged that in the present case the society has been registered in 1993. He submitted that in the present case, on facts, the obligation to convey has become enforceable under Sections 10 and 11. He clarified that mere formation of the society does not take away from the promoter the rights of the promoter to the remaining development. He is not deprived of his rights to the unsold flats. However, it is not open to the promoter to resort to an ingenious drafting enabling the promoter to defer execution of conveyance till eternity. On facts, learned counsel pointed out that in the present case, the NOC obtained by the promoter from the Urban Land Ceiling authorities read with the lay out plan/ block plan of 1985 as

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A well as the agreements with the flat takers showed that the scheme/ project/
lay out was in respect of only one building with different wings; that the
lay out plan does not indicate phase wise development; that the agreement
with the flat takers indicated the scheme for only one building and, in the
B circumstances, Section 7A is not attracted. That in any event, it was not
open to the promoter to unilaterally change the scheme/ lay out by adding
to it additional building and in the process remove the existing facilities and
amenities provided in the lay out plan. Learned counsel urged that on facts
of the present case, it was one building project which got completed in 1989
when occupation certificate was issued and, in the circumstances, the
promoter was not entitled to put up additional constructions.

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13. Looking to the importance of the matter in which we were required
to harmoniously construe the provisions of Sections 3 and 4 on one hand
with Section 7 and 7A on the other hand as also Sections 10 and 11 of
MOFA and keeping in mind the question of public importance, we requested
D Mr. G.E. Vahanvati, learned Solicitor General of India to assist the Court,
keeping in mind the externalities existing in such cases coming from Mumbai.
Learned Solicitor General of India has given us written submissions. He has
reproduced the various judgments of the Bombay High Court under MOFA.
It is submitted that, it is not open to the builders to insert clauses in the
agreement with the flat takers stating that conveyances will be executed only
E after the entire property is developed. Learned *amicus curiae* submitted that
the contention of the promoter in the present case is that its obligation to
form society and execute a conveyance only after completion of the scheme
is misconceived because under Sections 10 and 11 when the builder enters
into an agreement with the flat takers he is required to form a cooperative
F society as soon as the minimum number of flat takers is reached and,
thereafter, the conveyance has to be executed in favour of the society within
four months after the formation thereof in terms of Section 11. He submitted
that MOFA has been enacted to regulate the activities of the builders and
not to confer benefits on them. He submitted that Section 7A was inserted
G only for removal of doubts and to provide that the deleted words "construct
any additional structure" shall be deemed never to have been there
notwithstanding any judgment, decree or order of any court which means
that the builder could construct any additional structure without the consent
of the flat purchasers. However, it is pointed out that Section 7A does not
have the effect of conferring any rights on builders to claim an exemption
H from their obligations under Sections 10 and 11 of MOFA.

14. Before dealing with the point in issue one needs to look at original Section 7 which was in existence in the Statute prior to its amendment by Maharashtra Amending Act No. 36/86.

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15. The unamended Section 7 reads as follows:

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

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(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

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(ii) 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.”

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(emphasis supplied)

16. The amended Section 7 reads as follows:

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

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

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(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;

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(ii) any other alterations *or additions in the structure of the building* without the previous consent of all the persons

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A who have agreed to take the flats in such building.”

(emphasis supplied)

B 17. 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 No. 36/86. 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(ii), namely, “or construct any additional structures” came to be deleted and consequential amendments were made in Section 7(1)(ii). Maharashtra Act No. 36/86 operated retrospectively. Section 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.

F 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 36/86, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of

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

18. 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

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A 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.

19. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the lay out plan on the one hand *vis-à-vis* his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure of the flat takers remains unfettered even after the inclusion of Section 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 sub-section (1A) in Section 4 of MOFA by Maharashtra Amendment Act 36/86. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which *inter alia* states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964 are quoted hereinbelow:

“3. The Promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions if any, which may have been imposed by the concerned local

authority at the time sanctioning the said plans or thereafter and shall, before handing over possession of the Flat to the Flat Purchaser, obtain from the concerned local authority occupation and/or completion certificates in respect of the Flat.

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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 utilized by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilized by the Promoter elsewhere, then the Promoter shall furnish to the Flat Purchaser all the detailed particulars in respect of such utilization of said floor space index by him. In case while developing the said land the Promoter has utilized any floor space index of any other land or property by way of floating floor, space index, then the particulars of such floor space index shall be disclosed by the Promoter to the Flat Purchaser. The residual F.A.R. (F.S.I.) in the plot or the layout not consumed will be available to the promoter till the registration of the society. *Whereas after the registration of the Society the residual F.A.R. (F.S.I.), shall be available to the Society.*"

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(emphasis supplied)

20. 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.

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21. In our view, the above condition of true and full disclosure flows

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A 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.

C 22. In the light of what is stated above, the question which needs to be examined in the present case is whether this case falls within the ambit of amended Section 7(1)(ii) or whether it falls within the ambit of Section 7A of MOFA. As stated above, under Section 7(1) after the lay out plans and specifications of the building, as approved by the competent authority, are disclosed to the flat takers, the promoter shall not make any other alterations or additions in the structure of the building without the prior consent of the flat takers. This is where the problem lies. In the impugned judgment, the High Court has failed to examine the question as to whether the project undertaken in 1985 by the appellant herein was in respect of construction of additional buildings or whether the project in the lay out plan of 1985 consisted of one building with 7 wings. The promoter has kept the requisite percentage of land open as recreation ground/ open space. Relocation of the tennis court cannot be faulted. The question which the High Court should have examined is: whether the project in question consists of 7 independent buildings or whether it is one building with 7 wings? The answer to the above question will decide the applicability or non-applicability of Section F 7(1)(ii) of MOFA, as amended. The answer to the above question will decide whether the time to execute the conveyance has arrived or not. This will also require explanation from the competent authority, namely, Executive Engineer, "R" South Ward, Kandivali, Mumbai-400067 (Respondent No. 8 herein). In the dates and events submitted by the appellant-promoter, there is a reference to the permission granted by ULC authorities dated 16.11.1984 G which states that the owner/developer shall construct a building with 7 wings. One needs to examine the application made by the promoter when he submitted the lay out plan in 1985. If it is the building with 7 wings intended to be constructed in terms of the lay out plan then the High Court is also required to consider the effect of the judgment in the case of H *Ravindra Mutneja and Ors. v. Bhavan Corporation and Ors.*, (2003) 5

BomCR 695 in which the learned single Judge has held that if a building is put up as a wing of an existing building, it cannot be constructed without the prior permission of the flat takers. In that connection, the High Court shall also consider Permission dated 16.11.1984 under section 21(1) of ULC Act, application made to the competent authority when initial lay out plan was sanctioned, applications for amendments to lay out plans made from time to time and also agreements between promoter and flat takers.

23. For the aforesaid reasons and in view of the law enunciated by us *vide* this judgment, the impugned judgment is set aside and the matter is remitted to the High Court for reconsideration. As the matter has been under litigation for a considerable length of time, we hope that due priority will be given for early disposal of this matter.

24. We wish to express our deep appreciation for the assistance rendered by learned Solicitor General of India as *amicus curiae* in the matter.

25. Subject to what is stated, the appeal is allowed with no order as to costs.

S.K.S.

Appeal allowed.