IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL (STAMP) NO.11720 OF 2016
IN
REGULAR CIVIL APPEAL NO.02 OF 2015
WITH
CIVIL APPLICATION NO.737 OF 2016
IN
SECOND APPEAL (STAMP) NO.11720 OF 2016
WITH
CIVIL APPLICATION NO.178 OF 2017
IN
SECOND APPEAL (STAMP) NO.11720 OF 2016

Shri. Vitthal Laxman Patil …Appellant
(Original Plaintiff No.1)

vs.

Kores (India) Ltd. Real Estate Division
Mumbai & Ors. …Respondents
(Respondent Nos. 1 and 2
Original Defendant Nos. 1 and 2 &
Respondent No.3
Orig. Plaintiff No.2)

….

Mr. R.S. Apte, Senior Advocate, a/w. Mr. Atul Damle, Senior Advocate, Mr. Vaibhav Sugdare and Ms. R.M. Bagkar, i/b. Bagkar & Co., for the Appellant.

Mr. P.S. Dani, Senior Advocate, a/w. Mr. Sanjay Borkar, Mr. Amrut Joshi and Ms. Rashmi Telang, i/b. Rushabh Sheth, for Respondent No.1.

Mr. Mandar Patil, a/w. Ms. Roshni Naik, for the Applicant/Intervenor Society in Civil Application No.178 of 2017.

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CORAM : S.C. GUPTE, J.

RESERVED ON: 5 JULY 2018

PRONOUNCED ON: 25 JANUARY 2019.

(JUDGEMENT):

. This second appeal challenges a judgment dated 14 March 2016 passed by the District Court at Thane in Regular Civil Appeal No.2 of 2015, confirming the judgment and decree dated 20 December 2014 passed by the Court of Civil Judge (Senior Division), Thane, in Regular Civil Suit No.376 of 2010. By this latter judgment and decree the Appellant's suit was dismissed by the trial court.

2. It is the case of the Appellant (original "Plaintiff") that sometime in January 2007, he, like several others, entered into a flat purchase agreement with Respondent No.1 (original "Defendant No.1"). The agreement referred to a layout (Layout dated 19 January 2005) showing 15 buildings to be constructed by Defendant No.1 at site, including the building containing the Plaintiff's flat. The layout also showed various open and amenity spaces. The layout, including the buildings and open as well as amenity spaces, was part of a plan sanctioned by the local planning authority, namely, Thane Municipal Corporation, and shown to the plaintiff and other purchasers. The Plaintiff and others were also given brochures concerning the entire project, known as "Kores Nakshatra", specifying 15 numbers of buildings together with various open and amenity spaces and depicting their location as well as areas. In 2008-2009, the buildings were constructed. The buildings have since been duly occupied by the Plaintiff and other flat purchasers. Sometime in October 2009, the Plaintiff and others noted some activities suggesting a proposed construction of an additional building, viz. Building No.16, on the suit property, i.e. the layout referred

to above. The Plaintiff, through his advocate, objected to such construction. The planning authority, in response, rejected the proposal of additional construction. In December 2009, fresh plans were submitted by Defendant No.1 through a new architect, once again, for construction of additional Building No.16 with some changes in the plans rejected earlier. According to these new plans, the additional building was proposed to be constructed by utilizing additional FSI available to Defendant No.1 in the suit property by way of Transfer of Development Rights ('TDR'). The plans disclosed the proposal for construction of Building No.16 on the originally proposed area of Recreation Ground ('RG') in the suit property. Sometime in March 2010, the Corporation sanctioned the plans. Being aggrieved, the Plaintiff, along with one other flat purchaser, filed the present suit. The case of the Plaintiff before the trial court was that after having disclosed a sanctioned layout containing 15 buildings and open and amenity spaces including RG and having executed agreements for sale on the basis of such disclosure, it was impermissible for Defendant No.1 to construct any additional building on the RG area of the layout without the consent of the flat purchasers including the Plaintiff. Pending the hearing of the suit, Defendant No.1 was injuncted from carrying out construction of Building No.16. Evidence was led thereafter at the trial and the suit was heard. On 20 December 2014, the trial court dismissed the suit. A civil appeal was preferred from the order of dismissal before the District Court. The appeal was dismissed on 14 March 2015. Being aggrieved, the present second appeal is filed by the Plaintiff.

3. The appeal raises the following important question of law:

Whether, after making disclosure to flat purchasers of a sanctioned layout plan showing a certain number of buildings and open and amenity spaces including Recreation Ground ('RG') and their locations as per the requirements of Maharashtra Ownership Flats Act ("MOFA"), it is permissible to a promoter to construct an additional building on the RG area shown in the layout plan without seeking consent from the flat purchasers?

4. The question arises in the context of the provisions of MOFA. Section 7 of MOFA, as it originally stood (i.e. prior to its amendment by Maharashtra Amending Act 36 of 1986), restricted the promoter's rights to make the following alterations, once the plans and specifications of a building, as approved by the local planning authority, were disclosed or furnished to any person who agrees to take one or more flats in the building :

(i) any alterations in the structures described in the plans and specifications in respect of the flat or flats agreed to be taken, without the previous consent of that person (Section 7(1)(i)); and

(ii) any other alterations in the structure of the building, *or construct any additional structures*, without the previous consent of all persons who have agreed to take the flats (Section 7(1)(ii)).

Construing this provision, particularly Section 7(1)(ii), this Court, in the

case of **Kalpita Enclave Co-op. Housing Society Ltd. vs. Kiran Builders (P) Ltd.**[1], held that a promoter was not entitled to put up additional structures not shown in the original layout plan without the consent of the flat takers. Section 7(1)(ii) was thereafter amended by the state legislature, particularly to get over its interpretation in **Kalpita Enclave**'s case, by deleting the words "*or construct any additional structures*" appearing in Section 7(1)(ii) and substituting them with the words "*or additions in the structure of the building*". The legislature also introduced, by way of abundant caution, Section 7A in MOFA, which provided that the deleted words, namely, "*or construct any additional structures*", shall be deemed never to apply in respect of construction of any other additional buildings/structures constructed or to be constructed. The restriction, thus, after the amendment brought in by Maharashtra Amending Act 36 of 1986, applied to construction of "*additions in the structure of the building*" and not to "additional *structures*", i.e. structures other than and outside the building/s disclosed in the plans and specifications. The Supreme Court clarified this position in the case of **Jayantilal Investments vs. Madhuvihar Co.op. Housing Society**[2]. At the same time, the Supreme Court underlined the importance of other relevant provisions of MOFA, particularly Sections 3 and 4 thereof read with the Rules under MOFA prescribing *inter alia* the statutory form of a model flat purchase agreement. The Court held that at the stage of disclosure of plans and specifications the promoter is obliged to declare in the layout plan whether the plot in question is capable of being loaded in future with additional FSI/floating FSI/TDR; he is obligated in law to place before the flat takers the entire project/scheme, be it one-building

1 1986 Mah LJ 110 : (1987) 1 Bom CR 355
2 (2007) 9 Supreme Court Cases 220

scheme or multiple buildings scheme. The Court held that once the entire project is thus placed before the flat takers at the time of the agreement for sale, there is no need to obtain their prior consent so long as the additional construction put up is in accordance with the layout plan disclosed as well as in accordance with applicable building rules and Development Control Regulations.

5. The trial court in the present case, relying on the decision of the Supreme Court in the case of **Jayantilal Investments**, held that the question of taking prior consent of flat purchasers for additional construction, which was approved by the competent planning authority, did not arise after the amendment of Section 7(1)(ii) and introduction of Section 7A in MOFA. The trial court did not consider the impact of the other part of **Jayantilal Investments**' case, namely, whether the obligation of the promoter to construct buildings forming part of the scheme in accordance with the layout disclosed to the flat purchasers was fulfilled and if not so fulfilled, the effect of it on the purchasers' rights. The case of **Jayantilal Investments** (supra) concerned balancing of the rights of the promoter to make alterations or additions in the structure of a building in accordance with the layout plan as well as to construct additional building/s on the one hand and his obligation to make a true and full disclosure to the flat purchasers on the other. After stating the law in this behalf, the Supreme Court remanded the matter to this Court to consider whether the particular project undertaken by the promoter in that case was in accordance with law. Whilst doing so, the Court particularly posed for the remand court a question as to whether the project in question was for construction of seven buildings or one

building with seven wings. According to the Court, the answer to that question would decide the applicability of Section 7(1) (ii) of MOFA in the case on hand. This Court, on remand, in the reported case of **Madhuvihar Cooperative Housing Society vs. Jayantilal Investments**[3], held that by virtue of Section 7A of MOFA, the words originally existing in Section 7, namely, "*or construct any additional structures*" did not apply to construction of any additional building, or structures within the scheme or project of development in the layout. The Court, however, held that by this means, the buildings or structures, which were part of the scheme or project in the layout disclosed to the flat purchasers, alone were saved and not those that were not so disclosed. With particular reference to the facts in that case, this Court held that the project shown in the layout by the developer was of 7 wings interlinked to each other and not 7 independent buildings and accordingly, inasmuch as the originally proposed structure of 7 wings disclosed to the flat purchasers was altered, there was a breach of Section 7 (1)(ii) of MOFA. The ratio of this case was held to be inapplicable to the present case by the trial court on the ground that here, Building No.16 was not interlinked to the other buildings, but was an independent building. The Court held that since this building was being constructed as per plans approved by the Municipal Corporation, consent of flat purchasers was not required under Section 7(1)(ii). The appeal court has affirmed these conclusions of the trial court. What is singularly missing in the whole discussion of both the trial and the first appellate court is whether the requirement of full disclosure and obligation to construct according to such disclosure on the part of the promoter (i.e. Defendant No.1) were satisfied. This aspect of

3 2010 (6) Bom. C.R. 517

the matter falls for consideration of this Court in the present appeal.

6. With this preface, I may now move on to the merits of the matter. Let me at the outset make the legal position clear. MOFA has two sets of provisions to ensure that the flat purchasers get what they were promised by the promoter when the purchase agreements were made. This was deemed necessary since usually such agreements are entered into before a building is constructed or a project of multiple buildings is completed. Having once entered into an agreement and invested a substantial amount for purchase of the flat, the flat purchaser, who would hardly be expected to be in a bargaining position and who more or less would have signed on the dotted line when he executed the agreement, has practically no effective remedy in general law to ensure that he actually gets what was promised to him at the time of the agreement. MOFA, therefore, steps in and provides for the purchaser's rights and corresponding obligations of the promoter to keep to the bargain.

7. The first and the more obvious provision in this behalf is the restriction contained in Section 7 of MOFA, which prohibits the promoter, after the plans and specifications are disclosed, from making alterations or additions without the consent of persons who have agreed to take flats from him. Section 7(1), which is relevant for our purposes, as it originally stood before the amendment of MOFA in 1986, read 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.- (1) After the plans and specifications of the building, as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more flats, the promoter shall not make-
>
> (i) any 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;
>
> (ii) any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take the flats in such building."

This provision was interpreted by our Court in the case of **Kalpita Enclave**, as we have noted above, to mean that the promoter was not only prohibited from making alterations to the flat or the structure of the building but even from putting up additional structures not shown in the original layout plan without the consent of flat takers. The State legislature thereafter stepped in and amended Section 7 by deleting the words "*or constructs any additional structures*" and inserting in their place the words " *or additions in the structure of the building*". To make the position explicit, Section 7A was added to MOFA. The Section is in the following terms:

> "7A. **Removal of doubt**.- For the removal of doubt, it is hereby declared that clause (ii) of sub-section (1) of section 7 having been retrospectively substituted by clause (a) of section 6 of the Maharashtra Ownership Flats (Regulations of the promotion of construction, sale management and transfer) (Second Amendment) Act, 1986 (Mah. XXXVI of 1986) (hereinafter in this section referred to as "the Amendment Act"), it shall be deemed to be effective as if the said clause (ii) as so substituted has been in force at all material times; and the expression "or construct any additional structures" in clause (ii) of sub-section (1) of section 7 as it existed before the commencement of the Amendment Act and the expressions

> "constructed and completed in accordance with the plans and specifications aforesaid and "any unauthorised change in the construction" in sub-section (2) of section 7 shall, notwithstanding anything contained in this Act or in any agreement, or in any judgement, decree or order of any Court, be deemed never to apply or to have applied in respect of the construction of any other additional buildings or structures constructed or to be constructed under a scheme or project of development in the layout after obtaining the approval of a local authority in accordance with the building rules or building bye-laws or Development Control Rules made under any law for the time being in force."

Consequently, amended Section 7 and Section 7A together now make it clear that the question of taking prior consent of flat takers arises only when an addition to the structure of the building is to be carried out and not when additional structures (i.e. structures independent of the building concerned) are to be erected.

8. There is, however, another set of provisions in MOFA, read with the rules framed thereunder, which deal with the obligations of the promoter, firstly, to disclose all particulars of the building or project involving more than one buildings and then to construct in accordance with such particulars. These provisions, Sections 3 and 4 read with clauses 3 and 4 of Form V of Rules (i.e. Maharashtra Ownership Flats Rules, 1964), are quoted below :

Sections 3 and 4 :

3. **Manner of Making disclosure**.-

> (1) A promoter for the purposes of making disclosure of any document referred to in section 3 or prescribed thereunder shall produce the original of such document before the person intending to take or taking one or more flats. The promoter shall display or keep all the documents, plans or specifications

(or copies thereof) referred to in clauses (a), (b) and (c) of sub-section (2) of the said section 3 at the site and permit inspection thereof; Such person may ask the promoter all relevant questions for seeking further information or clarification in respect of any documents of matter to be disclosed, produced or furnished by or under the provisions of the Act; and the promoter shall be legally bound to answer all such questions to the best of his knowledge and belief.

(2) The promoter while making disclosure of the outgoings as required by clause (j) of sub-section (2) of section 3 shall state the basis on which any estimated figures or other information is given.

(3) The promoter shall, when the flats are advertised for sale, disclose inter alia in the advertisement the particulars as required by sub-clauses (i) to (iv) (both inclusive) of clause (m) of sub-section (2) of section 3.

4. **True copies of certain documents to be given**- A promoter shall, on demand and payment of a reasonable charge therefor, give to any person intending to take or taking one or more flats true copies of the following documents, namely:

(a) all documents of title relating to the land on which the flats are constructed, or are to be constructed, which are in the promoter's possession or power;

(b) the certificate by an Attorney-at-Law or Advocate referred to in clause (a) of sub-section (2) of section 3;

(c) all documents relating to encumbrances (if any) on such land, including any right, title, interest or claim, of any party in or over such land;

(d) the plans and specifications of the buildings built or to be built on the land referred to in clause (c) of sub-section (2) of Section 3;

(e) a list of fixtures, fittings and amenities (including the provision

for one or more lifts) provided or to be provided for the flat;

(f) a list referred to in clause (g) of sub-section (3) of section 3;

(g) a list of all outgoings referred to in clause (j) of sub-section (2) of section 3 and the basis on which any estimated figures or other information is given to the person intending to take or taking the flat.

Clauses 3 and 4 of Form V :

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

4. The Promoter hereby declares that the Floor Space Index available in respect of the said land is ..... sq. metres only and that no part of the said floor space index has been utilised by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the Promoter elsewhere, then the Promoter shall furnish to the flat purchaser all the detailed particulars in respect of such utilisation of the said floor space index by him. In case while developing the said land the Promoter has utilised any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the Promoter to the flat Purchaser."

Together these provisions require the promoter to make a full disclosure of the proposed building and its amenities or the project of buildings and their amenities, and then to comply with such disclosure whilst constructing the building/s or implementing the project.

9. The Supreme Court had an occasion to consider these

provisions in **Jayantilal Investments** (supra) side by side with the provisions of Sections 7 and 7A. The Supreme Court held that reading the two groups of provisions, it was clear that the obligation of the promoter under MOFA to make true and full disclosure to the flat takers remained unfettered even after the amendment of MOFA by Maharashtra Amendment Act 36 of 1986. Every agreement between the promoter and the flat takers would have to comply with the prescribed form V; the explanatory note under the form made it clear that clauses 3 and 4 were statutory and would have to be retained in every agreement between the promoter and the flat takers. By this means, the promoter is not only obliged statutorily to give to the purchasers the particulars of the land, building, 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 and if any departure is to be made in the scheme so disclosed, consent of flat takers must be obtained. The Supreme Court, in particular, held as follows :

> "The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one-building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.
>
> 19. In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society

> and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder put up additional construction in accordance with the layout plan, building rules and Development Control Regulations, etc."

Finally, the interplay between Sections 7 and 7A on the one hand and Sections 3 and 4 read with clauses 3 and 4 of Form V on the other was explained by the Supreme Court in the following words :

> "Therefore, having regard to the Statement of Objects and Reasons for substitution of Section 7(1)(ii) by Amendment Act 36 of 1986, it is clear that the object was to make legal position clear that even prior to the amendment of 1986, it was never intended that the original provision of Section 7(1)(ii) of MOFA would operate even in respect of construction of additional buildings. In other words, the object of enacting Act 36 of 1986 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 of 1986 the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters. The object behind the said amendment was to give maximum weightage to the exploitation of development rights which existed in the land. Thus, the intention behind the amendment was to remove the impediment in construction of the additional buildings, if the total layout 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 (1-A) to Section 4 was also introduced by the legislature by Maharashtra Act 36 of 1986 under which the promoter is bound to enter into agreements with the flat takers in the prescribed form. Under the prescribed form, every promoter is required to declare FSI available in respect of the said land. The promoter is also required to declare that no part of that FSI has been utilised elsewhere, and if it is utilised, the promoter has to give particulars of such utilisation to the flat takers. Further, under the proforma agreement, the promoter has to further declare utilisation of FSI of any other land for the

> purposes of developing the land in question which is covered by the agreement."

10. When the case of **Jayantilal Investments** came back to our court on remand, a learned Single Judge of our Court, after referring to the division bench judgment of our Court in **White Towers Co-operative Housing Society Ltd. vs. S.K. Builders**[4] and another decision of a learned Single Judge of our Court in **Megh Ratan Co-operative Housing Society Ltd. vs. Rushabh Rikhav Enterprises**[5], asserted this position in the following words :

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

11. The long and short of the position discussed above is that quite apart from the restrictions for development contained in Section 7 read with Section 7A of MOFA, the promoter's duty of disclosure and keeping to such disclosure, spelt out *inter alia* by Sections 3 and 4 of MOFA read with statutory clauses 3 and 4 of Form V prescribed in the Rules framed under MOFA, requires him to put up additional construction only in accordance with the layout plan disclosed to the flat takers at the time of entering into the contract for sale of flats consistent with the building rules contained in Development Control Regulations. If

4 2008 (6) Bom. C.R. 371
5 2009 (1) Bom. C.R. 361

the building site contains future development potential, i.e. any possibility of further construction, whether over one or the other building or buildings or anywhere else in the layout plan, the promoter's duty of disclosure requires him to firstly disclose such future construction; if it is to be over any particular building or buildings, the promoter must indicate such building or buildings and if is over any other area, such other area in the layout plan. He cannot disclose one or the other buildings or area/s for such additional construction and then construct somewhere else. He must keep to his disclosure. A necessary corollary of this duty of disclosure is that if any particular area is to be kept open either as recreation ground (RG) or amenity space, he cannot, without disclosing a possible future use of such area, use the area for any additional construction.

12. Against the backdrop of the law noted above, let us now consider the impugned judgements of the courts below. The trial court, whilst considering the legality of the plan for additional construction of building No.16 on account of want of the purchasers' consent, held that for constructing building No.16 the purchasers' consent was not necessary. Its reasons for holding so may be outlined as follows :

(i) As per paras 2a and 2b (iii) (2c & d, sic?) of the suit agreement (Ex.48), defendant No.1 promoter had disclosed having handed over possession of portion of reservation to defendant No.2 (TMC) and developed amenity spaces, against which the former was entitled to consume FSI/TDR which might be granted by TMC either on an existing building or for an independent building; the plaintiff and other

purchasers had given consent for the same (para 19 of the judgement);

(ii) The ratio of one court's decision in **Madhuvihar Co-operative Society** (supra) was not applicable to the present case, because here building No.16 was not interlinked to other buildings but was admittedly an independent building (para 22 of the judgement);

(iii) Under the law laid down by the Supreme Court in **Jayantilal Investments** (supra) and by our court following that judgement, the provisions of MOFA would not prevent defendant No.1 promoter from developing the plot in question by constructing a separate building thereon because defendant No.2 corporation had sanctioned the plan for construction of a new building and the building was being constructed as per this sanctioned plan (paras 23 to 25 of the judgement); and

(iv) Even if it is assumed that the plaintiffs' consent was necessary prior to construction of building No.16, under the agreement (Ex.48) such consent was expressly given (para 26 of the judgement).

13. What the trial court appears to have missed completely was that the case before it was not only that building No.16 was not disclosed in the layout plan, but that the area where that building was now proposed to be constructed was disclosed as a recreation ground (RG No.2) in the layout plan. What the court was bound to consider was not only whether additional FSI/TDR that may be available on account of surrendering the portion under reservation or developing amenity spaces could be used by the developer, but whether the developer could do so

by constructing on what was disclosed as a recreation ground. It is not material whether the flat of the present Appellant (who was plaintiff No.1 as also PW1 before the trial court) was facing this recreation ground or whether what was designated as RG No.2 was an additional area to be kept open as recreational space (5% additional RG). The trial court appears to have been swayed by these submissions of the defendant developer. They are neither here nor there. Any recreation area within the complex is for the benefit of all flat takers within the complex, irrespective of the location of their flats and it does not matter one bit whether such area is compulsory RG or additional RG. It is, after all, an important facility offered to the buyers collectively and if the developer is going to take away the same and put up a construction on it, it is imperative for him, under the scheme of MOFA referred to above, to disclose such proposal in the layout plan. If not so disclosed, the court must then find whether there is any informed consent for exploitation of the RG area disclosed in the layout. The trial court appears to have missed this point altogether.

14. Coming now to the first appellate judgement, the court appears to have rejected the appellant purchaser's contentions on the following grounds:

(i) The plaintiff (PW1) had admitted in his evidence that the promoter had made "*all disclosures of the manner in which he had to develop the suit property*" (para 21 of the judgement);

(ii) Otherwise also, the agreement (Ex.48) showed that in clause 2(b)

(i) & (ii) defendant No.1 promoter had disclosed "*the scheme of development of huge landed property by constructing multiple buildings*"; that both projects "Kores Tower" and "Kores Nakshatra", which were separate, were being developed on one piece of land but in separate portions; in clause (b)(iii), it was further clarified that the promoter may further sub-divide the property into sub-plots and convey them to respective apex societies (para 21);

(iii) Clause 2 further showed the entitlement of the promoter to purchase TDR from elsewhere and to load, use and utilize the same for further construction in the property by constructing additional buildings as per law; this was not a stereotype or blanket consent (para 21);

(iv) The brochure showing recreational spaces was a valueless paper, a simple pamphlet which was not part of the agreement; it was said to be merely promotional and even there the promoter had reserved its right to add, alter or delete any details or specifications (para 22);

(v) The plaintiffs' conduct showed that they were aware that the promoter was developing the project phase by phase and since the plaintiffs/purchasers were informed of further construction in clause 2 of the agreement (Ex.48), they could not now raise any objection to construction of building No.16 (para 23);

(vi) The required RG as per law was of 10,996.10 sq. ft., as against which 13725.86 sq.mtrs. was being provided even with the now proposed construction of building No.16; there was, thus, no curtailment

of the total area of RG (though the RGs, originally 2 Nos., were relocated and the total area was now comprised in 4 separate RGs) (para 24); and

(vii) Building No.16 was a separate building and fell within the ambit of Section 7A of MOFA and therefore, prior consent of the plaintiffs need not have been obtained (para 25).

15. Even here, in the entire discussion of the lower appellate court, what is singularly missing is the consideration of whether or not in the area disclosed as recreation ground, whether as part of required RG or additional RG, the promoter could construct any additional building or structure without disclosing such proposal in the layout plan or seeking, in the alternative, an informed consent of the flat takers of the project. It is immaterial that there was a disclosure of development "by constructing multiple buildings", or possibility of sub-division and separate conveyance of the plot for the separate projects (Kores Tower & Kores Nakshatra), or "phase by phase" development, or possibility of further construction. The moot question is whether there was disclosure or, in the alternative, informed consent on a proposed construction of a new building on what was disclosed to the flat purchasers as recreational space. There is no application of mind on this question. The plaintiffs' case in the plaint was that they were informed (by the layout plan) that there would be 15 buildings and two recreation grounds as disclosed in the plan and an additional building (building No.16) was illegally proposed on one of these two recreation grounds and that without seeking any consent from the purchasers. That case was not dealt with even in the first appellate order.

16. As for the case of consent, the lower appellate court's observations about such consent in clause 2 of the agreement are not in order. Clause 2 showed the possibility of purchase of TDR or FSI/TDR becoming available by surrender of portion of reservation and development of amenity spaces, for further construction. But the promoter cannot simply disclose that he may avail of further FSI and construct; he must further disclose how he proposes to use such F.S.I.- whether on any existing buildings/s, and if so, which building/s or whether in any other location of the layout plan; and he must seek a consent of the purchasers for such use, if such use does not form part of the existing project disclosed in the layout plan. Only in that case, the consent of the flat purchasers would be an informed consent. Any consent for the promoter to use additional FSI/TDR anywhere he likes, no matter that, as in the present case, it would be on what was offered as a recreational space to the purchasers, is nothing but a blanket consent.

17. The lower appellate court appears to have been swayed by the fact that there was no documentary evidence in support of the plaintiffs' case that they had paid premium price for purchase of their flat relying on the promise of additional recreational space. The court observed that this was not proved; besides, the plaintiff's flat was 30 meter away from building No.16 and there was no obstruction (?) to his view of RG No.2. That is completely besides the point. Whether he paid any particular premium or whether he had any particular view is immaterial. What is material is that the purchaser agreed to purchase the flat on the basis of the promoter's disclosures. These were: there would

be 15 buildings in the proposed layout (may be with the possibility of an additional construction by use of FSI/TDR); and there would be large recreational spaces (RG Nos.1 and 2) located at the places indicated in the layout. On these disclosures, the purchaser thought it worth his while to purchase the flat. If that is so, considering the duty of disclosure which includes duty to conform to such disclosure on the part of the promoter, the question to be considered was whether the purchaser could now be told that the open recreational space of RG No.2 would be constructed upon and there would be 4 RGs at 4 different locations (may be with an overall additional area).

18. Having thus ruled on the law and considered the judgements of the courts below and finding them to have not applied their mind to that law, the question now is what course should this court adopt - should it decide the point itself or remand the matter to the trial court for considering this aspect of the matter. Parties were heard in detail on these options. Learned Counsel for Respondent No.1 submitted that this Court should anyway proceed to hear the parties and decide the issue, since the matter pertained to the year 2010 and all this while, during the pendency of the matter, the construction was held up due to interim orders. Learned Counsel for the Appellant, on the other hand, preferred a remand. The issue itself involves two topics: (i) disclosure actually made by the promoter to the flat purchasers and (ii) compliance or breach of such disclosure insofar as construction of building No.16 is concerned. Both these aspects, to the extent they involve any factual material, are matters of trial. The court has to particularly consider as to what was the exact disclosure concerning RG No.2 area – whether it was

merely tentative or was it a given in the project, whether there was any disclosure in the layout plan or the agreement of any future use of RG No.2 for construction and accordingly, whether there was an informed consent on the part of the purchasers including the Appellant herein for construction of building No.16 on RG No.2. These considerations may involve other sub-topics, such as whether what was proposed was an overall RG area in the project or RGs at particular locations and of particular dimensions. I do not deem it right to decide these questions for the first time in a second appeal. Since these questions are, as shown by me above, not addressed at all by the courts below, it is appropriate that the matter be remanded for a fresh consideration of these issues in accordance with law.

19. Before I do so, however, I must consider one more aspect of the matter brought out by the Respondent in this connection. It is submitted that in the plaint, there is no specific plea that defendant No.1 promoter had committed breach or violation of Section 3 or 4 of MOFA read in the light of the rules framed thereunder, including clauses 2 or 3 of Form V. Since there was no such plea, it is submitted, there was no occasion for either the trial court or the first appellate court to consider any case of breach or violation of Section 3 or 4 of MOFA read in the light of the rules. There is no substance in this argument. The plaint in para 2 makes a statement that defendant No.1 promoter had, at the relevant time, represented to the plaintiff of having undertaken the project of construction of 15 buildings "*as per the original layout plans and specifications sanctioned by defendant No.2 corporation*". In para 3 it is averred that the plaintiffs agreed to purchase the respective flats

"*believing upon the aforesaid representations made and the assurances given by defendant No.1*". In para 5 it is alleged that defendant No.1 had duly completed construction of all 15 buildings of the complex and obtained occupation certificates in respect of all buildings including the buildings in which the plaintiffs had purchased their respective flats. Para 5 of the plaint claims that despite having completed the entire work of construction and delivery of possession of almost all premises, defendant No.1 had avoided and neglected to form society/societies of buildings in the complex and convey the same along with the land to such society or societies. It is claimed in para 7 of the plaint that the plaintiffs learnt about construction of an additional building, numbered as building No.16, on Recreation Ground No.2 sometime in September–October 2009. It is averred in paragraph 12 that the plaintiffs had purchased their respective premises "*taking into consideration the amenity of RG and parking spaces in front of and on the rear side of their respective buildings*". It is finally averred in paragraphs 14 and 15 of the plaint that defendant No.1 was legally bound to strictly comply with the provisions of MOFA; having delivered possession of the premises to respective purchasers long back, defendant No.1 could not be allowed to take advantage of his own wrongs and deprive the plaintiffs of their legal and legitimate rights; and the plaintiffs were accordingly constrained to approach the Court for redressal of their grievances and enforcement of their rights vested in them by virtue of MOFA and rules made thereunder and as such, were entitled to the relief of declaration that defendant No.1 was liable and duty bound to discharge the promoter's obligations under MOFA and rules made thereunder. A prayer was, accordingly, incorporated in the plaint (prayer clause (f)) seeking a perpetual

injunction against defendant No.1 promoter "*from commencing and/or carrying out the construction of building No.16 or any other constructions in the said complex or any portion thereof either as per the said plans and/or specifications sanctioned by defendant No.2*". This clearly amounts to sufficient pleading. What is pleaded is breach of MOFA on account of construction of a new building, building No.16, in an area designated and disclosed in the layout plan as RG No.2. The plaintiffs are not expected to plead law. That Sections 3 and 4 of MOFA read with the rules, including clauses 2 and 3 of Form V under the rules, require a full disclosure and provide for a duty of the promoter to conform to such disclosure whilst making the construction and the failure of defendant No.1 promoter to do so enables the plaintiff purchasers to seek a restraint order, are matters of law. They need not be expressly pleaded in the plaint. It is sufficient if the plaint complains of construction of an hitherto undisclosed building in an area represented and disclosed as Recreation Ground, committing thereby breach of provisions of MOFA. And that the plaintiffs in the present case have surely done, as I have demonstrated above. But that is not all. In fact, when the parties went to trial, it was this specific breach of Sections 3 and 4 of MOFA, which they had in mind and it was really on that basis that the judgment of Supreme Court in **Jayantilal Investments** was cited before the courts below. So much is clear from the impugned orders of the lower courts themselves. Whilst ruling on Issue No.1, which dealt with the defendant promoter's obligations, the trial court noted clauses 3 and 4 of Form V of the Rules, which were declared to be statutory and mandatory by the Supreme Court in the case of **Jayantilal Investments**. All this was in the context of the promoter's duty to make "*full disclosure of the*

development potentiality of the plot". The court came to a conclusion that all disclosures were made and the plaintiffs had failed to prove that defendant No.1 promoter avoided to discharge his obligations as promoter under MOFA. Even in the impugned appellate order of the lower appeal court, there is a reference to the Appellant's (the original plaintiff's) submission that when the plaintiffs approached defendant No.1 for purchase of flats in Kores Nakshatra, the layout plans disclosed by defendant No.1 indicated that RG2 was a recreation ground and that defendant No.1 had subsequently proposed construction of building No.16 on the portion of RG2 and that, in the context of this non-disclosure, the purchaser's consent would not be a consent within the meaning of Section 7(1) of MOFA; it would not be specific and informed; even after the amendment of 1986, such specific and informed consent would be necessary, if the construction was not disclosed in the sanctioned plan or layout shown to the purchaser at the time of the agreement. In para 19 of the appellate judgement, the observations of the Supreme Court in **Jayantilal Investments**' case concerning clauses 3 and 4 and their statutory and mandatory nature and the promoter's duty flowing from those clauses (para 18 and 19 of **Jayantilal Investments**) were expressly referred to. The first appellate court came to the conclusion (para 21 of its judgement) that clause 2 of the sale agreement (Exh. 48) made specific disclosures and that the consent obtained was not stereo-type or blanket. Then again, the question whether construction could not have been made on RG No.2 was specifically considered in the context of RG No.2 being additional and not compulsory recreation area. In other words, clauses 3 and 4 of Form V prescribed in the rules, which are relevant in the context of Sections 3

and 4 of MOFA, were pressed into service before the courts below by the plaintiffs and their impact in the context of the promoter's duty of disclosure was considered by the courts below. It cannot, thus, be said that for want of pleadings there was no occasion for the courts below to consider the case of breach or violation of Sections 3 and 4 of MOFA read in the light of Rules framed thereunder, including clauses 3 or 4 of Form V.

20. In the premises, the second appeal is allowed and the impugned orders of the courts below are set aside to the extent they relate to the relief claimed against defendant No.1 promoter and the suit is remanded to the trial court, namely, the court of Civil Judge, Senior Division, Thane, for a fresh hearing in accordance with law on the issue and in the light of the law discussed in the order above. There shall, in the facts of the case, be no order as to costs.

21. In view of the disposal of the second appeal, nothing survives in the civil applications (Civil Application No.737 of 2016 and Civil Application No.178 of 2017) and the same are also disposed of.

(S.C.GUPTE, J.)