



Kavita S.J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION NO.308 OF 2019
IN
SUIT NO.191 OF 2023

Lok Everest Co-Op.Hsg. Soc. Ltd.

...Applicant/
Org. Plaintiff

Versus

Jaydeep Developers & Ors.,

...Respondents/
Org. Defendants

WITH
INTERIM APPLICATION NO.2718 OF 2020
IN
INTERIM APPLICATION NO.308 OF 2019
IN
SUIT NO.191 OF 2023

Jaydeep Developers

...Applicant/
Org. Defendant No.1

Versus

Lok Everest Co-Op.Hsg. Soc. Ltd.

...Respondent/
Org. Plaintiff

Dr. Abhinav Chandrachud a/w Mr. Mukesh Gupta, Ms. Ashwini Patil
i/b Solicis Lex for the Plaintiff.

Mr. Ashutosh Kumbhakoni, Senior Counsel a/w Mr. Vishal
Narichania, Mrs. Pallavi Kulkarni i/b Ms. Minal Parab a/w Mr. Manoj
B., Mr. Shrinidhi Suryawanshi for Defendant No.1 in Suit and for
Applicant in IA 2718/2020.

Ms. Pooja Yadav i/b Ms. Komal Punjabi for Defendant No.2.

Mr. G.S. Bhat for Applicant in IA 452/2022.

CORAM : R.I. CHAGLA, J.

RESERVED ON : 27th JUNE, 2025.

PRONOUNCED ON : 7th NOVEMBER, 2025.

ORDER :

1. By this Interim Application, the Plaintiff/Applicant is seeking an order of injunction restraining the Defendant No.1 and / or their agents, servants and assigns from making any alterations and / or constructing new Building C5 or Wing C5 or undertaking any construction in the Larger Property. Further, consequential relief has been sought in addition to the primary relief.

2. The captioned Suit has been filed by the Plaintiff in which the present Interim Application has been taken out seeking to enforce its rights under Section 7(1)(ii), read with Sections 3(2)(c) and 4(1A)(a)(i) of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (“**MOFA**”). The Plaintiff is a society of flat purchasers occupying Building No.4, consisting of four Wings B1, B2, C1 and C2 that are connected to each other. The Plaintiff – Society has 309 members. The case of the Plaintiff is that, Defendant No.1 – Developer has exhausted the development potential of the land as disclosed to the

flat purchasers at the time of the execution of the flat purchase agreements, and in spite of which Defendant No. 1 is seeking to utilize more FSI on the subject plot on account of an increase in FSI due to a change in law, which the Plaintiff contends is contrary to MOFA.

3. A brief background of the facts is necessary:

- (i) The land of the Plaintiff – Society is part of City Survey No. 661/1/1. The Developer had constructed two buildings on the said land viz. Buildings Nos. 4 and 5. An Agreement was executed between Defendant No. 3 (land owner) and Lok Holdings (partnership firm) on 31st July, 1990 granting development rights over the larger layout of the said land. The partners of Lok Holdings incorporated a company called Lok Housing and Constructions (“**Developer**”).
- (ii) An Agreement was executed between Lok Holdings (partnership firm) and the Developer, whereby the latter was assigned the former’s development rights

in the larger layout.

- (iii) A Supplemental Agreement was executed between Defendant No. 3 and the Developer on 22nd June, 1993 modifying the terms of its Agreement.
- (iv) The Layout/sub-division for the larger property was sanctioned by Defendant No. 2 (MCGM) on 26th November, 1993.
- (v) A Commencement Certificate was obtained by the Developer for development of Building No. 5 on 4th January, 1995.
- (vi) The Sanctioned Plan of the project was issued on 5th April, 1995.
- (vii) The Developer executed Agreements for Sale with flat purchasers in Buildings No. 4 and 5 on 27th April, 1995. The layout plan mentioned in the said Agreement is the 1993 layout plan. It is pertinent to note that it is the Plaintiff's case that the 1993 layout plan was not disclosed to the Plaintiff and varied

from copy of the layout plan annexed at Exhibit-A to the said Agreements.

- (viii) A layout plan of Building No.5 was issued on 11th March, 1999.
- (ix) The Building No.4 received a full Occupation Certificate on 25th February, 2003.
- (x) The residents of Building No.4 formed a co-operative housing society under the name Kanchanchanga Lok Everest (name subsequently changed, on 23rd December, 2014 to Lok Everest Cooperative Housing Society Ltd. - the Plaintiff herein on 4th September, 2006). It is pertinent to note that there are ten societies which have been formed on larger layout of the said land.
- (xi) A fresh sanctioned plan of the project was issued on 1st November, 2007.
- (xii) An Architect's Certificate was issued on 4th January, 2008.

- (xiii) A Memorandum of Understanding (“**MoU**”) was executed between the Developer and Defendant No.1 on 29th April, 2011.
- (xiv) A Joint Venture Agreement was executed between the Developer and Defendant No. 1 on 29th April, 2011.
- (xv) The Plaintiff – Society filed an Application on 11th March, 2014 before the Competent Authority for the deemed conveyance under the provisions of MOFA.
- (xvi) The Competent Authority rejected the Plaintiff’s application for deemed conveyance on 16th October, 2014.
- (xvii) The layout plan was approved by the Defendant No.2 on 23rd December, 2016.
- (xviii) The Plaintiff once again filed an application for deemed conveyance before the Competent Authority on 29th December, 2016.

- (xix) The Developer received a Commencement Certificate for construction of Wing C5 (part of Building No.5) on 10th January, 2017.
- (xx) The Competent Authority held in favour of the Plaintiff and granted a deemed conveyance on 21st March, 2017.
- (xxi) The work of development was commenced and the work of shore piling has been completed in June 2017.
- (xxii) A Stay Order dated 6th July, 2017 was granted by this Court in Writ Petition No.6418 of 2017 filed by the Developer against order of deemed conveyance.
- (xxiii) A Stop Work Notice was issued by Defendant No.1 to the Developer on 5th January, 2018.
- (xxiv) The Assignment Agreement was executed between the Developer and Defendant No.1 on 29th March, 2018, whereby the Developer assigned its rights to Defendant No.1.

- (xxv) A MoU was executed between the Developer and Defendant No.1 on 18th May, 2018.
- (xxvi) An Order dated 8th March, 2019 was passed by this Court in Writ Petition No.6418 of 2017, wherein it was clarified that the stay order was applied only to the deemed conveyance order.
- (xxvii) A Stop Work Notice was issued by Defendant No.1 to the Developer which was withdrawn on 16th April, 2019.
- (xxviii) A fresh plan was submitted by Defendant No.1 to Defendant No.2 on 16th May, 2019.
- (xxix) A Report was prepared by M/s Nadkarni & Co. (Architects) on 10th July, 2019 which concludes that Defendant No. 1 is attempting to carry out construction which was never disclosed in the 1995 and 2007 plan, as per the 2019 plan, and to utilize FSI which was never available in 1995 and 2007.
- (xxx) The Plaintiff issued Notice to Defendant No.1 on 9th

September, 2019.

- (xxxi) The present Suit was filed on 17th October, 2019 alongwith present Interim Application No.308 of 2019.
- (xxxii) A Reply was filed by Defendant No.1 to the present Interim Application No.308 of 2019 on 18th December, 2019. It is pertinent to note that in Paragraph 9 of the said Affidavit-in-Reply, the Defendant No.1 contended that the flat purchasers were informed that the development was going to be carried on in a “*phase wise manner*”.
- (xxxiii) An order was passed by this Court on 5th February, 2020 recording the statement of Defendant No. 1 that no further activity would be conducted on site until the next date. The present Interim Application was part-heard and stood over on account of a request made on behalf of Defendant No. 1 in order to enable the advocate for Defendant No. 1 to study the sanctioned plans according to the Plaintiff. It is

pertinent to note that this statement had been continued from time to time and remains in force until date.

(xxxiv) By an Order dated 22nd February, 2022 this Court dismissed an application filed by the flat purchasers in Building C5 for impleadment.

4. Dr. Abhinav Chandrachud, learned Counsel appearing for the Plaintiff has submitted that the Defendant No.1 (hereinafter referred to as “**Developer**”) has exhausted the development potential of Building No. 5 and of the entire layout. He has submitted that once the Developer exhausts the development potential of the land, no further construction is permissible without the informed written consent of 100% of the flat purchasers.

5. Dr. Chandrachud has submitted that the said land / subject plot is City Survey No. 661/1/1. The Developer was required to construct two buildings on this plot of land viz. Building Nos. 4 and 5. The Plaintiff - Society occupies Building No. 4 which consists of 4 Wings (B1, B2, C1 and C2) and has 309 members.

6. Dr. Chandrachud has submitted that the 1993 layout plan was prepared by the erstwhile Developer which has been annexed to the Additional Affidavit of Defendant No. 1 dated 10th February 2020 does not disclose the development potential of Building No.5. The words/letters “S+16” have been illegibly scribbled in a far corner of this layout plan alongside Wing B4 of Building No. 5. The 1993 layout plan does not contain vital details such as the total square meter area of Building No. 5 or how many tenements Building No. 5 was to comprise of. He has submitted that the 1993 layout plan does not constitute a “full and true disclosure” as per the Supreme Court’s decision in *Jayantilal Investments v. Madhuvihar Cooperative Housing Society*¹ at Paragraphs 15, 17, 18 and 19. In the said decision, the Supreme Court has held that the Developer must make a full and true disclosure of particulars mentioned in Section 3(2) of MOFA, including the FSI available in respect of the land, and the “*development potentiality of the plot*”.

7. Dr. Chandrachud has submitted that during the course of arguments, the learned Senior Counsel for Defendant No. 1 had to produce an enlarged version of layout plan for the Court to see the

¹ (2007) 9 SCC 220

text clearly. He has submitted that this could hardly constitute sufficient disclosure/informed consent under MOFA. He has placed reliance upon the Judgment of this Court in ***Madhuvihar Cooperative Housing Society v. Jayantilal Investments***² at Paragraph 47 and ***Dosti Corporation v. Sea Flama Cooperative Housing Society***³ at Paragraphs 80, 83, 85, 87, 92-93, 96-97, 100-102. It has been held that the Developer must make a full disclosure of the entire project to the flat purchasers. In ***Malad Kokil Cooperative Housing Society v. Modern Construction Co.***,⁴ at Paragraph 38, this Court has held that the Developer must make a full and true disclosure of the development potential of the plot and place before the flat purchasers the entire project/scheme.

8. Dr. Chandrachud has submitted that the 1993 layout plan did not disclose to the flat purchasers that Wing B4 consists of three Wings (A, B, and C) each of 22 floors, that additional FSI of 14,233.96 square meters would be used to construct the same, or that 265 additional tenements would be constructed in the said building, as is now proposed by the Developer in the plan of 2019.

² (2011) 1 Mh LJ 641

³ (2016) 5 Mh LJ 102

⁴ (2012) SCC Online Bom 1310

9. Dr. Chandrachud has submitted that in Pro-Forma A at item 11, the 1993 layout plan reveals that the total development potential of the entire layout is 74,476.04 square meters. He has submitted that admittedly, this development potential has already been exhausted. The Developer has already constructed buildings which exhaust this development potential as on today. He has submitted that no further construction is now permissible. He has relied upon Judgment of this Court in *Sheth Developers v. Venus Vasant Valley*⁵ at Paragraphs 115, 119, 122, 125, 126) as well as Judgment of this Court in *Lakeview Developers v. Eternia Cooperative Housing Society*⁶ at Paragraphs 43-44.

10. Dr. Chandrachud has submitted that it is an admitted position that the 1993 layout plan was never disclosed to the flat purchasers at the time of entering into the flat purchase agreements. He has referred to Paragraph 6.1.2 of the Rejoinder dated 15th February 2020, wherein the Plaintiff has averred that what was shown to the flat purchasers at the time of executing the flat purchase agreements was not the plan of 1993 but the sanctioned layout plan of the year 1995. He has submitted that this has not been

⁵ (2024) SCC Online Bom 1054

⁶ (2015) SCC Online Bom 3824

countered by Defendant No. 1 in any sur-rejoinder/affidavit thereafter.

11. Dr. Chandrachud has submitted that one of the recitals to the flat purchase agreement referred to a layout plan dated 26th November 1993. However, the flat purchase agreement itself makes it abundantly clear that this 1993 layout plan was never disclosed to the flat purchasers. Recital (c) of the flat purchase agreement reveals that what was disclosed to the flat purchasers was a plan annexed at Exhibit-C to the flat purchase agreement. The said plan annexed at Exhibit-C does not even disclose that Wing B4 of Building No. 5 would have 16 floors. It does not disclose the development potential of Building No. 5 or that of the entire layout.

12. Dr. Chandrachud has submitted that what a Developer is required to disclose to the flat purchasers is the development potential of the land/building, not the number of floors. Once the development potential is exhausted, no further construction is permissible. He has placed reliance upon *Sheth Developers (supra)* and *Lakeview Developers (supra)* in this context.

13. Dr. Chandrachud has submitted that the Defendant No. 1

during the course of oral arguments, relied on a recital in the Agreement for Sale dated 27th March, 2007 which has no relevance to the present case since it was between purchasers in Lok Everest Mansarovar CHS and the Developer whereas the said recital does not exist or find any mention in the Agreement of sale entered into by the flat purchasers of the Plaintiff - Society from 27th April, 1995 onwards.

14. Dr. Chandrachud has submitted that Defendant No.1 during oral arguments, relied on an NOC of the Chief Fire Officer dated 30th October, 1993 and parking layout plan dated 27th January, 1995, which were not provided to the flat purchasers at the time of the flat purchase agreements. Hence, they cannot be relied upon by the Developer.

15. Dr. Chandrachud has submitted that the 1995 Sanctioned Plan was the only plan which was admittedly disclosed to the flat purchasers while executing the flat purchase agreement. He has submitted that in Pro-Forma A at item 12 of the 1995 Sanctioned Plan, the total development potential of Building No. 5 was disclosed as 22,807.89 square meters. The total development potential of the

entire layout was 67,028.44 square meters. He has submitted that it is an admitted position that this development potential for both Building No. 5 and the entire layout has been exhausted by the Developer. Thus, no further construction is permissible.

16. Dr. Chandrachud has submitted that in the Tenement Statement (table on the left-hand side of the 1995 Sanctioned Plan), Building No. 5 was to consist of 9 typical floors (216 tenements) and 2 refuge floors (32 tenements). He has submitted that what matters is the development potential disclosed to the flat purchasers and not the number of floors/tenements etc. disclosed. He has relied upon *Sheth Developers (supra)* at Paragraphs 115, 119, 122 and 125 in this context.

17. Dr. Chandrachud has submitted that the 2007 Sanctioned Plan contained a “location plan” on the left-hand side of the plan. In it, it was stated that Building No. 5 would consist of four Wings (B3, C3, C4 and C5). However, the entire development potential of all four Wings was only 22,513.38 square meters. Further, while Wings B3, C3 and C4 were to be stilt+16 storey structures, Wing C5 was only going to be a stilt+1 storey structure.

In other words, the entire development potential of Building No. 5, i.e. 22,513.38 square meters, was proposed to be used up by the Developer in Wings B3, C3 and C4. The total development potential of the layout was 83,621.77 square meters mentioned in Pro-Forma A on the right hand side of the Plan.

18. Dr. Chandrachud has submitted that it is an admitted position that the development potential of Building No. 5 (i.e., 22,513.38 square meters) and the entire layout (83,621.77 square meters) has been fully exhausted by the Developer. Thus, no further construction is permissible.

19. Dr. Chandrachud has submitted that the 2016 Sanctioned Plan contained a “Summary of Buildings Proposed Area” statement on the left-hand side of the page. This table makes it clear that the entire development potential of Building No. 5 (i.e. 22,513.38 square meters) has been utilized by the Developer in Wings B3, C3 and C4 of Building No. 5, which were each Stilt+16 storey structures. It was for this reason that Wing C5 was shown as a Stilt+1 storey structure with “Nil” FSI. Thus, in short, the 2016 Sanctioned Plan makes it clear that the Developer had fully

exhausted the development potential of Building No. 5 by 2016 itself. Thus, no further construction is permissible.

20. Dr. Chandrachud has submitted that against the total development potential of 74,476.04 in respect of the entire layout in the 1993 layout plan and total development potential of 67,028.44 sq. mtrs. disclosed to flat purchasers in the 1995 Sanctioned Plan, the Developer had consumed total FSI of 82,755.62 sq. mtrs. He has submitted that no consent for the same was obtained from flat purchasers and the flat purchasers could not take any legal recourse against these unilateral constructions of the Developer in view of the blanket legal immunity granted to the Developer for a period of about fifteen years from 27th January, 1999 to 25th April, 2014 under Bombay Relief Undertakings (Special Provisions) Act, 1958.

21. Dr. Chandrachud has submitted that the 2019 unapproved Plan contains a “Summary of Buildings Proposed Area” Statement (at the center of the page). This table shows that the developer has exhausted the development potential of Building No. 5 in Wings B3, C3 and C4, i.e., 22,513.38 square meters. However, the Developer now proposes that Wing C5, which was earlier shown as a

Stilt+1 storey structure with “Nil” FSI will now be a structure with three Wings (A, B and C) each of 22 floors, and will have additional FSI of 14,233.96 square meters.

22. Dr. Chandrachud has submitted that this is contrary to MOFA because the Developer, having exhausted the development potential of Building No. 5 and the development potential of the entire layout, cannot seek to construct more now as FSI has become available due to a change of law. He has placed reliance upon *Sheth Developers (supra)* and *Lakeview Developers (supra)* in this context.

23. Dr. Chandrachud has submitted that the 2019 plan was prepared shortly before the present Suit was filed on 17th October 2019. He has submitted that there is no delay on the part of the Plaintiff - Society in filing the present Suit. No cause of action arose prior to the 2019 plan, since none of the previous sanctioned plans altered the development potential of Building No. 5. It was only in the 2019 plan that the Developer sought to alter / add to the development potential of Building No. 5 for the first time. Further, in any event, the previous Developer had been granted legal immunity

under the Bombay Relief Undertakings (Special Provisions) Act, 1958, between 1999-2014 which barred the Plaintiff from filing any proceedings against the said Developer.

24. Dr. Chandrachud has submitted that the flat purchase agreements did not contain any disclosure as to what the development potential of the land was, unlike the disclosure made by the promoter in the case of *Sheth Developers (supra)*. Further, the flat purchase agreements in the instant case contained several clauses of general consent/blanket consent which gave the Developer permission to utilize more FSI as and when additional FSI became available due to a change in law. He has placed reliance upon *Madhuvihar (supra)* wherein this Court has held that it is not permissible for a developer to obtain blanket consent/general consent from flat purchasers. The aforesaid clauses of the flat purchase agreement in the instant case are contrary to this principle and therefore not binding on the flat purchasers.

25. Dr. Chandrachud has submitted that the plan that was annexed at Exhibit C to the flat purchase agreements did not contain any disclosure about the development potential of the land or the

number of floors in the Wings of Building No. 5. He has submitted that though the flat purchase agreement was originally executed with Lok Housing and Construction Ltd., which is now in insolvency proceedings, it is an admitted position that the agreement binds Defendant No. 1 who is an assignee of the said original Developer. The agreement itself says that the term “Developer” includes the “successors and assigns” of the original Developer.

26. Dr. Chandrachud has submitted that the Defendant No. 1 has not produced the report of any expert of its own to counter the report of M/s Nadkarni & Co. Thus, the report of Nadkarni & Co. reflects the admitted position between the parties.

27. Dr. Chandrachud has submitted that the report of Nadkarni & Co. reveals that both Buildings No. 4 and 5 are on the same plot of land, i.e., CTS No. 661/1/1 and it stands to reason that the residents of Building No. 4 have a vital interest in any additional structures that are put up as part of Building No. 5.

28. Dr. Chandrachud has submitted that the report of Nadkarni & Co. concludes that in the 2019 plan, Defendant No. 1 is planning on constructing 258 new tenements in Wing C5 of Building

No. 5, in a structure of three Wings (A, B, and C) each comprising Stilt+22 upper floors. This makes for an increase of 265 tenements over the number of tenements approved in the 1995 approved plans. The report notes that the 2019 plan is based on a change in law brought about by DCPR 2034. He has submitted that what is contemplated by the developer in the 2019 plan is clearly contrary to MOFA.

29. Dr. Chandrachud has submitted that on 21st March, 2017 the competent authority had granted a deemed conveyance to the Plaintiff society of the area underneath its building (5,219.90 square meters) and an undivided share in the plot to the extent of 17,288.80 square meters. This deemed conveyance order has been upheld by the learned Single Judge of this Court on 26th March 2025 in Writ Petition No. 6418 of 2017. He has referred to Paragraph 33 of the said order, wherein this Court had observed that the developer has *“unilaterally revised the sanctioned plan and introduced a fourth building”*, that the developer has *“consum[ed] the entire permissible Floor Space Index (FSI) under the Development Control Regulations”*. Having *“consumed the entire FSI and revised the layout unilaterally”*, it was held that the developer cannot take

advantage of its own wrong.

30. Dr. Chandrachud has submitted that though liberty was granted in the said order to the previous developer to file a Suit against the Plaintiff society, no such Suit has been filed.

31. Dr. Chandrachud has referred to the Judgment dated 4th April 2025 passed by this Court in ***Flagship Infrastructure Ltd. v. Competent Authority*** in Writ Petition No.151 of 2019 at Paragraph 26, wherein this Court commented on the conduct of the Developer in the instant case. It was held that the Developer was making a “*similar excuse*”, that “*even after 30 years, the promoter had not given conveyance*”, which was “*completely against the purpose of MOFA*”, and “*very unfair to flat owners*”. He has submitted that the conduct of Defendant No. 1 shows that it is not worthy of any equitable orders at the interim stage.

32. Dr. Chandrachud has submitted that the Plaintiff has not conceded/admitted that the FSI which became available on the subject plot prior to 2015 belongs to the Developer. He has submitted that it is well settled that pleadings must be read as a whole and in a liberal manner, not like statutes. Admissions must be clear,

unambiguous and unequivocal, and on a perusal of Paragraph 42 of the Plaintiff it would reveal that there is no such admission on the part of the Plaintiff. In any event, there cannot be any admission/concession of a point of law.

33. Dr. Chandrachud has submitted that the Plaintiff in Paragraph 42 of the Plaintiff has stated that the Developer has exhausted the development potential of the land. Further down the paragraph, the Plaintiff has made a statement that in any event, after 2015, all the FSI of the land belongs to the registered societies in the layout. He has submitted that this averment in Paragraph 42 does not constitute an admission that all the FSI which accrued on the subject plot prior to 2015 belongs to the Developer. He has submitted that it is well settled that pleadings in India must be read as a whole and liberally, not pedantically or like a statute. He has placed reliance upon Judgment of the Supreme Court in ***Ram Sarup Gupta v. Bishun Narain***⁷ at Paragraph 6 and ***S.B. Noronah v. Prem Kumari***⁸ at Paragraphs 3, 5 and 6.

34. Dr. Chandrachud has submitted that it is well settled that

⁷ (1987) 2 SCC 555

⁸ (1980) 1 SCC 52

an admission of facts may bind a party, but an admission of law is not binding. He has placed reliance upon the Judgment of the Supreme Court in ***Banarsi Das v. Kanshi Ram***⁹ at Paragraph 11 in this context. He has submitted that assuming, while denying, that the Plaintiff has admitted in Paragraph 42 that the FSI which accrued on the subject plot prior to 2015 belongs to the Developer, this would be contrary to MOFA and therefore an admission in law, can never be binding on the Plaintiff.

35. Dr. Chandrachud has submitted that it is well settled that an admission has to be clear, unambiguous and unequivocal. He has placed reliance upon the Judgment of the Supreme Court in ***Sita Ram Bhau v. Ramchandra***¹⁰ at Paragraphs 17-18 in this context.

36. Dr. Chandrachud has submitted that the present Suit is not barred by the provisions of the Real Estate (Regulation and Development) Act, 2016 as the Occupation Certificate of the Plaintiff's building was obtained prior to 2016. He has relied upon the Judgment of the Division Bench of this Court in ***Neelkamal Realtors v. Union of India***¹¹ at Paragraphs 87, 89 in this context.

⁹ (1962) SCC Online SC 90

¹⁰ (1977) 2 SCC 49

¹¹ (2017) SCC Online Bom 9302

37. Dr. Chandrachud has submitted that the statutory notice under Section 527 of the Mumbai Municipal Corporation Act, 1888, was duly issued by the Plaintiff to the Municipal Corporation. It was issued prior to the Suit being filed. He has submitted that this has not been disputed by the municipal corporation in their reply. It would therefore not lie in the mouth of the Developer to contend that the statutory notice was not issued by the Plaintiff prior to the Suit being filed. He has placed reliance upon the Judgment of this Court in ***Chandmal Lodha v. Pravin Sutar***¹² at Paragraphs 5, 9 wherein it has been held that such objections must be raised by the corporation, and not by private parties.

38. Dr. Chandrachud has submitted that Section 149 of the Maharashtra Regional and Town Planning Act, 1966, does not bar Suits seeking to prevent Developers from acting in pursuance of plans illegally sanctioned contrary to MOFA. He has placed reliance upon the Judgment of this Court in ***Raja Bahadur v. State of Maharashtra***¹³ at Paragraph 12; ***Gadre Constructions v. Sadashiv Sathe***¹⁴ at Paragraph 5, and ***Jitendra Santilal Shah v. Zenal Construction Pvt.***

¹² (2015) SCC Online Bom 7454

¹³ (2002) SCC Online Bom 679

¹⁴ (2004) 3 Mh LJ 875

*Ltd.*¹⁵ at Paragraphs 65-66, in which this Court has held that Section 149 of the Maharashtra Regional and Town Planning Act, 1966 does not bar Suits by which parties can be prevented from acting in pursuance of an order made under the Act. In *Jitendra Santilal Shah (supra)* it has been held that despite the said provision, a flat purchaser is entitled to challenge the construction itself as being violative of MOFA. He has submitted that the challenge in the instant case is not to the sanctioned plans alone/per se, but to the right of the Developer to even submit the plans or carry out construction in view of the provisions of MOFA.

39. Dr. Chandrachud has submitted that the Developer is wrong to contend that the society of Building No. 5 has not opposed the additional construction which is now proposed in the plan of 2019. He has referred to Intervention Application [IA No. 452 of 2022] filed by the society of Building No. 5 which opposes the construction now proposed by the Developer i.e. three Wings (A, B and C) of C5, each Wing being 22 storeys.

40. Dr. Chandrachud has submitted that Section 7(1)(ii) of MOFA requires the informed written consent of 100% of the flat

¹⁵ (2009) SCC Online Bom 105

purchasers before any additional construction is carried out once the development potential of the land has been exhausted by the Developer. This is different from section 14(2)(ii) of the RERA Act, which requires the permission of 2/3rds of the flat purchasers for putting up any such additional construction. The Plaintiff - Society represents 309 flat purchasers. Even if one flat purchaser was to object to the additional construction, the Developer would have been prohibited from carrying it out under Section 7(1)(ii) of MOFA. Thus, even if the intervenor did not have any objection to the additional construction proposed under the plan of 2019, the objection of the Plaintiff - Society to the same is sufficient to bar the developer from carrying out the said additional construction.

41. Dr.Chandrachud has submitted that the concession/suggestion made by the counsel for Defendant No. 1 during oral arguments, that Defendant No. 1 will only construct one building of 16 floors at the interim stage, is contrary to MOFA. He has submitted that it has been demonstrated above that the Developer has exhausted the development potential of Building No. 5 and the development potential of the entire layout. Having done so, it is no longer permissible for the Developer to construct even one

square meter more than what was disclosed to the flat purchasers. He has placed reliance upon *Sheth Developers (supra)* and *Lakeview Developers (supra)*.

42. Dr. Chandrachud has submitted that the consent orally given by the counsel for the intervenor (Lok Everest Mansarovar Cooperative Housing Society Ltd.) to the said suggestion of the Defendant No.1 is immaterial. Under Section 7(1)(ii) of MOFA, the consent of 100% of the flat purchasers is required prior to carrying on any additional construction contrary to what has been disclosed to the flat purchasers at the time of execution of the flat purchase agreements. In the instant case, the Plaintiff - Society has objected to the proposal which has been made by the Defendant No. 1 during oral arguments.

43. Dr. Chandrachud has submitted that the Judgment of this Court in *Sheth Developers (supra)* relied upon by Defendant No.1 supports the case of the Plaintiff. In that case, the Developer had disclosed the development potential of the land as being 6,00,000 square feet (i.e., 55,762.08 square meters) in the flat purchase agreements themselves. The Court noted in the said case

that the Developer was not exceeding the development potential of the land as disclosed to the flat purchasers in the flat purchase agreements. The Court noted that the source of the FSI was irrelevant, as were the number of floors. What was important was that the Developer had disclosed the development potential of the land and was “in no manner exceeding the same”.

44. Dr. Chandrachud has submitted that in the instant case, the Developer did not disclose the development potential of the land in the flat purchase agreement. The development potential of the subject plot and Building No. 5 were only revealed in the 1995 sanctioned plan. This development potential has admittedly been exhausted by the Developer. Thus, no further construction is permissible as per the law laid down by this Court in *Sheth Developers (supra)*.

45. Dr. Chandrachud has submitted that in *Krishna Constructions v. Subash Uttam Dalvi*, Appeal from Order No. 744/2024, Judgment dated 10th June, 2025, relied upon by Defendant No.1, this Court has held that there is “*no straitjacket formula*” for determining the issues of disclosure, developability and

informed consent (paragraph 22). Thus, each case would have to be decided on its own facts. Further in the said case, the Developer had terminated the flat purchase agreement with the only flat purchaser who filed a Suit, which was not challenged by the said flat purchaser. Finally, the said case did not consider the binding decision of this Court in *Sheth Developers (supra)* on the duty of the developer to disclose the development potential of the land.

46. Dr. Chandrachud has submitted that the Judgment of this Court in *Zircon Venture Cooperative Housing Society Ltd. v. Zircon Ventures*¹⁶ relied upon by Defendant No.1, was decided before the Judgment of the Division Bench of this Court in *Lakeview Developers (supra)*. Thus, the Court did not have the benefit of the binding decision of *Lakeview Developers (supra)* wherein it has been held that the Developer cannot construct anything further once the development potential of the land has been exhausted. In any event, in *Zircon Ventures (supra)*, it was not argued that the development potential of the land was exhausted. It has been held by this Court that what is required to be seen is whether the developer is intending on making a “drastic change” to what was disclosed to the flat

¹⁶ (2014) 4 Mh LJ 481

purchasers. In the instant case, the Developer is proposing to utilize 14,233.96 square meters to construct three Wings, each with 22 floors, and adding 265 tenements to what was disclosed to the flat purchasers. This certainly is a drastic change.

47. Dr. Chandrachud has submitted that the decision of this Court in ***Chetan Shelke v. Savannah Vasant Lawns***¹⁷ relied upon by the Defendant No.1, the Court noted in Paragraphs 24 and 25 that the Plaintiff therein was guilty of substantial delay/laches in filing the Suit, since the plans in the said case had undergone eight revisions between 2007-2022. In the instant case, the development potential of Building No. 5 was not altered by the Developer until the plan of 2019. In fact, the 2016 sanctioned plan showed Wing C5 as having “Nil” FSI. It was only in 2019 that the Developer sought to construct more than what was disclosed to the flat purchasers since 1995 by *inter alia* adding 14,233.96 square meters to Wing C5. The present suit was filed on 17th October 2019. Thus, there is no delay on the part of the Plaintiffs in the instant case.

48. Dr. Chandrachud has submitted that in ***Chetan Shelke (supra)*** at Paragraph 27, this Court *prima facie* found that the Suit

¹⁷ (2025) SCC Online Bom 130

was barred by the provisions of the RERA Act, which do not apply in the instant case since the occupation certificate of the Plaintiff society was obtained prior to the coming into force of the RERA Act. Finally, in Paragraph 30 of *Chetan Shelke (supra)*, this Court has held that the question of whether the development potential of the land was consumed could not be decided summarily on the basis of pleadings alone. However, in the instant case, the Plaintiff has established through documentary materials (including the sanctioned plans of 1995, 2007, 2016, the plan of 2019, and the report of Nadkarni & Co.) that the developer has exhausted the development potential of the land.

49. Dr. Chandrachud has submitted that the present Interim Application ought to be allowed and Defendant No. 1 restrained from carrying on any further construction on the subject plot.

50. Mr. Ashutosh Kumbhakoni, learned Senior Counsel for the Defendant No.1 – Developer has submitted that admittedly, the proposed construction does not even ‘touch’ the Building of the Plaintiff Society i.e. Building No. 4 or has any impact on any of its flats in any manner whatsoever. The Plaintiff has not even made such

an allegation in the pleadings.

51. Mr. Kumbhakoni has submitted that it is pertinent to note that occupiers of existing three Wings of the Building No.5 of which 'identical' fourth Wing is proposed to be constructed, are not objecting to such construction of Wing C5 of Building No. 5, more particularly since the construction of such Wing C5 of Building No. 5 was always disclosed to the flat purchasers of both Building Nos. 4 and 5. Even the Occupation Certificate for the three constructed Wings of Building No. 5 has not been granted. Therefore, it is submitted that the construction of Building No. 5 has not been completed.

52. Mr. Kumbhakoni has submitted that the fundamental principle to be observed in such matters is that the flat purchasers are "not taken by surprise" by sudden additional construction taking place in or around their building, which was never disclosed to them. This is certainly not the facts in the present case. He has submitted that Building No.5 having 4 Wings of 16 floors each, including Wing C5 (proposed construction), was always disclosed at the specific location pointedly indicated in the original 1993 plan disclosed to the

flat purchasers, which is referred in the flat purchase agreements, and it was always disclosed that Building No. 5 would be 'identical' to Building No. 4, being also of 4 Wings having 16 floors. He has submitted that this necessarily means that there had been an informed consent obtained and/or such adequate and sufficient disclosure made as required by law.

53. Mr. Kumbhakoni has submitted that the revised 1995 plan which the Plaintiff contends is the only plan which had been disclosed to them at the time of execution of the flat purchase agreements has not even been referred to or annexed to the flat purchase agreements. The Plaintiff has only relied upon an Affidavit of a flat purchaser to contend that the revised 1995 plan was disclosed to it. He has submitted that it is the Plaintiff's own case that there had been a purported deviation from the revised 1995 plan as the developer had constructed 3 Wings of Building No. 5 with 16 floors, but no objection was admittedly raised by the Plaintiff as to the purported deviation in construction of 3 Wings of Building No. 5 with 16 floors till date.

54. Mr. Kumbhakoni has submitted that it is not the case of

the Plaintiff that, the Plaintiffs sought/asked for the 1993 plan at any time and that still it was not given/‘shown’. Clause 1 of the flat purchase agreements expressly mentions that the layout plans and specifications were kept for inspection at the site and the office of the developers. The fact that the Plaintiff did not ask/sought for it itself, at this *prima-facie*/interim stage, on the basis of ‘preponderance of probabilities’, leads to an inescapable conclusion that it was not only ‘disclosed’ to the Plaintiff but also that it was ‘shown’ to the Plaintiff that Building Nos. 4 and 5 were two ‘identical’ buildings, like mirror images, with total 8 Wings i.e. 4 Wings each would be constructed, the exact design and location of which was ‘shown’ on the plan annexed to the flat purchase agreements.

55. Mr. Kumbhakoni has submitted that as Wing C5 of Building No. 5 was an additional structure in redevelopment scheme in the 1995 layout plan ‘disclosed’ to the Plaintiff, the requirements of Section 7-A of the MOFA have been met and no further consent is/was required for construction of Wing C5 of Building No. 5.

56. Mr. Kumbhakoni has submitted that the Defendant No. 1 - Developer is entitled to develop in a phase wise manner, once the

scheme including Wing C5 of Building No. 5 had been disclosed by the erstwhile Developer – Lok Housing Co-operative Housing Society to the flat purchasers. The MOFA Flat Purchase Agreements further provide that the FSI would be available to the societies only after the completion of the scheme and registration of societies.

57. Mr. Kumbhakoni has submitted that the Developer was entitled to apply for and claim 33% premium FSI introduced under the 2011 amendment to the 1991 DCPR Regulations as the completion of the entire scheme had not been completed as construction of Wing C5 of Building No. 5 with 16 floors as disclosed to the flat purchasers of Building Nos. 4 and 5 had not been completed.

58. Mr. Kumbhakoni has submitted that the Plaintiff cannot claim that there was zero FSI on the plot as the Defendant No. 1 was entitled to apply for the 33% premium FSI (introduced by the amendment to the 1991 DCPR Regulations) as the construction of Wing C5 of Building No. 5 as disclosed to the flat purchasers under the original 1993 sanctioned layout had not been completed and such benefit of change in law would accrue to the Developer until

such scheme of Building Nos. 4 and 5 being 8 Wings of 16 floors under the original 1993 plan as disclosed to the flat purchasers and expressly mentioned in the flat purchase agreements had been constructed and completed.

59. Mr. Kumbhakoni has submitted that the 1993 layout plan was disclosed to the Plaintiff and this has also been noted in Paragraph 37 of this Court's Order dated 26.03.2025 in ***Lok Housing & Construction Ltd. v. State of Maharashtra and others***, Writ Petition No. 6418 of 2017. The Plaintiff was a party to the Writ Petition as Respondent No.3 and defending the Deemed Conveyance Order dated 21st March, 2017 passed in its favour. He has submitted that the 1993 Layout Plan clearly refers to Building C5 (at the time numbered as B-4) as having stilt + 16 floors.

60. Mr. Kumbhakoni has submitted that the documents on record also refer to the 1993 Layout Plan and Building No. 4 and 5 being identical buildings having 4 Wings of 16 floors each. This include the Recital in Agreement for Sale dated 27th March, 2007 and the Recitals in Flat Purchase Agreements entered into with flat purchasers of the Plaintiff dated 27th April 1995; 9th February, 2000;

30th December, 2000 & 3rd August, 2006.

61. Mr. Kumbhakoni has submitted that the Plaintiff alleges that the IOD drawing dated 5th April 1995 sanctioned by MCGM was disclosed to its members in Paragraph 24 of the Complaint. However, none of the Flat Purchase Agreements annex the 1995 IOD Plan. The Plaintiff has solely relied on Affidavit of Mr. Mahendra Kumar Prabhashankar Bhatt which is a matter of evidence which cannot be considered at this stage.

62. Mr. Kumbhakoni has placed reliance upon *Zircon Venture Co-operative Housing Society Ltd. (supra)*, wherein this Court was dealing with a similar situation where the flat purchasers of a society did not mention in the Complaint that the original plan of 2005 had been disclosed to it, which expressly mentioned that there were 12 buildings contemplated in the 2005 plan. Ultimately, 9 buildings were constructed. The flat purchasers only relied in the Complaint on a subsequent revised plan of 2008, to allege that the proposed construction of the 10th building was being done where the 2008 revised plan indicated closed car parking space and that the FSI had been consumed in constructing the 9 buildings. Ultimately, this

Court had held that there had been a reference to the original 2005 plan in the flat purchase agreements, which indicated the 10th building and therefore, *prima facie*, there had been a full and true disclosure of the construction of 12 buildings and there was no further consent required for putting up the 10th building.

63. Mr. Kumbhakoni has referred to Paragraphs 23 and 32 of Plaintiff and Paragraph 5 and 6 of Plaintiff's Affidavit-in-Rejoinder dated 15th January 2020. The Plaintiff admitted therein that as per the 1995 IOD plan that had been purportedly disclosed to the Plaintiff that Building No. 5 would have 4 Wings including Wing C5 of Building No. 5, all Wings of Building No. 5 having 12 floors. He has further referred to Paragraphs 37 and 52 of Plaintiff's Affidavit-in-Rejoinder dated 15th January, 2020, wherein the Plaintiff acknowledges that the layout sketch annexed to flat purchase agreements indicated that Building No. 5 had 4 Wings. In Paragraph 6.1.2 of Plaintiff's Rejoinder dated February 2020, the Plaintiff admits that he was shown layout of Building No. 5 as having 4 Wings titled B3, C3, C4 and B4 (B4 now known/titled as C5). The Plaintiff in Paragraph 6.1.5 does not deny that the 1993 Layout Plan showed a Wing of 16 floors. Additionally, in Paragraph 6.4 of Plaintiff's

Rejoinder dated February 2020, the Plaintiff admits that Wing B-4 of Building No.5 had been renamed as Wing C5.

64. Mr. Kumbhakoni has submitted that the 1995 IOD Plan disclosed to Plaintiff's members, as per the Plaintiff's own admission, indicated that there was a refuge area on the 7th and 12th floor for Wing B-4 (now known as Wing C5). Therefore, Wing C5 of Building No. 5 was always going to have more than 12 floors.

65. Mr. Kumbhakoni has submitted that the Plaintiff has produced the No Objection Letter dated 30th October 1993 issued by the Chief Fire Officer which evidences Building C5 (at the time referred to as Wing B-4) of Building No. 5 having 16 floors. Further, it is mentioned that the refuge area was on 7th and 12th floor, indicating Wing C5 having 16 floors. He has submitted that this No Objection Letter dated 30th October, 1993 has been referred in Paragraph 41 of the Plaint and is also mentioned in the Nadkarni's Report.

66. Mr. Kumbhakoni has also relied upon fact that the Plaintiff has produced Parking Layout dated 27th January 1995 issued by the Traffic Department of MCGM, which evidences Building C5 (at

the time referred to as Wing B-4) of Building No. 5 having 16 floors. Further, the layout plan dated 19th April 1997 shows Wing No. C5 (at the time numbered as B-4 as having stilt and 16 floors).

67. Mr. Kumbhakoni has placed reliance upon other documents on record which also state that Wing C5 would have 16 floors. This includes the MoU dated 29th April, 2011 and Joint Venture Agreement dated 29th April, 2011 pursuant to which the Defendant No. 1 acquired rights to develop Wing C5. The Joint Venture Agreement dated 29th April, 2011 in Recital F states that Building Nos. 4 and 5 were being constructed being 8 buildings of 16 floors. Further, in the Joint Venture Agreement signed in 2016 between Lok Housing and Defendant No. 1 states in Recital I that Building Nos. 4 and 5 comprised 8 Buildings having 16 floors. In the Agreement of Assignment of Development Rights dated 29th March, 2018 signed by Lok Housing in favour of Defendant No. 1 stated in Recital I that Lok Everest comprised of 8 buildings having stilt + 16 floors, of which 7 buildings were completed.

68. Mr. Kumbhakoni has submitted that the Plaintiff in its final arguments has made no allegation that garden, swimming pool

and clubhouse are being affected by construction of Wing C5, if the same is constructed in accordance with the 1993 Layout Plan.

69. Mr. Kumbhakoni has submitted that in the Flat Purchase Agreements dated 27th April 1995, 9th February 2000, 30th December 2000 and 3rd August 2006 it is stated that the residual F.A.R (F.S.I) in the plot of the layout not consumed will be available to the Developers till the completion of the scheme and registration of the Societies (Clause 29 of the Agreement).

70. Mr. Kumbhakoni has submitted that in *Sheth Developers (supra)* this Court held in Paragraphs 133 and 134 that clauses in flat purchase agreements that provide that formation of the society and conveyance taking place after the entire property was developed or full payment was received was not contrary to Sections 10 and 11 of MOFA.

71. Mr. Kumbhakoni has submitted that the 1993 layout plan was for 5 buildings only and the 1995 IOD Plan referred to only 7 buildings. He has submitted that the 1993 Layout Plan and the 1995 IOD Plan refer the total area and permissible area as 74,476.04 sq.meter for the entire sub-divided Plot A. He has submitted that

there had been multiple revisions to the sanctioned plans on 6th August, 1994, 5th April, 1995, 9th October, 1995, 20th May, 2000, 10th March, 2003, 12th January, 2006 and 1st November, 2007 which had led to an increase in the number of buildings being constructed, which were NOT a part of these plans.

72. Mr. Kumbhakoni has submitted that the buildings constructed are more than those mentioned in the aforementioned plans. The Plaintiff at no point in time raised any objection that there had been a deviation in relation to the disclosure of construction of Buildings that had not been disclosed in 1993 or 1995 Plan.

73. Mr. Kumbhakoni has submitted that the MCGM had conceded by placing reliance upon the 2000 layout plan that Building No. 5 in issue is not completed. This 2000 layout plan shows Wing C5 (at the time numbered as Wing B-4). He has submitted that it is pertinent to note that the 2000 layout plan was to add Building Nos. 3 and 11.

74. Mr. Kumbhakoni has placed reliance upon the Judgment of this Court in *Chetan Shelke (supra)* at Paragraphs 8.6 and 8.7, wherein it has been held that where there had been various

modifications/amendments to the original sanctioned plan and at no point of time did the flat purchasers file their objections nor resisted the amendment of the original sanctioned plan, this conduct was a relevant factor to determine whether injunction ought to be refused. It has been held in the said case that there had been 8 revisions of the original sanctioned plan, which were in public domain and the fact that the flat purchasers had not raised any objections to any of the revisions was a strong mitigating factor. The flat purchasers were held to have approached the Court after gross delay. Further it was held that the grievance that the FSI had been exhausted could not be decided summarily merely on the basis of pleadings.

75. Mr. Kumbhakoni has also placed reliance upon the Judgment of this Court in *Krishna Constructions (supra)* at Paragraphs 17 and 18 which referred to the decisions of *Lakeview Developers (supra)* and *Dosti Corporation (supra)*. These Judgments have been distinguished as being cases where the construction as disclosed to the flat purchasers had been completed. Further the decision of this Court in *Malad Kokil (supra)* has been referred to and distinguished on the ground that in that case construction was being done not in accordance with the disclosed layout. It has been held in

Krishna Constructions (supra) that the Suits in the aforementioned decisions were filed after the construction was complete and the society of the flat purchasers had been formed and registered. Further, it is held that the issue of full potential of the project and developability, and the informed consent of the flat purchasers could not be decided in a straitjacket formula as these issues depend on the facts of each case.

76. Mr. Kumbhakoni has submitted that the Plaintiff though having admitted that additional FSI of 33% was added to DCR 1991 by amendment vide Notification dated 24th October, 2011 and, having acknowledged that this additional FSI became available after construction of 3 Wings of Building No. 5 did not mention that this additional FSI of 33% became available prior to the registration of Building No. 5 on 31st August, 2015. Therefore, the development potentiality on account of 33% FSI under change to DCR 1991 belonged to Defendant No. 1. Clause 7 of such notification states that *“any disclosure made for use of TDR/FSI, while making agreements with purchasers under MOFA Act shall be held valid for use of 0.33 FSI”*.

77. Mr. Kumbhakoni has submitted that the construction of proposed Wing C5 of 16 floors would require approximate 8357 sq. meter which was available to the developer on account of introduction of premium FSI of 33% under the 2011 amendment to the 1991 DCPR regulations. The developer was entitled to make the application to MCGM for availing the premium FSI of 33% as the construction of Wing C5 with 16 floors as disclosed to flat purchasers had still not been completed and therefore, the construction of the entire scheme had not been completed.

78. Mr. Kumbhakoni has submitted that the Defendant No.1 has mentioned in the Sur-rejoinder dated 22nd January, 2020 to the Plaintiff's Rejoinder dated 15th January 2020 that necessary approvals for utilizing 0.33 FSI and loading TDR for construction of Wing C5 were pending. Subsequently, vide Notification dated 4th December, 2015 the premium FSI under DCR 1991 increased to 50%.

79. Mr. Kumbhakoni has submitted that the Plaintiff has admitted in Paragraph 42 of the Complaint and Paragraph 12 of the Plaintiff's Affidavit-in-Rejoinder dated 15th January 2020 that as the society for Building No. 5 was formed in August 2015, the balance

FSI after that date, i.e. August 2015 purportedly belonged to the Society. Consequently, as per the Plaintiff's own admitted case in the Plaint the extra FSI prior to August 2015 would belong to Defendant No. 1.

80. Mr. Kumbhakoni has submitted that as the flat purchase agreements mention that the layout was being constructed as a scheme in a phase wise manner, all FSI belongs to the Developer until completion of the scheme and construction of Wing C5 with 16 floors as disclosed to the flat purchasers under the flat purchase agreements.

81. Mr. Kumbhakoni has submitted that this Court ought to decide the entitlement of Defendant No. 1 on the question of area, *dehors* the Orders passed by this Court dismissing the Writ of Lok Housing filed against the Deemed Conveyance Order dated 21st March, 2017. This is in view of the Competent Authority while exercising jurisdiction under Section 11 of MOFA was concerned primarily with *prima-facie* entitlement of the society and did not adjudicate upon disputed title involving complex factual questions, which required detailed evidence and for which the predecessor-in-

interest of Defendant No. 1 had the liberty to file a civil Suit to establish right, title and interest in relation to the larger property and such Suit would be decided on its own merits, without being influenced by the observations made in the Deemed Conveyance Order.

82. Mr. Kumbhakoni has submitted that the balance of convenience is also in favour of Defendant No. 1. Pursuant to the MoU dated 29th April, 2011 and Joint Venture Agreement dated 29th April, 2011, the Defendant No. 1 has taken steps for redevelopment including putting up its board. Based on these agreements, Defendant No. 1 obtained Commencement Certificate dated 10th January, 2017. Thereafter, Agreement of Assignment of Development Rights dated 29th March, 2018 was signed by Lok Housing in favour of Defendant No. 1. The Development work had started after grant of Commencement Certificate in 2016, which was paused due to stop work notice. Excavation and shore piling work has been done after withdrawal of stop work notice. The Defendant No. 1 has invested a sum of INR 12 crores on the project. Multiple individuals had also made claims in respect of various flats in Building No. C5 in the communication dated 1st February, 2010 received from Insolvency

Professional. Lok Housing was entitled to 25% of constructed area under the assignment agreement in which the said individuals may claim. Without accepting these claims, these individuals may be adversely affected.

83. Mr. Kumbhakoni has accordingly submitted that the Interim Application requires to be dismissed in view of no *prima facie* case being made out and balance of convenience also being against the Plaintiff.

84. Having considered the submissions, the issue that arises for determination is whether the Defendant No.1 – Developer has exhausted the development potential of the land as disclosed to the flat purchasers at the time of the execution of the flat purchase agreements and is now seeking to utilize more FSI on the subject plot on account of an increase in FSI due to change in law, contrary to MOFA.

85. It is the Plaintiff's case that the Developer had exhausted the development potential of Building No.5 and of the entire layout. That once the Developer had exhausted the development potential of the said land, no further construction is permissible without the

informed written consent of 100% of the flat purchasers. The Plaintiff has based its case on the disclosures made by the Developer of the 1995 layout plan to the flat purchasers while executing the flat purchase agreements.

86. It is pertinent to note that in the flat purchase agreements executed between the Developer and the flat purchasers / members of the Plaintiff – Society, the 1993 layout plan has been specifically mentioned. Admittedly, the 1995 layout plan has neither been referred to nor annexed to the flat purchase agreements. The only reliance of the Plaintiff in support of its contention that the revised 1995 plan was disclosed by the Developer to the members of the Plaintiff – Society at the time of execution of the flat purchase agreements is an Affidavit of Mr. Mahendra Kumar Prabhashankar Bhatt - flat purchaser. This overlooks the fact that in Clause 1 of the flat purchase agreements, it is expressly mentioned that the layout plans and specification i.e. the 1993 layout plan were kept for inspection at the site and office of the Developer. It is nowhere the Plaintiff's case that the Plaintiff had sought/asked for the 1993 layout plan and that the same was not given / “shown”. Thus, at this *prima facie* stage, on a balance of “preponderance of

probabilities”, it can only result in one conclusion that the 1993 layout plan was not only “disclosed to the Plaintiff”, but also was “shown” to the Plaintiff.

87. Further, it is evident from the 1993 layout plan, of which I have had the benefit of perusing, that Building Nos.4 and 5 are shown as two “identical” buildings, like mirror images, with total 8 Wings, i.e. 4 Wings each which were to be constructed. I have also had the benefit of perusing the plan annexed to the flat purchase agreements and from which it is evident that the exact design and location of Building Nos. 4 and 5 is “shown” on the plan. In my *prima facie* view Building Nos.4 and 5 have been disclosed to the members of the Plaintiff - Society and which buildings were “identical” with 4 Wings, having 16 floors each. It is an admitted position that only 3 Wings of Building No.5 have been constructed. The Defendant No.1 - Developer has proposed completion of Building No.5 by completing the construction of the balance 4th Wing i.e. Wing C5 with 16 floors.

88. I find much merit in the submissions on behalf of the Defendant No.1 - Developer that the Developer is entitled to develop in a phase wise manner, the scheme which includes Wing C5 of

Building No.5 which has been disclosed to the flat purchasers. In the flat purchase agreements, certain clauses are relevant to reproduce as under:

“1. The Developers are constructing various buildings in the said complex known as “Lok Everest” as per the layout and building plans sanctioned by the Bombay Municipal Corporation. The said plans and specifications have been kept for inspection at the site and also at the office of the Developers, which the Purchaser(s) have seen and approved. It is hereby agreed that the Developers shall be entitled to make such variations or amendments as may be required to be done from time to time by the Bombay Municipal Corporation or any other local authorities or Government body and the Purchaser(s) shall not be entitled to raise any objection on account of such variation or amendment provided that the Developers shall obtain prior consent in writing from the Purchaser(s) in respect of such variations or modification which may adversely affect the premises agreed to be furnished by the Purchaser(s)

....

16. Nothing contained in this Agreement is intended to be nor shall be construed as a grant, demise or assignment in law of the said premises or

of the said plot and Building or any part thereof. The Purchaser(s) shall have no claim save and except in respect of the premises hereby agreed to be sold to him and all open spaces, parking spaces, recreation spaces etc. will remain the property of the Developers until the said land and Building is transferred to the Society as hereinafter mentioned.

....

20. *The Developers shall have a right to make additions, alterations, to raise additional storeys or structures at any time as may be permitted by Municipal Corporation of Bombay and such additions, alterations and additional structures or storeys shall be the sole property of the Developers who shall be entitled to deal with or dispose it of in any manner that they may deem fit and the Purchaser(s) hereby consents to the same. The Purchaser(s) hereby agrees that he/she/they will give all necessary facilities and fully cooperate with the Developers to enable the developers to make any additions and alterations and/or to raise additional storeys or structures in accordance with the plans sanctions or which may hereinafter be sanctioned and the Purchaser(s) hereby further agrees even after being admitted as a member of the said Society, he will consent to the Society giving to the Developers full facility,*

assistance and cooperation to enable the Developers to make the said additions and alterations and/or to raise additional storeys or structures complete and fit for occupation in all respects and for the aforesaid purpose the Developers shall be entitled to utilise and/or make connection from all water pipe-lines and storage tanks, sewerage and draining pipe-lines, electric cables and electric lines and other convenience and amenities to the said additional storeys or structures which may be constructed by the Developers and the Purchaser(s) hereby consents to the same, and he/she/they shall not raise any objection whatsoever.

...

25. *The Developers, shall after the construction of the said Building is completed in all respects and after the Occupation Certificate is granted by the Bombay Municipal Corporation, get the Purchaser (s) admitted as member of the Co-operative Society, which may be formed by the Purchaser(s) of the different premises of the said Building subject, however, that the Developers shall be entitled to form the said Co-operative Society of an individual or of a group of buildings in particular sector. The said Co-operative Society shall then be entitled to look after and manage the affairs of the said building. The*

Conveyance of the said plot and the Buildings standing thereon shall be executed or caused to be executed by the Developers in favour of such Society only after completion of the entire scheme, namely "LOK EVEREST".

...

28. *The Purchaser(s) is/are aware that the plot on which the said Building is constructed, forms a part of the larger property which is more particularly described in the first schedule hereunder written. The Purchaser(s) is/are also aware that he said plot is a part of the entire layout which includes staff quarter buildings as well as the buildings at the disposal of the Developers known as "LOK EVEREST". The Developers shall be entitled either to form and register a cooperative society of all the buildings in the layout or to form a Cooperative Society of each individual building. The discretion shall solely lie with the Developers and the Purchaser(s) shall have no objection of whatsoever nature in respect of the same. In view of the said entire scheme being a large property, the individual Cooperative Societies in the said scheme shall not be entitled to any title deeds. The title deeds shall be handed over to the apex body of all the cooperative societies in the said scheme after the completion of the entire scheme "LOK EVEREST" and after the execution of the*

Conveyance/s in respect of the said property.

29. The Developers hereby declare that the Floor Area Ratio (Floor Space Index) available in respect of the said entire land is as per the FSI statement given in the plans sanctioned by the Bombay Municipal Corporation (BMC) and that no part of the said Floor Space Index has been utilized by the Developers elsewhere for any purpose whatsoever. In case the said Floor Space Index has been utilized by the Developers elsewhere, then the Developers shall furnish to the Purchaser(s) all the detailed particulars in respect of such utilization of Floor Space Index by them. In case while developing the said land the Developers have utilized any Floor Space Index of any other land or property by way of Transferable Development Rights (TDR), then the particulars of such floor space index shall be disclosed by the Developers to the Purchaser(s). The residual F.A.R (F.S.I) in the plot of the layout not consumed will be available to the Developers till the completion of the scheme and registration of the Societies. Whereas after the registration of all Societies, the residual F.A.R (F.S.I) in “Lok Everest” complex, if any shall be available to the respective Societies or the apex body.

...

32. The purchaser(s) is/are aware that the said property more particularly described in the First Schedule hereunder written is divided by the Developers into various smaller plots for the effective development of the said property consisting of various buildings in the layout. The purchaser is also aware that the Developers shall be consuming the full potential of F.S.I. in relation to the total area of the said entire property as permissible under the relevant D.C. Rules while constructing the said building on the basis of the approved, single layout. It has also been brought to the notice of the Purchaser(s) that the FSI consumed in the said building has no relation with the area of the plot on which the said building is constructed. It is abundantly made clear to the Purchaser(s) that none of the plots on which the said buildings are constructed shall be entitled to additional benefits of FSI in lieu of the open spaces, internal road, garden and/or appurtenant to the said building as the FSI of the entire property has been utilized fully by the Developers irrespective of the size or height or floor space consumed by the individual buildings. As far as possible the Developers may cause to form a Co-operative Society of an individual building but, however, it shall be at the discretion of the Developers to form a Society of more than one building or all the buildings in a particular sector. The Conveyance shall accordingly be executed in favour

of such Society or Societies. In view of what is stated hereinabove it is hereby agreed that none of the purchasers and none of the Societies so formed shall claim any proportionate benefit of FSI in respect of their individual buildings, nor shall they be entitled to raise objection for the said imbalance in the distribution/consumption of FSI, interse between Lok Everest and Staff Quarters Buildings.”

(Emphasis Supplied)

89. The extracted clauses of the flat purchase agreement makes it clear that the FSI in the plot of the layout not consumed will be available to the Developers till the completion of the scheme and registration of the societies. Further, it is provided that the Developers shall be consuming the full potential of FSI in relation to the total area of the entire property as permissible under relevant DC Rules while constructing the said buildings on the basis of the approved, single layout itself. The purchasers shall not have any claim save and except in respect of the premises agreed to be sold to them and all open spaces, parking spaces, recreation spaces, etc. will remain the property of the Developers until the said land and building is transferred to the Society as mentioned therein.

90. It is an admitted position that additional FSI of 33% was added to DCR 1991 by amendment vide a Notification No.TBP/4308/776/CR127/2008/UD-11 dated 24th October, 2011. The Plaintiff has also admitted that this additional FSI became available after construction of 3 Wings of Building No.5. Under the aforementioned clauses of the flat purchase agreements the development potentiality on account of 33% FSI under change to DCR 1991 belongs to Defendant No.1 – Developer as the registration of Building No.5 was on 31st August, 2015. It is pertinent to refer to Clause 7 of the said Notification dated 24th October, 2011 which states that “any disclosure made for use of TDR/FSI, while making agreements with purchasers under MOFA Act shall be held valid for use of 0.33 FSI”.

91. It has been held in the Judgment of this Court in ***Krishna Constructions (supra)*** that the issue of full potential of the project and developability, and informed consent of land purchasers cannot be decided in a straitjacket formula as these issues depend on the facts of each case. The Judgments of this Court in ***Lakewood Developers (supra)***; ***Dosti Cooperation (supra)*** and ***Malad Kokil (supra)*** have been distinguished in the said Judgment. In ***Lakewood***

Developers (supra) and Dosti Cooperation (supra), the construction disclosed to the flat purchasers had been completed and in *Malad Kokil (supra)*, the construction was not done in accordance with the disclosed layout.

92. An attempt has been made on behalf of the Plaintiff to distinguish the said judgment, on the ground that the Developer in that case had terminated the flat purchase agreement with the only flat purchaser who filed a Suit, which was not challenged by the said flat purchaser. Further, the said case had not considered the Judgment of this Court in *Sheth Developers (supra)*, on duty of the Developer to disclose the development potential of the land. I find that the distinguishing of the said Judgment on this ground is misplaced as the ratio of the Judgment is that the issue of full potential of developability and informed consent of the flat purchasers cannot be decided in a straitjacket formula as these issues depend on the facts of each case. The further development cannot in any manner be interfered with, at the behest of the flat purchasers who have informed consent as contemplated under Section 7 of MOFA and where the Developer has been held to comply with the requirement of true and full disclosure, as contemplated under

Section 3 of MOFA.

93. In *Zircon Venture Cooperative Housing Society Ltd. (supra)* which has been relied upon by Defendant No.1, this Court had considered a similar case where the flat purchasers of the society had not mentioned in the Plaint that the original plan of 2005 had been disclosed to them, which expressly mentioned that there were 12 Buildings contemplated in the said plan. Ultimately 9 Buildings had been constructed. The flat purchasers had relied upon a subsequent revised plan to contend that in the revised plan, the proposed construction of the 10th building was done where the said plan indicated closed car parking space and that FSI had been consumed in constructing the 9 Buildings. This Court had considered the fact that there was a reference to the original 2005 plan in the flat purchase agreements which indicated the 10th Building and therefore, *prima facie* held that there had been a full and true disclosure of the construction of the 12 Buildings and no further consent was required for putting up the said 10th Building.

94. I do not find merit in the attempt made on behalf of the Plaintiff to distinguish this Judgment on the ground that it had been

decided before the *Lakeview Developers (supra)* and it did not have the benefit of this binding decision. In the said Judgment, it has been held that what is required to be seen is whether the Developer intends on making “drastic change” to that disclosed to the flat purchasers. It is contended by the Plaintiff that the Developer in the present case is proposing to utilize 14,233.96 square meters to construct 3 Wings, each with 22 floors and thereby adding 265 tenements to what was allegedly disclosed to the flat purchasers and this certainly is a drastic change. It is pertinent to note that during the course of arguments, Mr. Kumbhakoni for the Defendant No. 1 has suggested that Defendant No. 1 will only construct one building of 16 floors as Wing C5 and not 3 Wings of 22 floors as per the 2019 plan. This concession on behalf of Defendant No. 1 being in consonance with the 1993 sanctioned layout plan is entirely reasonable. It is not contrary to MOFA as sought to be contended by the Plaintiff.

95. It is evident from the documents on record that Wing C5 would have 16 floors and these documents include the no objection letter dated 30th October, 1993 issued by the Chief Fire Officer which the Plaintiff has itself produced; the parking layout dated 27th

January, 1995 which the Plaintiff itself has produced and the layout plan dated 19th April, 1997. Further, the joint venture agreement dated 29th April 2011 at recital F states that Building Nos. 4 and 5 were being constructed, being 8 buildings of 16 floors each. The joint venture agreement signed in 2016 between Lok Housing and Defendant No. 1 states in recital 1 that Building Nos. 4 and 5 comprises of 8 Buildings having 16 floors each. This is also mentioned in the agreement of assignment of development rights dated 29th March 2018 signed by Lok Housing in favour of Defendant No. 1 at recital 1 viz. that Building Nos.4 and 5 comprise of 8 buildings having 16 floors, of which 7 buildings were completed. Thus, at this *prima facie* stage, the Plaintiff has been aware of Building Nos. 4 and 5 comprising 8 buildings having 16 floors each and out of which 7 buildings have been completed and the remaining building being Wing C5 in Building No.5 also having 16 floors is to be completed.

96. Further, it is not the Plaintiff's contention that the garden, swimming pool and club house would be affected by construction of Wing C5, if the same was constructed in accordance with the 1993 layout plan.

97. There have been multiple revisions to the 1993 sanctioned layout plan on 6th August 1994, 5th April 1995, 9th October 1995, 20th May 2000, 10th March 2003, 12th January 2006 and 1st November 2007 which have led to increase in number of buildings being constructed, which were not part of these plans. In the 1993 layout plan only 5 buildings were provided. The 1995 IOD plan referred to only 7 buildings. In view of the multiple revisions to the sanctioned plans, there are 10 societies in the layout, excluding the Plaintiff's society (Building No.4) and Lok Mansarovar Cooperative Society Limited (3 Wings of Building No.5) covering 14 Buildings in the current layout. This indicates that the Buildings constructed are more than that were mentioned in the 1993 layout plan or the 1995 IOD plan.

98. The Plaintiff has at no point of time raised any objection to there being a deviation in relation to the disclosure of construction of Buildings that had not been disclosed in the 1993 or 1995 plan. Building No.8 was originally planned with 2 Wings only i.e. L1 and L2, and this was subsequently amended and now comprises of 7 Wings consisting of L1 to L7 which have been constructed. It is pertinent to note that even in respect of Building No.5, although it

was the contention of the Plaintiff that the FSI of 22,807.89 square meters for 4 Wings of 12 floors, had been exhausted by the Developer in constructing 3 Wings of 16 floors plus stilt and podium. The Building No.5 with 3 Wings of 16 floors had admittedly been completed in 2008. No objection had been raised by the Plaintiff for deviation from the 1995 IOD plan in relation thereto.

99. It has been held by this Court in *Chetan D. Shelke (supra)*, relied upon by Defendant No.1 that where there has been various modification / amendments to the original sanction plan and at no point of time did the flat purchasers file their objections nor resist the amendments to the original sanction plan, the Court before granting injunction, would consider the conduct of the party as a relevant factor to determine whether injunction ought to be refused. It has been held in that case that the flat purchasers had approached the Court after gross delay as there had been 8 revisions of the original sanction plan, which were in public domain and the fact that the flat purchasers had not raised any objections to any of the revisions was a strong mitigating factor.

100. I do not find merit in the attempt made on behalf of the

Plaintiff to distinguish this Judgment on the ground that in the present case it was only in 2019, that the Developers sought to construct more than what was disclosed to the flat purchasers in the 1995 plan by *inter alia* adding 14233.96 square meters to Wing C5. This is on the misconceived premise that the 1995 plan was the plan shown to the Plaintiff at the time of executing the flat purchase agreements. Further, the only basis for this premise is an Affidavit of a flat purchaser produced by the Plaintiff and which requires to be proved by evidence to be substantiated in trial and not at this *prima facie* stage.

101. The flat purchase agreements provide that the layout was being constructed as a scheme in a phase wise manner and that all FSI belongs to the Developer until completion of the scheme by construction of Wing C5 with 16 floors as per the 1993 layout plan disclosed to the flat purchasers under the flat purchase agreements. It has been held in *Sheth Developers (supra)* that clauses in flat purchase agreements that provide that formation of the society and conveyance taking place after the entire property was developed or full payment was received was not contrary to Sections 10 and 11 of MOFA.

102. The Plaintiff also relied upon *Sheth Developers (supra)* to contend that in that case the Developer had disclosed development potential of the land as being 6,00,000 square feet in the flat purchase agreements themselves. They have contended that in the instant case the Developer had not disclosed the development potential of the land in the flat purchase agreement and which was only revealed in the 1995 sanctioned plan. It is their contention that this development potential has admittedly been exhausted by the Developer. Accordingly no further construction is permissible as per the law laid down in *Sheth Developers (supra)*. I find this contention misconceived in view of the fact that the 1993 sanctioned layout plan had revealed the development potential of the said land including the construction of Building No.5 which included Wing C5 and Building No.5 was a mirror image of Building No. 4.

103. In view of the layout being constructed as a scheme in a phase wise manner, including construction of Wing C5 with 16 floors, until completion of the scheme and construction of Wing C5 with 16 floors, the FSI would belong to the Developer. This would include the additional FSI accruing to the Developer in 2011 as the construction of Wing C5 of Building No.5 had not been completed as per the 1993

layout plan disclosed and registration of Building No.5 was on 31st April, 2015.

104. With regard to the report of M/s Nadkarni & Co. relied upon by the Plaintiff, the report has proceeded on the premise that the 1995 layout plan had been disclosed to the flat purchasers i.e. members of the Plaintiff - Society when the flat purchase agreements had been executed. Although the Defendant No.1 had not produced the report of any expert of its own to counter the report of M/s Nadkarni & Co., in view of the report being based on the 1995 layout plan without considering the 1993 layout plan which, in my *prima facie* view, had been disclosed to the flat purchasers, the findings in the report cannot be accepted at this stage. Further, in view of the concession which has been made by Mr. Kumbhakoni on behalf of Defendant No.1 that instead of constructing three Wings (A, B, C) each comprising stilt plus 22 upper floors as Wing C5 of Building No.5 as per the 2019 Plan, there shall be construction of only one building of 16 floors at the interim stage in consonance with the 1993 layout plan, this concession deserves acceptance.

105. The Plaintiff has sought to rely upon an Order dated

26th March 2025 passed by the learned Single Judge of this Court in Writ Petition no. 6418 of 2017, wherein it is observed that the Developer has unilaterally revised the sanctioned plan and introduced a fourth building and that the Developer has consumed the entire permissible FSI under the Development Control Regulations and in spite of which revised the layout unilaterally. These findings in my view, is in the context of the competent authority exercising jurisdiction under Section 11 of MOFA in granting deemed conveyance. There remains adjudication of disputed title which involves complex factual issues which have rightly not been gone into by the learned Single Judge whilst dismissing the Writ Petition of Lok Housing filed against the deemed conveyance Order dated 21st March, 2017. This would be a matter of trial in the Suit. Having arrived at a *prima facie* finding that the Developer can utilize the additional FSI which became available by amendment to DCR 1991 vide a Notification dated 24th October, 2011 as the phase wise construction of proposed Wing C5 of 16 floors is yet to be carried out as disclosed to the flat purchasers, the observations made in deemed conveyance Order dated 21st March, 2017 cannot come in the way of these *prima facie* findings.

106. I find that the balance of convenience is also in favour of the Defendant No.1 as Defendant No.1 has pursuant to the agreements entered into including the joint venture agreement dated 29th April 2011 taken steps for redevelopment. Defendant No.1 – Developer has put up its board at the site of Wing C5 i.e. after the assignment of the agreement the board in the name of joint venture had changed to the Developer. In spite of which no steps have been taken by the Plaintiff until 2019 when Defendant No.1 submitted new plans for development. Further, the Defendant No.1 has based on the agreements including joint venture agreement executed in 2016 obtained commencement certificate dated 10th January 2017. Thereafter the agreement of assignment of development rights has been executed on 29th March 2018 by Lok Housing in favour of Defendant No.1.

107. Development work started after grant of Commencement Certificate in 2016 which was paused due to stop work notice. The excavation and shore piling work has been done after withdrawal of stop work notice. The Defendant No.1 is stated to have invested a sum of INR 12 crores on the project, a break up of which is mentioned in Paragraph 11 of Defendant No.1's reply dated 18th

December 2019. There are multiple individuals who have made claims in respect to various flats in Wing C5 in communication dated 1st February 2010 received from the Insolvency Professional. The Lok Housing was entitled to 25 percent of the constructed area under the assignment agreement in which the said individuals may claim. Thus, without accepting these claims, the individuals may be adversely affected.

108. In view of the delay in approaching this Court, considering that the construction had begun after the issuance of the Commencement Certificate on 10th January, 2017, coupled with the balance of convenience being in favour of the Defendant No.1 and no *prima facie* case being made out, the present Interim Application requires to be dismissed.

109. Accordingly, the present Interim Application is dismissed. The statement of Defendant No.1 that no further activity would be conducted on site recorded in Order dated 5th February, 2020 passed by this Court which has continued till today is vacated. In so doing I accept the concession / statement made by Mr. Kumbhakoni on instructions of Defendant No.1 that Wing C5 to be constructed by

Defendant No.1 shall comprise of one Building of 16 floors at the interim stage. The Defendant No.1 shall accordingly not construct Wing C5 of Building No.5 comprising of 3 Wings and 22 floors as per the 2019 plan, but a single Building of 16 floors as per their statement which is accepted, pending the hearing and final disposal of the captioned Suit.

110. The Interim Application No.308 of 2019 is accordingly disposed of.

111. The Interim Application No. 2718 of 2020 filed by the Defendant No.1 is also disposed of by this Judgment and Order.

[R.I. CHAGLA, J.]

112. After pronouncement of this Judgment and Order, Dr. Chandrachud, learned Counsel appearing for the Plaintiff has applied for continuation of the statement of Defendant No.1 that no further activity will be conducted on the site which has been recorded in the Order dated 5th February, 2020 passed by this Court, for a period of six weeks from today.

113. Although Mr. Narichania, learned Counsel for Defendant No.1 has opposed the continuation of the statement, considering that the statement of Defendant No.1 has been in operation from 5th February 2020, there shall be no further activity conducted on the site for a period of four weeks from today.

[R.I. CHAGLA, J.]