Shephali

**REPORTABLE**

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY

## ORDINARY ORIGINAL CIVIL JURISDICTION

## WRIT PETITION NO. 180 OF 2018

**Marathon Era Co-operative Housing Society Ltd,**
A Co-operative Society registered, having Registration No. MUM/WGS/HSG/TC/ 8936/09, 10/2/2010, having office at C.S. No. 2/142, Veer Santaji Lane, Opp. GK Marg, Lower Parel, Mumbai 400 013 **...Petitioner**

**~ versus ~**



**The Competent Authority & District Dy. Registrar, Co-operative Societies,** Mumbai City (1) having his Office at 6th Floor, Malhotra House, Op. G.P.O., Fort, Mumbai 400 001.

**Marathon Next Gen Realty Limited,** (formerly known as Marathon Next Gen Realty & Textiles Limited) having its registered office AT Marathon Max, 3rd Floor, Mulund-Goregaon Link Road, Mumbai (West), Mumbai 400 080

**Marathon Realty Pvt Limited,**
(formerly known as Marathon Realty Limited) having its registered office At Marathon Max, 3Floor, Mulund-

Goregaon Link Road, Mumbai (West), Mumbai 400 080

**Maplewoodd Trading Pvt Ltd,**
511 Embassy Centre, Nariman Point, Mumbai 400 021

**Innova Co-operative Housing Society,** Registration No. MUM/WGS/ GNL/O/ 8750/ year 2016, having office at C.S. No. 2/142, Veer Santaji Lane, Op. G. K. Marg, Lower Parel, Mumbai 400 013.

**Municipal Corporation of Grater Mumbai,** Mahanagar Palika Marg, Mumbai 400 001

**... Respondents**

**Appearances**

| | |
|---|---|
| **FOR THE PETITIONER** | **Mr DJ Khambata,** ***Senior Advocate***, with CS Balsara, Ali Antulay, NH Vakil & Suzan Vakil, i/b Mulla & Mulla & Craigie, Blunt & Caroe |
| **FOR RESPONDENTS NOS 2 AND 3** | **Mr Pravin Samdani,** ***Senior Advocate***, with Karl Tamboly, Bindi Dave, Raghor Gupta & Kashish Mainkar, i/b Wadia Ghandy & Co |
| **FOR RESPONDENT NO 5** | **Mr Vivek Kantawala,** with Amey Patil, & Shanay Bafna, i/b M/s Vivek Kantawala & Co. |
| **FOR RESPONDENT NO 6, MCGM** | **Mr BM Chatterjee,** ***Senior Advocate*****,** with Pooja Yadav, for MCGM |

**ALONG WITH**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 295 OF 2015**

**Gulmohar Lokmilan Co-operative Housing Society Limited,** a registered Co-operative Housing Society, having its registered office at Chandivali Farm Road, Near Powai Police Station, Opp. HDFC Bank, Chandivali (Powai), Andheri (Est), Mumbai 400 072.

**The Secretary, Gulmohar Lokmilan Co-operative Housing Society Limited,** a registered Co-operative Housing Society, having its registered office at Chandivali Farm Road, Near Powai Police Station, Opp. HDFC Bank, Chandivali (Powai), Andheri (Est), Mumbai 400 072.

**...Petitioners**

**~ versus ~**

**The Competent Authority,** Appointed under Section 5A of The Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1963, for the Eastern Suburb of Mumbai, having his office at 201, 2nd Floor, Konkan Bhavan, Navi Mumbai 614

**Ekta Lokmilan Co-operative Housing Society Limited,** a registered Co-operative Housing Society, having its registered office at Chandivali Farm Road, Near Powai Police Station, Opp. HDFC Bank, Chandivali (Powai), Andheri (East), Mumbai 400 072.

**Milap Lokmilan Co-operative Housing Society Limited,** a registered Co-operative Housing Society, having its registered office at Chandivali Farm Road, Near Powai Police Station, Opp. HDFC Bank, Chandivali (Powai), Andheri (East), Mumbai 400 072.

**Sangam Lokmilan Co-operative Housing Society Limited,**
a registered Co-operative Housing Society, having its registered office at Chandivali Farm Road, Near Powai Police Station, Opp. HDFC Bank, Chanddivali (Powai), Andheri (East), Mumbai 400 072.

~~**M/s. A.V.J Wires Limited,** Company incorporated and registered under the provisions of the Companies Act, 11956 having its registered office at 8, B.T. Road, Balghona, Kolkata – 700 001 AND Office at – Gupta Bhavan, 1st Floor, Ahmedabad Street, Carnac Bunder, Mumbai 400 009~~

**Municipal Corporation of Grater Mumbai,** Mahanagar Palika Marg, Mumbai 400 001 **...Respondents**

**APPEARANCES**

| | |
|---|---|
| **FOR THE PETITIONER** | **Mr Piyush Raheja**, with Ankita Savani, i/b RVJ Associates |
| **FOR RESPONDENT NO 1, THE STATE** | **Mr YD Patil**, *AGP* for Respondent No. 1 – State in WP/295/2015 |
| **FOR RESPONDENTS NOS 2, 3 & 4** | **Mr Raymond Samuel**, i/b PS Nadar |

**CORAM : G.S.Patel, J.**

**RESERVED ON : 16th April 2024**

**PRONOUNCED ON : 18th April 2024**

**JUDGMENT:**

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# A. OVERVIEW OF THE ISSUES INVOLVED

**1.** In early 2018 the first of these Writ Petitions, Writ Petition No. 180 of 2018 ("**the Marathon Writ Petition**") came before me. The question raised was in regard to what is called a 'Unilateral Deemed Conveyance' under the Provisions of Section 11 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963 ("**MOFA**"). Soon other Writ Petitions with a similar point involved came to be tagged with the Marathon Writ Petition. The hearings continued with several interruptions unfortunately. By this time, of the original clutch of tagged or grouped Petitions, only these two remained — the Marathon Writ Petition and, from the Appellate Side is Civil Writ Petition No. 295 of 2015 ("**the Gulmohar Writ Petition**"). Others were segregated.[1]

**2.** While I deal with both Petitions on merits, having regard to the nature of submissions and arguments presented, I believe it is first necessary to address the question or questions of law that arise. I take this approach because individual facts will not affect statutory interpretation. But in order to appreciate the submissions on statute, I believe it is necessary first to broadly identify as accurately, yet as neutrally as possible, the specific problem.

**3.** MOFA has been held to be a type of welfare legislation, or, at any rate, one meant for the protection of flat purchasers. Among its

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**1** Order dated 1st April 2019 in Original Side Writ Petition No. 2453 of 2018 and Order dated 12th February 2019 in Original Side Writ Petition Nos. 2590 and 2591 of 2016.

provisions in Section 11. As we shall see, this relates entirely to a transfer of title from the 'promoter' to an organisation of persons who take flats. This may be a cooperative society, a company or an association of flat takers or apartment owners. The word 'promoter' is defined in the statute.

**4.** Section 11 of MOFA has what I can only describe as a statutory waterfall mechanism. It first casts a duty on the promoter to transfer title by executing a conveyance. It then prescribes the time within which this is to be done. Should he fail to do so, the Section itself allows the ultimate beneficiaries, i.e., the society, company or association to apply to a designated statutory authority to obtain this conveyance — what is called a Unilateral Deemed Conveyance. What the authority is to do on receipt of such an application is also set out. The prescribed procedure requires the authority to issue a notice and give a hearing.

**5.** MOFA is an Act of 1963. It began to operate in that era. Section 11 was extensively amended nearly 50 years later in 2008. On any reasonable reading of Section 11, and this is a point on which there is no dispute at all, the procedure that it contemplated applied to what is called a single plot development. More accurately, it did not specifically deal with the very different considerations that apply to what is called a 'layout development' undertaken over a long period of time in phases.

**6.** This needs some explanation. The concept of this layout development in phases is relatively recent. As we shall see, this is

perhaps a case of the law falling behind the progress of society. To appreciate the difference, we must return to fundamental concepts in development and in planning law. Our starting point is the undisputed premise that all land holdings have a development potential. This is what gives them value. Some may have more potential than others. That depends on a various factors such as location, topography, zoning and special considerations, but we are not concerned with these restrictions. How much can be built on a plot is determined by what is called the Floor Space Index ("**FSI**") or the Floor Area Ratio ("**FAR**"). This is an arithmetical formula that tells us how much can be built on a particular plot of land. What particular FSI or FAR is applicable is determined by the governing development regulations or the planning statute. There are the mandatory reductions for marginal and other required open spaces. There are other dimensions — sometimes entirely notional or even imaginary, frequently counter-intuitive and often egregiously arbitrary — of what is or is not to be included in a computation of "built up area". Again, this is a nicety that does not immediately concern me on the question of statutory interpretation.

**7.** For the purposes of framing the problem, I will assume that we are dealing with a single empty plot not a more complex issue of demolition of an existing structure, its reconstruction with all its attendant problems of rehousing, let alone the additional complexity of a slum area redevelopment project. The boundaries of such a plot are known. Therefore, its plot area is known. From this, applying the relevant FSI or FAR, its buildability is known. Where, for instance, a plot is of 1000 sq mtrs and the FSI is 1.00, the built up area is 1000 meters. If the FSI is 1.33, then the built up is 1330 sq

mtrs, and if the FSI is 2 the maximum built up area possible is 2000 sq mtrs. The 'footprint' of the building is immaterial and may be dictated by available technology, structural engineering considerations, marginal open space requirements and so on.

**8.** In what I will call a 'pure' MOFA Section 11 scenario, a promoter or developer can build only up to the maximum permissible built up area so computed. His development is coupled with a statutory obligation to convey title to those who take up residential units in the building constructed. For this, there is Section 11's waterfall mechanism.

**9.** The scenario changes radically when we have not a single plot of land, i.e., land with a single land-record identifying number, but a development that is spread out over a large tract of land comprising several or multiple plots. This is increasingly common in and around the city. What comes up on these developments is not a single building, but many of them. There are shared facilities within this entire layout: common roads, shared open spaces, even built recreational facilities such as club houses etc.

**10.** There are two aspects to this kind of multi-structure large layout development. The first is that not all the construction is done at the same time. Obviously, it cannot be. The construction is planned in phases. In fact, even flat sales take place in phases with promoters and developers telling potential flat buyers which phase is currently being undertaken. The second aspect to any such development, and this is crucial, is that the buildability is not

computed on the basis of each plot on individual land record-specific units in the layout. There is an assessment of the maximum buildability of the entire layout taken as a whole. This makes not only the development more complex but also changes the legislative and statutory terrain. These are often what are called as gated communities, almost self-contained townships within the city. They have every amenities from healthcare to roads, power and water supply, open spaces, parks, parking, recreational areas both built and unbuilt, basic schooling and more. These facilities are to be used and shared in common. Within this layout, there will be many residential constructions. Each will have many flats. Each structure may form its own society. Sometimes two or three structures combine to form one society. Uniting all these societies is one federation or apex society, quite literally a society of societies. In the development, and again we will remember that for a theoretical purposes we are looking at a greenfield development, there is, of necessity, a pooling of the FSI, that is to say the maximum permissible built up area, for the entire layout. This is often expressed in terms of square meters or some other unit of measurement. The number is very large. But it is not evenly distributed across the layout. Indeed, this is the essence of a layout development: that while the maximum permissible built up area is known, the internal allocation within the layout is determined by the promoter or developer and is unrelated to any particular land revenue record.

**11.** This makes perfect sense. A clubhouse, or a parking garage or perhaps a low-height commercial complex may consume less built up area then a tall residential tower that is also sited within the same layout. To calculate the so-called 'FSI consumed' by any structure,

this might well become impossible. It would be invariably meaningless. In the case of a very tall residential tower, on what 'plot' could that FSI be computed? Were we to do this, we should probably find that the tower exceeds some theoretical 'permissible FSI' but it actually does not because that built up area is subsumed and included in the built up area and FSI for the layout *as a whole*.

**12.** Thus, there is a breaking of the linkage between the built up area of a structure and its own plot-specific FSI. The built up area that a structure consumes is no longer tied to any particular, defined or known plot area.

**13.** All this built up area is not being consumed at the same time. This brings us immediately to the heart of the problem in these matters. At what point precisely are the flat owners, whether as an association, a company or a society entitled to 'Unilateral Deemed Conveyances'? What would be the subject of that conveyance? It cannot be any particular plot because, as we have seen, there is no identifiable plot that can be tied to the built up area consumed. What would happen to shared or common facilities including roads, open spaces, club houses and so forth? Does such a development fall entirely outside the frame of Section 11? Are flat purchasers not entitled to some conveyance? Are they required to wait until the completion of the entire layout, a time that is wholly uncertain and may extend well into the future for a conveyance? Are they bound to only take a conveyance of the layout as a whole or is there in law a possibility of a partial deemed 'Unilateral Deemed Conveyance'? When presented with an application under Section 11, what is it that the competent authority is supposed to direct should be conveyed?

It cannot be the entire layout because no individual society has title to the whole of it. If that be so, what portion of the layout should be ordered so conveyed?

**14.** These are the matters on which counsel have addressed me and they have taken me through not only provisions of MOFA but subsequent statutes as well. Yet, even after legislative changes, there is a complete lack of statutory clarity in regard to the subject of a 'Unilateral Deemed Conveyance' although, as we shall see, recent development in the statutory regime appears to specifically contemplate such large layout developments.

**15.** There is an additional wrinkle in this fabric. Development regulations change. Sometimes they change very fast. Often these changes allowed for greater buildability than the previous statutory regime. If the applicability development regulation alters before the layout is 'completed' so that the promoter builds even more. Does this mean — or should it mean — that flat purchasers must wait that much longer to receive a conveyance? If this change keeps happening, how long exactly does the law require flat purchasers to bide their time?

**16.** I proceed now to an examination of the statutory provisions and a closer look at the arc of statutory change. I do so with this single focus on 'Unilateral Deemed Conveyance' and I will not concern myself with the very many other dimensions of MOFA-related law such as the requirement for informed consent and so on.

Those are not matters that fall for consideration before me in these cases.

## B. THE FACTS IN THE MARATHON WRIT PETITION

**17.** The property in question lies in the Lower Parel Division. The plot area is roughly 35000 sq mtrs. There are two structures on this plot called Marathon Era and Marathon Innova. The sanctioned layout plan is of 2003. We are concerned only with Marathon Era, a residential complex of four wings. Marathon Innova is supposedly for commercial use. In addition, there is a car parking tower of ground and four floors with a club house on the fifth level and a designated recreation ground.

**18.** On 11th August 2004, the developer, the 3rd Respondent, Marathon Realty entered into agreements for sale with individual residential flat purchasers in Marathon Era. The plot itself was said to be owned by 2nd Respondent, Marathon Next Gen. The agreement for sale had several schedules. The second schedule said that the Marathon Era would be built on a part of the larger plot. An area of 6787.82 sq mtrs was to be used to construct all four wings of Marathon Era. The agreement itself contemplated the formation of a condominium of flat owners. Marathon Realty was to give individual flat purchasers the benefit of utilising amenities on the common areas of the larger plot. A copy of the sanctioned layout plan is attached to each sale agreement. This agreement is also called the 'premises ownership agreement'. Recital (ii) describes

Marathon Next Gen as the owner of what is called 'the larger property'. There is no dispute that the larger property was on land that once belonged to one of Mumbai's now defunct cotton textile mills. Its development was, therefore, governed by Development Control Regulation 58 of the 1991 Development Control Regulations. Recital (vi) contained specific mention of several buildings in the layout and, importantly, that Marathon Next Gen even then had in mind possible amendments to this layout resulting in a possible relocation of 'various areas'. This recital then described the 2003 approved or sanctioned layout with greater particularity. It said, among other things, that there would be recreational area of 1716.90 sq mtrs on a particular portion; another recreational area of 3169.65 sq mtrs above the car park and a commercial building either at the ground or at the elevated levels; and internal roads of 4781.39 sq mtrs (with there waypoints identified), which were to be used by the Marathon Era residents along with other layout occupants. A portion of these roads was reserved for exclusive use by the occupants of Marathon Innova. This was an identified area surrounding the Innova building. Then there was mention of a 7.50 meter width internal road, and open space around the building marked D2 of 1097.70 sq mtrs and an additional 321.37 sq mtrs of open space. The Innova building itself of ground and nine floors was to be built on an area of 4775.88 sq mtrs while the Marathon Era building would, as I have indicated, be built on an area of 6787.82 sq mtrs. Recital (vii) then gave further details of the Marathon Era residential four-wing tower. Recital (xvii) referred to Section 4 of MOFA and clearly said that the premises ownership agreement was MOFA-compliant or as mandated by MOFA. Clause 4 of the

Agreement defined premises to include the flat and associated parking.

**19.** The most important Clauses are 10 and 11. I set these clauses out in their entirety.

> "**Clause 10**: It is expressly agreed that the right of the Purchaser under this Agreement or otherwise is restricted to the said Premises and remaining part of the Larger Property shall be the sole property of the Developer / the Owner. The Purchaser confirms and consents to the Developer surrendering (at an appropriate stage, after completion of the development of the entire project) the Larger Property to the provisions of the Maharashtra Apartment Act, 1970 (**"the Apartment Act"**) and constitute the flats in two wings of the Residential Tower, Era II and III and the car parking spaces in the podium as a condominium of apartments and each of the flat/car-parking as "an apartment".
>
> **Clause 11**: The Purchaser agrees to join in the scheme of condominium of holders whereby the Owner shall surrender the residue of the larger Property admeasuring 27803.72 Square Meters or part thereof, referred to in recital (iii) above, as indicated in red outline on the Plan, Annexure 'A' hereto, and the buildings thereon, including the two wings of the Residential Tower, Era II and III, all the common amenities of the Lay-out as also the common amenities of the Residential Tower, Era I, II, III and IV to the operation of the Apartment Act. The Developer shall after surrendering the Larger Property to the operation of the Apartment Act and at any appropriate stage thereafter execute in favour of the Purchaser a Deed of Apartment **conveying the said Premises and the proportionate share and amenities in the common areas** of the Residential

> Tower, Era I, II, III and IV. As as holder of the apartment, the Purchaser shall be entitled to the benefit of the common Recreational Ground at ground level and on Podium level, **Internal Road** use between points 1-2-3-4-5-6 **to be used jointly** with other occupants/ users of the layout as shown on the plan annexed and club house usage on payment of fees."
>
> (*Emphasis added*)

**20.** Clearly, Clause 10 contained consent by each flat purchaser to the developer surrendering the larger property to the provisions of Maharashtra Apartment Ownership Act, 1970 ("**the Apartments Act**"). This was to be done 'at any appropriate stage after the completion of the entire project'. Clause 11 then seems to have built on Clause 10 by providing that the common areas would also be surrendered to the discipline of the Apartments Act. Each purchaser would get the benefit of the common recreational ground at ground level, podium level, the internal road, club house for joint use with other occupants, etc. We then have Clause 18 which projects a time frame for completion. Each flat purchaser confirmed an understanding that the development being extremely large, its completion would take 'a long time'. There was thus in Clause 18 a no-objection in advance by the purchasers that the Apartments Act scheme would be put into effect only on completion of 'the entire development'.

**21.** This puts the matter within the frame of the question being addressed in this judgment.

**22.** Interestingly, Clause 18 also says that the purchasers had no objection to the developer altering or amending layout of 2003 or altering or amending the sanctioned plan of two wings of the Marathon Era tower. This consent is said to be the consent required under MOFA and dispenses with the requirement of the developer obtaining any further or fresh consent from the flat purchasers. For completeness, Clause 18 is reproduced below.

> "**Clause 18**: The Purchaser confirms that he/they are aware that the development being undertaken by the Developer of the said Property is extremely large and that the completion thereof may take a long time. Accordingly, the Purchaser agrees that he/they have no objection to the Scheme under the Apartment Act, as indicated hereinabove, being put into effect only after completion of the entire development. The Purchaser further confirms that he/they have no objection to the Developer altering or amending the plans sanctioned in respect, inter alia, of the two wings of the Residential Tower, Era II and II vide IOD bearing No. EB/1/GS/A dated 5 January 2004. Accordingly, the Purchaser confirms that the Developer shall be amending and altering the sanctioned plans which will include construction of additional floors above the building presently sanctioned vide IOD dated 5 January 2004. The Purchaser confirms that the consent permitting the Developer to amend the plans sanctioned vide IOD dated 5 January 2004, the Purchaser's consent. It is agreed, confirmed and covenanted by and between the parties hereto that the Developer shall have full right and absolute authority and shall be entitled to, at any time hereafter, change, alter and amend the plans designs elevation inter alia of the two wings of the Residential Tower, Era II and III and the Purchaser does not have any objection in this regard."

**23.** Clause 18 is what one might call an informed consent Clause within the meaning of MOFA requirement. It also seems to indicate that any additional loading of available FSI would be on this subsidiary layout and not elsewhere.

**24.** We are in this matter not concerned with the other development except for the common areas and amenities. Taken together, the scheme of Clauses 10, 11 and 18 is, in Mr Khambata's submission, that the Apartments Act scheme is presently deferred. Clause 18 has a pre-consent or advance consent. Once Clause 18 has been fulfilled, the conveyance requirement of Clause 11 must necessarily follow.[2] The question that confronts Mr Khambata is when can it fairly be said that the Clause 18 completion is done? His submission is that there are, in the building industry and under development regulations two-well defined time-markers for determining this. These are, respectively, the issuance of a Completion Certificate ("**CC**") and the issuance of an Occupation Certificate ("**OC**"). The first speaks to the completion of the construction but this does not necessarily mean that the building is fit for occupation or habitation. There may be other works involved for this purpose such as electrical fittings, water supply, sanitation, ventilation, lifts, etc., apart from internal flat finishing works such as flooring, tiling, painting and so on, which could be individual requirements. His submission is that once this is complete, the provisions of Clause 11 would apply.

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**2** I should also note that Clause 26 has a similar advance consent provision for the larger property or the larger plot but this is unrelated to the Apartments Act scheme and therefore need not be considered further.

**25.** To complete the factual narrative, it seems that pursuant to this understanding regarding amendments to the plans and the layout, in May 2009, the layout plan was amended but without the Petitioner society's approval. This amendment now proposed the construction of a *third* building to be called Marathon Icon on another portion of the plot (called the '**Icon Plot**') with a plinth area of 3895.66 sq mts. It was to have a built up area of 12422.88 sq mtrs. Additional FSI was sought to be included. Further, a portion earlier reserved for surrender to MHADA was de-reserved and substituted by another (slightly larger) plot. In this amended layout plan, which too the MCGM approved, Marathon Era was to have a built up of area 24,900.75 sq mtrs.[3]

**26.** In October 2009 Marathon Next Gen wrote to an ad-hoc committee of the Marathon Era flat purchasers and consented to the formation of a society. It said that it was open to the formation of a condominium or a society at the option of this ad hoc committee. It showed a comparative statement of the respective merits and demerits of the two bodies. Mr Khambata has a submission on this letter to the effect, as I understand it, that it forms some sort of admission because Marathon Next Gen did not say at that time that the society or condominium was to be formed for the limited purpose of managing the day to day affairs of the building or addressing grievance of apartment owners. He submits that Marathon Next Gen took this stand only much later and without justification. I do not believe that this is a sufficient ground in itself to hold in favour of the Petitioners and I will exclude this submission from further consideration.

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**3** In addition, there are constructed areas that are all free of FSI.

**27.** In December 2009, the flat purchasers submitted a proposal for the formation and registration of a society in the name of the present Petitioner. Marathon Next Gen then filed the necessary declaration under the Maharashtra Co-operative Societies Act, 1960, Exhibit "F", page 105. This contained the usual clauses. It had a title certificate. The declaration contained an undertaking to convey the right, title and interest in the property without reservation within the period mentioned in the MOFA agreement within four months from the date of registration of the society Clause 18. The title and area certificate are on record.[4] It certifies that Marathon Next Gen's title to 6787.82 sq mtrs (the area under Marathon Era) was free from encumbrances. The declaration thus contained an unambiguous statement that the proposed or contemplated conveyance was of the four wings of Marathon Era and land of 6787.82 sq mtrs.

**28.** The Petitioner society was registered very shortly thereafter in January 2010 and its registration is without challenge.

**29.** On 25th May 2010, the MCGM issued an OC to the Petitioner society.

**30.** Disputes arose between the parties. They approached one Partho Lahiri for mediation. There are minutes that record the Marathon group's agreement to convey its entire right, title and interest in the property and other common rights to the Petitioner.

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**4** Petition, *pp.* 90-93.

The Petitioner's submission is that the Marathon group has backed out of its commitments.

**31.** On 11th July 2015, the Petitioners obtained a certificate from Architects (M/s Patidar Alliance). This showed that a little over of 56% of the larger property 'would be required' by Marathon Era 'to sustain its built up area'. Whether there is a tenable basis to this argument in the context of a layout development is the issue to be determined. The Petition and its averments in regard to this Patidar Alliance certificate seems to draw a direct one-is-to-one correlation between the built up area of a building in a phased multi-building layout development and the FSI required. As I have noted, in a layout development, this is not only impractical but virtually impossible. The FSI is computed on the entire layout and its internal allocation to any particular construction is unrelated to a specific smaller area. If a smaller area is defined, it is only to show location and to identify the footprint area of the building.

**32.** Indeed, this argument seems to me to be self-destructive. The Petitioner society cannot insist simultaneously on its footprint area of 6787 sq mtrs, its entire built up area of 29000 and then lay claim to a greater portion or slice of the larger property.

**33.** On 30th May 2013, the Petitioner made Section 11 application to the District Deputy Registrar of Cooperative Societies for a 'Unilateral Deemed Conveyance under Section 11 MOFA.[5] On 22nd November 2013 the District Deputy Registrar issued his order[6]

**5** Exhibit "J", *p.* 120.

**6** Exhibit "N, *p.* 146.

and a certificate.[7] This order was challenged in this Court on 18th April 2015. This Court set aside the District Deputy Registrar's order and remanded the matter to him.[8] On 4th July 2016, the Supreme Court disposed of a Special Leave Petition against the High Court order directing the District Deputy Registrar to dispose of the application within 12 weeks.[9]

**34.** In August 2016, the MCGM approved yet another amended plan. This now proposed the construction of Building No.3 with a built up area of 1526.40 sq mtrs using some remaining FSI. This building was sought to be located on a parcel of land identified as plot 'C'.

**35.** In March 2017, the Marathon group amended these plans revising the total built up area of this new Building No. 3 to 9782.24 sq mtrs by appropriating some 8255.84 sq mtrs of FSI. While doing so, the built up area of Marathon Icon was also increased from 12420.88 sq mtrs to 20480.71 sq mtrs. This was achieved by using further FSI.

**36.** On 10th April 2017, the District Deputy Registrar passed the order impugned in this Petition.[10] He now refused or declined to issue a 'Unilateral Deemed Conveyance'. The Petitioners filed this Petition on 2nd November 2017 challenging that order. Shortly after this Petition was filed the MCGM rejected amendments proposed

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**7** Exhibit "O", *p.* 172.

**8** Exhibit "P", *p.* 173

**9** Exhibit "Q", *p.* 196.

**10** Exhibits "R" & "R1", *p.*275.

by the Marathon group. There was a further amendment of 1st February 2018, again amending the areas of Marathon Icon in Building No. 3. The area of Marathon Icon was brought down to 12870.91 and that of Building No.3 reduced to 1018.02 sq mtrs.

## C. MARATHON ERA'S SUBMISSIONS

**37.** Mr Khambata's submissions on behalf of Marathon Era are at some distance from the application that Marathon Era made on 30th May 2013 for a 'Unilateral Deemed Conveyance' under MOFA Section 11. As we have seen, that application sought a conveyance on the basis that Marathon Era was entitled to sufficient ground or plot area to sustain the building's built up area. On Marathon Era's architects' computation, the society was entitled to a conveyance of as much as 56.18% of the total area of the larger property. In his submissions, and quite fairly appreciating the complexity of FSI allocation, Mr Khambata submitted that the 'Unilateral Deeded Conveyance' had to be, *at a minimum*, of the 6787.28 sq mtrs mentioned in the sale agreements, the built up area of Marathon Era being some 24,900.75 sq mtrs;[11] and an undivided share in the common areas and common amenities of the larger property.

**38.** It is not necessary to revisit every clause of the agreement. It is sufficient to note Mr Khambata's submission that Clause 18 set out earlier has no application to the development of the larger

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**11** Also any additional built up area not included in FSI computation.

property but deals only with the development of the sub-plot i.e. that area on which Marathon Era was to be constructed.

**39.** Specifically, the claim is that once Marathon Era received its OC on 25th May 2010, the Marathon group had no right under Clause 18 to develop the Marathon Era building or any of its wings or to change, alter or amend sanctioned plans for its construction, and the Clause 11 scheme for a conveyance had to be given effect. As far as the Petitioners are concerned, therefore, in his submission the property to which Marathon Era is entitled to conveyance has these three elements: that is to say, (i) the plot of 6787.82 sq mtrs, (ii) the built up area and (iii) an undivided interest in the common area.

**40.** He also submits that Marathon Next Gen agreed inter alia by the later agreement with flat purchasers and in its statutory declaration under the Cooperative Societies Act to convey the underlying land of 6787.82 sq mtrs and all four wings of Marathon Era. The statutory declaration was, he says, a modification to the agreement to sell. Together, these constituted the agreement that MOFA demands. Once, therefore, the society was formed and had an OC, the conveyance had to follow. If it was not done voluntarily by the owner, it could be forced by means of 'Unilateral Deemed Conveyance' under Section 11. He submits that the society's entitlement is not only to the building itself — about that there seems to be no dispute — but also of the land beneath it, *and appurtenant to it.* Section 11 itself mandates a conveyance of title in both the land and in the building. As to the common areas, as we have seen, these are defined by the Apartments Act, which specifically contemplates every apartment owner being entitled to a

joint and undivided interest in such common areas and facilities in percentages expressed in the statutory declaration. I have understood this submission to mean, in effect, that the 6787.82 sq mtrs and the built up area of Marathon Era could never have been conveyed to anyone but the Petitioner society. There was no question of any federation or condominium obtaining title to it.

**41.** The question however remains as to how much appurtenant area is to be included in any such 'Unilateral Deemed Conveyance'. The Petitioners, bolstered by their Patidar Alliance certificate, asked for a vast area of the larger property, enough to sustain the built up area consumed. That is clearly untenable and incorrect, for reasons I have already discussed. The claim is essentially one for exclusivity. It is difficult to see how any appurtenant area over and above 6787.82 sq mtrs might legitimately be included in such a conveyance. For one thing, there has to be an objective certainty to any transfer of title in immovable property. Merely saying 'appurtenant area' is far to imprecise to commend itself.

**42.** As to the period within which a conveyance or 'Unilateral Deemed Conveyance' must be executed, we have already seen the Sections of MOFA. There can be no difficulty in accepting the principle that there can be a transfer of an undivided interest in common property. This may be sold, mortgaged or leased without partition.[12] As to the question of whether Section 11 of MOFA continues to apply to multi buildings layout, the discussion above

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**12** See Section 44 of the Transfer of Property Act; and *Konijeti Venkayya & Anr v Thammana Peda Venkata Subbarao*, 1955 SCC OnLine AP 251 : AIR 1957 AP 619 (DB).

will suffice to support the conclusion that Section 11 has not been repealed. The entitlement to a 'Unilateral Deemed Conveyance' must be segregated from a consideration of what that conveyance should contain. Mr Khambata is also correct in saying that the law in this country recognizes dual ownership, that is to say separate ownership of the land as distinct from the ownership of the building that stands on it. The building can be assigned independently of the land beneath it.[13]

**43.** I am also inclined to accept Mr Khambata's argument that there is not available to a developer an infinite amount of FSI. As I have noticed above, in a layout, one needs to delink the FSI consumed in the construction of one of several buildings in a layout from any particular plot area. In other words, the footprint of the building may be small; it may stand on a small portion of land; but it may consume a large FSI because modern engineering allows for very tall structures with a high built up area. Mr Khambata is therefore correct in saying that so much of the layout FSI that has been consumed in the construction of a particular building on that layout cannot be consumed elsewhere and it must be held to have been sold to the purchasers of flats in building so constructed. The right of a co-owner in an undivided land is equivalent to the land that would come to his share on partition. No co-owner can thus construct on an undivided land in such a way as to defeat the rights of the other co-owners.[14]

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**13** *Dr KA Dhairyawan & Ors v JR Thakur & Ors*, 1958 SCC OnLine SC 39 : AIR 1958 SC 789; *Krishnapasuba Rao Kundapur & Anr vs Dattatraya Krishnaji Karani*, AIR 1966 SC 1024.

**14** *Shadi & Anr v Anup Singh*, 1889 SCC OnLine All 36 : (1890) ILR 12 All 436; *I Gouri & Ors v Dr CH Ibrahim & Anr*, 1979 SCC OnLine Ker 198 : AIR

**44.** In *Gangubai D Chaudhari v Sitaram Bhalchandra Sukhthankar*,[15] the Supreme Court held that the co-owners of an undivided plot were only entitled to an FSI amount equivalent to the FSI that each co-owner would get on a subdivision or partition of that property. It follows from the foregoing discussion that it is entirely possible for a building to use a FSI that has no co-relation to its footprint area. It is for this reason that Mr Khambata submits that in fact in a layout where there are multiple buildings but the layout plot itself is undivided, conveyances can be obtained based on the FSI consumed by each building.[16]

**45.** He therefore submits that it is only the Petitioner society that entitled to the FSI used in constructing the four wings of Marathon Era even absent a demarcation of the larger property into smaller sub-plots. There can be no difficulty with the proposition that once the larger layout is complete a conveyance must be executed: *Eternia CHSL & Ors v Lakeview Developers & Ors*.[17]

**46.** Except on the question of additional FSI becoming later available (Section G below), it is not necessary to enter into any larger discussion about the need for a disclosure by the Developer to

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1980 Ker 94; *Israil v Samser Rahman*, 1913 SCC OnLine Cal 238 : (1914) ILR 41 Cal 436 (DB); *Chhedi Lal v Chotey Lal*, 1950 SCC OnLine All 50 : AIR 1951 All 199.

**15** (1983) 4 SCC 31.

**16** *Shree Siddharth Construction Builders and Developers v Shree Saraswati Apartment CHSL*, 2013 SCC OnLine Bom 1364 : (2014) 1 MLJ page 784; *Sushil Samir CHSL vs District Deputy Registrar Co-operative Societies*, 2014 SCC OnLine Bom 139 : (2014) 4 Mh LJ 888.

**17** 2015 SCC OnLine Bom 723 : (2015) 5 Bom CR 680, upheld in *Lakeview Developers & Ors v Eternia CHSL & Ors*, 2015 SCC OnLine Bom 3824.

flat purchaser of a FSI potential of the land or possible future increased in FSI. This aspect is fully covered including in the *Eternia v Lakeview* cases as also in *Madhuvihar CHSL & Ors v Jayantilal Investments & Ors;*[18] *Malad Kokil CHSL & Anr v Modern Construction Co Ltd & Ors*;[19] *Dosti Corporation vs Sea Flama CHSL*.[20]

**47.** This set of submissions evolved after some discussion in court. Mr Khambata submitted as follows:

> "1. The Promoter/ Developer/ Owner of a multi-building layout ("the larger property") shall as soon as the Occupation Certificate (as per Government Resolution No. Misc. 2016/C.No. I/ & R-2 dated 18th September 2017 (it has been clarified that an Occupation Certificate is not a necessary document in order to make an application for deemed conveyance to the Competent Authority) is received in respect of a building constructed on any portion of the larger property and where the provisions of the Real Estate (Regulation and Development) Act 2016 ("**RERA**") do not apply,[21] convey to the company/association/ of flat

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**18** 2010 SCC OnLine Bom 1526 : (2011) 1 Mah LJ 641 : (2010) 6 Bom CR 517.

**19** 2012 SCC OnLine Bom 1310 : (2012) 6 AIR Bom R 257 : (2013) 2 Bom CR 414.

**20** 2016 SCC OnLine Bom 1836 : (2016) 5 Mah LJ 102 : (2016) 5 Bom CR 512.

**21** He submits that RERA is not applicable.

**Definitions under RERA:—**

***Section (2)(zn):***

> "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and

purchasers of that building, subject to any contrary terms of the Agreements for Sale with the flat purchasers:-

a) The land underneath and surrounding the concerned building as provided in the Agreement for Sale (In this case recital (vii) read with the Plan Annexure "A" indicates that the portion of land shown in black hatched lines and defined as "the said Property" admeasures 6787.82 square meters.);

b) The built up area/FSI of the concerned building (Marathon Era building built up area/FSI is 24900.75 square meters.);

c) An equal right to hold, use manage and maintain all the common areas and common amenities of the larger property (entire layout) pending their conveyance as provided by Clauses 4(b).

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includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;

***Section 3(2)(b) of RERA:***

"Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required where the promoter has received completion certificate for a real estate project prior to commencement of this Act;"

***Section 17(1): Transfer of title:***

The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws.

2. A deemed conveyance shall be issued to the company/ association/ society of flat purchasers of that building as provided in Clause 1 above. However, notwithstanding Clause 1 the deemed conveyance will be issued to the company/ association/ society of flat purchasers of that building in any event and even if the Occupation Certificate is not issued within 6 months from the receipt of the Completion Certificate.

3. The application for an Occupation Certificate (in this case the Occupation Certificate has already been granted on 25th May 2010) shall be made by the Promoter/Developer/ Owner within a period of eight weeks of receipt of the Completion Certificate. The MCGM (Respondent No. 6) shall within 6 months of the issue of the Completion Certificate issue the Occupation Certificate in respect of the said building or reject the application therefore, with reasons. The obligations, liabilities and duties of the Promoter/Developer/ Owner in law and under any Agreement for Sale to ensure that the Occupation Certificate is obtained/ granted are not diluted in any way and the Promoter/Developer/ Owner will not be absolved of any of its obligation/liability/duty to get the Occupation Certificate.

4. The Conveyance shall contain:-

a) The right to any benefits or rights arising in respect of the larger property (including additional FSI being made available in any manner in the future) such that these benefits / rights (including additional FSI) will be shared by all the buildings on the larger property in the same proportion that corresponds to the proportion of the land underneath the built up area of each building to the land underneath the total built up area of the larger property;

b) An undertaking to the effect that an equal undivided share in the common areas and common amenities shall on completion of the development of the larger property, be transferred by the Promoter/ Developer/ Owner to a Common Apex Body/ Association of Societies/ Associations wherein all the Societies/ Association of each building will compulsorily be members holding an equal undivided share therein and thereby equally hold, manage and maintain the said areas and amenities.

c) The Promoter /Developer/Owner shall, once the construction of all buildings proposed on eh larger property is complete, convey the common areas and common amenities to a Common Apex Body/ Association of Societies /Association wherein each of the Societies/ Associations in respect of each of the buildings on the larger property are members holding equal undivided shares."

**48.** It is his submission, therefore, that the Competent Authority was entirely incorrect in refusing the 'Unilateral Deemed Conveyance'.

**49.** I am inclined to accept 1(a), (b) and (c) above, but not the rest. There cannot be a binding judgment of this court worded in that omnibus a fashion.

## D. SUBMISSIONS ON BEHALF OF THE CONTESTING RESPONDENT

**50.** Mr Samdani for Marathon (both owner and the developer) based his submissions essentially on the statutory interpretation that I have set out above. He commended the view that Section 11 of MOFA is impliedly repealed and in any case cannot apply to anything other than a single building development. He based his submission on a reading of the Maharashtra Housing (Regulation and Development) Act 2012 ("**MHRD Act**"). In his submission, the MHRD Act impliedly repealed MOFA. This line of argument went on for days.

**51.** But, as it turns out, the repeal provision in the MHRD Act, Section 56, repealing MOFA was never actually notified. It never came into force. There is no question of an implied repeal.

**52.** In any case, this argument will not carry us further because Section 92 of RERA Act specifically repealed the so-called impliedly-repealing MHRD Act. The argument that repealing a repealing act does not revive the repealed first act goes nowhere, because the MHRD Act's repeal provision never came into force to begin with.

**53.** Mr Samdani's submission that RERA impliedly repeals MOFA also cannot be accepted. On the contrary: it could have repealed MOFA, but did not. It did repeal the MHRD Act.

**54.** Multiplying authorities on this aspect serves little purpose.

**55.** On the question of the contents of the conveyance, as I have noted, there is no dispute that society is entitled to a conveyance of the building itself. Mr Samdani's principal objection is to the submission that there must be some appurtenant land also conveyed. As we have seen even the latest iteration of Mr Khambata's submission still includes a demand not only for the land beneath the building, i.e., its footprint, *but also the surrounding land*. That is surely unexceptionable and must be accepted for a simple reason: every built structure is required by development law to have some space kept open around it (for whatever reason or purpose). This is the 'appurtenant land'. It must go with the building and with the footprint land, because no other structure can, so to speak, 'invade' this compulsory open space.

**56.** I am unable to accept Mr Samdani's submission that there can be no conveyance of the footprint land, the actual area mentioned in the sale agreement and the appurtenant land. After all, this much at least is the area the owner and developer agreed to convey and there is neither a cancellation of this agreement nor any statutory prohibition on it.

**57.** As to an undivided equal right to hold manage and maintain the remaining common areas, there can be no quarrel with that either. The result would be in this form, viz., of an individual conveyances of the built up area/FSI, the footprint, the stated plot area and appurtenant land, and an undivided right in the common areas and amenities. The apex society or federation would itself take a conveyance of — that is to say, a title to — these common areas and any other balance FSI left over. It should be clarified that as

regards the common areas and amenities, the conveyance to individual society such as the Petitioner would be the right to use and manage them but the actual *title* to these common lands amenities and common built up areas (garages, club houses etc) would be transferred to and vest in the federation society. None could claim a divisible right in those common areas and amenities which would be for common enjoyment for all.

## E. THE NEED FOR A CONVEYANCE EVEN BEFORE COMPLETION OF THE LAYOUT DEVELOPMENT

**58.** Why this insistence on a conveyance? This is not, in my understanding of it, an application by a society just because there is an entitlement in law. After all, what is a conveyance? It is a transfer of property, and, specifically, land or other immovable property such as a structure so as to pass a marketable title free from reasonable doubt to those who have 'purchased' parts of it. Let us understand the structure of this. A flat purchaser buys only a flat. He does not buy any part of the land or even the footprint of the building. Along with his fellow flat purchasers, he brings forth a distinct legal entity — a collective or cooperative of all flat purchasers with a shared interest. Each owns his own apartment. *Together* they have a shared interest in the common areas of the building and its common facilities but their society, the entity of each they are members, has an undeniable interest and title in the structure as a whole as also in the land beneath in it and in the plot assured in the sale agreement. No individual member can claim exclusive title to that land or even

any particular part of it. But it is a society that can make that claim. This is of importance to flat purchasers because it directly affects that asset value. A vital component of ownership of immovable property is the marketability of its title. An owner must be able to vend that property and to transfer and convey title in that which he owns. Without this, her or his investment is incomplete. She or he does not have sufficient title to pass. This affects the value of the asset. The reason for these applications is thus only this: the desire of members to become owners of that which they paid so handsomely for.

## F. THE IMPUGNED ORDER

**59.** The difficulty in Mr Khambata's way is not the formulation in law but is the nature of the Petitioner's application itself. The application is annexed to the Petition at Exhibit "J" pages 120 to 126. Paragraph 11(i) specifically sought for a conveyance not only of the land of 6787.82 sq mtrs assured in the agreement but also 56.19% of the right, title and interest in the total FSI of the larger plot i.e. 56.19% of the layout plot FSI. This is unsustainable. The same application then sought a conveyance of Marathon Next Gen's *entire* right, title and interest (excluding land rights) in several common facilities such as the tennis court, fifth and sixth floors of the club house exclusively and absolutely. As I have noted this is based solely on the Patidar Alliance's assessment and certificate.[22]

**22** Exhibit "K", *pp.* 127-134.

**60.** In the impugned order dated 10th April 2017,[23] the Competent Authority and District Sub Registrar had before him only this application. He did not have the variation Mr Khambata now proposes. One of the questions raised was whether MOFA itself continue to have applications or whether it was repealed and therefore whether the competent authority would have jurisdiction. The application itself was amended to include this prayer for a conveyance of not only the stated plot area of 6787.82 but also the 56.19% of the total FSI.[24] The competent authority took the view that the sale agreement contained no specific provision for conveyance of the land to this particular society. Leaving aside the questions of any mediated agreement, evidently not binding, what the competent authority had to do was to see whether the application conformed to the agreement and the statute or not. In paragraph 24, the competent authority held that there is no provision of the agreement for the transfer of the sub plot of 6787.82 sq mtrs. He also rejected the submission for the FSI-based calculation of 56.19%, and in my view quite correctly. Finally, the authority said that absent the specific provision for a conveyance of the sub plot, there could be no case made out for the grant of a deemed conveyance. The minutes of the mediation meeting would not assist. It could not therefore be held that the developer had failed to comply with the statutory obligations. Essentially the larger plot was still under a development and therefore this was not a fit case to issue a certificate in favour of the applicant.

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**23** Original in Marathi, Exhibit "R", *pp.* 198-274, accepted translation, Exhibit "R1", *pp.* 275-331.

**24** This was because the Patidar Alliance certificate came later.

**61.** On the application *as it then stood*, I do not see how the competent authority had any option but to hold as he did certainly in regard to the claim for 56.19%. The arguments before him were also on a question of interpretation of statute and of jurisdiction, which he obviously could not have decided.

## G. ADDITIONAL FSI

**62.** There is one potential complication. It is best understood with an illustration. Let us take a layout development, with several plots, but a unified layout development scheme. As we have noted, the overall FSI is computed, and then allotted differentially based on need or requirement (and promise or assurance). A residential tower may get more FSI than a clubhouse or a low-rise shopping complex. But these developments take time. If, before the layout development is completed, the development regime changes and becomes more liberal,[25] the developer now gets additional FSI.

**63.** Both sides discussed Section 7A of MOFA at some length. This is the subject of the cases noted earlier: *Eternia CHSL & Ors v Lakeview Developers & Ors*.[26]

**64.** Except on the question of additional FSI becoming later available (Section G below), it is not necessary to enter into any

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**25** The converse rarely happens and, in any case, will not affect the discussion.

**26** 2015 SCC OnLine Bom 723 : (2015) 5 Bom CR 680, upheld in *Lakeview Developers & Ors v Eternia CHSL & Ors*, 2015 SCC OnLine Bom 3824.

larger discussion about the need for a disclosure by the Developer to flat purchaser of a FSI potential of the land or possible future increased in FSI. This aspect is fully covered including in the *Eternia*, *Madhuvihar*, *Malad Kokil*, and *Dosti Corporation* among them. This needs some explanation.

**65.** A pivotal case was the 1985 decision in *Kalpita Enclave CHSL Ltd v Kiran Builders Pvt Ltd.*[27] This decision by a learned single Judge of this Court *inter alia* interpreted Section 7 of the MOFA prior to its amendment in 1986. The Court held that if the plans shown to the purchaser and on which basis the purchaser took a flat did not show additional proposed construction in future, the consent of the flat purchaser was necessary before any such construction was undertaken, even if the subsequent plans were sanctioned by the local or planning authority, and irrespective of whether that additional sanction was based on a change in the applicable rules or the exercise of some administrative discretion. Section 7 of the MOFA, the learned single Judge held, imposed an

> "an obligation on the promoter to construct the buildings and otherwise develop the property strictly in accordance with the agreements entered into with the flat purchasers and the plans and specifications upon the basis of which the agreement was entered into."

The contravention contemplated in Section 7(1) and Section 7(2) of the MOFA extended to the construction of any additional structure not in the original plans and specifications as approved by the local authority.

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**27** 1985 SCC OnLine Bom 196 : 1986 Mh LJ 110 : (1987) 1 Bom CR 355.

> "Thus if the original plans and specifications on the basis on which the persons were persuaded to purchase the flats disclosed that certain areas will be kept open, it would be a clear contravention of the agreements as well as of law if the promoter proceeds to construct additional structure on those open spaces even with the sanction of the Municipal Corporation."

**66.** This led to the amendment of Section 7 of the MOFA, and the introduction of Section 7A. These now read:

> **7. After plans and Specifications are disclosed no alternations 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 buildings as approved by the local authority as aforesaid, are disclosed or furnished to the person who agrees to take one or more fiats, the promoter shall not make —
>
> (i) any alteration in the structures described therein in respect of the flat or flats which are agreed to be taken, without the previous consent of that person; or
>
> **[(ii) <u>any other alterations {or additions} in the structure of the building {~~or construct any additional structures~~} without the previous consent of all the persons who have agreed to take fiats in such building</u>]**.
>
> (2) ... ...
>
> **7A. Removal of doubt.—**
>
> For the removal of doubt, it is hereby declared that clause (ii) of sub-section (i) 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 had 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 judgment, 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.
>
> (*Emphasis supplied*)

**67.** I must explain how I have reproduced Section 7(1)(ii). The words "or construct any additional structures" were in the unamended section. These were removed by the Maharashtra Amending Act 36 of 1986 following *Kalpita Enclave*. The words "or additions" were added. The whole of Section 7A was added, and it gave retrospective effect to Section 7, nullifying *Kalpita Enclave*, and saying that the amended Section 7(1)(ii) would be deemed to be the section as originally enacted.

**68.** In *Jayantilal Investments v Madhuvihar Co-operative Housing Society & Ors,*[28] the Supreme Court had occasion to consider the MOFA as amended. The matter arose out of an order of this Court in a First Appeal, by which this Court allowed a cooperative society's appeal and dismissed that of the promoter (the appellant before the Supreme Court). This Court directed the promoter to execute a conveyance in favour of the society and restrained further construction on the suit plot. This Court held that the promoter was not entitled to put up further construction on the plot. It appears that the impugned construction in that case was of additional wings. The Supreme Court observed that the purpose of the 1986 amendment to the statute was to remove the basis of the *Kalpita Enclave* decision, and the object of the amendment was to maximise the exploitation of development rights that existed in the land in question. However, the Supreme Court also noticed Section 3 of the MOFA, which imposes a statutory obligation on the promoter to make a "full and true disclosure" of the particulars mentioned in Section 3(2), including the nature, extent and description of common areas and facilities. Further, in Section 4(1-A) of the MOFA, also introduced in 1986, a form of the flat purchase agreement was prescribed, and this form required *inter alia* a declaration of the FSI available in respect of that land. The promoter is also required to disclose that no part of that FSI has been used elsewhere and, if used, particulars of that utilisation are to be set out. Paragraphs 16 to 20 of this decision of the Supreme Court read:

> 16. Therefore, the legislature has sought to regulate the activities of the promoter by retaining Sections 3 and 4 in

**28** (2007) 9 SCC 220.

the Act. It needs to be mentioned at this stage the question which needs to be decided is whether one building with several wings would fall under amended Section 7(1)(ii). Section 7-A basically allows a builder to construct additional building provided the construction forms part of a scheme or a project. That construction has to be in accordance with the layout plan. **That construction cannot exceed the development potentiality of the plot in question. Section 10 of MOFA casts an obligation on the promoter to form a cooperative society of the flat takers as soon as minimum number of persons required to form a society have taken flats.** It further provides that the promoter shall join the society in respect of the flats which are not sold. He has to become a member of the society. He has the right to dispose of the flats in accordance with the provisions of MOFA. Section 11 inter alia provides that a promoter shall take all necessary steps to complete his title and convey the title to the society. He is obliged to execute all relevant documents in accordance with the agreement executed under Section 4 and if no period for execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period. Rule 8 inter alia provides that where a cooperative society is to be constituted, the promoter shall submit an application to the Registrar for registration of the society within four months from the date on which the minimum number of persons required to form such society (60%) have taken flats. Rule 9 provides that if no period for execution of a conveyance is agreed upon, the promoter shall, subject to his right to dispose of the remaining flats, execute the conveyance within four months from the date on which the society is registered.

17. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in

> accordance with the layout plan on the one hand vis-à-vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1-A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. … …
>
> 18. The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the **promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject-matter of the agreement**. **The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of 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.
>
> (*Emphasis supplied*)

**69.** Now the complication in a layout development is that one building may be completed first, with its occupation certificate, but

development may yet be going on elsewhere. Now if the developer, due to a change in the regime, is entitled to additional FSI, what is to happen to the building already completed — and already entitled to a conveyance?

**70.** Two principles emerge. *First*, while additional FSI may be used, it cannot be used in a manner that would reduce the promised or assured facilities and amenities. That is settled law. *Second*, the FSI already used in the completed building cannot be compromised in any way. It cannot be reduced either. Further FSI utilization cannot come at the cost of *either* promises amenities *or* already consumed FSI.

**71.** To illustrate: if a 10,000 sq mt plot has an FSI of 4.00, then 40,000 sq mts may be built. Building A is constructed with 15,000 sq mts — the FSI used from the layout FSI of 4 is 1.5. This cannot be reduced or taken away. The test, surely, must be at the extremity: if the completed building has to be re-built, then it must be allowed to be re-built *at least* to the extent already constructed.

**72.** There is a ticklish problem here of sharing of additional FSI. I need not decide it now, but will only state it. If the development regime changes, and there is additional FSI available *for the whole layout*, does the completed building have a stateable fractional share in the augmented FSI? Can it demand that share as of right, on the basis that it is already an 'owner' with title to the completed building, the land beneath it, the area mentioned in the sale agreement and the appurtenant land?

# H. THE GOVERNMENT RESOLUTION OF 22ND JUNE 2018

**73.** Acknowledging the difficulties in operating the deemed conveyance provisions in MOFA, the Government issued a GR on 22nd June 2018, based on recommendation of a special committee, and superseding all previous GRs. It was intended to 'streamline' the process.

**74.** There is now a four-stage process. Part A deals with the documents required. Part C details the procedure to be adopted. While issuing orders of deemed conveyances, the Competent Authority is to bear in mind and take into consideration identified issues (Clause C(vi) of the GR):

> 1) **On a parcel of land, where there are many buildings and every building has a separate/independent co-operative society and amongst these buildings, if some of the building's construction work is incomplete, then for such Co-operative Society buildings completed buildings Deemed Conveyance should be done in relation to their constructed area of the land area (proportionate area) or ground coverage or plinth area and similarly open area, common service/ facilities, road, on all of these in relation to the constructed area undivided share usage entitlement be given**.
>
> 2) **While making Deemed Conveyance in respect of the buildings in the layout where T.D.R. is utilized, conveyance of such buildings should be made according to plinth and appurtenant area**.
>
> 3) If only one society has made such application for Deemed Conveyance, in a layout when there is more than

one society and other societies are not cooperating in the measurement of the land area, then the District Dy. Registrar, Cooperative Societies or Competent Authority, shall suggest that a registered architect from the panel of the Competent Authority, be appointed, who shall in relation to Applicant Society's building constructed area approved plan, present his report on the Society's land area.

4) **If the developer did not complete the project in expectation of getting additional F.S.I. or T.D.R. in urban area, then in such cases, deemed conveyance of the number of flats proposed as per approved construction plan and such number of flats have already been constructed, then their deemed conveyance should be effected**.

5) On carrying out inspection of the application filed by the society in prescribed form and the documents submitted along with it, if application is fulfilled in all respect, then only the Competent Authority should issue Deemed Conveyance Order and Certificate to the concerned society.

6) While mentioning common easement/amenities in the Deemed Conveyance order, certificate and documents, it should be mentioned therein that the applicant society shall have undivided rights in the common easements/amenities, in proportion to the construction of the building of the applicant society.

(*Emphasis added*)

**75.** Thus, there is now legal basis and sanction for a conveyance of the kind Mr Khambata commends in a layout development. My findings are in consonance with and not in derogation of this GR.

# I. ORDER

**76.** In my view, the correct approach in a matter like this would be to dismiss the Petition, but while doing so to grant the Petitioners leave to file a fresh application to be decided by the competent authority in accordance with law set out in this judgment as mentioned above.

**77.** Prayers (a) and (b) of the Writ Petition cannot be granted and are rejected. Prayers (c) and (d) effectively demand a mandamus to the Competent Authority to decide in a particular manner. Those cannot be granted either. The Petition is dismissed, but the Petitioners are granted leave to file a fresh application to be decided by the competent authority in accordance with law set out in this judgment as mentioned above. That application will be filed by the Petitioner society within 60 days from today. The competent authority will issue notice and grant the hearing as contemplated under Section 11 of MOFA. The competent authority will decide that fresh application entirely on its own merits uninfluenced by any previous orders including the impugned order of 10th April 2017 or any orders that preceded it.

# J. THE GULMOHAR PETITION

**78.** There are four societies involved. The 1st Petitioner, Gulmohar Lokmilan, is one. The other three are Ekta Lokmilan, Milap Lokmilan and Sangam Lokmilan, Respondents Nos. 2, 3 and

4. The 5th Respondent was or is the owner of the land. The 6th Respondent is the Lok Constructions, the developer. The owner entered into an agreement with Lok Constructions on 30th October 1987. The land is at Chandavali, in Taluka Kurla. It is 20195.80 sq mtrs. The developer was put in possession. It submitted building plans at different dates for a phased development. The scheme was called Lokmilan. Phase I was the construction of two buildings of two wings each. These were to be the Sangam, Lokmilan and Milap Lokmilan societies. These are identified as wings A1, A2, A4 and A5. Construction was completed in 1995-1996. Phase II consisted of one building with six wings. This was the Ekta Society, 2nd Respondent. Wing B1 is not complete. Wings B2 to B6 are part of the Ekta Society. Wing B1 and its occupants have stood apart. Lok Constructions claim that Wing B1 is not complete. Phase III was of one building of three wings constructed in 2005. This is the Petitioner, the Gulmohar Lokmilan society. In the plan it is shown as Wings C1, C2 and C3. This phase was complete in 2005. The Petitioner obtained an OC in that year. Lok Constructions did not subdivide the property into sub-plots. All buildings have been developed on a common or single undivided layout.

**79.** The challenge in the Petition is to a 'Unilateral Deemed Conveyance' obtained under an order of 30th October 2014 by which the 1st Respondent, the Competent Authority, ordered a 'Unilateral Deemed Conveyance' in favour of Respondent Nos. 2, 3 and 4 societies. The Respondents' case is that the Petitioner society was not part of the layout but prima facie it is difficult to appreciate that submission.

**80.** The direction in the impugned order cannot be sustained for several reasons. There is a reliance in the order on a private surveyor's plan and the documents annexed to the Petition indicate that there is an attempt to order a conveyance of the society of a plot that was to be handed over to the MCGM.

**81.** The order itself contains virtually no reasoning beyond the mentioning that there is a delay by Lok Constructions in executing the conveyance. The competent authority mentions that 17 years had passed, that there is no balance FSI and therefore there should be a 'Unilateral Deemed Conveyance' as sought.

**82.** What the argument overlooks is the submission that the Petitioner made that there cannot be any objection to Deemed Conveyance in favour of federation of a society but there cannot be a conveyance of the entire plot or the common amenities in favour of the other three societies *to the exclusion of the Petitioner*. Quite clearly, the competent authority failed to appreciate that without arriving at an affirmative findings on sufficient cogent material that the Petitioner society was not a part to the layout, it could not have been excluded from the conveyance. Furthermore, there is no explanation as to how lands already handed over to MCGM could be included in any such conveyance.

**83.** The answer in the Affidavit in Reply at page 158 para 7 is unsatisfactory. If there is a dispute between the society inter se as to there so called calculations, then evidently there can be no 'Unilateral Deemed Conveyance'. None of the forgoing

considerations have been kept in mind including how a conveyance could operate for a common area and shared facilities.

**84.** The Writ Petition will have to be allowed but with the some directions. The impugned order is quashed and set aside. The matter is remanded to Competent Authority for a fresh decision uninfluenced by any previous orders including the impugned order. The Petitioner society will also be entitled to file a separate application if it so desires. The Competent Authority will decide these applications under the formulation of law as set out above.

**(G.S. PATEL, J.)**