



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.17527 OF 2024

Rose Villa Co-operative Housing Society Limited .... Petitioner

V/S

1. The District Deputy Registrar  
Co-operative Societies Mumbai City (3)
  2. Can Enterprises Private Limited &
  3. Naresh Shah
- ....Respondents

Mr. Shreepad Murthy with Mr. Abhishek Patil *for the Petitioner.*

Mr. Amrut Joshi with Ms. Rucha Jog and Ms. Hemali Dhande *for Respondent No.2.*

Ms. Savina R. Crasto, AGP *for Respondent No.1./State.*

CORAM : SANDEEP V. MARNE, J.  
RESERVED ON: 22 SEPTEMBER 2026  
PRONOUNCED ON: 06 OCTOBER 2026

**J U D G M E N T:**

1. By this Petition, the Petitioner-society has challenged order dated 29 July 2024 passed by the District Deputy Registrar, Co-operative Societies, Mumbai City (3) and Competent Authority (**Competent Authority**) rejecting Application No.8 of 2024 filed seeking certificate of unilateral deemed conveyance in respect of the land and the building. Deemed Conveyance is denied to the Petitioner-society *inter alia* on the grounds that Respondent No.2-developer is undergoing Corporate Insolvency Resolution Process (**CIRP**) and that Respondent No.2 is

entitled to carry out additional construction of 7<sup>th</sup> and 8<sup>th</sup> floors on the building.

2. Briefly stated, facts of the case are that plot of land bearing CTS No.725/A, Survey No.68, Hissa No.1, Survey No.128 (part) and 69A (Part) of Village Ambivali, Taluka Andheri, Mumbai Suburban District was purchased by Respondent No.2 on 8 December 2009. There was existing structure on the plot by name Rose Villa comprising of ground plus six upper floors. Respondent No.2 decided to demolish the old building and to construct a new building in place thereof. Accordingly, Respondent No.2 submitted plans for construction of new building on 9 December 2013. Intimation of Disapproval (**IOD**) was received in respect of the plans for construction of the building of four floors. Later, commencement certificate dated 31 May 2014 was issued by Municipal Corporation of Greater Mumbai. On 30 January 2015, plans were further revised and sanctioned for construction of building upto sixth floor. Accordingly, revised commencement certificate dated 23 February 2015 was issued for building comprising six floors. Respondent No.2 completed construction of the entire building and secured full occupation certificate on 7 September 2016.

3. After procuring occupation certificate in respect of the completed building, Respondent No.2 started selling flats in the building. During 2016-17, Respondent No.2 sold majority of the flats in the building. One flat was sold on 5 June 2018 and one more flat was sold on 20 February 2020. According to Respondent No.2, under flat purchase Agreements

executed under Section 4 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (**MOFA**), Respondent No.2 reserved a right to use additional FSI/TDS for vertical addition to the building. The Agreement also recognized right of Respondent No.2 to obtain/receive setback compensation. Respondent No.2 claims to have secured individual No Objection Certificates (**NOCs**) from each flat purchasers for vertically extending the building by referring to Notification dated 16 November 2016 for use of Transferable Development Rights (**TDR**). In the year 2020, Respondent No.2 secured approval for construction of floor Nos.7 and 8 by paying premium towards consumable FSI etc.

4. CIRP was initiated against Respondent No.2 and by order dated 27 January 2020 passed by the National Company Law Tribunal (**NCLT**) in Company Petition (IB) No.3753/(MB)/2018, a moratorium was imposed and Board of Directors of Respondent No.2 was suspended. By order dated 9 June 2020, a Resolution Professional came to be appointed in respect of Respondent No.2. On 8 July 2020, Commencement Certificate was issued by the Municipal Corporation for construction upto 8<sup>th</sup> floor. On 10 November 2022, Petitioner-society was registered. Challenge raised by Respondent No.2 to registration order was repelled by this Court by order dated 27 February 2024. On 30 April 2022, commencement certificate was issued for proposed two additional floors on existing completed building.

5. In the above background, Petitioner-society filed Application dated 2 January 2024 before the Competent Authority seeking deemed

conveyance of land and building under Section 11(3) of the MOFA. The Resolution Professional appeared on behalf of the Promoter and opposed the Application relying on NOCs issued by individual flat purchasers. The commencement certificate towards vertical extension was revalidated on 24 April 2024. By order dated 29 July 2024, the Competent Authority has dismissed the Application preferred by the Petitioner-society for deemed conveyance. Aggrieved by the order dated 29 July 2024 passed by the Competent Authority, Petitioner-society has filed the present Petition.

6. Mr. Murthy, the learned counsel appearing for Petitioner-society submits that the Competent Authority has erroneously rejected the Application for deemed conveyance filed by the Petitioner-society on account of pendency of CIRP against Respondent No.2. He relies on judgment of this Court in **Darshan Mandir Co-operative Housing Society Limited vs. District Deputy Registrar, Co-operative Societies, Mumbai (4)**<sup>1</sup> holding that mere initiation of CIRP against a promoter does not suspend or extinguish right of the society to secure conveyance of the land and the building.

7. Mr. Murthy further submits that Respondent No.2 is not entitled to carry out any further construction on the existing building as he has fully exhausted the entire development potential sanctioned by the Planning Authority. That NOCs relied upon by Respondent No.2 are nothing but mere blanket consents, which have no existence in the eyes

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<sup>1</sup> Writ Petition No.16318 of 2025, decided on 22 June 2026.

of law. He relies on judgment of this Court in **Dosti Corporation vs. Sea Flama Co-operative Housing Society Limited and Others.**<sup>2</sup> He submits that NOCs state that the flat purchasers had seen the approved plans, which means the plans which were sanctioned as on the date of execution of the NOCs and at that time no plan was sanctioned for vertical extension of the building. That most of the letters are secured from flat purchasers on the same day of execution of Agreement for Sale. That there is absolutely no disclosure of details about additional construction, utilization of FSI, balance FSI potential etc. in the alleged NOCs. That plan subsequently sanctioned in the year 2020 is of little relevance as there is no consent by flat purchasers to the said plan. Mr. Murthy relies on judgment of this Court in **Ariisto Realtors Pvt. Ltd. vs. District Deputy Registrar**<sup>3</sup> in support of his contention that the balance FSI belongs to the society. He submits that Competent Authority cannot go into the issue of consent and in support, he relies on judgment of this Court in **Santoshkumar Motilal Bhansali vs. Competent Authority**<sup>4</sup>. Mr. Murthy submits that construction of the entire six floor building is complete. That there is overhead tank constructed on the building and that there is no scope for putting up two additional floors. Mr. Murthy accordingly prays for setting aside the impugned order and for issuance of direction to the Competent Authority to convey the entire land and the building in favour of the Petitioner society.

8. The Petition is opposed by Mr. Joshi, the learned counsel appearing for Respondent No.2. He submits that the Competent

<sup>2</sup> Appeal from Order No.117 of 2016, decided on 7 April 2016

<sup>3</sup> 2026 SCC OnLine Bom 6344

<sup>4</sup> Writ Petition No.5974 of 2025, decided on 28 January 2026

Authority has rightly dismissed the application of the society, which was clearly premature. Additionally, deemed conveyance cannot be granted in favour of the society in view of the pendency of the CIRP against Respondent No.2. He distinguishes the judgment of this Court in ***Darshan Mandir CHSL*** (supra) contending that the said case involved imposition of moratorium on an assignee. That in the present case, the concept of divesting of title of the Promoter has not taken place since construction of the building is still incomplete. That the society is formed after imposition of moratorium and that therefore there is prior legal incapacity in the facts of the present case. In support, he relies on judgment of the Apex Court in ***Vishnoo Mittal vs. Shakti Trading Company***<sup>5</sup>. That therefore, the application for deemed conveyance cannot be decided in the present case in view of provisions of Section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC).

9. On merits, Mr. Joshi submits that the Petitioner had suppressed NOCs/consent letters executed by flat purchasers. That the developer had started selling the flats after securing the occupancy certificate and had given a clear idea of his intention to put up additional construction by use of TDR. That the case does not involve deliberate delay in construction of building and availing of benefit of additional development potential. That while selling flats itself, the flat purchasers were made aware of the position that additional vertical extension to the building would be effected. That the flat purchasers cannot first execute consent letters and then seek to backtrack from them by branding the

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<sup>5</sup> (2025) 9 SCC 417

same as blanket consent. He submits that the revised plan was submitted before securing consent letters and that the same was disclosed to the flat purchasers. That thus, flat purchasers purchased the flats with full idea that two more floors would be added to the building. He submits that the flat purchasers subsequently sought to withdraw their consent, meaning thereby that the consents were validly given by them. That Respondent No.2 is entitled to carry on further construction on the building in accordance with the revised sanction permission. That Respondent No.2 is willing to convey the land after completion of construction of 7<sup>th</sup> and 8<sup>th</sup> floor. That additional construction partly inures to the benefit of the society as Respondent No.2 would construct common amenities for the society on the 8<sup>th</sup> floor in the form of fitness center and society office.

10. Mr. Joshi relies on judgment of this Court in **Nahalchand Laloochand Pvt. Ltd. and Ors. vs. Shree Panchamurti CHSL**<sup>6</sup> in support of his contention that power of Competent Authority under Section 11 of MOFA is not unfettered and that the same is circumscribed by verification of authenticity of agreements and consents under Section 7 of MOFA. He relies on judgment of this Court in **Satellite Garden I Co-operative Housing Society Limited vs. State of Maharashtra**<sup>7</sup> in support of his contention that where flat purchasers have consented to revised plan, conveyance needs to be made in accordance with the revised plan. He accordingly prays for dismissal of the Petition.

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<sup>6</sup> 2025 SCC OnLine Bom 341

<sup>7</sup> Writ Petition No. 1128 of 2026, decided on 16th September 2026

11. Rival contentions urged on behalf of the parties now fall for my consideration.

12. Petitioner-Society's Application for deemed conveyance is rejected by the Competent Authority essentially on twin grounds of pendency of CIRP against Respondent No. 2 and alleged entitlement of Respondent No.2 to put up additional construction in the building in accordance with revised development permission.

13. I first take up for consideration the issue as to whether mere pendency of CIRP against Respondent No.2 can be a reason for not deciding the application for deemed conveyance by the Competent Authority under Section 11(3) of MOFA. The issue is no more *res integra* and is covered by judgment of this Court in ***Darshan Mandir CHSL*** (supra). After considering the ratio of judgments in ***Anudan Properties Private Limited vs. Mumbai Metropolitan Region, Slum Rehabilitation Authority***<sup>8</sup> and ***Santoshkumar Motilal Bhansali*** (supra), this Court held in paragraphs 25 to 29 of the judgment as under:

25) Though the judgment in ***Anudan Properties Private Limited*** is rendered in the context of interplay between the provisions of IBC and Slum Act, the subsequent judgment in ***Santoshkumar Motilal Bhansali*** takes into account the interplay between the provisions of Section 14 of IBC and Section 11 of MOFA. The judgment in ***Santoshkumar Motilal Bhansali*** provides a complete answer to the issue at hand. In that case, this Court has borrowed the analogy of distinction between freezing of monetary claims under resolution plan and statutory obligations which continue despite insolvency in the context of adjudication of application for deemed conveyance. This Court has held that the Competent Authority performs a statutory function and confers a statutory benefit upon flat purchasers which function is not in the nature of a recovery action. It is not a claim enforcement mechanism. It is an exercise of statutory power to perfect title in favour of an organization of purchasers.

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<sup>8</sup> 2025 SCC OnLine Bom 692

Therefore, it is held that statutory rights of third parties and statutory duties of authorities continue despite insolvency or moratorium.

26) The ratio of the judgment in ***Santoshkumar Motilal Bhansali*** binds me. I would like to further build upon the ratio of that judgment by observing that an action initiated by a financial creditor against a corporate debtor under Section 7 of IBC and a moratorium imposed under Section 14 while admitting the application of that financial creditor cannot negate or even suspend the statutory duty of the Competent Authority under Section 11(3) and (4) of MOFA. One must bear in mind the objective behind amending the provisions of Section 11 by 2008 amendment by incorporating a provision for deemed conveyance. The concept of deemed conveyance is introduced after noticing a large-scale failure on the part of the developers in transferring title in the land and after noticing a trend followed by almost all developers in deliberately delaying conveyance of land with a view to endlessly milk the additional development rights created in the land with passage of time. The developers in cities like Mumbai, Pune etc. were deliberately not conveying land in favour of societies so as to exploit further development potential created in the land due to sanction of additional FSI/TDR etc. The Legislature took note of the ground reality that the provisions of Section 11, as it stood prior to amendment, were not sufficient and it was taking unduly long time for decision of suits for conveyance as there was large scale failure on the part of the developers to perform statutory duty imposed under Section 11. It is with a view to provide a swift mechanism for the societies to secure title in respect of the land and the building that special provision for granting unilateral deemed conveyance was introduced in the form of sub-sections (2) to (5) in Section 11 of MOFA. This statutory objective cannot be permitted to be defeated merely on account of provisions of Section 14 of IBC.

27) What is sought to be done in the present case is an attempt on the part of Respondent No.4 to circumvent the provisions of Section 11 of MOFA by taking aid of CIRP initiated by an altogether unconnected entity (Canara Bank). In many cases, the developers are corporate entities who undertake numerous projects over the period of time. If such developer-company fails to convey land in contravention of Section 11(1) of MOFA in respect of a building which is constructed a quarter of century ago but attracts CIRP from an unconnected financial creditor, the same would not suspend the statutory obligation under Section 11(1) imposed on such developer. Otherwise, errant developers would misuse the moratorium imposed on them under Section 14 of IBC to indefinitely delay conveyance under Section 11(1) of MOFA. The Courts must be alive to the ground reality that several buildings in cities like Mumbai, Pune etc are in the need of redevelopment. The normal life of a building in Mumbai Metropolitan Region is statutorily recognised as 30 years, after which it is incumbent for the owner of the building to a secure structural audit report certifying its stability. This is on account of peculiar weather

conditions in MMR areas. Thus, several buildings in MMR areas are in need of redevelopment since the buildings have crossed their lifespans. The Society whose building becomes dangerous or dilapidated, but does not have a title in the land or building for undertaking redevelopment, uses the route under Section 11(3) of MOFA to secure conveyance in a swifter manner. However, if provisions of Section 14 of IBC are interpreted to mean that proceedings for deemed conveyance cannot be adjudicated by Competent Authority till resolution plan is approved by NCLT, the same would put Society's building, as well as lives of occupants therein, in danger. In a case where Society's building is in eminent need of redevelopment, but Society is unable to undertake redevelopment because of absence of conveyance and where deemed conveyance is denied on account of initiation of CIRP against the developer, the same would put the lives of occupants of the building in danger.

28) What must also be borne in mind is the fact that in most of the cases, there is virtual loss of right of the promoter in the land and building due to combined effect of provisions of Section 4 and Section 11 of MOFA. With sale of each flat in the building, there is dilution of title of the developer in the land. The moment all the flats in the building are sold, the developer is virtually divested of title in the land. While things may look slightly complicated in respect of multistory towers, one may take into consideration a simple illustration of a developer undertaking construction of four flats on a plot of land. When all four flats in the building are constructed and sold, the four flat purchasers acquire 25% right each in the land and the developer loses its title in the land. In a similar manner, when all flats in a multistorey tower are sold and a cooperative society/company of flat purchasers is formed, the promoter's title in the land gets divested and such society/company becomes entitled to own the land on which the building is constructed. The things may also get slightly complicated in a layout development. However, even qua layout development, similar analogy would apply and the developer loses proportionate title in the land to the extent of completed buildings in the layout. It cannot be that the developer exploits development potential in the land, constructs flats and sells them to the purchasers, but still retains ownership in the land. This concept is unknown to law. On the other hand, provisions of Sections 4 and 11 of MOFA ensure that the developer is divested of his right, title and interest in the land and the building which is statutorily required to be transferred/conveyed to the organisation of flat purchasers. Thus what is conveyed by the Competent Authority need not necessarily be the 'asset' of the promoter on account of operation of concept of divesting.

29) Ordinarily only an owner of the immovable property can execute conveyance thereof. However, a unique concept of 'deemed conveyance' is introduced in MOFA for reasons discussed above. The concept of deemed conveyance envisages transfer of title of land owner without his consent and in absence of his signature on the instrument of conveyance. The transaction of deemed conveyance is effected through registration of a certificate issued by

the Component Authority. This concept of deemed conveyance envisaging transfer of title of a landowner against his desire is thus based on the principle of divesting of title. Once the development potential as per the sanctioned plan is exploited, buildings are constructed, flats are sold and an organization of flat purchasers is formed, the developer loses title in the land and the building. The law enjoins a duty on him to transfer the title in the land and the building in favour of the organization of flat purchasers [Section 11(1) of MOFA]. However, if the developer fails in performance of statutory duty by not transferring the title, the Competent Authority steps into developer's shoes and issues a certificate of unilateral deemed conveyance. The law thus presumes loss of title of the developer once failure occurs on his part to perform the duty under Section 11(1) of MOFA. This presumption is however rebuttable. Even after the certificate of unilateral deemed conveyance is issued and registered, the developer can still institute a suit and demonstrate that the title in the land or in portion thereof still vests in him. Thus, the statutory scheme of Section 11 of MOFA is such that there is presumption of loss of title in the land and the building and it is on this presumption that a certificate of unilateral deemed conveyance is issued by the Component Authority. Till the developer secures a declaration from a Court to the contrary through a decree, the instrument of deemed conveyance based on such presumption continues to remain valid for all purposes. Considering this peculiar statutory scheme of Section 11 of MOFA, it is difficult to hold that the deliberate act of the developer in not transferring the title in the land in violation of statutory duty under Section 11(1) results into holding of any 'asset' by him within the meaning of Section 14 of IBC, which cannot be transferred on account of imposition of a moratorium. What is effected by the Competent Authority is, not transfer of property of the corporate debtor in real sense, but mere certification that the title in the land and building has now vested in the organization of flat purchasers by reason of failure to perform statutory duty by the developer. In my view therefore, provisions of Section 14 of IBC do not come in the way of Competent Authority exercising powers under Section 11 of MOFA.

14. Thus, this Court has taken a view in *Darshan Mandir CHSL* (supra) that the promoter gets divested of his title in respect of the land and the building upon sale of all flats in the building, and therefore the land or the building no longer remains his asset within the meaning of Section 14 of the IBC. This Court has, therefore, held that mere initiation of CIRP against a promoter cannot come in the way of Competent Authority exercising jurisdiction under Section 11 of MOFA to grant

deemed conveyance of the land and building in favor of organization of flat purchasers.

15. A useful reference can be made to the view expressed by the Apex Court holding that the rights created under the Development Agreement in favour of a promoter cannot be considered to be the asset of the corporate debtor for the purpose of Section 14 of the IBC. In **AA Estates P. Ltd vs. Kher Nagar Sukhsadan Co-operative Housing Society Limited**<sup>9</sup>, the issue before the Hon'ble Apex Court was whether a Development Agreement executed in favour of a promoter constitutes the asset or property of the corporate debtor so as to attract the protection of moratorium under Section 14 of the IBC. Answering the issue in the negative, the Apex Court held that for the purposes of Section 14 of IBC, only such property or assets which form part of the corporate debtor's estate as on the insolvency commencement date are protected. Mere expectant, contingent or uncrystallized contractual rights do not constitute 'assets' within the meaning of the Code. The Apex Court has held in paragraphs 16.1, 16.2, 16.4, 16.11 and 16.12 of the judgment in **A.A. Estates** as under:

16.1. It is not in dispute that the corporate debtor is entitled to the protection of Section 14 of the IBC, which mandates that on the insolvency commencement date, the Adjudicating Authority shall by order declare a moratorium prohibiting, inter alia –

- (a) the institution or continuation of suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
- (b) the transfer encumbrance, alienation or disposal by the corporate debtor of any of its assets or any legal right or beneficial interest

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<sup>9</sup> 2025 SCC OnLine SC 2579

therein;

(c) any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property; and

(d) the recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

16.2. The object of Section 14 is to maintain the corporate debtor's estate as a going concern and to preserve its assets so as to facilitate resolution. The term "property" under Section 3(27) of the IBC is defined in the widest terms to include money, goods, actionable claims, land and every description of movable or immovable, tangible or intangible property, and extends to deeds and instruments evidencing title or interest therein. However, for the purposes of Section 14, only such property or assets which form part of the corporate debtor's estate as on the insolvency commencement date are protected. Mere expectant, contingent or uncrystallized contractual rights do not constitute "assets" within the meaning of the Code.

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16.4. The above exposition clarifies that whether a development agreement constitutes an "asset" of the corporate debtor depends on whether it creates a proprietary, possessory or enforceable right in its favour at the relevant time. Not every executory or conditional contract amounts to an asset. The protection of Section 14 is confined to existing, subsisting and enforceable rights as on the date of commencement of the CIRP.

16.11. It is well settled that the moratorium under Section 14 does not revive terminated contracts or protect rights that have ceased to exist prior to insolvency. The protection is intended to preserve the existing value of the corporate debtor's estate, not to resurrect lapsed or extinguished interests. Extending moratorium to such non-existent rights would defeat commercial certainty and the sanctity of lawful termination under general law.

16.12. Accordingly, we hold that the Development Agreement dated 16.10.2005 and the Supplementary Agreements dated 23.12.2005 and 09.04.2014 do not constitute "assets" or "property" of the corporate debtor within the meaning of Section 14 of the IBC, as the same stood terminated prior to initiation of the second CIRP. No proprietary, possessory, or enforceable right subsisted in favour of the corporate debtor on the insolvency commencement date. The moratorium declared under Section 14 would therefore not restrain Respondent No. 1 Society or its members from proceeding with redevelopment in accordance with law.

**16.** Since this Court has taken into consideration the ratio of the Apex Court's judgment in *AA Estates* (supra), it would also be necessary to

refer to judgment of Coordinate Bench of this Court in **RNA Exotica Flat Purchasers Association vs. Skyline Construction Company and Others**<sup>10</sup>, on which reliance was placed on behalf of Respondent No.2 during the course of previous hearing of the Petition. In ***RNA Exotica*** (supra), a Single Judge of this Court had apparently taken a view that the relief of specific performance, compensation and damages against the developer would constitute a 'debt' under the IBC and that therefore, when the developer was undergoing CIRP proceedings, the claim of the Plaintiff could not be continued to be adjudicated in the forum other than before NCLT. This Court held in paragraph 36 of the judgment as under:

**36.** The perusal of the plaint along with the relief sought therein would reveal that the suit is filed by the plaintiff association, for a declaration that the agreements for sale, and or the agreement evidenced by the allotment letter, allotting flats to its members in the project 'RNA Exotica' constructed by the defendant no. 1 to be valid, legal, concluded and binding and hence calling upon the defendant no. 1 to perform the said agreement and to hand over the respective flats on completion of the project in time bound manner, in addition, the plaint also seek an order and decree for compensation and damages, owing to the Plaintiff, due to the non handing over possession of the flats and not performing their obligations, under the agreement evidenced by the confirmation letter and for future losses and damages, quantified, at Rs. 1,00,000/- per member per month to each member of the Plaintiffs association.

In the event of the relief of specific performance not being granted, it is prayed that Defendant No. 1, shall repay to the Plaintiff paid amounts with escalation calculated at the current market value of the suit flat along-with compensation and damages as may be computed as per the ready reckoner.

In the wake of the aforesaid, it is evident that upon the relief being granted to the aforesaid effect, it would amount to a 'debt' and if the defendant no. 1 is undergoing the CIRP proceedings, then the claim of the plaintiff shall not be continued to be adjudicated in a forum other than the NCLT, which at the end of the process, would draw a resolution plan as, contemplated under Section 30, which shall be approved under Section 31 and bind the corporate debtor and its employees, members, creditors to whom a debt in respect of payment of dues arising under any law for the time being in force and since the Plaintiff

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<sup>10</sup> 2024 SCC OnLine Bom 945

Society would be one such creditor, it must ultimately fall in line with the resolution plan.

For the aforesaid reasons, the term debt cannot be given a constricted meaning particularly in the wake of the laudable object underlying the IBC. For this reason, when an application is filed against defendant no. 1 for initiation of Insolvency Resolution Process, with an interim moratorium being imposed, the interim application filed by the plaintiff do not deserve consideration and must await the outcome of the proceedings before the National Company Law Tribunal (NCLT), Mumbai.

17. However, in subsequent judgment of the Hon'ble Apex Court in **AA Estates** (supra), the Apex Court has emphatically ruled that a development agreement executed in favour of a promoter does not constitute asset of promoter/corporate debtor and that therefore, writ petition filed by the society seeking direction against Planning and Statutory Authorities to process and consider the redevelopment proposal of new developer was perfectly maintainable. The Apex Court has summarized the principles in paragraph 21 of the judgment in **A.A. Estates P. Limited** (supra) as under:

21. Upon a comprehensive consideration, the conclusions of this Court on the issues framed are as follows:

(i) The termination of the Development Agreement dated 16.10.2005 and Supplementary Agreements dated 23.12.2005 and 09.04.2014 by Respondent No. 1 Society was valid, lawful, and effective in law, having been carried out after due notice and in consequence of prolonged and inexcusable default by the developer. The Society, as the owner of the land, was entitled to revoke the contract and appoint a new developer to protect the interest of its members.

(ii) The aforesaid Development Agreement and the Supplementary Agreements do not constitute "assets" or "property" of the corporate debtor within the meaning of Section 14 of the IBC. The said agreements stood validly terminated prior to the initiation of the second CIRP, and hence, no subsisting or enforceable right survived in favour of the corporate debtor.

(iii) The High Court was justified in entertaining the writ petition filed by Respondent No. 1 Society and directing the statutory authorities to process

and grant approvals in favour of Respondent No. 8, subject to compliance with law. Such directions were procedural in nature, did not encroach upon the jurisdiction of the NCLT, and did not contravene the moratorium under Section 14 of the IBC.

(iv) The proceedings before the High Court were conducted in substantial compliance with the principles of natural justice. The appellants were afforded a fair opportunity of hearing, and no real prejudice or failure of justice has been demonstrated.

**18.** The spirit of ratio of the judgment of the Apex Court in **A.A. Estates** (supra) would apply in connection with deemed conveyance applications as well. Mere initiation of CIRP cannot be blindly considered as a factor for suspension of every proceeding against the corporate debtor. It first needs to be ascertained as to whether the property involved in the proceedings is indeed the asset of the corporate debtor. In the context of obligation of the promoter to convey the land under Section 11(1) of MOFA, this Court has held in **Darshan Mandir CHSL** (supra) that the land is no longer the asset of the promoter and that therefore mere pendency of CIRP against a promoter does not come in the way of Competent Authority exercising jurisdiction under Section 11(3) of MOFA for granting deemed conveyance of the land and the building in favour of the organization of flat purchasers.

**19.** Mr. Joshi has sought to distinguish both the judgments in **A.A. Estates** as well as in **Darshan Mandir CHSL**. According to him, the ratio of the judgment in **A.A. Estates** does not apply in the facts of the present case as the said judgment deals with the issue as to whether development rights granted by a society in favour of a developer while executing redevelopment process constitutes an asset of the developer

or not. He submits that the present case does not involve grant of any development rights and that Respondent No.2 is the owner of land who has right to complete construction of the building. In my view, however, ratio of judgment in **A.A. Estates** would be squarely applicable to the facts of the present case. The judgment is an authority on the issue as to whether mere pendency of CIRP against a developer would suspend the proceedings initiated against him. The Apex Court has ruled that High Court was justified in entertaining the writ petition, directing the statutory authorities to process and grant approvals in favour of a new developer notwithstanding termination of the Development Agreement of appellant before the Apex Court and in favour of Respondent No. 8- new developer. The spirit of the ratio of judgment of the Apex Court is clearly attracted in the present case since Competent Authority has refused to exercise jurisdiction under Section 11 MOFA merely on account of pendency of CIRP against Respondent No. 2.

20. So far as judgment of this Court in **Darshan Mandir CHSL** is concerned, Mr. Joshi has sought to distinguish the same by contending that the case involved initiation of CIRP against assignee of the original promoter, which is not the case here. In my view, execution of assignment in favour of third entity was merely an additional facet involved in **Darshan Mandir CHSL**. This Court has essentially decided the issue as to whether mere pendency of CIRP against the promoter would suspend obligation under Section 11(1) of MOFA. It is held that Competent Authority can exercise jurisdiction and decide Application under Section 11(3) of MOFA notwithstanding initiation or pendency of

CIRP against the promoter. In my view therefore, judgment of this Court in ***Darshan Mandir CHSL*** would fully apply to the facts of the present case.

21. Mr. Joshi relies on judgment of the Apex Court in ***Vishnoo Mittal*** (supra) in support of his contention that CIRP is initiated in the present case well before registration of the Petitioner-society. CIRP has been initiated on 27 January 2020 whereas the Petitioner-society is registered on 10 November 2022. It is therefore sought to be contended that failure within the meaning of Section 11(1) MOFA had not occurred since Respondent No.2 was under legal disability to convey the land and building in favour of the society after its formation. Reliance is placed on judgment of the Hon'ble Apex Court in ***Vishnoo Mittal*** (supra), in which it is held in paragraph 13 as under:

13. The bare reading of the above provision shows that the appellant did not have the capacity to fulfil the demand raised by the respondent by way of the notice issued under clause (c) of the proviso to Section 138 NI Act. When the notice was issued to the appellant, he was not in charge of the corporate debtor as he was suspended from his position as the Director of the corporate debtor as soon as IRP was appointed on 25-7-2018. Therefore, the powers vested with the Board of Directors were to be exercised by the IRP in accordance with the provisions of IBC. All the bank accounts of the corporate debtor were operating under the instructions of the IRP, hence, it was not possible for the appellant to repay the amount in light of Section 17 IBC.

22. The judgment in ***Vishnoo Mittal*** (supra) is delivered in the context of provisions of Section 138 of the Negotiable Instruments Act, 1881 (**NI Act**). In the case before the Apex Court, the Appellant, as a director of the Corporate Debtor, had drawn cheques in favour of the Respondent, which were dishonored on 07 July 2018. On 25 July 2018, CIRP was

initiated against the Company, and moratorium under Section 14 of the IBC was imposed. Notice under Section 138 of NI Act was issued thereafter on 6 August 2018. In the light of the above factual position, the issue before the Hon'ble Apex Court was whether the appellant therein had the capacity to fulfill the demand as per notice issued under Section 138 of NI Act. The Apex Court answered the issue in the negative by holding in paragraph 13 as quoted above. The ratio of the judgment in ***Vishnoo Mittal*** has no application to the facts of the present case. In the light of declaration of law by this Court in ***Darshan Mandir Co-operative Housing Society Limited*** (supra), mere imposition of CIRP on a promoter does not suspend his statutory obligation under Section 11(1) of MOFA. Therefore, it cannot be held that the promoter was under prior legal incapacity, as sought to be suggested by Mr. Joshi.

23. Thus, the housing society's non-registration cannot be treated as a legal disability for conveyance of land during the CIRP. Under Section 10 of MOFA and Rule 8 of the MOFA Rules, the promoter must form a cooperative housing society once the minimum number of flats has been sold. Because the society's non-registration results from the developer's own violation of statutory obligation, the developer cannot benefit from his own wrong and contend that the 'failure' envisaged under Section 11(1) of MOFA did not occur to claim the protection of Section 14 of the IBC.

24. In view of the above discussion, it is held that the Competent Authority has erred in not deciding the Application of the society for

deemed conveyance on the ground of pendency of CIRP against Respondent No.2.

25. Coming to the second issue of the alleged right of Respondent No.2 to put up additional construction in the building, it is seen that Respondent No.2-promoter has essentially relied on covenants of Flat Purchase Agreements as well as specific consent letters issued by the flat purchasers in support of his alleged entitlement to construct 7<sup>th</sup> and 8<sup>th</sup> floors on the existing building. In the present case, the initial plans for construction of the building were sanctioned on 9 December 2013 and 30 January 2015. As per the revised permission dated 30 January 2015, the planning authority sanctioned plans for construction of building upto 6<sup>th</sup> floor. Upon construction of the building upto 6<sup>th</sup> floor, the building has received Occupancy Certificate. Perusal of the OC plan would indicate that the total built up area (BUA) sanctioned was 1615.88 sq.m. The entire sanctioned BUA 1615.88 sq.m. is utilized in construction of building comprising of stilt and six floors.

26. After securing the Occupancy Certificate, Respondent No.2-developer sold the flats in the building vide various Agreements for Sale. Respondent No.2 has relied upon some of the covenants in the Agreement for Sale, which read thus:

K) The Promoter has constructed a residential building with the name of “ROSE VILLA” hereinafter referred to as “**Building**” comprising of ground plus 6 upper floors on the said Property and the plans for the Building have been approved by the Municipal Corporation of Greater Mumbai (hereinafter referred to as “MCGM”) and the MCGM has issued an Intimation of Disapproval dated 09-12-2013 upto 4<sup>th</sup> Floor bearing No. CHE/WS/0258/K/337

(NEW) hereinafter referred to as “**IOD**”. The copy whereof is annexed hereto and marked as **ANNEXURE “D”**. The MCGM also issued amended / revised I.O.D. dated 30-01-2015 upto 6<sup>th</sup> Floor bearing No. CHE/WS/0258/K/337 (NEW) hereinafter referred to as “**AMENDED IOD**”. The copy whereof is annexed hereto and marked as **ANNEXURE “E”**.

xxx

### 13. RIGHT TO USE ADDITIONAL FSI / TDR

13.1 The Promoter were desirous of redeveloping the said property by constructing a new building by utilizing FSI of the said property and TDR FSI to the utmost extent and in the said process purchased TDR (Transfer of Development Rights) and after having complied with rules and regulations of MCGM have got the said TDR loaded on the said property.

13.2 Purchaser is/are aware that the Promoter are utilizing the FSI of the said Property and Fungible FSI as well as FSI by way of Transfer of Development Right (TDR) in the proposed building under construction or in the said property and also in future with adjacent another property or properties as per the law time being in force and the Purchaser do hereby agree to give his/her/their full free and irrevocable consent and permission to the Promoter for the utilization of such FSI, Fungible FSI and TDR FSI or any other benefits arising and or available from the local bodies or authorities on the said property and also on the said NEW BUILDING “**ROSE VILLA**” itself which was constructed on the Said property itself as per the latest D.C. Rules and Regulations of MCGM. The Purchaser further agrees not to create any obstruction or hindrance in the construction activities, which will be undertaken by the Promoter for the construction of the said building including utilisation of the said FSI, Fungible FSI, TDR FSI of the said Property and with knowledge of the same the Purchaser is/are executing this agreement.

13.3 The Promoter shall have exclusive rights to utilize any additional FSI that may be granted in future as also the TDR rights that the Promoter may receive in future in respect of the said Property and carry out vertical and or horizontal addition as to the Building by either adding floor or adding wings to the Building. The Purchaser/s hereby explicitly warrants and covenants to the Promoter that he/she/they/it shall have no right, claim, interest and/or benefit of any nature whatsoever, whether under the existing laws / rules and/or such laws / rules that may be amended and/or formed in future.

13.4 The Purchaser shall not be entitled to any rebate and/or concession in the price at his/her/their the said premises on account of the construction of any other building and/or structure and/or the changes alterations and additions extensions etc. made in the building or buildings or structures or on account of any advertisement hoarding put up on the said property and / or the said

building and on terrace of the building.

xxx

#### 19. SET BACK COMPENSATION

19.1 The Promoter shall be entitled to claim and receive set back compensation for the Property, which may be so notified by the concerned authorities prior to the transfer of the said Property described in the first Schedule in favour of the said Society/Condominium/Company.

*(emphasis and underlining supplied)*

27. The property taken up for development was referred to in the First Schedule to the Agreement for Sale, which reads thus:

(Description of the said property)

ALL that pieces or parcels of land and premises together with building/structures standing thereon known as "**ROSE VILLA**" situated at Village Ambivali, Taluka Andheri, bearing Survey No.68, Hissa No.1 (part), Survey No.128(part) and Survey No.69A(part) admeasuring about 755 ½ sq.yds. Corresponding to Old CTS Nos.725, 725/1 & 725/2 and as per City Survey records admeasuring 602.50 sq.mtrs and subsequently after sub-division corresponding to CTS No. 725/A admeasuring 598.60 sq.mtrs. and CTS No.725/B admeasuring 18.10 sq.mtrs. (Reserved for Road Set Back) in the Registration District and Sub-District of Mumbai & Mumbai Suburban and bounded ..

28. It appears that Respondent No.2-developer was desirous of putting up additional construction in the building, construction of which was already complete upto 6 floors. Accordingly, in addition to contractual covenants, Respondent No.2 secured individual consent letters from each of the flat purchasers. One such consent letter dated 10 May 2017 executed by the flat purchasers: Chandan Panjwani and Aekta Panjwani reads thus:

10th May, 2017

To,  
Can Enterprises Pvt Ltd.  
103/C, Thosar House, Hanuman X Road No. 1,  
Nr. Shiv Leela Hotel, Vile Parle (East),  
Mumbai-400057

SUB: NOC FOR VERTICAL EXTENSIONS ON PLOT BEARING C.T.S NO 725/A (OLD CTS NO.725, 725/1 AND 725/2) SITUATED AT CEASAR ROAD, OF VILLAGE AMBIVALI, ANDHERI (W), MUMBAI-400058.

Dear Sir,

We Mr. CHANDAN NARENDER PANJWANI AND Mrs. AEKTA CHANDAN PANJWANI staying at flat no. 603, on 6th floor in the building known as Rose Villa, Ceaser Road, Near Filmalaya Studio, Andheri (West), Mumbai-400 058.

This is in reference to the vertical extension of my/our building approved / to be approved under BMC file no.CHE/WS/0258/K/337 (New), constructed by you.

We have seen, examined the approved plans for vertical extension of my/our building and state that we have no objection of whatsoever nature with regard to the construction of the same or as may be amended in future by MCGM.

Subject to what is stated herein, and as per the proposed development plan 2034 and or notification No. TPS-1813 / 3067 / CR-122 / MCORP/12/UD-13 dated 16.11.2016 and for any future circular, notifications, DCR etc. related to additional FSI and Fungible FSI, TDR, **you shall always have a right to make additions, alterations, raise storeys and/or structures, cantilever and surface parking, elevation of the building**, as may be permitted by the MCGM and other competent authorities and shall be entitled to sell and/or dispose of the same in the manner they deem fit. **I hereby confirm and consents to the irrevocable right of yours to construct the said additional floors on the Building to be/being constructed on the said Property in the manner deemed fit by you without any further or other consent or concurrence in future.**

This consent is an irrevocable consent would be binding upon me/our legal heirs, executors, administrator whom so ever claiming right, title and interest through me.

*(emphasis and underling supplied)*

**29.** Similarly worded consent letters were secured from each of the flat purchasers by Respondent No.2-developer. The details of dates of execution of flat purchase agreements and consent letters/NOCs are put on record by Mr. Joshi through a chart, which reads thus:

**Consent-cum-Noc signed before the execution of the MOFA Agreement**

| Sr No. | Flat No. | Name                                   | Date of NOC | Date of MOFA Agreement         | Status         |
|--------|----------|----------------------------------------|-------------|--------------------------------|----------------|
| 1.     | 103      | Jennifer Drego                         | 08.12.2016  | 09.12.2016                     | Flat Purchaser |
| 2.     | 202      | Rajesh Pancholi                        | 07.02.2017  | 15.02.2017<br>PAA – 21.05.2010 | Tenant         |
| 3.     | 302      | Maya Adnani                            | 23.10.2017  | 18.12.2017                     | Flat Purchaser |
| 4.     | 602      | Himanshi Shah, Rupa Shah and Ruhi Shah | 20.02.2020  | 24.02.2020                     | Flat Purchaser |
| 5.     | 603      | Chandan Paanjwani                      | 10.05.2017  | 11.05.2017                     | Flat Purchaser |

**Consent-cum-Noc signed after the execution of the MOFA Agreement**

| Sr No. | Flat No. | Name            | Date of NOC | Date of MOFA Agreement         | Status         |
|--------|----------|-----------------|-------------|--------------------------------|----------------|
| 1.     | 101      | Karmali Sisters | 24.06.2017  | 26.11.2015<br>PAA – 21.05.2010 | Tenant         |
| 2.     | 102      | Joyce Rodrigues | 24.02.2017  | 26.11.2015<br>PAA – 21.05.2010 | Tenant         |
| 3.     | 201      | Bhartiben Dubal | 24.02.2017  | 13.12.2016<br>PAA – 21.05.2010 | Tenant         |
| 4.     | 401      | Deepak Tupe     | 28.12.2019  | 26.12.2019                     | Flat Purchaser |
| 5.     | 404      | Tanuja Gawde    | 24.10.2017  | 10.10.2016                     | Flat Purchaser |
| 6.     | 501      | Varsha Dave     | 24.02.2017  | 05.10.2016                     | Flat Purchaser |
| 7.     | 502      | Vaibhav Gohil   | 08.06.2017  | 21.04.2017                     | Flat           |

|     |     |                     |            |            |                |
|-----|-----|---------------------|------------|------------|----------------|
|     |     |                     |            |            | Purchaser      |
| 8.  | 503 | Lynette Mascarenhas | 24.02.2017 | 23.09.2016 | Flat Purchaser |
| 9.  | 504 | Viraj Bhatia        | 24.02.2017 | 12.09.2016 | Flat Purchaser |
| 10. | 604 | Pooja Gawde         | 24.06.2017 | 10.10.2016 | Flat Purchaser |

**Consent-cum-Noc signed with the execution of the MOFA Agreement**

| Sr No. | Flat No. | Name                      | Date of NOC | Date of MOFA Agreement | Status         |
|--------|----------|---------------------------|-------------|------------------------|----------------|
| 1.     | 104      | Shekhar Pradhan           | 09.05.2017  | 09.05.2017             | Flat Purchaser |
| 2.     | 203      | Malti Junnarkar (Pradhan) | 17.11.2017  | 17.11.2017             | Flat Purchaser |
| 3.     | 204      | Milind Deosthali          | 21.11.2017  | 21.11.2017             | Flat Purchaser |
| 4.     | 301      | Vijay Kumar Dutt          | 09.11.2017  | 09.11.2017             | Flat Purchaser |
| 5.     | 303      | Nila Shah                 | 09.05.2017  | 09.05.2017             | Flat Purchaser |
| 6.     | 304      | Prashant Phadke           | 27.04.2017  | 27.04.2017             | Flat Purchaser |
| 7.     | 402      | Ozward Sylvester Lewis    | 05.06.2018  | 05.06.2018             | Flat Purchaser |
| 8.     | 403      | Neeta Rao                 | 14.12.2017  | 14.12.2017             | Flat Purchaser |

Note: Flat No.601 – Unsold

**30.** Thus, in respect of the 8 flat purchasers, NOCs / consent letters were executed on the ‘same day’ of execution of Agreement for Sale. In respect of 5 flats, NOCs/consent letters were signed ‘before’ execution of Agreements for Sale and in respect of 10 flat purchasers, NOCs / consent

letters were signed 'after' execution of Agreements for Sale. Flat No.601 in the building is apparently unsold and still belongs to Respondent No.2-developer.

31. Respondent No.2 accordingly relies on contractual covenants as well as specific NOCs / consent letters executed by individual flat purchasers in support of his contention that there is a consent given by the flat purchasers within the meaning of Section 7 of MOFA for construction of additional floors/flats in the building. Under Section 7 of the MOFA, there is an embargo on the promoter from making any alteration in the structure of the flat or in making alterations or additions in the structure of the building without the previous consent of purchasers who have agreed to take flats in such building. Section 7 of MOFA provides thus:

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

(1) After the plans and specifications of the building as approved by the local authority as aforesaid, are disclosed or furnished to the persons who agrees to take one or more flats, 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 persons;
- (ii) any other alterations or additions in the structure of the building without the previous consent of all the persons who have agreed to take the flats in such building.

(2) Subject to sub-section (1), the building shall be constructed and completed in accordance with the plans and specifications aforesaid; and if any defect in the building or material used, or if any unauthorized change in the construction is brought to the notice of the promoter within a period of three years from the date of handing over possession, it shall wherever possible be rectified by the promoter without further charge to the persons who have

agreed to take the flats, and in other cases such person shall be entitled to receive reasonable compensation for such defect or change. Where there is a dispute as regards any defect in the building or material used, or any unauthorised change in the construction, or as to whether it is reasonably possible for the promoter to rectify any such defect or change, or as regards the amount of reasonable compensation payable in respect of any such defect or change which cannot be, or is not rectified by the promoter, the matter shall, on payment of such fee as may be prescribed, and within a period of three years from the date of handing over possession, be referred for decision,

—

(i) in an urban agglomeration as defined in clause (n) of section 2 of the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976), to such competent authority authorised by the State Government under clause (d) of section 2 of that Act, and

(ii) in any other area, to such Deputy Chief Engineer, or to such other Officer of the rank equivalent to that of Superintending Engineer in the Maharashtra Service of Engineers, of a Board established under section 18 of the Maharashtra Housing and Area Development Act, 1976 (Mah. XXVIII of 1977),

as the State Government may, by general or special order, specify in this behalf. Such competent authority, Deputy Chief Engineer or, as the case may be, the other officer of a Board shall, after inquiry, record his decision, which shall be final.

**32.** According to Respondent No.2, since specific individual consents are given by all the flat purchasers for making additions to the building, the embargo under Section 7 does not apply in the present case.

**33.** Both the parties are at serious dispute about the nature of consent letters. According to the Petitioner-society, what is secured is a blanket consent, whereas according to Respondent No.2-Promoter, consents are given after perusal of the approved plans. Before I go into the issue of nature of consents, it must be observed that the Competent Authority is a tribunal of limited jurisdiction, while exercising the jurisdiction of granting certificate of unilateral deemed conveyance under Section 11 of MOFA. In exercise of summary jurisdiction under Section 11, the

Competent Authority is not expected to conduct intrinsic evidentiary enquiry into existence or otherwise of validity of consents given by the flat purchasers. In *Satellite Garden I CHSL* (supra), this Court while laying down guidelines for conveyance of proportionate land to organisation of flat purchasers in a layout development, has dealt with the issue of consent under Section 7 of MOFA. While laying down the principle that proportionate land division has to be on the basis of sanctioned plan at the time of expiry of period of 4 months from formation of society of the first building in the layout, this Court has recognised an exception where subsequent plan can also be considered for proportionate land division, where there is a consent to such subsequent plan. This Court has held in paras-210 and 211 of the judgment as under:

210) It is not that in every case the plans are revised behind the back of already constructed buildings. There may be cases where the developer has secured written consent from the society of building already constructed as per originally sanctioned plan for effecting a revision therein for availing additional BUA. In some cases, the existing societies may have monetized their right of giving consent by securing consideration in the form of money or additional facilities and may have given consent for revision in the plan. In such cases, whether the concept of land freezing/crystallisation as on the date of formation of the first society can be applied? In my view, the answer is in the negative. Where there is express consent by the flat purchasers/societies of earlier buildings for revision of plans for construction of subsequent buildings, the freezing/crystallisation concept cannot apply. Where such express written consent is given, land division can be undertaken on the basis of subsequently revised plan, which has such consent. However, in every case where such express consent is not given, proportionate land division must necessarily be on the basis of the first sanctioned plan or at least the sanctioned plan which was in existence at the time of application of concept of freezing.

211) It is contended that Competent Authority being a tribunal of limited jurisdiction cannot go into the issue of existence of consent. There can be no dispute about this proposition and since existence or otherwise of the consent,

being a matter of intrinsic evidentiary inquiry, the Competent Authority would not have jurisdiction to decide that issue. However, in its summary jurisdiction, if the developer or society of subsequent building produces a consent letter/affidavit, I do not see much difficulty in the Competent Authority in acting on the same and assuming that there exists a consent for undertaking the exercise of proportionate land division. If a competing society has any contrary claim, the same can always be taken for adjudication to the Civil Court as the order of deemed conveyance passed by the Competent Authority is not final determinative of rights and entitlement of parties *qua* the land conveyed. On the other hand, if no *prima facie* written evidence of consent is produced, the Competent Authority can proceed on the basis of absence of consent and apply the principle of freezing/crystallisation of land entitlement as per the plan in existence at the time of expiry of the prescribed period under Section 11 of MOFA and Rule 9 of MOF Rules for the first society. In such a case, the developer/society of latter building can approach the Civil Court to establish existence of consent. In my view therefore, though the Competent Authority may not be able to resolve the issue of existence or otherwise of consent but can make an adjudication on the basis of *prima facie* existence/absence of material to indicate consent. I am supported in my view by the judgment of this Court in **Nook CHS Ltd.** (supra).

**34.** In **Nahalchand Laloochand** (supra), this Court has held that the Competent Authority can take into consideration the factum of consents under Section 7 of MOFA. The Court held in paras-12 and 13 of the judgment as under:

12. The statutory field of the Maharashtra Ownership Flats (regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963 ("MOFA") imposes a threefold obligation upon the promoter: (i) to execute and register agreements under Section 4; (ii) to facilitate the formation of a legal entity or society of flat purchasers under Section 10; and (iii) to execute a conveyance of title within the stipulated timeline contemplated under Section 11. The regulatory framework is further fortified by Rule 8(1) of the Maharashtra Ownership Flats (regulation of the Promotion, Construction, Sale, Management and Transfer) Rules, 1964 ("the MOFA Rules"), which requires that a conveyance be executed within four months of the formation of the society. Upon failure by the promoter to comply, the competent authority is empowered under Section 11(4) of the Act to grant a "deemed conveyance." This legislative intervention was introduced to address the systemic defaults of errant promoters, who often failed to fulfill their contractual and statutory obligations, leaving flat purchasers perpetually deprived of proprietary rights in the land and building.

13. However, it cannot be gainsaid that the competent authority's functions under Section 11 are not unfettered. They are circumscribed by fundamental norms of procedural fairness, which include:

- (i) verification of the **authenticity** of the agreements and **consents** under Section 7 of MOFA;
- (ii) affording the promoter a reasonable opportunity to contest the application under Rule 9(3) of the MOFA Rules; and
- (iii) ensuring that the society's claim aligns with the sanctioned plan and the registered agreements.

*(emphasis and underlining added)*

It is thus held in ***Nahalchand Laloochand*** that the Competent Authority can conduct inquiry into authenticity of consents under Section 7 of MOFA.

35. Thus, even in exercise of its limited jurisdiction, the Competent Authority can conduct a *prima facie* enquiry about existence or otherwise of consents to the additional construction in the building or in the layout. Mere raising of a plea by a promoter/developer about existence of consents by the flat purchasers is not enough and the Competent Authority can direct production of such consents and can satisfy itself about existence or otherwise of such consents. It therefore cannot be contended that the issue of existence of consents under Section 7 of MOFA is altogether outside the jurisdiction of the Competent Authority.

36. Mr. Joshi has contended that once consent letters are produced before the Competent Authority, it must accept the same and cannot enter into the controversy as to whether the consents are valid or otherwise. While there can be no difficulty in accepting what is suggested by Mr. Joshi, the issue for consideration is whether the

Competent Authority would blindly accept every consent and proceed to reject the application for deemed conveyance? The answer, to my mind, appears to be in the negative. Though the Competent Authority cannot conduct a detailed enquiry into the validity of consents, it can *prima facie* satisfy itself as to whether there exists a consent within the meaning of Section 7 of MOFA or not. A party aggrieved by the decision of Competent Authority can file a suit and seek a declaration to the contrary from Civil Court.

**37.** There is fine distinction between ‘existence of consent’ and ‘validity of consent’. While the Competent Authority can record a finding about ‘existence’ of consent, it cannot determine the issue of ‘valid’ consent, which inquiry would fall squarely into the realm of a Civil Court. However, whether mere production of a consent letter would ouster jurisdiction of the Competent Authority is the issue for consideration.

**38.** Promoters and developers do incorporate wide and blanket clauses in the Agreements for Sale for recognising their entitlement to milk future development potential in the land and the building. These are popularly known as ‘blanket consent’ clauses. By now, the law is well settled that such blanket consent clauses are ineffective/unenforceable and do not entitle a developer to carry out additional construction in the building or in the layout. While seeking consent of flat purchasers for putting up additional construction in the building or in the layout, it is mandatory that a full disclosure is made to the flat purchasers about the

nature of additional construction. This would include disclosure of the existing development potential, the additional development potential made available, number of additional floors and additional flats to be constructed etc. A developer cannot simply secure consent to put up additional construction without making disclosure of the necessary details. By now, the law is well settled in this regard by judgments of this Court in *Dosti Corporation, Eternia CHSL and Ors. Vs Lakeview Developers and Ors.*<sup>11</sup> and *Rajkumar Gulati and Ors. Versus. S.D. Corporation Pvt. Ltd. and Ors*<sup>12</sup>.

39. Over the period of time, the promoters have exhibited a tendency to circumvent the statutory provisions under MOFA about embargo on additional construction contrary to disclosures. Obtaining blanket consents from flat purchasers was one of the *modus operandi*, which Courts were required to hold as unenforceable. After the blanket consent clauses are held to be unenforceable, the developers have in some cases started segregating the blanket consent clause from the Agreements and printed the same in the form of a separate letter. The clause is virtually the same empowering additional construction without adequate disclosure. However, the same is in the form of a separate letter. The issue for consideration is if such kind of consent letters are produced, whether the Competent Authority would immediately lose jurisdiction to decide the application of deemed conveyance on the ground that the full construction as per the consent letter is yet to be completed? Again, the answer to my mind appears to be in the negative. Some *prima facie*

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<sup>11</sup> 2015 SCC OnLine Bom 723

<sup>12</sup> 2025 SCC Online Bom 4370

inquiry by the Competent Authority into 'existence' of consent would be necessary and production of such letters would not mean that existence of consent is proved. It can record a finding that the consent letters do not conform to the requirement of Section 7 of MOFA. Such finding would be rebuttable and can be questioned by the aggrieved developer before the Civil Court. If it is held that the competent authority must reject the application for deemed conveyance upon production of such letters containing blanket consent clauses, the developers would take disadvantage of such situation and would thereby delay conveyance of land by securing such letters from flat purchasers while selling the flats.

40. Thus, the Competent Authority needs to make a *prima facie* enquiry into existence or otherwise of consents within the meaning of Section 7 of MOFA even while deciding application under Section 11 of MOFA. It cannot blindly rely upon the defence taken by developer that flat purchasers have consented to additional construction. It can conduct a *prima facie* inquiry into the aspect of disclosure preceding the consent and if it finds that the consent secured is without disclosing any details of additional construction, it can ignore the consent letters and proceed to convey the land. What it cannot conduct is an inquiry into adequacy of disclosure. To illustrate, if consent for putting up additional construction of disclosed area is secured, Competent Authority cannot go into issue as to whether disclosure includes information about number of floors/flats, plinth of additional structure etc. This inquiry would be about validity of consent and outside the scope of inquiry of the Competent Authority. However, if a mere blanket consent is

produced, the Competent Authority can look into the same and hold that there is no consent.

41. Now I proceed to determine whether in the facts of the present case, the flat purchasers indeed consented to additional construction over the building. Perusal of the consent letters would indicate that the draft of the same was apparently prepared by the developer and flat purchasers have signed the same either before or simultaneously or after registration of their individual agreements. The letters state that the purchasers had examined the approved plans for vertical extension of the building and that they had no objection to the construction of the same. The consent letters also refer to the proposed development plan of 2034, as well as Notification dated 16 November 2016 or '*any future Circular, Notification, DCR, etc.*' related to additional FSI and fungible FSI, TDR and recognises right of the developer to make additions, alterations, raise storey and other structures in the building.

42. Since consent letters referred to examination of the '*approved plans*', this Court repeatedly enquired with Mr. Joshi about the exact plan which was allegedly disclosed to the flat purchasers at the time of securing their consents. Till the petition was heard, Respondent No.2 had not placed on record any plan which was approved by MCGM at the time of execution of the consent letters. On the contrary, it was always the stand of Respondent No.2 that the revised Commencement Certificate was issued for construction of 7<sup>th</sup> and 8<sup>th</sup> floor in the year 2020. However, during the course of hearing and even after the hearing

ended, Mr. Joshi has placed on record copies of several plans. He has placed on record the plan which was allegedly submitted to MCGM for approval in the year 2017. He has referred to the said plan as a 'Concession Approval'. However, there is nothing on record to indicate that the plan allegedly submitted to MCGM for approval in September 2017, was approved and that such approved plan was brought to the notice of the flat purchasers. Mr. Joshi has relied on a flowchart to demonstrate as to how the plan submitted in September 2017 was approved on 8 November 2017. Even if it is momentarily accepted that the plan was indeed approved by MCGM on 8 November 2017, it is seen that most of the consent letters are signed prior to 8 November 2017. Only 7 consent letters in respect of 7 flats are apparently signed after 8 November 2017. There are total 24 flats in the building out of which 23 flats are sold. This means that the consent letters in respect of 16 flats are executed before the alleged sanction of plan on 8 November 2017. It therefore becomes difficult to accept that the flat purchasers were even shown the approved plans for the purpose of securing their consents. In respect of majority of flats, no approved plan in respect of 7<sup>th</sup> and 8<sup>th</sup> floor of the building existed when their alleged consents were obtained.

**43.** The case thus clearly involves a scenario where Respondent No.2-developer foresaw the advent of Development Control and Promotion Regulations for Greater Mumbai, 2034 (**DCPR, 2034**) when he sold the flats to the flat purchasers. DCPR, 2034 came into effect from 13 November 2018, before which construction of the building was already completed and Occupancy Certificate was issued on 7 September 2016.

Being a professional developer, Respondent No.2 was aware of the fact that there was likelihood of increase in the FSI/development potential in respect of the plot and he smartly secured blanket consent letters from the flat purchasers that he is entitled to make use of additional FSI that may be sanctioned by DCPR, 2034. The consent letters specifically refer to DCPR, 2034 as well as to any subsequent Circular/Notification which may make available additional FSI/BUA. Thus, the consent letters are nothing but mere separation of typical blanket consent clauses in the Agreement for Sale and the incorporation of the same therein in the letters. As observed above, most of the flat purchasers were made to sign the consent letters at the time of booking of the flats or at the time of registration of their Agreements. 5 + 8 = 13 consent letters are executed before or at the time of execution of flat purchase agreements. The flat purchasers possibly have signed those letters without being aware of the exact nature of additional construction that Respondent No. 2 was planning to effect on the building.

**44.** In fact, in the flat purchase agreements, there is a picture of the building 'Rose Villa', which clearly shows that the same was to comprise of only 6 floors. These flat purchasers saw the six storeyed building and purchased flats therein. The photographs of the building would indicate that construction thereof is complete in all aspects. There is overhead tank and terrace above the six floors of the building. For putting up additional floors, the overhead tank will have to be demolished and constructed again above the 8<sup>th</sup> floor. By now, a period of 10 long years has elapsed from the date of issuance of Occupancy Certificate. The

building has already started showing signs of deterioration in terms of external paint etc. It is difficult to conclude that the building is incomplete in any manner. The photographs show that construction of the building is complete in all sense.

**45.** Mr. Joshi has placed on record photographs of the building to suggest there was already a provision made for construction of additional floors. He has contended that the columns are maintained for vertical extension on the terrace and provision is made for taking the lift upto 7<sup>th</sup> and 8<sup>th</sup> floors. This, in my view, is not sufficient to infer that there is proper disclosure made to the flat purchasers that 7<sup>th</sup> and 8<sup>th</sup> floor of the building were planned to be constructed. This is a typical tendency of the promoters and developers to leave open the beams and columns on the terrace of the building with the aim of exploiting future development potential by construction of additional floors/flats. It therefore becomes difficult to conclude that Respondent No.2 had secured individual consents within the meaning of Section 7 of MOFA for carrying out construction of additional floors in the building.

**46.** The subsequent development permissions granted by the Municipal Corporation post the year 2020 are outcome of additional development potential made available under DCPR, 2034. This Court has repeatedly held that additional development potential made available due to change in the DCPR regime cannot be a ground for a developer to put up additional construction. If any additional development potential has become available, the same would belong to the society and not to Respondent No.2. Following observations of this

Court in ***Dosti Corporation*** (supra) in this regard are apposite:

86. In the said judgment, it is held that if the developer wants to make additional construction which is not a part of the layout, consent of the flat purchasers would be required. It is held that once the buildings shown in the approved plan are completed and possession is handed over, the Developer cannot contend that because he has not formed the Society and because he had not conveyed the property he can take advantage of the additional FSI which became subsequently available. **Such FSI will go to the society to whom the land had to be conveyed.** It is held that the advantage of the FSI would be taken only when the building is under construction and only for the buildings forming part of the development plan or layout plan already approved. It is held that subsequent amendment of layout plan without the consent of the flat purchasers was not permissible. Therefore, once the building is completed in terms of the plan and the flat purchasers are to be put in occupation, permission of the flat purchasers would be required. **If subsequently FSI becomes available under the Development Control Rules, it would be available to the Society to whom the land had to be conveyed.**

*(emphasis supplied)*

47. In ***Aristo Realtors*** (supra), this Court thwarted an attempt on the part of the developer to delay conveyance with a view to milk the additional development potential made available under DCPR 2034. This Court held in para-46 of the judgment as under:

46. The objective of the Petitioner behind opposing conveyance must also be appreciated. In the present case, filing of present Petition is aimed by Petitioner-developer at milking future additional FSI arising out of change of FSI regime (DCPR 2034). Petitioner has constructed the society's building by consuming the entire available FSI granted at the time of sanction of plans. Merely because DCPR 2034 are introduced in 2018, Petitioner believes that it can put additional construction admeasuring 841.16 sq.m. on the land and with that objective, Petitioner is denying conveyance of land to the society. This way, no developer would ever convey land to the organisation of flat purchasers and would continue to take benefit of further additional FSI made available due to change in FSI regime. Fortunately, in the present case, the landowners to whom the FSI belongs as per Clause 12 of the Development agreement, fairly do not want to utilise the same. It is only the promoter who is attempting to earn a fortune by taking benefit of its own wrong, who is

interested in putting up additional construction on subject land. This Court would not be a party to such devious acts of the Petitioner of monetising something which belongs to society. If additional FSI flows out of DCPR 2034, the same would belong to Respondent 2-Society and not to the Petitioner. Therefore, this Court would refuse to permit its extraordinary jurisdiction being misused by the Petitioner for achieving its insatiable objective of endlessly milking the development potential in the land for eternity. Section 11 of MOFA is aimed at curbing this tendency on the part of the developers.

**48.** In view of the above discussion, I am of the view that the consent letters relied on by Respondent No. 2 cannot be a reason for rejecting the application of the Petitioner for deemed conveyance. What are executed by the members of Petitioner society are mere blanket consents for putting up additional construction based on FSI made available under the DCPR 2034, without disclosing the plans for such additional construction. The flats are sold and the consents are obtained when the new DCPR was on the cusp of being introduced. The additional BUA sanctionable under the DCPR 2034 would belong to the Petitioner society and not to Respondent No.2-developer. If Respondent No.2-developer wanted to retain the benefits flowing out of DCPR 2034, he ought not to have sold the flats till introduction of DCPR 2034 and could have got the plans revised as per DCPR 2034 and then sought consents of the flat purchasers for additional construction. Once the Respondent No. 2 took the risk of selling the flats in the building constructed up to 6 floors by utilizing the entire FSI potential then available, he lost the right to add more floors to the building as the twin MOFA obligations to form a society within 4 months of sale of minimum number of flats and to convey the right, title and interest in the land kicked in.

**49.** Respondent No.2 had placed on record before the Competent Authority, certificate of his architect dated 12 March 2024 which indicates that in the original plan, BUA of the building was 1615.88 sq.m. and under the revised development permission dated 8 July 2020, additional BUA of 323.26 sq.m. is made available for construction of 7<sup>th</sup> and 8<sup>th</sup> upper floors in the building. Respondent No.2 proposes to construct 5 residential flats in the building by adding two more floors. The Certificate of the Architect dated 12 March 2024 reads thus:

Date: 12-03-2024

**This is to certify that**

The building on plot bearing C.T.S. No. 725-A (old C.T.S. No 725, 725/1 & 2) of village Ambivali at Ceaser Road, Andheri West, Mumbai -400058 has been granted O.C.C. for the building comprising of Stilt floor + 1<sup>st</sup> to 6<sup>th</sup> upper floor vide letter No. CHE/WS/0258/K/337(NEW) dated 07-09-2016 for residential use and thereafter amended concessions were approved by Hon'ble M.C. vide his note sheet dated 07-11-2017 in lieu of Plot potential 0.50 additional FSI + 0.90 Admissible TDR + Fungible Compensatory area for 7<sup>th</sup> & part 8<sup>th</sup> upper floor. Accordingly amended plans were approved for upper 7<sup>th</sup> floor & part 8<sup>th</sup> upper floor vide letter No. CHE/WS/0258/K/337(NEW) dated 17-03-2020 and accordingly C.C. was granted on 08-07-2020 upto the top of the part 8<sup>th</sup> floor + L.M.R. + O.H.T.

Further the built up area as per O.C.C. plan and Approved Amended plan is as follows:

| Approval | Built Up Area   | Building Status                                                                           | User                                                                                                                              |
|----------|-----------------|-------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|
| O.C.C.   | 1615.88 Sq.Mts. | Stilt floor + 1 <sup>st</sup> to 6 <sup>th</sup> Upper floor                              | Residential                                                                                                                       |
| Amended  | 323.26 Sq.Mts.  | 7 <sup>th</sup> and part 8 <sup>th</sup> upper floor                                      | 7 <sup>th</sup> floor Residential Part 8 <sup>th</sup> floor partly Residential user and partly Fitness center and Society office |
| Total    | 1939.14 Sq.Mts. | Stilt floor + 1 <sup>st</sup> to 7 <sup>th</sup> upper floor + part 8 <sup>th</sup> Floor |                                                                                                                                   |

We further certify that as per amended approved plan 5 residential unit will be constructed along with common amenities such as society office & Fitness center aggregating 29 nos. of residential unit in entire building. i.e. Stilt floor + 1<sup>st</sup> to 7<sup>th</sup> upper floor + part 8<sup>th</sup> upper floor.

For Vistar Architects  
Sd./-  
Ar. Kiran Rokadiya  
Partner

**50.** Mere provision of additional facility of fitness center and society's office on the 8<sup>th</sup> floor in the proposed development may not entitle Respondent No.2 to put up additional construction on the building, which has received Occupancy Certificate in the year 2016. Though this issue cannot be conclusively decided in these proceedings, these observations are made in the context of Petitioner's right to seek conveyance of the land and the building.

**51.** Mr. Joshi has strenuously relied on averments made by the Petitioner in its rejoinder filed before the Competent Authority in support of his contention that there is admission of existence of valid consents. It appears that the society had initially not disclosed the consent letters in the application made under Section 11(3) of MOFA. Along with its affidavit in reply, Respondent No.2 relied on the consent letters. In its rejoinder, the society dealt with the consent letters by pleading in paras-14 and 33 of the rejoinder as under:

14. The Respondent has deliberately delayed the registration of the Applicant society, failed to commence the so called construction in time despite receiving the NOCs from the members in the year 2017. Now, the Respondent is stalling the conveyance in favour of the Applicant.

33. With reference to para 31 & 32, the Applicant states that there is no additional or balance FSI as falsely claimed by the Respondent and the Respondent has purchased TDR to gain more profits and it can be found in their own reply at para 8. The RP is talking about the blanket consent taken by the Respondent during the execution of the individual agreements under section 4 of MOFA, which is not maintainable in the eyes of law as it is not consent within the meaning of Section 7 (1) of the Maharashtra Ownership of Flats Act, 1963 ("MOFA"). Furthermore, the NOCs taken by the Respondent to carryout additional construction in the year 2017 is hereby withdrawn by the Applicant due to the hopeless behaviour of the Respondent and failure to complete his duties on time.

52. From the contents of paras 14 and 33 of the rejoinder, it is difficult to infer that valid consents were given for construction of additional floors of the building. On the other hand, the society took a specific stand that what was secured were mere blanket consents. Those blanket consents are withdrawn by the society and by its members. Therefore, mere use of the word '*withdrawn*' in the affidavit-in-rejoinder does not mean that there was an admission of the existence of valid consents for the construction of the 7<sup>th</sup> and 8<sup>th</sup> floors of the building.

53. In my view, the case represents a typical tendency on the part of the developers to put up additional construction by making use of additional development potential made available due to change of policy/regime. The developer has relied upon Notification dated 16 November 2016 by which Regulation No.34 of DCR, 1991 was modified in the light of enactment of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. The Notification dated 16 November 2016, by itself, did not make available any particular TDR. On the other hand, the original plan indicates that TDR has already been loaded on the plot for construction of building

upto 6<sup>th</sup> floor. What is taken advantage of by Respondent No.2 is the benefit of fungible FSI and other areas made available under DCPR, 2034 while seeking sanction for revised plans. Once Occupancy Certificate was secured in respect of the building which was fully constructed, it was impermissible for the developer to once again apply for revision in the plans for construction of additional floors in the building.

54. Ordinarily, after sale of minimum number of flats in the building, an obligation was imposed on the Promoter to form and register a society under the provisions of Section 10 of MOFA read with Rule 9 of MOFA Rules. The promoter has, however, violated the said obligation with impunity and did not form society. Even when members came together and applied for formation of the society, Respondent No.2 opposed the same. He litigated upto this Court by filing WP (St.) No. 190 of 2023 for opposing formation of the society. The objective behind his opposition to formation of the society was clear. He did not want to convey the land and wanted to retain the ownership of the land so as to milk the future development potential in respect of the plot. Such a tendency on the part of the promoter needs to be nipped in the bud. Construction of the building is completed in the year 2016. *Albeit* with some delay, the society is registered on 10 November 2022. It is now time for Respondent No.2 to exit the site and not to expect construction of additional floors on the building. If any additional FSI/BUA is generated in respect of the plot on account of advent of DCPR, 2034 or by virtue of any Notification/Circular post grant of Occupancy Certificate, the same is now the property of the society. Respondent No.2 cannot own or exploit the same.

55. It also appears that Respondent No.2 has embroiled itself into litigations over its failure to pay the debts to the creditors. Respondent No.2 has been under CIRP for a considerable period of time. Certain adverse orders are passed against the previous Resolution Professional of Respondent No.2 and now the Resolution Professional is replaced. However, this Court is not going into the details of CIRP pending against Respondent No.2. Suffice it to observe that Respondent No.2 is not entitled in law to put up additional construction in the building. Additionally, it has disabled itself for a considerable period of time from acting on the revised development permissions secured from MCGM. As observed above, the revised development permissions are sanctioned by MCGM only on account of unlawful denial of conveyance of the land to the society by Respondent No.2. If the society was timely formed and conveyance was timely effected, the society would have been the owner of the land and there would have been no question of Municipal Corporation entertaining any application of Respondent No.2 for revision of the development plan.

56. In view of the above discussion, both the grounds on which the Competent Authority has rejected the application for deemed conveyance are found to be unsustainable. The impugned order dated 29 July 2024 is indefensible and deserves to be set aside. The proceedings deserve to be remanded to the Competent Authority for issuance of certificate of deemed conveyance in respect of the land and the building in favour of the Petitioner-society.

57. I accordingly proceed to pass the following order:

(I) The order dated 29 July 2024 passed by the Competent Authority is set aside.

(ii) Application No.8/2024 filed by the Petitioner-society is remanded to the Competent Authority for limited purpose of issuance of certificate of unilateral deemed conveyance in respect of the land and the building in favour of the Petitioner-society.

(iii) Parties shall appear before the Competent Authority on 12 October 2026 along with copy of this order downloaded from the website of the Court.

(iv) The Competent Authority shall proceed to decide the remanded proceedings and shall issue the certificate of unilateral deemed conveyance in favour of the Petitioner-society as expeditiously as possible, preferably within a period of 3 months.

58. With the above directions, the Writ Petition is **allowed**. Rule is made absolute. There shall be no order as to costs.

**(SANDEEP V. MARNE, J.)**