

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

FIRST APPEAL NO. 2182 OF 2007

Nahalchand Laloochand Pvt. Ltd. ..Appellant

Vs.

Panchali Co-Operative Housing

Society Limited. ..Respondent

Mr. F. E. Devitre, Senior Advocate with Ms. Rajani Iyer,

Senior Advocate with Mr. Venkatesh Dhond, Mr.

Vineet B. Naik i/by M/s. Prakash and Company for

appellant.

Mr. G.N. Salunke with Mr. S.R. Sharma for respondent.

CORAM: B.H. MARLAPALLE,J.

Reserved on : February 13, 2008.

Pronounced on : April 25, 2008.

JUDGMENT

1. This appeal is directed against the Judgment and Decree passed by the learned Judge of the City Civil Court, Greater Mumbai on 4/4/2007 in S.C. Suit No. 1767 of 2004. The said suit was dismissed with costs. 2 The suit was filed by the appellant-company for the following substantial relief:

That the defendants, office bearers, committee members, members, servants, agents or any other person claiming through them be restrained by an order of permanent injunction of this Hon'ble Court from encroaching upon/ trespassing on the suit premises and/or in any manner disturbing/ obstructing /interfering with the possession of the plaintiffs in respect of the suit premises i.e. 25 number of parking spaces in the stilt portion of the building by name Panchali, as more particularly shown in the plan annexed at Exhibit "A" hereto, situated at Indraprasta Enclave, N.L. Complex, Anand Nagar, Dahisar (East), Mumbai 400 068.

3. The plaintiff is a Private Limited Company, representing itself as a developer/builder/promoter as defined under the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short the MOFA). It had purchased from the original owners, namely, Anjani Krishna Boritkar and others land bearing CTS Nos.1458 (Pt), 1459 (Pt), 1472 (Pt), 1474 (Pt), 1475 (Pt), 1476 (Pt), 1478 (Pt) and 1482 (Pt) situated in village Dahisar, Taluka Borivali, Mumbai

Suburban District and which was declared as excess vacant land by the Additional Collector and Competent Authority (Urban Land Ceiling), Greater Mumbai. The appellant then decided to construct seven multi storeyed buildings and shopping complex on the said land in accordance with the building plans and specification duly approved by the Mumbai Municipal Corporation (the Corporation for short). One of the said seven multi storeyed buildings is by name "Panchali" which has stilt plus seven upper floors having two wings, "A" and "B" with 56 flats (the Building for short). The building has enclosed parking area below the stilt. There are in all 28 stilt parking spaces as per the plans approved by the Corporation. Between February 2001 to August 2003, on the basis of the agreements signed between the promoter and the individual flat purchasers, the plaintiff-promoter sold each of the 56 flats and the construction was completed some times in mid 2002. On 19/8/2002 the Corporation issued the occupation certificate. The flat purchasers formed a Co-operative Society, which was registered on or about 8/10/2003 and it was named as "Panchali Co-operative Housing Society". Before the society was registered, three parking spaces were sold and remaining 25 were purportedly in the possession of the plaintiff. It is alleged that on 22/2/2004 the committee members of the society tried to take forcible possession of the remaining 25 parking spaces by breaking open the locks of the appellant. It appears that the plaintiff has enclosed all the parking lots by a collapsable gate/grill door and had locked each one of them. On 21/3/2004, even the residents of other buildings also resorted to the similar action. The plaintiff filed police complaints on 11/3/2004 and 22/3/2004 and finally approached the trial court in Civil Suit No. 1767 of 2004 and others. Thus the suit property is the enclosed car parking spaces in the stilt portion in the building named "Panchali".

4. In the suit a permanent injunction has been prayed in respect of the suit parking lots mainly on the following grounds:

(a) As per the agreement for sale signed with every flat purchaser, the plaintiff intended to sell either residential flat/stilt parking space/open parking space in the said building on ownership basis.

(b) Each of the flat purchaser had executed a declaration/undertaking at the time of taking over possession of the respective flats in favour of the plaintiff, inter alia to the effect, that each purchaser unconditionally and irrevocably agreed that stilt parking spaces and open parking spaces shown in the plan belonged exclusively to the plaintiff, that they would have no claim of whatsoever nature to the same and that they will not object to the sale of the same by the plaintiff to any person, that the flat purchaser understands that he/she/they shall not be allowed to park his/her/their vehicle in the suit premises until and unless he/she/they has/have purchased from the plaintiff a stilt parking space or open parking space as shown in the plan and that each flat purchaser undertaken not to park his/her/their vehicle in the said property until and unless the same is purchased from the plaintiff.

(c) The stilt parking space is included in the definition of flat as given under Section 2(a) of the MOFA and it is not a part of the common areas and it is like a private garage.

5. The defendant -society filed Written Statement and opposed the suit on the grounds that,

(a) the plaintiff has no absolute right to sell or dispose off the parking spaces in the stilt portion, more particularly under the provisions of the MOFA and the plaintiff is entitled to only sale flats/shops/garages;

(b) the D.C. Rules 1991 restrict the rights of the promoters to sell parking spaces;

(c) the undertakings allegedly given by the flat purchasers are not binding on the society and in any case such an undertaking is contrary to the provisions of the MOFA and, therefore, it requires to be declared as illegal and bad in law;

(d) the defendant -society never attempted to take forcible possession of the stilt parking spaces and, therefore, the plaintiff was not entitled for the reliefs prayed in the suit.

6. As per the final order passed on 24/7/2006 the following issues were framed by the trial court and answered accordingly:

ISSUES FINDINGS (1) Do the plaintiffs prove that In the negative they have absolute right to sell/dispose of the parking space under the stilt?

(2) Do the provisions of the In the MOFA restrict the rights of affirmative plaintiffs/promoters to sell /dispose of the parking spaces?

(3) Do the provisions of the In the Development Control Rules affirmative 1991 restrict the rights of the plaintiffs/promoters to sell/dispose of the parking spaces?

(4) Do the Defendants prove that In the the undertaking given by the affirmative respective flat purchasers is not binding upon the Defendants namely the co-operative societies?

(5) Do the Defendants prove that In the the undertaking referred to affirmative in paragraph 7 of the Plaint purported to have been executed by the respective flat purchasers are contrary to the provisions of the MOFA and as such illegal?

(6) Do the Defendants prove that In the the undertaking referred to affirmative in paragraph 7 of the Plaint are contrary to the D.C. Rules and as such illegal?

(7) Do the Plaintiffs prove that In the negative the residents of the respective buildings attempted to take possession of the stilt portion with the use of force?

(8) Are the Plaintiffs entitled In the negative to the reliefs asked in the Plaint?

(9) What order? As per final order

Issue Nos.4 to 6 deal with the undertaking furnished by the purchasers and hence they have been decided together. Similarly Issue Nos. 1,2 and 3 have been decided together. Certain documents were brought on record before the trial court and the following documents are relevant for deciding this appeal:

- (a) Exh.-A : Copy of the agreement dated 27/05/2002.
- (b) Exh.-D : Letter dated 4/3/05 from the Corporation to the plaintiff.
- (c) Exh.-E : Undertaking executed by one flat owners.
- (d) Exh.-F Colly : Sanctioned plan alongwith forwarding letter dated 19/8/02.
- (e) Exh.-G : Original I.O.D. dated 3/5/1997. (f) Exh.-H Colly : Original letter dated 27/2/01 alongwith approved amended plan.
- (g) Exh.-J : Original office copy of the plaintiff's letter dated 26/3/02.
- (h) Exh.-M Colly: Affidavit of examination in chief of Rajesh Himatlal - PW 1.
- (i) Exh.-1 : Affidavit of examination in chief of Hariharan T. Iyer - DW 1. (j) Exh.-2 : List of documents along with the copies of original documents.
- (k) Exh.-3 Colly: Copies of tax receipts showing that the Defendants paid municipal taxes.
- (l) Exh.-4 Colly: Copy of the complaint filed by Defendants society in B.M.C. (m) Exh.-5 : Copy of the complaint filed by the Defendants society against the plaintiff in Metropolitan Magistrate Court.

7. Before we deal with the merits in the challenge to the order passed by the trial court, it would be necessary to reproduce certain provisions of the MOFA, Clauses of the model form of agreement, namely, Form-V prescribed by the State Government, Development Control Rules and Regulations and Model bye-laws 2001 framed under the Co-operative Societies Act, 1960.

FLAT

Section 1(a). "Flat" means a separate and self-contained set of premises used or intended to be used for residence, or office, show-room or shop or godown or for carrying on any industry or business and includes a garage, the premises forming part of a building and includes an apartment.

Explanation.-Notwithstanding that provision is made for sanitary, washing, bathing or other conveniences as common to two or more sets of premises, the premises shall be deemed to be separate and self-contained;

Promotor

Section 2(c). "promoter" means a person who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes

his assignees; and where the person who builds and the persons who sell are different persons, the term includes both;

Section 3(2)(d) -A promoter, who constructs or intends to construct such block or building of flats, shall

(d) disclose the nature of fixtures, fittings and amenities (including the provision for one or more lifts) provided or to be provided;

(h) state in writing, the precise nature of the organisation of persons to be constituted and to which title is to be passed; and the terms and conditions governing such organisation of persons, who have taken or are to take the flats;

Section 3(m)(ii)(iii)(iv)

(m) when the flats are advertised for sale, disclose inter alia in the advertisement the following particulars, namely:

(1) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(ii) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which the instalments thereof may be paid;

(iii) the nature, extent and description of the common areas and facilities;

(iv) the nature, extent and description of limited common areas and facilities if any. Section 4(1A)(a)(iii)(iv).

(1A) The agreement to be prescribed and sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b),

(a) particulars

(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;

Section 10 (1) -As soon as a minimum number of persons required to form a Co-operative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a Co-operative society or, as the case may be, as a company; and the

promoter shall join, in respect of the flats which have not been taken, in such application for membership of a co-operative society or as the case may be, of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act.

(2) If any property consisting of building or buildings is constructed or to be constructed and the promoter submits such property to the provisions of the Maharashtra Apartment Ownership Act, 1970, by executing and registering Declaration as provided by that Act then the promoter shall inform the Registrar as defined in the Maharashtra Co-operative Societies Act, 1960, accordingly; and in such cases, it shall not be lawful to form any co-operative society or company. Section 11. A promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association of flat takers or apartment owners his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under Section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

Section 16.-The provisions of this Act, except where otherwise provided, shall be in addition to the provisions of the Transfer of Property Act, 1882, and shall take effect notwithstanding anything to the contrary contained in any contract.

Clauses of the model form of agreement, FORM-V

Clause 2: The Flat Purchaser hereby agrees to purchase from the Promoter and the Promoter hereby agrees to sell the Flat Purchaser one Flat No. ... of the Type ... of carpet area admeasuring ... sq.metres (which is inclusive of the area of balconies) on Floor as shown in the floor plan thereof hereto annexed and marked Annexure D/shop No. .../ covered/ open Garage No... in the ...Building (herein referred to as "the Flat") for the price of Rs... including Rs. ... being the proportionate price of the common area and facilities appurtenant to the premises, the nature, extent and description of the common/limited common areas and facilities which are more particularly described in the Second Schedule hereunder written... Clause 4 -The Promoter hereby declares that the Floor Space Index available in respect of the said land is ... sq. mtrs. only and that no part of the said floor space index has been utilised by the Promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the promoter elsewhere, then the Promoter shall furnish to the flat purchaser all the detailed particulars in respect of such utilisation of the said floor space index by him. In case while developing the said land the Promoter has utilised any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclose by the Promoter to the Flat Purchaser. The residual F.A.R. (F.S.I) in the plot or the layout not consumed will be available to the

promoter till the registration of the society. Whereas after registration of the society the residual F.A.R. (F.S.I) shall be available to the society.

Clause 5 -In case the Promoter is acting as an agent of the vendor/Lessor/Original Owner of the said land, the Promoter hereby agrees that he shall, before handing over possession of the flat to the flat purchaser and in any event before execution of a conveyance/ assignment of lease of the said land in favour of a corporate body to be formed by the purchasers of flats/shops/garages in the building to be constructed on the said land (hereinafter referred to as "the Society"/ the Limited Company"), make full and true disclosure of the nature of his title to the said land as well as encumbrances, if any, including any right, title, interest or claim of any party in or over the said land and shall as far as practicable ensure that the said land is free from all encumbrances and that the Vendor/Lessor/Original Owner the Promoter has/have absolute, clear and marketable title on the execution of a conveyance/assignment of lease of the said land by the Promoter in favour of the said Society/Limited Company.

Clause 11 -The Flat Purchaser shall use the Flat or any part thereof or permit the same to be used for purpose of residence/office/ showroom/shop/godown for carrying on any industry or business. He shall use the garage or parking space only for the purpose of keeping or parking the Flat Purchaser's own vehicle.

Clause 13 -Unless it is otherwise agreed to by and between the parties hereto the Promoter shall, within four months of registration of the Society or Limited Company, as aforesaid cause to be transferred to the Society or Limited Company all the right, title and the interest of the Vendor/Lessor/Original Owner/Promoter and/or the owners in the aliquot part of the said land together with the building/s by obtaining/ or executing the necessary conveyance/ and or assignment of lease of the said land (or to the extent as may be permitted by the authorities) and the said building in favour of such Society or Limited Company, as the case may be such conveyance/ assignment of lease shall be in keeping with the terms and provisions of this Agreement.

Clause 24 - IT IS ALSO UNDERSTOOD AND AGREED BY AND BETWEEN THE PARTIES hereto that the terrace space in front of or adjacent to the terrace flats in the said building, if any, shall belong exclusively to the respective purchaser or the terrace flat and such terrace spaces are intended for the exclusive use of the respective terrace Flat Purchaser. The said terrace shall not be enclosed by the Flat Purchaser till the permission in writing is obtained from the concerned local authority and the Promoter or the Society, or as the case may be, the Limited Company.

Sections 5 and 53 of the Transfer of Property Act, read as under: 5.Transfer of property" defined.-In the following sections "transfer of property" means an act by which a living

person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

53. Fraudulent transfer.-(1) Every transfer of immovable property made with intent to defeat or delay the creditors or the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term include a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

8. The Government of Maharashtra by its notification dated 20/2/1991 has sanctioned and published the Development Control Regulations (DCR) for Greater Bombay, 1991. Regulation No.2 defines certain terms and the relevant of those for the present consideration are reproduced as under:

2(7) "Amenity" means roads, streets, open spaces, parks, recreational grounds, play grounds, gardens, water supply, electric supply, street lighting, sewerage, drainage, public works and other utilities, services and conveniences.

2(11) "Building" means a structure, constructed with any materials whatsoever for any purpose, whether used for human habitation or not, and includes -foundation, plinth, walls etc., verandas, balconies, any wall enclosing or intended to enclose any land or space, tanks constructed for storage of chemicals.

2(13) "Built-up area" means the area covered by a building on all floors including cantilevered portion, if any, but excepting the areas excluded specifically under these Regulations.

2(15) "Carpet area" means the net usable floor area within a building excluding that covered by the walls or any other areas specifically exempted from floor space index computation in these Regulations.

2(31) "External wall" means an outer wall of a building not being a party wall even though adjoining a wall of another building and also means a wall abutting on an interior open space of any building.

2(47) "Garage-Private" means a building or a portion thereof designed and used for the parking of vehicles.

2(48) "Garage-Public" means a building or portion thereof, designed other than as a private garage, operated for gain, designed and/or used for repairing, servicing, hiring, selling or storing or parking motor-driven or other vehicles.

2(64) "Open space" means an area forming an integral part of a site left open to the sky.

2(67) "Parking space" means an enclosed or unenclosed covered or open area sufficient in size to park vehicles. Parking spaces shall be served by a driveway connecting them with a street or alley and permitting ingress or egress of vehicles.

2(91) "Tenement" means an independent dwelling unit with a kitchen, or a cooking alcove. Regulations 35 (2) and 36 read as under:

35. Floor Space Index Computation- (1) ...

(2) Exclusion from FSI computation -The following shall not be counted towards FSI:

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) Area of unenclosed but covered parking spaces as provided in clause (b) (i) of sub-regulation (5) of Regulation 36.

36. Parking spaces.-Wherever a property is developed or redeveloped, parking spaces at the scale laid down in these Regulations shall be provided. When additions are made to an existing building, the new parking requirements will be reckoned with reference to the additional space only and not to the whole of building but this concession shall not apply where the use is changed.

(1) General Space Requirements.- (i) Types.-The parking spaces mentioned below include parking spaces in basements or on a floor supported by stilts, or on upper floors, covered or uncovered spaces in the plot and lock-up garages.

(ii) Size of Parking Space.-The minimum sizes of parking spaces to be provided shall be as shown below:

(a) Motor vehicle 2.5 m x 5.5 m.

(b) Scooter, Motor-cycle 3 sq.m.

(c) Bicycle 1.4 sq.m.

(d) Transport Vehicle 3.75 m. x 7.5 m.

(iii) Marking of Parking Spaces spaces shall be paved and clearly marked for different types of vehicles. -Parking (2) Quantitative Requirements - Four wheeled auto-vehicles. -Parking

spaces for four wheeled auto vehicles shall be provided as in Table 15 below, any fractional space of more than half resulting from the ratios in column (3) thereof being rounded off upward to the nearest integer.

1. Residential - (B) In the rest of the Island City area, Suburbs and Extended Suburbs: sq.m.

(a) 4 tenements having carpet area above 35 each. sq.m.

(b) but 2 tenements with not exceeding carpet 70 area sq.m. exceeding 45each.

(c) 1 tenement with carpet area exceeding 70 sq.m.

(5) Parking Spaces.-Where to be accommodated-The parking spaces may be provided -

(a) underneath the building, in basements within its stilted portion, or on upper floors;

(b) in the side and rear open spaces, but not in the amenity open spaces, if

(i) they are unenclosed but uncovered except as provided in (d) below;

(ii) they do not consume more than 50 percent of the open space;

(iii) a minimum distance of 3.0 m. around the building is kept free of parking for proper manocuverability of vehicles;

(iv) they are atleast 7.5 m. from the road boundary in case of detached covered garages;

(v) the parking layouts meet the requirements of the Chief Fire Officer in the case of multi-storeyed, high rise and special buildings.

(c) in a residential zone, beyond the compulsory side and rear open spaces stipulated in sub-regulation 2 of Regulation 26, if other conditions under sub-rule (b) above are satisfied. Here the parking space may be an unenclosed covered space.

(d) ...

38. Requirements of parts of buildings - (1) Plinth.-...

(i) Main Building.- ...

(ii) Interior court-yards, covered parking spaces and garages. - These shall be raised at least 15 cm above the surrounding ground level and shall be satisfactorily drained.

9. P.W. 1 -Rajesh Himatlal, in his cross-examination before the trial court, admitted as under:

The reference of 700 sq.ft. in Exh. K is not referred therein as carpet area. I cannot say whether it is referred therein as built up or super built up. The reference of Rs.10,29,700/-is for 700 sq.ft. area of the flat applicable from 1/5/2002 to 31/5/2002....

The amount of Rs.10,29,700/-referred in clause no.3-A of agreement dated 27/5/2002 Exh.A refers to price mentioned in Exh.K. The area of 535 sq.ft. referred in clause 3-B is not a carpet area. It refers to built up area. There is no consumption of F.S.I. in respect of stilt parking area....

Clause no.3-B, 3-C and 3-D are deleted, as agreement is in respect of sale of a flat mentioned in clause 3-A....

Undertaking is executed on a proper stamp paper. It is not registered. The stamp paper Exh."E" was purchased by me in my name. I have not signed Exh."E" undertaking. It is incorrect to say that the deponent of Exh.E never appeared before notary or advocate....

It is true that as per clause 6-C of Exh.J parking space is required to be kept open as shown in the plan.

10. D.W. 1 -Shri Hariharan T. Iyer, the Secretary of the respondent -society, in his cross-examination, admitted as under:

I have purchased my flat in the defendant-society in May 2002. In June 2002 I got possession of my flat. The building was completely constructed in May, 2002

Since I wanted some time of approximately a month for making balance payment, I could not take possession of my flat in the month of May, 2002.

I had signed a written undertaking in favour of the developer. It is true that I have not challenged undertaking signed by me, as I do not know the contents thereof. I am secretary of the defendant-society from October/November, 2003

The plaintiff disclosed the undertaking executed by flat purchasers in this suit. All the undertakings executed by the flat purchasers were not annexed but one copy of it was

annexed. I have read the undertaking when I received the copy of plaint. We had received copy of all undertakings executed by the flat purchasers including myself. It is correct to say that, till today, we have not decided to challenge undertaking executed by the flat purchasers, who are members of the defendant society.

All the members are flat purchasers of the defendant society....

It is true that in my agreement, no where it is mentioned what is super built up area of my flat. The area mentioned in my agreement is built up area of my flat. So far, municipality has not assessed each and every flat separately. The property taxes are paid by the members in respect of the flats occupied by them. The members are not paying any other taxes, save and except for the area of the flat in their respective occupation.

It is true that there is no conveyance executed by the developer in favour of the society till today.

11. The main issues that arise for consideration in this Appeal are,

(a) Whether the plaintiff-company has the four tenements and if the carpet area exceeds 45 sq.mtrs. but less than 70 sq.mtrs., two tenements will have one parking spaced provided by the builder. In case the carpet area exceeds 70 sq.mtrs., each tenement must have one parking space. In the instant case the carpet area of any of the 56 flats / tenements in Panchali building is not less than 35 sq.mtrs. or upto 35 sq.mtrs. The Managing Director of the plaintiff-company Shri Rajesh Himatlal (PW 1) in his depositions before the trial Court admitted that the consideration of Rs.10,29,700/-was for 700 sq.ft. area of the flat as mentioned in the agreement dated 27/5/2002. He further states that the area of 535 sq.ft. referred in clause 3(b) is not carpet area. The area of 35 sq.mtrs. will be approximately 350 sq.ft. and admittedly the members of the defendant -society have paid for a total area of 700 sq.ft. The learned Senior Counsel fairly conceded that between the carpet area and built up area, there would be different of about 15 to 20 per cent i.e. if the carpet area is 350 sq.ft., the built up area may be around 400 sq.ft. and by no stretch of imagination it can be 700 sq.f.t. Thus a totally new case was sought to be made out in this appeal by the plaintiff -company and if such a plea was taken up before the trial Court, obviously the same could have been dealt with on the basis of the evidence. Even otherwise it is far-fetched to state that when the flat purchasers have paid for 700 sq.ft. area, carpet area would be 350 sq.ft. i.e. 50 per cent. The suit has proceeded on the basis that the carpet area of each flat is 535 sq.ft. and the built up area is 700 sq.ft. This new plea of the plaintiff -company, therefore, must fail and it cannot be considered despite the articulations sought to be made in the Written Submissions made before this Court. right to sell the suit parking spaces separately to anyone including the members of the defendant-Society in view of the provisions of the

MOFA, the model agreement prescribed by the State Government under the same and the Development Control Regulations, 1991; and

(b) Whether the defendant-Society is estopped from challenging the action of the plaintiff-company for sale of the suit parking spaces on account of the undertakings furnished by its members / flat purchasers.

12. At the outset let me deal with the submission made by the learned Senior Counsel which has been taken up for the first time in this appeal and to the effect that the plaintiff-company was not required to provide the suit parking spaces as per the DCR in view of the carpet area of each flat being less than or upto 35 sq.mtrs. This submission is based on the scheme of Regulation 36(2) of the DCR which states that if the carpet area of the tenements is above 35 Sq.mtrs., one parking space has to be provided for

13. It is the plaintiff's case that the stilt parking space is a garage and, therefore, it is entitled to dispose it off as a separate premises by way of sale and it cannot be treated to be a common open space or common parking area available to the members of the society. Regulation 2(67) of DCR defines "Parking space" which means an enclosed or unenclosed covered or open area sufficient in size to park vehicles. As per Regulation 2(47) "Garrage-Private" means a building or a portion thereof designed and used for the parking of vehicles.

Surely the parking space either enclosed or unenclosed, covered or open cannot be a building. It is also admitted that the area of parking space is excluded from FSI as per DCR 35(2)(f). But admittedly the area for a garage is counted in the FSI. Similarly a garage as defined in the DCR is charged to property tax, the stilt parking space is not charged to property tax. DCR 35(2)(f) states that area of unenclosed but covered parking space as provided in clause (b)(i) of sub-regulation (5) of Regulation 36. In the instant case the stilt parking spaces were unenclosed but covered. However, by a fabricated structure the parking spaces were sought to be enclosed. DCR 36 states that wherever a property is developed or redeveloped, parking spaces at the scale laid down in these Regulations shall be provided. When additions are made to an existing building the new parking requirements will be reckoned with reference to the additional space only and not to the whole of building but this concession shall not apply where the use is changed. Thus it is a compulsory requirement to provide for parking spaces under DCR 36. Under clause (ii) of DCR 36(1), size of parking spaces has also been set out and in the instant case, as required under DCR 36(2) for 56 flats, 28 parking spaces (unenclosed but covered) have been provided.

14. Section 3(2) of the MOFA states that a promoter, who constructs or intends to construct a building of flats, shall disclose the nature of fixtures, fittings and amenities provided or to be provided, in writing the precise nature of the organisation of persons to be constituted

and to which title is to be passed, and the terms and conditions governing such organisation of person, who have taken or are to take flats, when the flats are advertised for sale, disclose in the advertisement the extent of the carpet area of the flat including the area of the balconies which should be shown separately, the nature, extent and description of the common areas and facilities, and the nature, extent and description of limited common areas and facilities, if any. As per Section 4 of MOFA all these particulars which are set out in Section 3 are required to be provided for in the agreement that is to be signed between the builder / promoter and the flat purchasers. As per Section 4(1), the agreement between the promoter and the flat purchasers shall be in the prescribed form. As per Section 11 of the MOFA, a promoter shall take all necessary steps to complete his title and convey to the organisation of persons his right, title and interest in the land and building and execute all relevant documents of title relating to the property which may be in his possession or power. Clause 4 of the Model Agreement states that the residual FSI in the plot or the lay out not consumed will be available to the promoter till the registration of the society and whereas after the registration of the society, it shall be available to the society and not to the builder. The time limit for registration of the society is fixed under Rule 8 of the MOFA Rules, 1964. Clause 13 of the Model Agreement states that unless it is otherwise agreed to by and between the parties, the promoter shall, within four months or registration of the society or Limited Company, cause to be transferred to the Society or Limited Company all the right, title and the interest of the Vendor/Lessor/Oriani owner / Promoter and/or the owners in the aliquot part. Section 16 of the MOFA states that its provisions, except where otherwise provided, shall be in addition to the provisions of the Transfer of Property Act, 1882, and shall take effect notwithstanding anything to the contrary contained in any contract. Thus on the touchstone of these provisions, it is very clear that the rights arising from the agreement signed under the MOFA between the promoter and the flat purchasers cannot be diluted by any contract or an undertaking to the contrary. When the plans are sanctioned by the Corporation, it is obligatory on the part of the promoter to follow the DCR and the agreement signed under the MOFA between the developer and the flat purchaser must be in conformity with the model form of agreement (Form V) prescribed by the State Government. The said model agreement does not contemplate the flat purchasers to separately purchase the enclosed but covered parking spaces i.e. the stilt parking spaces. In the instant case the PW-1 admitted before the trial Court that Clauses 3-B, 3-C and 3-D of the model agreement were deleted while signing the agreement (Exh.A) between the developer and flat purchaser. It cannot be presumed that every flat purchaser was in the know of the clauses of the model agreement and its binding nature. The builders tend to encash on this ignorance and seek all sorts of undertakings which are contrary to the provisions of MOFA, DCR and the model agreement. When such is the requirement of law, any undertaking furnished by the flat purchasers cannot have a binding effect as it would be contrary to the guarantees available to the flat purchasers under the MOFA. There is no estoppel against the statute as is well-known and, therefore, the trial Court rightly held that

the individual undertakings furnished by the flat purchasers were contrary to the provisions of MOFA and were illegal. They were also contrary to the DCR. Consequently, such undertakings will not be binding either on the flat purchasers of the Society.

15. In the instant case when the defendant -Society was registered on 8/10/2003 under Clause 13 of the Model Form of Agreement, the promoter was duty bound within four months from the said date, to transfer to the society his rights, title and interests with the buildings along with land appurtenant thereto in favour of the society. This was not done and instead the plaintiff -company retained its hold on the stilt parking spaces which were enclosed by fabricated structure and kept under lock and key. This was totally illegal and void ab initio. As noted earlier, the stilt parking space is a common parking area available and the developer is obliged to provide the same under the DCR when the carpet area of the flat is 350 sq.mtr. It is not an additional premises / area that he is authorised to sell either to any flat purchaser or to any outsider. It is part and parcel of the Society building and it cannot be a separate premise available for sale. As soon as the Corporation issues the occupation certificate and the society is registered, the building as well as the stilt parking spaces, open spaces and all common amenities become the property of the society and four months' time is provided, if any other period is not mentioned in the agreement, under clause 13 of the model form of agreement and it is binding on the developer. Hence the stilt parking spaces cannot be put on sale by the developer as he ceases to have any title on the same as soon as the occupation certificate is issued by the Corporation and it will become a property of the society on its registration. Furnishing undertaking by the flat purchasers is an act which is forced upon by the developer and it is commonly known, if the flat purchaser refuses to furnish such an undertaking, he would be informed that the flat is not available for sale. Asking for an undertaking as was sought in the instant case and furnished by the individual flat purchaser is nothing sort of exploitation by the developers and that too by resorting to the methods contrary to the provisions of law. As per Rule 8 of the MOFA Rules, the promoter shall submit an application to the Registrar for registration of the Co-operative Society within four months from the date on which the minimum number of persons required to form such society have taken flats. But this provision is followed in breach invariably by the developers and one hardly comes across an instance where the developer has taken steps as soon as eleven flat purchasers have signed agreements for purchase of the flats. There are instances that even after the occupation certificate is issued by the Corporation and the flat purchasers have occupied the flats, the developers do not take any steps for registration of the Co-operative Society even for years together and thus hold on to their interests in the property (except the unsold flats/shops or garages), which they are not entitled in law.

16. Section 5 read with Section 53-A of the Transfer of Property Act, 1882 also does not permit the developer to contend that part of the Society's property viz. the enclosed stilt

parking spaces are to be sold either to third parties or to the members of the Society. Regulation No.1(2) of the DCR states that the said Regulations apply to the building activity and development work in any area under the entire jurisdiction of the Municipal Corporation of Greater Bombay and if there is a conflict between the requirements of the Regulations and those of any other Rules or Bye-laws, the Regulations shall prevail. Having regards to this scheme of Regulation 1(2) of the DCR, the undertaking admittedly furnished by the flat purchasers has to surrender to the requirements of the DCRs and the said undertaking will not debar or prevent the Society from claiming that the stilt parking spaces are the property of the society and any of them cannot be offered for sale by the developer at any time.

17. As per the DCR No.36(5) the location of the parking spaces has been fixed and the relevant provisions read as under:

The parking spaces may be provided

(a) underneath the building, in basements within its stilted portion or on upper floors.

Whereas the location of the garage as stipulated under DCR No.38(8)(ii) stipulates that the garage may be located at its side or rear, but at least 7.5 m. away from any access road, if not within the building. The Explanation therebelow states that for the purpose of this Regulation, the term "garage" means a detached ground floor structure in the open space of the plot or on the ground floor or on upper floor of a building, and intended for parking or shelter of mechanically controlled vehicles but not for their repairs. Thus the location of the garage is one more reason to reject the contentions of the appellant that the stilt parking spaces are garages. The reliance of the appellant on Clause 2 of the Model Agreement -Form V in support of the contention that it recognises its right to sell open / covered garages is also misplaced. The stilt parking spaces cannot be termed as open / covered garages and Clause 2 of the Model Agreement -Form V provides for sale of covered / open garage in addition to the flat / shop. It is immaterial if the purchase agreement does not include stilt car parking spaces in the common areas of amenities. The DCR obliges to provide car parkings as noted hereinabove and the plans approved by the Municipal Corporation call upon the developer to comply with the requirements of the DCR. Exhibit "J" is the letter dated 26/3/2002 as noted hereinabove addressed to the Executive Engineer praying for issuance of the occupation certificate and in the said letter under the caption "Conditions to comply" Sr.No.6 deals with the condition regarding "surrounding open spaces, parking spaces and terraces" which are required to be kept open. It also makes it clear that open spaces are different from car parking spaces. Therefore, the defendant -Society is right in its contentions that the stilt car parking spaces is part of the common

amenities and it cannot be treated to be a separate premises / garage which could be sold by the Developer to any of the members of the society or to an outsider. It was sought to be argued that the MOFA expressly recognises the promoter's right to retain premises which remain unsold. There could be no dispute on this. However, the word "premises" does not include "stilt parking spaces". Section 16 of the MOFA states that the provisions of the said Act, except where otherwise provided, shall be in addition to the provisions of the Transfer of Property Act, 1882 and shall take effect notwithstanding anything to the contrary contained in any contract. The undertakings furnished by the flat purchasers and relied upon by the builder are hit by the provisions of Section 16 of the MOFA and are, therefore, illegal and void ab initio as has been rightly held by the trial Court. As per the Oxford Dictionary the word "stilt" means one of the set of posts that support a building so that it is high above the ground or water. No evidence was placed before the trial Court by the builder / developer to the effect that the area of stilt parking spaces was included in the saleable area as per the plans approved by the Municipal Corporation. Under the MOFA the developer's right is restricted to the extent of disposal of flats, shops and/or garages, which means that any premises which is included in the

FSI can be sold by the developer / promoter. The area of the stilt parking space is not included in the FSI nor is it assessable for the Corporation taxes. Hence disposal of three stilt parking spaces by the developer even before the occupation certificate was issued by the Corporation or thereafter is per se illegal and that by itself cannot be a reason for the developer to contend that these stilt parking spaces are its property which could be transferred by sale, notwithstanding the undertakings executed by the flat purchasers.

18. In the premises, I am satisfied that the well reasoned judgment and order passed by the learned Judge of the City Civil Court, Greater Mumbai does not call for any interference in this appeal and the same is required to be in fact confirmed. Hence this appeal must fail and the same is hereby dismissed with costs. Interim order stands vacated.

Mr. Naik made an oral application to stay the operation of this order for twelve weeks. has been opposed by Mr. Salunke, the appearing for the societies. The operation order is stayed for a period of four weeks from today.

25/4/2008

(B.H. MARLAPALLE,J)