DEVELOPING PROPERTY IN PHASES & DISCLOSURE TO BE MADE TO PURCHASER

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A large plot of land is normally developed in phases therefore it is important that proper disclosure should be made to Flat purchaser to avoid any dispute in future with the Flat Purchaser or Association of the Flat Purchaser.

Let us consider an example of development of 10 Acre of land, which is to be developed in phases and in First Phase only 2 Acres is proposed to be developed, then it will be in the interest of the Developer to clearly disclose to the Purchaser how he propose to develop entire 10 Acres of land. (The area of the entire plot is taken arbitrarily for explanation purpose only).

In Maharashtra, law governing the sale and purchase of Flat is Maharashtra Ownership Flat (Regulation of the Promotion of Construction of Sale, Management and Transfer) Act 1963 **(MOFA)** and Rule under MOFA and The Real Estate(Regulation and Development) Act, 2016(**RERA**) and Rule under RERA. The RERA being central act, in case of any conflict between RERA and MOFA, provisions of RERA will prevail over the provision of MOFA.

Under Section 3 of RERA every Real Estate Project(**Project**) is required to be registered with Real Estate Regulation Authority(**Authority**). The project cannot be even advertised without registering it with Authority.

PHASE OF THE PROJECT

If project is developed in phases, then as stated in explanation to section 3 of RERA every phase will be considered as standalone project and will have to register as Project. Though RERA does not states, what is Phase or how phase can be defined, therefore it can be safely assumed that RERA has left it to the discretion of Developer to define phase. Technically speaking even 10-15 Flat in the building can be defined has phase, but in practice it will be difficult to do it.

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A project for purpose of RERA may be standalone project, but it may not be standalone project for Local Authority i.e. Municipal Authority and under Development Control Regulation (**DC Regulation**). Municipal Authority while sanctioning the plan for development of any property are guided by the provision of DC Regulation as may be applicable in the area, every Local Authority have their own DC Regulation which are more or less identical. Some of the important provision which is considered by Local Authority while sanctioning the plan are consumption of Floor Space Index(**FSI**), Recreation Garden, Open Space, access road etc. Further while planning Developer will also have to take into consideration provision of Sewerage Treatment Plant(**STP**), Club House and other amenities/facilities some of which are required to be mandatorily provided and others are optional, which Developer provide as an additional attraction in the project.

In the given example, first question which will have to be considered is whether for sanction of plan, entire area of 10 Acre is submitted or only 2 Acre is considered. If plan is submitted to Local Authority for only 2 acre, then development is not done in phased manner for purpose of RERA or under DC Regulation but it is complete project in itself PROVIDED it has nothing to do with remaining part of the area proposed to be developed and to calculate entire potential viz FSI, TDR only of 2 Acre is considered and loaded in that and it has nothing to do with remaining part of 8 Acres land.

If 2 Acre is considered by local authority for sanction of the Plan, legally it will mean 2 Acre and balance 8 Acres is subdivided. Even if property is subdivided and local authority while sanctioning the project have considered provision of DC Regulation as may be applicable to 2 Acre, but Developer while providing amenities might be planning for amenities taking into consideration whole 10 Acre. Example a Club House may be proposed as part of development of the said 2 Acres plot, the Developer may be contemplating the said Club House for flat purchaser of whole 10 Acre. Similarly there could be many other amenities like STP which Developer might be contemplating for whole 10 Acres and not restricting for 2 Acres only. Therefore Developer should be very clear about how he desire to develop the whole 10 Acre right in the beginning itself.

Some of the relevant provision of RERA and MOFA and also some of judgments passed by the courts, which will be helpful to understand this issue properly and will help in making disclosure to the Flat Purchaser as under;

The Relevant Provision of RERA

Section 2(n) "common areas" mean—

(i) the entire land for the real estate project or where the project is developed in phases and registration under this Act is sought for a phase, the entire land for that phase;

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(v) installations of central services such as electricity, gas, water and sanitation, air-conditioning and incinerating, system for water conservation and renewable energy;

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(viii) all other portion of the project necessary or convenient for its maintenance, safety, etc., and in common use;

Therefore when development is done in phase and project is registered only of Phase entire land of the phase will be considered for the Common area. In the given example development of 2 Acres of land is considered for registration of project entire land of 2 Acre will be considered for common area and not 10 Acres. But careful reading of definition will also show that all convenient and central service also is presumed to be in the common area.

Section 3, Prior registration of Real Estate Project with Real Estate Regulatory Authority

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Explanation.—For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain registration under this Act for each phase separately.

Explanation to Section 3, clearly states that, the Phase of the project is also considered as standalone project and has to be registered as project under RERA.

Section 4 : Application for registration of Real Estate Project

Section 4(2) The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely:
(d) the sanctioned plan, layout plan and specifications of the proposed project or the phase thereof, and the whole project as sanctioned by the competent authority;

If sanction is for whole property then phase and whole project should be disclosed. In the given example if sanction is for 10 Acre, than even if 2 Acres is being developed, sanction plan of 10 Acre should be disclosed.

Sec 4(2)(l)(C) the time period within which he undertakes to complete the project or phase thereof, as the case may be;

Time period within which Developer desire to complete the phase should be disclosed.

Sec 14. Adherence to sanctioned plans and project specifications by the promoter.
(1) The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.
(2) Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—
(i) any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person:
Provided that the promoter may make such minor additions or alterations as may be required by the allottee, or such minor changes or alterations as may be necessary due to architectural and structural reasons duly recommended and verified by an authorised Architect or Engineer after proper declaration and intimation to the allottee.
Explanation.—For the purpose of this clause, "minor additions or alterations" excludes structural change including an addition to the area or change in height, or the removal of

part of a building, or any change to the structure, such as the construction or removal or cutting into of any wall or a part of a wall, partition, column, beam, joist, floor including a mezzanine floor or other support, or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment, etc.

(ii) any other alterations or additions in the sanctioned plans, layout plans and specifications of the buildings or the common areas within the project without the previous written consent of at least two-thirds of the allottees, other than the promoter, who have agreed to take apartments in such building.

Explanation.—For the purpose of this clause, the allottees, irrespective of the number of apartments or plots, as the case may be, booked by him or booked in the name of his family, or in the case of other persons such as companies or firms or any association of individuals, etc., by whatever name called, booked in its name or booked in the name of its associated entities or related enterprises, shall be considered as one allottee only.

Thus under Sec 14 once plans are disclosed and nature of fixture, fitting are disclosed, without consent of two third of the Purchaser plan cannot be changed. Thus once plans are disclosed, it cannot be changed without consent of two third of Purchaser, the plans are disclosed at the time of registration of project. Further, I am not convinced about the decision by the majority, how can majority decide and accept the change, a person might have agreed to acquire the Flat after considering plan disclosed to him and thereafter majority of Purchasers are accepting the change, therefore if changes are made without everyone's consent it will be unfair to minority. The changes which Developer proposes to make may be in the interest of the majority and may prejudicially affect minority. Therefore provision should have been made for minority to exit and amount paid by them should be refunded along with interest.

Relevant provisions of MOFA are;-

Sec 7:-After plans and specification are disclosed no alteration or addition without consent of persons who have agreed to take the Flat and defect notice within three years to be rectified.

(1) After plans and specification as approved by local authority as aforesaid are disclosed or furnished to persons who agrees to take one or more Flats the Promoter shall not make

(i). any alteration in the structure described therein in respect of the Flat and Flats which are agreed to be taken without the previous consent of that person

(ii) any other alterations or additions in the structure of the building without previous consent of all the person who have agreed to take the flats in such building.

Removal of Doubt Sec 7A

For removal of doubt, it is hereby declared that clause(ii) of Sub-Section (1) of Section 7 have been retrospectively substituted by clause(a) of section 6 of Maharashtra Ownership Flat (Regulation of the Promotion of Construction of Sale, Management and Transfer) (Amendment) Act 1986(herein after in this Section referred to as "the Amendment Act") , it shall be deemed to be effective as if the said and the clause(ii) so as substituted has been in force at all material time; and the expression "or construct any additional structures" in clause(ii) of sub-section (1) of Section 7 as its existed before the commencement of amendment Act and expression "constructed and completed in accordance with the plans and specification as aforesaid" and "any unauthorised changes in the construction" in Sub-section (2) of section 7 shall notwithstanding anything contained in this Act or in any Agreement or in any judgment, decree or order of any court be deemed never to apply or to have applied in respect of the construction of any other additional building or structure constructed or to be constructed under a scheme or project of development in the layout after obtaining the approval of a local authority in accordance with building rules or building bye law or Development Control Rule made under any law for time being in force.

IMPORTANT JUDGMENTS OF SUPREME COURT AND BOMBAY HIGH COURT

i. Jayantilal Investment vs Maduvihar Co-operative Society.

Facts of the Case: - This is one of the landmark judgments on disclosure and interpretation of MOFA. In this case Promoter had developed 6071 sq.mtr land by constructing 126 Flats and 12 shops and gave possession to the Flat Purchaser in 1989. Promoter did not form Co-operative Society, therefore all Flat Purchaser made an application to Registrar to form Co-operative Society, which was formed in 1993. Despite completing the project Promoter was trying do further construction after sanction of plan by BMC in 2001. Therefore Society filed a suit in the City Civil Court, the suit was partly decreed, Developer was given 3 years' time to convey and also

permitted to do the construction as per plan sanctioned by BMC in 2001. Therefore appeal was filed in the High Court by the Society and also Promoter. The Appeal of the Society was allowed and Appeal of the Society was dismissed. Against the order of High Court, Appeal was preferred by the Developer to Supreme Court, Supreme Court after considering varies provisions of the MOFA had sent back the case to the High Court. High Court again allowed the Appeal of the Society and dismissed the Appeal of the Promoter.

Some of the important observation by the Supreme Court is as under;

16. Therefore, the legislature has sought to regulate the activities of the promoter by retaining Sections 3 and 4 in the Act. It needs to be mentioned at this stage the question which needs to be decided is whether one building with several wings would fall under amended Section 7(1)(ii). Section 7-A basically allows a builder to construct additional building provided the construction forms part of a scheme or a project. That construction has to be in accordance with the layout plan. That construction cannot exceed the development potentiality of the plot in question. Section 10 of MOFA casts an obligation on the promoter to form a cooperative society of the flat takers as soon as minimum number of persons required to form a society have taken flats. It further provides that the promoter shall join the society in respect of the flats which are not sold. He has to become a member of the society. He has the right to dispose of the flats in accordance with the provisions of MOFA. Section 11 inter alia provides that a promoter shall take all necessary steps to complete his title and convey the title to the society. He is obliged to execute all relevant documents in accordance with the agreement executed under Section 4 and if no period for execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period. Rule 8 inter alia provides that where a cooperative society is to be constituted, the promoter shall submit an application to the Registrar for registration of the society within four months from the date on which the minimum number of persons required to form such society (60%) have taken flats. Rule 9 provides that if no period for execution of a conveyance is agreed upon, the promoter shall, subject to his right to dispose of the remaining flats, execute the conveyance within four months from the date on which the society is registered.

17. Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the layout plan on the one hand vis-à-vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1-A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Form V of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, etc.) Rules, 1964 are quoted hereinbelow

> *"3. The promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions, if any, which may have been imposed by the local authority concerned at the time of sanctioning the said plans or thereafter and shall, before handing over possession of the flat to the flat purchaser, obtain from the local authority concerned occupation and/or completion certificates in respect of the flat.*
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> *4. The promoter hereby declares that the floor space index available in respect of the said land is ... square metres only and that no part of the said floor space index has been utilised by the promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the promoter elsewhere, then the promoter shall furnish to the flat purchaser all the detailed particulars in respect of such*

utilisation of said floor space index by him. In case while developing the said land the promoter has utilised any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the promoter to the flat purchaser. The residual FAR (FSI) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the society the residual FAR (FSI), shall be available to the society."

18. The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one-building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.

19. In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations, etc.

20. In the light of what is stated above, the question which needs to be examined in the present case is whether this case falls within the ambit of amended Section 7(1)(ii) or whether it falls within the ambit of Section 7-A of MOFA. As stated above, under Section 7(1) after the layout plans and specifications of the building, as approved by the competent

authority, are disclosed to the flat takers, the promoter shall not make any other alterations or additions in the structure of the building without the prior consent of the flat takers. This is where the problem lies. In the impugned judgment, the High Court has failed to examine the question as to whether the project undertaken in 1985 by the appellant herein was in respect of construction of additional buildings or whether the project in the layout plan of 1985 consisted of one building with 7 wings. The promoter has kept the requisite percentage of land open as recreation ground/open space. Relocation of the tennis court cannot be faulted. The question which the High Court should have examined is: Whether the project in question consists of 7 independent buildings or whether it is one building with 7 wings? The answer to the above question will decide the applicability or non-applicability of Section 7(1)(ii) of MOFA, as amended. The answer to the above question will decide whether the time to execute the conveyance has arrived or not. This will also require explanation from the competent authority, namely, Executive Engineer, 'R' South Ward, Kandivali, Mumbai-400067 (Respondent 8 herein). In the dates and events submitted by the appellant promoter, there is a reference to the permission granted by ULC Authorities dated 16-11-1984 which states that the owner/developer shall construct a building with 7 wings. One needs to examine the application made by the promoter when he submitted the layout plan in 1985. If it is the building with 7 wings intended to be constructed in terms of the layout plan then the High Court is also required to consider the effect of the judgment in Ravindra Mutneja v. Bhavan Corpn. [(2003) 5 Bom CR 695] in which the learned Single Judge has held that if a building is put up as a wing of an existing building, it cannot be constructed without the prior permission of the flat takers. In that connection, the High Court shall also consider permission dated 16-11-1984 under Section 21(1) of the ULC Act, application made to the competent authority when initial layout plan was sanctioned, applications for amendments to layout plans made from time to time and also agreements between promoter and flat takers

Observation of High Court in Jayantilal Investment case when remanded:

40. *It can, thus, be seen that it is settled position of law, as laid down by the Apex Court, that a prior consent of the flat owner would not be required if the entire project is placed before the flat taker at the time of agreement and that the builder puts an additional construction*

in accordance with the layout plan, building rules and Development Control Regulations. It is, thus, manifest that if the promoter wants to make additional construction, which is not a part of the layout which was placed before flat taker at the time of agreement, the consent, as required under Section 7 of the MOFA, would be necessary.

ii. Observation in Malad Kokil Co-operative Housing Case,

33. It is thus clear that relying on the judgment of the Apex Court in the case of ***Jayantilal Investment*** *it has been held that at the time of execution of the agreement with the flat takers, promoters are statutorily obliged to place before the flat taker the entire project scheme be it one building scheme or multiple number of building scheme. It has been further held by the Apex Court that obligations remains unfettered because the concept of developability has to be harmoniously read with concept of registration of Society and conveyance of title. It has been held that once the entire project has been placed before the plaintiff at the time of agreement then the promoter is not required to obtain prior consent of the flat takers as long as builder makes additional construction in accordance with the lay out plans, building rules and DC Regulations etc. It has been held that if the construction which is sought to be made was not a part of layout which was placed before the flat taker at the time of agreement, the consent as required under Section 7 of the MOFA would be necessary.*

35. As discussed herein above, as held by the Apex Court in the case of ***Jayantilal Investment*** *, it is obligatory on the part of the promoter to make full and complete disclosure of the development potentiality of the plot which is a subject matter of agreement. It has also been held that promoter is not only required to make disclosure concerning inherent FSI but he is also required at the stage of the layout plan to declare whether plot in question in future is being capable of loaded with additional FSI/floating FSI/TDR. As held by the Apex Court, at the time of execution of the agreement promoter is statutorily obliged to place before the flat takers the entire project/scheme. It has been held by the Apex Court that once the entire scheme is placed before the flat takers at the time of the agreement then the promoter is not required to obtain prior consent of the flat taker as long as the construction is in accordance with layout plan, building rules and DCR.*

36. It will, therefore, have to be seen as to whether the impugned construction which the developer desires to construct is in accordance with the full disclosure that he is required to

make and as to whether it is in accordance with the layout plan which was presented to the flat purchasers at the time of execution of the agreement. As already discussed herein above, the disclosure that the developer made to the members of the plaintiff-society regarding the proposed S-5 building, which also was to be constructed if permitted by the Corporation, was to have ground + one floor. The same was located in one corner of the open plot abutting S-4 building. Insofar as the members of the appellant-society is concerned, in the agreement which have been entered into in 1982, there is a reference to S-5 building of ground + one floor. Insofar as members who have entered into agreement in 1984, there is no mention in so far as S-5 building is concerned. It is pertinent to note that in neither of the layouts annexed to 1982 agreement or 1984 agreement the proposed S-5 building is shown. On the contrary the area which is parallel to S.V. Road on one side and is surrounded by paved pathway on all other sides is shown as an open area. It is thus clear that the lay out placed before the flat takers either does not show S-5 building or if it shows S-5 building, the same is shown to consist of ground + one floor. In my considered view, therefore, in view of the law laid down by the Apex Court in ***Jayantilal Investment****, since the construction which is sought to be made is not in accordance with layout plan presented to the flat takers, the same cannot be permitted unless there is a consent of the members of the plaintiffs and the appellant-society.*

37. I am unable to accept the contention on behalf of the developer that if in the layout an area is earmarked for proposed construction, it hardly matters if the layout shows a building of 1+1 floor and the construction is in fact of four storeys, 10 storeys or 28 storeys. In my view the said argument is heard to be rejected. If such an argument is accepted, it would frustrate the very purpose of beneficial legislation like MOFA.

38. The very purpose that the entire layout should be presented to the flat purchasers and that there should be full disclosure made to him is with the purpose that he should be aware as to what is the entire layout of the scheme in which he is going to purchase the property. Suppose the original layout shows only the proposed building of ground + one, the flat taker would purchase the same with the knowledge that only few more persons are likely to join the Society and there would not be much effect on the facilities, amenities etc. provided to the members of the Society. However, if a structure of ground + one is converted in a towering structure of 28 storeys, the entire scenario would change. The number of additional members that would reside on the said plot would increase by substantial number, thereby putting an additional load on the infrastructure, amenities, facilities etc. available on the said plot. In any case, if this is permitted, the very purpose of requiring a developer to make full

and complete disclosure would stand frustrated. I am, therefore, unable to accept the contention ofthe learned Counsel for the developers in that regard.

56. The another contention of learned counsel appearing for the developers that the TDR is not in respect of the suit plot and the same is purchased from some other property and, therefore, no prejudice is caused to the plaintiff/ appellant is also without any substance. Though the TDR sought to be loaded is in respect of some other property, it cannot be forgotten that insofar as TDR potentiality is concerned, the suit plot is a relevant factor. It cannot be forgotten that the TDR loaded cannot be more than inherent FSI available on the suit plot. It is not in dispute that the only remaining inherent FSI available on the suit plot is 0.7% inasmuch as 0.93% has already been utilised. Had the developers executed conveyance in favour of the plaintiff and the appellant to comply with statutory obligations, the TDR potential in respect of land on which buildings of plaintiff and defendants are already constructed would have been available to the plaintiff/ appellant. Under the impugned plan the developers are using TDR potential which could have been otherwise available to the plaintiff/ appellant society. In that view of the matter, the contention in that regard is rejected.

iii. Hiranandani Case

Powai Area Development Scheme ("PADS") is being developed by Hiranandani on 230 acres. The PADS is divided into different sectors. One of these is Sector IV-A, a roughly trapezoidal area of some 30 acres. Hiranandani wanted to do further development on the said Sector IV-A by constructing further 3 building, by loading the TDR under guise of High Court order. The 8 Societies in Sec IV-A filed a suit and opposed the development being done by Hirandani. The ground to oppose this was building were constructed consuming the FSI of the Flat and Proposed building were never disclosed to the Flat Purchaser. The Single Judge granted the injunction, which was confirmed by the Division Bench and Supreme Court refused to stay the order of High Court but has directed to dispose off the suit if possible within one year but suit is still pending. All about referred judgments are referred in that case so I am not repeating the same.

iv. Kores India case

Facts of the Case:- In this case Developer had constructed 15 building in the layout and was constructing 16 building, which was shown as RG to the Flat Purchasers, Purchasers therefore filed Suit in Thane Court which was dismissed, against which appeal was filed which was also dismissed, therefore Second Appeal was filed. The court after considering the law as laid down by varies

judgment has reminded the case to the Trial court. Some to the important observation of the court are as under.

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

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

17. The lower appellate court appears to have been swayed by the fact that there was no documentary evidence in support of the plaintiffs' case that they had paid premium price for purchase of their flat relying on the promise of additional recreational space. The court observed that this was not proved; besides, the plaintiff's flat was 30 meter away from building No.16 and there was no obstruction (?) to his view of RG No.2. That is completely besides the point. Whether he paid any particular premium or whether he had any particular view is immaterial. ***What is material is that the purchaser agreed to purchase the flat on the basis of the promoter's disclosures.*** *These were: there would be 15 buildings in the proposed layout (may be with the possibility of an additional construction by use of FSI/TDR); and there would be large recreational spaces (RG Nos.1 and 2) located at the places indicated in the layout.* ***On these disclosures, the purchaser thought it worth his while to purchase the flat. If that is so, considering the duty of disclosure which includes duty to conform to such disclosure on the part of the promoter, the question to be considered was whether the purchaser could now be told that the open recreational space of RG No.2 would be constructed upon and there would be 4 RGs at 4 different locations (may be with an overall additional area****).*

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

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

CONCLUSION AND SUGGESTION

When above judgment/orders were passed, only MOFA was applicable and now in addition to MOFA, RERA is also applicable, which is more stringent and more elaborate and have machinery for enforcement of RERA, therefore it will be in the interest of the Developer to make true and proper disclosure and obtain irrevocable consent from the Flat Purchaser at the time of agreement for sale of the Flat itself, to avoid any dispute.

The Promoter should be very clear, how promoter desire to develop the entire property i.e. 10 Acres. Whether Promoter desire to sub-divide the said 10 Acres and develop it in separate phase by obtaining separate permission for each phase and not utilizing any of the amenities of one phase for the Flat Purchasers of the other phase, then it is totally separate project and will have nothing to do with other project. Please note no amenities should be shared with other project which is developed by the Developer. As a note of caution, if any representation is made to the Flat Purchaser that surrounding area will be open and no building or any other obstruction will come up around the project, then because owner of the surrounding area is same then it may amount to misrepresentation, therefore Developer should ensure that no such representation is made..

When for purpose of submitting the plan for sanction to the Local Authority its one property but for RERA it is developed in Phases, then Developer should disclose entire project as envisaged by the Developer to the Flat Purchaser, if in the instant case if approval is obtained by considering it as 10 Acre project, then entire project that will come up on 10 Acre should be disclosed to the Purchaser, so that Purchaser is aware and put to notice how that property will be developed in future. This disclosure will have to be made, even if future development is not part of the project registered under the RERA, it will have to be

clearly disclosed to the Flat Purchaser. This will be necessary because, Purchaser will make decision after becoming aware of development of whole property, even during promotion of the project, entire proposed development should be disclosed to the Purchaser.

All proposed development, should be disclosed even if plans are not sanctioned. It should be disclosed, even at the time of registration of project with Authority, in the affidavit filed during the registration of project. All brochures, leaflet and all publicity materials including promotion on the social media and website should disclose entire project.

The purchaser acquire Flat on basis of advertisement and if anything is misleading in Advertisement or true disclosure is not made then again it will be ground for non-disclosure and action can be taken against the Developer under section 12 of RERA.

If amenities like Club House, STP, and Electric Sub-Station are common for concerned project along with future project, then it should also be clearly mention it the Agreement, so that Flat Purchaser is aware that club house will be used by all occupier of registered project along with other occupier of the future development.

It authors view that right in the beginning itself Developer should plan the project and envisage how Developer propose to develop, if that is not possible than sub-divide the property and isolate it from each other so that they become independent and separate project with no connection to each other.