

INTERIM ORDER AND JUDGMENT IN FAVOUR OF HOUSING SOCIETIES

In a major setback to developers, the Hon'ble Supreme Court has confirmed the interim order and judgment passed by the Hon'ble Single Judge of the Hon'ble High Court granting interim reliefs in favour of Housing Societies. Earlier, the Hon'ble Bombay High Court had vide its interim order and judgment passed in the matter of Etemia CHS Ltd. & Ors. vs. Lakeview Developers & Ors. [\[1\]](#), *inter alia* held that the developers cannot put up additional construction in variance of the scheme disclosed to the flat purchasers and more particularly on completion of the construction by utilization of the disclosed FSI and TDR. ***Vide the above interim order and judgment, it is inter alia held that the developer is required to obtain an informed consent from the flat purchaser before the developer puts up additional construction in addition to the layout plans disclosed to the flat purchaser.***

BRIEF BACKGROUND OF THE ABOVE INTERIM ORDER AND JUDGMENT:

The Plaintiff Societies had filed a Suit against a prominent developer *inter alia* seeking injunction against the developers from carrying out further construction on the suit plot without the explicit consent of each flat purchaser/member of the Plaintiff Housing Societies. The societies had *inter alia* contended that save and except the construction of a common clubhouse, the developer had completed full construction in terms of the scheme disclosed to the flat purchasers at the time of entering into individual agreements with such flat purchasers and also exhausted the entire development potential of the suit plot i.e. FSI / TDR as disclosed to such flat purchasers. It was therefore contended that the developer could not carry out any further construction on the suit plot and could not exploit any further developmental potential of the suit plot.

MAIN CONTENTIONS OF THE DEVELOPER

The developer opposed the interim application for stay of any construction on the suit plot on various grounds. The main contentions of the developer are as follows:

- the developer was not required to take any consent for putting up any additional construction on the suit plot *inter alia* in view of the amendment of Section 7 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA") and the introduction of Section 7A to MOFA.
- Till the conveyance of the plot is executed in favour of the Housing Societies and as long as there is development potentiality in the land, Section 7A empowered the developer to put up additional construction without the consent of the flat purchasers.

- the additional construction on the suit plot was required to be put up to comply with the orders passed by the Division Bench of the Hon'ble Bombay High Court in the Public Interest Litigations filed against the developer.
- the flat purchasers had given general consents to the developer to put up additional constructions and utilize all future FSI / TDR that would be available with respect to the suit plot in the flat purchase agreements executed with the developers.

BOMBAY HIGH COURT RULING

The Hon'ble Bombay High Court after examining the facts of the case and the provisions of MOFA and also the various judgments passed by the Hon'ble Bombay High Court as well as the Hon'ble Supreme Court, was pleased to uphold the Plaintiff Societies contentions and passed the aforesaid interim order and judgment thereby passing an order of injunction against the developers from carrying out any further construction on the suit plot till the disposal of the suit, save and except the construction of common clubhouse thereon. The Hon'ble Bombay High Court in its order has inter alia observed and held as follows:

- The obligation of the promoter under MOFA to make true and full disclosure to the flat purchasers remains fundamental even after the inclusion of Section 7A and amendment in Section 7(i) (ii) of MOFA.
- That obligation is reinforced by insertion of sub-section 1A of Section 4 of MOFA. Every agreement between developer and flat purchaser shall comply with the prescribed Form V.
- Clauses 3 and 4 of Form V, which are statutory and mandatory in nature, obligate the promoter to give particulars of the land, amenities, facilities and to make full and true disclosure of development potentiality of the plot/land.
- The condition of true and full disclosure flows from the obligation of promoter under MOFA vide Sections 3 and 4 and Form V. This obligation remains unfettered because of the concept of developability has to be harmoniously read with the concept of registration of the society and conveyance of title.
- The promoter is not only required to make disclosure concerning the inherent FSI but 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 and TDR.
- Once the entire project is placed before the flat purchasers at the time of agreement, then the promoter is not required to obtain prior consent of the flat purchasers as long as the builder puts up the additional construction in accordance with the layout plan, building rule and Development Control Regulations.
- In view of the above, if the promoter wants to make additional construction, which is not a part of the layout plan which was placed before the flat purchaser at the time of execution of agreement, the express consent under Section 7 of MOFA would be necessary. The consent must be an informed consent with a full disclosure.
- In other words, at the time of execution of the agreement with the flat purchasers, the developer is obliged statutorily to place before the flat purchasers the entire project/scheme.

CONCLUSION & IMPACT

The interim order and judgment is bound to have a profound impact on development where MOFA provisions apply till final orders are passed in the suit. ***So, not only does the aforesaid judgment confirm the rights of the flat purchasers but also in effect mandates the developer into carrying out and completing the construction in accordance with the disclosures made to the flat purchasers.*** Further, the aforesaid judgment will empower the flat purchasers to enforce their

rights rather than being helpless spectators. It will also ensure that no developer can exploit the additional FSI/TDR (that may subsequently accrue upon the said land) by reason of non-completion of the construction and/or non-execution of conveyance in favour of the societies as per the Section 10 of MOFA.

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[\[1\]](#) (2015 (2) ABR 314 : 2015 (5) Bom CR 680)

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