

### Consent must be 'informed consent'

A single judge of the Bombay High Court (“**Court**”), in the case of *Dosti Corporation v/s. Sea Flama Co-operative Housing Society Limited and Ors*<sup>1</sup>, decided on 7<sup>th</sup> April 2016 has reiterated and upheld the contention that blanket consent or authority obtained by the builder promoter at the time of entering into the agreement for sale or at the time of handing over possession of the flat is not consent within the meaning of Section 7 (1) of the Maharashtra Ownership of Flats Act, 1963 (“**MOFA**”).

Dosti Flamingos was constructed in 2008 on 27,185.46 sq m of land owned by Standard Industries. The initial plan was to construct five multi-storey towers, but was subsequently changed to four towers, with construction rights in the form of FSI of the fifth tower being used to construct additional floors in the other buildings. The BMC issued its completion certificate in 2008 and later in 2010, the societies were registered. Meanwhile, following a 2009 policy by the state providing incentives to those who build public parking facilities, Dosti obtained permission to construct a 10-storey parking tower. *In lieu* of setting up a public facility, it also got approval to construct a 25-storey residential tower. The four societies approached the trial court, which in an interim order restrained the developer from carrying out any construction on availing of additional FSI.

Pursuant to the blanket consent provided in the contested clause<sup>2</sup> of the agreement for sale, the developer had sought to construct an additional public parking tower other than the four wings at Dosti Flamingos complex in Sewri. Hon'ble Justice R D Dhanuka dismissed the applications filed by the builder, Dosti Corporation, seeking to overturn the order of the trial court restraining it from going ahead with the construction.

The Court echoed the observations made in plethora of judicial precedents<sup>3</sup> and reinforced with vigor the following:

- a) Consent as contemplated under Section 7(1) of the MOFA has to be an informed consent which is to be obtained upon a full disclosure by the developer of the entire project and that a blanket consent would hold no water;

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<sup>1</sup> Appeal From Order No. 117 of 2016 in Notice of Motion No. 2672 of 2014 in Suit No. 2073 of 2014 and Appeal From Order (ST) No. 23483 of 2015 in Notice of Motion No. 2672 of 2014 in Suit No. 2073 of 2014

<sup>2</sup> *The promoters shall be entitled to make any variations, alterations, amendments or deletions to or in the development or the said project, layout, plans and specifications of the flats and premises in the said building, relocating/realignment of the water, power, sewage, telephone, gas and other services and utility connections and lines etc. It was further provided that promoters proposed to construct buildings on the said entire land in a phase wise manner as per the plans approved or to be approved by the Municipal Corporation with such amendments and alterations as may be permitted. It was further provided that the reference to the said entire land and the said Dosti Flamingos project in the said agreement shall be deemed to mean and include that the nearby contiguous, adjacent and adjoining lands and properties may be acquired in future and construction thereon wherever the context so permits or requires.'*

<sup>3</sup> *Ravindra Mutenja & Ors v/s. Bhavan Corporation & Others* 2003 (5) Bom CR 695, *Noopur Developers v. Himanshu V. Ganatra and others*, 2010(7) Mh.L.J. 694, *Malad Kokil Co-operative Housing Society Ltd. & Anr. v. Modern Construction Co. Ltd. & Ors.* 2013(2) Bom. C.R. 414, *Lakeview Developers and Ors. vs. Eternia Co-operative Housing Society Ltd. and Ors.* 2015 SCC Online 3824, *White Towers Co-op. Hsg. Society Ltd. vs. S.K. Builders and Ors.* (2008) 6 Bom.C.R. 371

- b) 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. It is further held that the prior consent of the flat purchasers would only not be required, if the entire project is placed before the flat purchasers at the time of the agreement and the developer puts additional construction in accordance with the layout plan;
- c) Blanket consent taken in the agreement would defeat public policy and would dilute the purposive object and intent of the legislature and would not eliminate the abuses and malpractices which it sought to remedy;
- d) Additional FSI cannot be claimed by the Developer for putting up any additional building not under the approved plan. Failure to convey land would not constitute the Developer a true owner. That would be putting a premium upon his default and that would constitute an abuse of legal process. It is held that any FSI for putting up any additional construction not in the initial sanctioned plan can therefore never enure for the benefit of the Developer except with the express written permission of all the flat purchasers or the Society, after its formation; and
- e) Even if there is any contractual condition mentioned in the contract permitting the construction till the entire land was developed, the statutory obligations would over ride the contractual clauses in the agreement.

The Court disallowed the developer from seeking to enforce blanket consent clauses on the ground that if permitted, the benevolent purpose under MOFA requiring the developer to make full and complete disclosure would stand frustrated. The verdict has taken cognizance of the fact that a flat taker purchases the flat upon the disclosures provided to him at the time of entering into the agreement; and thus at no cost can anyone be allowed to unjustly enrich his position to the detriment of others.

If you require any further information or clarification, please do not hesitate to contact Mr. Avikshit Moral, at [avikshit.moral@jcllex.com](mailto:avikshit.moral@jcllex.com), Tel.: +91 22 6720 5558, Ms. Almitra Gupta, at [almitra.gupta@jcllex.com](mailto:almitra.gupta@jcllex.com) Tel.: Tel.: +91 22 6720 5582 at any time.