

**BEFORE THE MAHARASHTRA REAL ESTATE
APPELLATE TRIBUNAL, MUMBAI**

Appeal No. AT006000000010569

Udayachal Goregaon Co-operative Housing Society
Limited, a society registered under the provisions of
Maharashtra Co-operative Societies Act, 1956 having
Address at Udayachal Building, Aarey Road, Pahadi,
Goregaon (East), Mumbai 400 063.

..Appellant

Versus

1. Manoj Kumar Mistry,
having address at 214/5760, Arunodaya Darshan
CHS, 90 Feet Road, Near Ganesh Temple,
Ghatkopar (E), Mumbai 400 075.

2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054.

.. Respondents

**WITH
Appeal No. AT006000000010570**

Udayachal Goregaon Co-operative Housing Society
Limited, a society registered under the provisions of
Maharashtra Co-operative Societies Act, 1956 having
Address at Udayachal Building, Aarey Road, Pahadi,
Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. Mohamed Tarique Sayed,
having address at 1502, B Block, 15th Floor,
Belvedere Hills CHS, Belvedere Road,
Mazgaon, Mumbai 400 010.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. .. Respondents

WITHAppeal No. AT006000000010571

Udayachal Goregaon Co-operative Housing Society
Limited, a society registered under the provisions of
Maharashtra Co-operative Societies Act, 1956 having
Address at Udayachal Building, Aarey Road, Pahadi,
Goregaon (East), Mumbai 400 063 ..Appellant

Versus

1. Kaushal Kishore HUF,
Through Karta Kaushal Kishore having address
At 701, A Wing, Sarnath Upper Govind Nagar,
Malad (E), Mumbai 400 075.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054.

WITH
Appeal No. AT006000000010572

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. (1) Dr. Akbar Mehdi,
(2) Mrs. Tahsin Mehdi,
having address at 0/302, Runwal Centre,
Opp. ICICI Bank, Deonar,
Mumbai 400 088.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054.

..Respondents

WITH
Appeal No. AT006000000010573

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. Das Aritra,
having address at B-1507/08, Riviera Towers,
Lokhandwala Township, Kandivali East,
Mumbai 400 101.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. .. Respondents

WITH
Appeal No. AT006000000010574

Udayachal Goregaon Co-operative Housing Society
Limited, a society registered under the provisions of
Maharashtra Co-operative Societies Act, 1956 having
Address at Udayachal Building, Aarey Road, Pahadi,
Goregaon (East), Mumbai 400 063 ..Appellant

Versus

1. Pinki Kishore,
having address at 701, A-Wing, Sarnath Upper
Govind Nagar, Malad (E), Mumbai 400 097.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. ..Respondents

WITH
Appeal No. AT006000000010575

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. Shyam Sundeer Kedia HUF,
Through Karta Shyam Sunder Kedia,
Having address at A/902, Sweet Home,
Plot No.24, Mhada Layout Versova, Near Jankidevi
School, Andheri (W), Mumbai 400 053.

2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054.

..Respondents

WITH
Appeal No. AT006000000010576

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. Om Prakash Bharondia,
having address at 701, A-Wing, Sarnath Upper
Govind Nagar, Malad (E), Mumbai 400 097.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. ..Respondents

WITH
Appeal No. AT006000000010577

Udayachal Goregaon Co-operative Housing Society
Limited, a society registered under the provisions of
Maharashtra Co-operative Societies Act, 1956 having
Address at Udayachal Building, Aarey Road, Pahadi,
Goregaon (East), Mumbai 400 063 ..Appellant

Versus

1. Ankit Kantilal Dama and Jasmeet Ankit Dama,
having address at 1005, Ruby Lifestyle,
Nirmal Lifestyle, LBS Marg, Mulund (West),
Mumbai 400 080.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. ..Respondent

WITH
Appeal No. AT006000000010578

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063.

..Appellant

Versus

1. Pratik Brijesh Mittal,
having address at 602 Skydeck Oberoi Complex,
Near Sab TV Link Road,
Andheri (W), Mumbai 400 053.

2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054.

..Respondents

WITH
Appeal No. AT006000000010579

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. Narendra S. Moriani,
having address at 603/604, Shantanu Building,
St. Martins Road, Near L.S. Raheja College of
Architecture, Bandra (W), Mumbai 400 050.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. ..Respondents

WITH
Appeal No. AT006000000010580

Udayachal Goregaon Co-operative Housing Society
Limited, a society registered under the provisions of
Maharashtra Co-operative Societies Act, 1956 having
Address at Udayachal Building, Aarey Road, Pahadi,
Goregaon (East), Mumbai 400 063 ..Appellant

Versus

1. Mukesh Pursnani and Prakash Pursnani,
having address at 501, Mangal Bhandar,
13th Road, TPS III, Khar (West), Mumbai 400 052.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. ..Respondents

WITH
Appeal No. AT006000000010581

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. Revati Karande,
having address at A-201, Krishna Sagar Apartment,
New Link Road, Opp. Fire Brigade,
Nalasopara (E), Mumbai 401 209.

2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054.

..Respondents

WITH
Appeal No. AT006000000010582

Udayachal Goregaon Co-operative Housing Society Limited, a society registered under the provisions of Maharashtra Co-operative Societies Act, 1956 having Address at Udayachal Building, Aarey Road, Pahadi, Goregaon (East), Mumbai 400 063

..Appellant

Versus

1. Deep Omprakash Shukla and Aneeta Deep Shukla,
having address at 8-302, 3rd floor, Sadguru
Complex Phase-2, Near Satellite Tower,
Filmcity Road, Goregaon (East),
Mumbai 400 063.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. .. Respondents

WITH
Appeal No. AT006000000010583

Udayachal Goregaon Co-operative Housing Society
Limited, a society registered under the provisions of
Maharashtra Co-operative Societies Act, 1956 having
Address at Udayachal Building, Aarey Road, Pahadi,
Goregaon (East), Mumbai 400 063 ..Appellant

Versus

1. Tarun Choudhary,
having address at Flat No. B-1704, Vastu Tower,
Evershine Nagar, Malad (W), Mumbai 400 064.
2. M/s. Jaycee Homes Private Limited,
A company registered under the provisions of
Companies Act 1956, having Head Office at 501
Prime Plaza, Next to Asha Parekh Hospital,
S.V. Road, Santacruz (West), Mumbai 400 054. ..Respondents

Mr. Annirudh Joshi a/w Mr. Viraj Maniar, Ms. Hiral Vora i/b Maniar Srivastava Associates, Advocates for Appellants.
Smt. Laxmi Murli, Advocate for Respondent No.1
Shri Alok Kumar Singh, Advocate for Respondent No.2.

CORAM : INDIRA JAIN J.,CHAIRPERSON &

S.S. SANDHU, MEMBER(A)

DATE : 30TH JANUARY, 2019.

COMMON JUDGMENT (PER : INDIRA JAIN, J.)

These appeals take an exception to the interim order dated 6th August, 2018 passed by the Ld. Member and Adjudicating Officer, MahaRERA thereby holding the complaints maintainable against the Co-operative Housing Society. Since the appeals arise out of common interim order, they are being decided together by this common Judgement.

2. For the sake of convenience, facts in First Appeal No. AT/006000000010569 of 2018 are being referred to. Appellant Udayachal Goregaon is Co-operative Housing Society, Respondent No.1 are the flat purchasers and Respondent No.2 is developer. We would refer the appellant and respondents in their original status as in complaints.

3. The complainants are purchasers in the sale component of respondents' registered project 'Horizon' situated at Village Pahadi Taluka: Borivali. Udayachal Goregaon Co-operative Housing Society Ltd. consisting of 15 members was desirous of exploiting redevelopment and reconstruction of building by demolishing the old building.

4. The society then on 15/04/2013 entered into Development Agreement with M/s. Jaycee Homes Pvt. Ltd. and permitted the developer

to demolish and reconstruct the then existing building by utilizing increased additional FSI / TDR. The members of society allowed developer to construct a building having stilt and 15 upper floors. It was agreed that developer shall provide a car parking 40% extra carpet area than the existing area to the members free of cost. The timeline agreed was 36 months from the receipt of commencement certificate. They also permitted developer to sell the sale component for raising funds for construction in his own capacity on principal to principal basis.

5. The grievance of flat purchasers was that developer collected money from them and constructed building upto 11th floor (skeleton). According to them, it was the responsibility of society and developer to complete the construction and hand over possession of their respective flats. It was contended that society and developer introduced Tarun Bharti Construction Co. by executing unregistered Tripartite Agreement. Public Notice was issued in the newspapers on 25/01/2018 and 13.4.2018 terminating Development Agreement of M/s. Jaycee Homes Pvt. Ltd. and revoking its Power of Attorney. In this backdrop complaints were filed before MahaRERA Authorities.

6. The main contention of flat purchasers was that Agreements for Sale entered into by developer with them are legal and binding on society and developer as well. They sought directions against duo to hand over possession of their respective flats by completing construction or in the alternative to allow them to complete remaining construction of building.

7. Respondent no. 2 – society appeared and raised an objection to the maintainability of complaints. It was the case of society that developer entered into agreements on principal to principal basis. There is no privity of contract between society and flat purchasers in the sale component. According to society, though it is the owner of land it is not Promoter and in the absence of privity of contract, purchasers cannot be

foisted on society. The bone of contention was that complaints are not maintainable against the society being not Promoter.

8. Ld. Member and Adjudicating Officer, MahaRERA on hearing the Ld. Counsel for parties came to the conclusion that society owner of the land is Promoter within the definition of section 2(zk) of 'The Real Estate (Regulation and Development) Act, 2016' (hereinafter referred to as "the Act") and in the changed circumstances, Judgement of the Hon'ble Bombay High Court in case of Vaidehi Akash Housing Pvt. Ltd. V/s. New D.N. Nagar Co-op. Hsg. Society dated 1/12/2014 would not be applicable to the complaints. Consequent thereto, complaints were held maintainable.

9. Being aggrieved, society has challenged the legality and propriety of the impugned order in these appeals.

10. We heard in extenso Ld. Counsel for the parties.

11. Appellants in all the appeals made manifold submissions.

- i] pursuant to the Development Agreement dated 15th April, 2013 developer was to complete the construction within a timeline. After partial construction, developer was facing financial difficulties so expressed inability to complete the project vide letter dated 28th September, 2017. Appellant under compelling circumstances executed a Tripartite Agreement on 8th November, 2017 with developer and Tarun Bharti Constructions permitting them to complete the construction. Despite Tripartite Agreement Tarun Bharti Constructions failed even to recommence further construction. As respondent no.2 failed to ensure compliance as per Tripartite Agreement, appellant society was faced with a dire situation. In this situation, having left with no alternative society terminated Development

Agreement dated 15th April, 2013 and Deed of Assignment dated 8th November, 2017 by legal notice dated 16th January, 2018. It is the case of society that any person who entered into any transaction with developer who fails to perform his obligations would not have any right qua society in the absence of privity of contract.

- ii] The next submission on behalf of appellant is that the law laid down by the Hon'ble Bombay High Court in case of Vaidehi has not been scrupulously followed. A grievance is made that definition of 'Promoter' has been misinterpreted and the Circular No.12 dated 4th December, 2017 issued by MahaRERA came to be completely ignored. The submission is that land owner like appellant society can never be a Promoter in redevelopment project as per the said Circular and also as per the law laid down by the Hon'ble Bombay High Court in case of Vaidehi.
- iii] Another submission by the society is that serious dispute of facts of civil nature requires evidence to be taken. It was submitted that complex civil dispute cannot be adjudicated before MahaRERA in a summary proceeding and the flat purchasers may approach Civil Court for adjudication of their civil rights if any. It is contended that Act does not cover rights of owners and liabilities and obligations of developer. As the Act is silent on these issues, flat purchasers having no contractual rights cannot complain before MahaRERA.
- iv] Ld. Counsel then submits that complainants are not allottees as apparent from the huge payments made at the

inception and they being investors are not covered within the definition of allottee under Section 2(e) of the Act.

- v] It is further submitted that society being not an agency, partnership or joint venture cannot be brought within the sweep of provisions of the Act.
- vi] According to appellant unstamped / unregistered documents / agreements cannot be relied upon in support of alleged claims of flat purchasers.
- vii] Referring to the various provisions of RER Act viz. section 2 (c), (d), 2(zk), section 3, 11 (c), 15, various clauses of Agreements and section 2(c) of The Maharashtra Ownership of Flats (Regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963 ("MOFA" in short), Ld. Counsel tried to demonstrate that society owner of the land being not Promoter cannot be dragged into litigation before MahaRERA. The sum and substance of the submissions is that impugned Order being untenable needs interference in these appeals.

11. Per contra, Ld. Counsel for respondent no.1 submits that purported termination and transfer of project to third party is in contravention of section 15 of the Act. She submits that Authority has jurisdiction to deal with the present proceedings as section 79 of the Act oust the jurisdiction of Civil Courts. She contended that society having shared consideration, confirming sale and being signatory to the Deed of Assignment is estopped from raising the contention that it is not the Promoter within RER Act. It is submitted that society's stand that purchasers are Investors is after thought and raised only to escape from the clutches of law. Referring to the relevant clauses of Development

Agreement and Tripartite Agreement, Ld. Counsel tried to canvass that collective reading would clearly indicate existence of privity of contract. According to respondent No.1, very purpose of the Act will be toothless if owner of the property is allowed to run away.

12. For the scope and object of the Act and its Preamble, Ld. Counsel relied upon the Judgment of the Hon'ble Bombay High Court in case of Neelkamal Realtors Suburban Pvt. Ltd. V/s. The Union of India & 2 Ors delivered on 6th December, 2017. She also placed reliance on the decisions of this Tribunal in case of i] M/s. Srushti Sangam Developers P. Ltd. Versus Sarvapriya Leasing (P) Ltd. & Anr. dated 30th October, 2018 and ii] Bharat Raichand Shah Vs. Runwal Constructions & Ors. dated 1st November, 2018 to substantiate her contention that allottees cannot be branded as 'Investors' as per the desire of Promoter.

13. Ld. Counsel referring to the judgement of the Hon'ble Bombay High Court in Vaidehi submits that circumstances have changed and in factual scenario, law laid down in Vaidehi is not comparable to the case in hand. It is submitted that very purpose of the Act will be futile if the appellant society is allowed to escape specially in a city like Mumbai where lands are almost owned by Co-operative societies. She submits that land owner is necessarily a Promoter within the Act and taking into consideration intention of law makers, Authority has rightly held the complaints maintainable.

14. In response to the submissions on behalf of society, Ld. Counsel for respondent no.2 submits that Circular issued by MahaRERA is merely clarificatory in nature. According to the Ld. Counsel circular even otherwise cannot take away law and the same would not in any way come to the assistance of the appellant society.

15. It is submitted that various clauses in Development Agreement read together would be self speaking to clearly indicate that there is

existence of privity of contract and on this premise decision in case of Vaidehi has rightly been held as not applicable in the fact situation of the present case. Ld. Counsel prays for dismissal of the appeals.

16. In view of the rival pleadings, aforesaid submissions, papers annexed to the complaints and appeal memos, following points would arise for our consideration :

<u>Points</u>	<u>Findings</u>
a] Whether the impugned common interim order dt. 6 th August, 2018 is sustainable in law ?	No
b] Whether the order challenged calls for interference in these appeals ?	Yes

17. Before adverting to the merits of the case, we find it appropriate to consider the crucial aspect of the matter pertaining to the law laid down by the Hon'ble Bombay H.C. in case of Vaidehi. Ld. Member found that because of RER Act legal position has changed, definition of promoter is comprehensive and covers the society within its fold.

i] In Vaidehi before the Hon'ble High Court Notices of Motion and the respective suits in which they were taken out were concerning the development of a large property in suburb of Andheri in Mumbai. The property belonging to Co-operative Society consisted of 8 buildings housing nearly 480 families together with the appurtenant land. The chief contest before the Hon'ble High Court was in respect of:-

- i] the development rights claimed by two rival developers in respect of the property,
- ii] the rights of the original member residents occupying tenements within the property of being rehabilitated, and

iii] the respective rights of new purchasers with whom agreements were entered into by the developers at various stages during the course of development of property. Each of the different stakeholders filed their own suits or adopted proceedings seeking interim reliefs concerning their respective rights.

ii] The occupants of each building formed their respective Co-operative Societies. The societies later on amalgamated with the Federal society. As buildings became dilapidated, society was desirous of exploiting the development potential by reconstructing new buildings to house the then existing members.

iii] In August, 2005 Development Agreement was executed between individual society and Vaidehi. According to Vaidehi, redevelopment project could not proceed further because of several impediments. In April 2007 Vaidehi entered into an agreement with Rustomji Realty Pvt. Ltd. agreeing to assign the rights to exploit partial FSI available to the suit plot. Vaidehi retained rehab portion to be allotted to the members of Society.

iv] In March, 2008 Vaidehi commenced construction of rehab buildings for rehousing the members of the society. The buildings were demolished and 6 rehab buildings of ground plus four and two rehab buildings upto plinth were constructed.

v] In February 2010, Tripartite Supplementary Agreement was executed between Vaidehi, society and Rustomjee. By this agreement society granted Rustomjee right to exploit full development potential of suit plot without any restriction of permissible FSI. Soon after execution of these agreements, dispute arose between the parties which were followed by various notices published by Rustomjee against Vaidehi and some of the members of the society asserting their rights.

vi] In April 2010, society terminated Development Agreement with Vaidehi and executed agreement with Rustomjee for construction of

rehab portion. Rustomjee was thus seized with the construction of both sale and rehab portions.

vii] In this premise, when Notices of Motion were taken out before the Hon'ble High Court, it was held that there is no case against the society merely in position of an owner.

viii] In paragraph 16, 16.1 to 16.9 challenges to the redevelopment by the society and Rustomjee on the basis of third party rights created by Vaidehi in favour of various purchasers were examined in detail. For the sake of ready reference they are being reproduced here as follows -

"16 Challenges to the redevelopment by the Society and Rustomjee on the basis of third party rights created by Vaidehi in favour of various purchasers:

16.1 This brings us to an important aspect of this group of matters and which has engaged anxious attention of this Court. During the subsistence of the Society Development Agreement, and in pursuance of various rights conferred upon it thereunder with reference to disposal of the free sale component of the project, Vaidehi has created third party rights in favour of various flat purchasers and others. These flat purchasers and others themselves consist of different categories. There are those who have come in between the dates of the Society Development Agreement and the Rustomjee Agreement. During this period the entire free sale component, i.e. nearly 2,53,500 sq.ft. of real estate, was at the disposal of Vaidehi and it was free to deal with the same the way it liked. Third party rights have been created by it in favour of various parties during this period. Then there are others who have come in after the Rustomjee Agreement but before the Society Development Agreement was terminated by the Society. During this period vaidehi had a limited right, namely, the right to deal with an area of 37050 sq.ft. for residential use and 20000 sq.ft. for commercial use. Different considerations may apply to those third parties whose rights have been created within or beyond this limitation on Vaidehi's rights, as the case may be for Vaidehi seems to have gone much beyond its limitation during this period and oversold its position. It purports to have created rights over an area far in excess of this limited F.S.I. available to it for disposal. Another distinction as between the various third parties is on the basis of the kinds of arrangements entered into with them by Vaidehi. There are purchasers who hold

registered agreements with Vaidehi, whilst there are those who have unregistered agreements and there are others who have simply allotment letters in their favour. The rights of these various stakeholders vis-à-vis the entitlement of the Society and through it of Rustomjee to go ahead with the redevelopment project need an anxious thought. Whilst some of these third parties appear to be investors, there may certainly be those who are genuine buyers who have staked their hard-earned money to obtain premises within the project.

16.2 The flat purchasers' main arguments are that under the Society Development Agreement which was at any rate valid upto 16 April 2010, Vaidehi had the authority to deal with the entire free sale component, i.e. nearly 2,53,500 sq.ft of area; that even if such authority could be treated as having been divested by it under the Rustomjee Agreement, between 4 April 2007 (i.e. the date of Rustomjee Agreement) and 16th April 2010 (i.e. the date of termination of the Society Development Agreement), Vaidehi had the authority to deal with 57050 sq.ft. of area as shown above; that the agreements entered into by Vaidehi during these periods were lawful and binding on the Society, since during these periods Vaidehi was an agent of the Society and the former's acts within its authority were binding on the latter; and that at any rate, the Society itself being a 'promoter' within the meaning of MOFA, the rights of the purchasers under MOFA were binding on the Society and the latter could not enter into any agreement with Rustomee in breach of these rights.

16.3 The purchasers' right may, thus, be examined from two angles, one from the standpoint of the contract between the Society and Vaidehi (who was their vendor) and the other from the standpoint of the obligations of the Society, if any, under MOFA.

16.4 No doubt Vaidehi had been conferred with the authority to deal with the free sale component of the project by the Society under the Society Development Agreement, but the question is whether such authority was to be exercised by vaidehi for its own sake or on its own account as an independent contractor or as an agent of the Society. Some of the important clauses of the Society Development Agreement may be noted in this behalf. These are as follows:

"5. The party of the first part i.e. the eleven individual societies and the party of the second part i.e. the new D.N. Nagar Co-operative

Housing Societies Union Limited hereby agree to execute a sublease in favour of the party of the third part i.e. M/s.Vaidehi Akash Housing Private Limited in respect of the construction of the saleable part immediately after the part of the third part puts the part of the first part in their respective possession of the individual premises.

11. The Developers will be entitled to utilize the balance FSI including additional area available for construction by way of balcony servant rooms and area in lieu of staircase, passage, lift wells, and such other area available free of F.S.I. etc., on payment of premium to BMC in the separate new building/s to be constructed on the said property and to sell the said area in the separate new building to be constructed on the said property, hereinafter referred to as the "the Developers' area/flats" and appropriate the sale proceeds to itself.

13. The remaining flats shall being to the Developers, Herienafter referred to as "the Developers' area". The location of the Developers' flats are given in Annexure-"G" and the Developers alone will be entitled to sell / allot the same and appropriate the sale proceeds to itself.

27. The Developers shall be entitled to sell to the persons of its choice flat / commercial area, car parking spaces and other premises being the Developers area and more particularly described in the Annexure "G" and to receive and appropriate the sale consideration amount receivable from such Allottees / purchasers of the office premises, flats/ commercial area and car parking spaces in the said new building on the said property without in any way being required to give any account for the same to the Society or the Union.

28. It is expressly agreed by and between the parties hereto that only after the Occupation Certificate in respect of the said new building shall have been obtained and the Developers shall have paid to the amount becoming payable

as specified in Clause 19 hereinabove and after the Developers shall have offered to put the Members herein in possession of their respective flats thereafter the Developers shall be entitled to hand over vacant possession of the Developers' flats to the respective purchasers thereof.

30. The said Society and the Members herein hereby agree that in Developers along shall be entitled to sell on ownership basis in their own name and in their own right the flats / commercials and other premises and the car parking spaces being the Developers' area [which are specified in Annexure-"G"] and appropriate the sale proceeds to itself and for that purpose, the Developers shall be entitled to enter into Agreement for Sale of the Commercial premises, flats in their own name.

32. The Society on its own will not execute any Agreement and/or any writing with the prospective purchasers in respect of Developers area.

33. The said Society its members and union herein hereby agree and undertake with the Developers they will not to do deal with or dispose off or create any third party right, title and interest in respect of the said flats and other premises, the car parking spaces which are earmarked for sale by the Developers being the Developers' area more particularly described in Annexure-"G".

38. It is agreed hereto that since the basis of this Agreement, the Developers shall have incurred several obligations [including financial obligations herein mentioned], the said Society and the Members herein will be entitled to cancel terminate and/or rescind this Agreement for the grant of Development Rights or any other Agreement as shall be executed pursuant to this Agreement under circumstances stated herein only and no other circumstances.

41. It is further agreed that the Developers alone shall be responsible for any claim made by any third party in respect of any flats and other

premises sold to the prospective purchaser / Allottee of the flat and other premises in the said new building constructed on the said property and the Developers agree to indemnify and keep indemnified and harmless the said Society and the Union herein from all costs, charges and expenses and legal fees by any third party and/or any damage caused to the prospective purchasers / Allottees.

45. This Agreement for Grant of Development Rights does not constitute a partnership and / or a joint venture between the parties hereto. Each of the parties hereto shall be liable to pay and discharge their respective liabilities and debts including their respective income-tax liabilities and each shall indemnify and keep indemnified the other therefrom."

16.5 The clauses quoted above, read together and in their proper perspective to be gathered from the whole agreement, clearly envisage the development and sale of the free sale component of the project by Vaidehi on their own account and as an independent contracting party, and not as agents of the Society. The contract between Vaidehi and the Society is on a principal to principal basis; it neither constitutes a partnership nor a joint venture or agency between the two. The third party purchasers with whom Vaidehi might enter into agreements for sale would have no privity of contract with the Society and the Society would in no way be responsible for any claim made by such purchasers against Vaidehi under their respective agreements for sale.

16.6 There being no privity of contract between the Society and the third party purchasers claiming under Vaidehi, the third party purchasers cannot claim specific performance of their respective agreements for sale except through Vaidehi. They stand or fall by Vaidehi. If the rights of Vaidehi are brought to an end upon a lawful termination of the Society Development Agreement, the third party purchasers cannot lay any independent claim against the Society or anyone claiming through the Society. The agreements with third party purchasers are premised upon a valid, subsisting and enforceable agreement between their vendors, namely, Vaidehi and the owners, namely, the Society and in fact refer to the Society Development

Agreement in this behalf. Admittedly, therefore, the third party purchasers had, or at any rate, ought to have, notice of the Society Development Agreement and its terms and conditions, and Vaidehi's obligations to perform the same. If Vaidehi fails to perform these obligations, the purchasers cannot but suffer the consequences. In other words, the purchaser's rights are subject to Vaidehi's rights and not higher than those. Therefore, from a contractual standpoint, the third party purchasers have no case against the Society or Rustomjee, who claim through the Society.

16.7 Let us now consider if these third party purchasers have any rights under MOFA against the Society. It is submitted on their behalf that the Society is very much a 'promoter' within the meaning of MOFA as regards their respective agreements for sale. Learned Counsel for the purchasers rely upon the definition of "promoter" contained in Section 2(c) of MOFA. The definition is in the following terms :

"promoter" means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be considered 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 person who sells are different persons, the term includes both."

It is submitted that the Society can at any rate be said to have caused the building of flats to be constructed for the purpose of selling the same, and as a person, who causes such building to be built, is as much a promoter as a person who sells premises in such building.

16.8 The Society is the owner of the property and has entered into an agreement with the developers, i.e. Vaidehi, for development of its property. The redevelopment envisages construction of the Society's building to accommodate its members and also construction of building/s of flats/premises to be sold to outsiders. The agreement authorizes or entitles the developers to construct such building/s and sell flats/premises therein to outsiders. Such authority or entitlement is to the developers' account and in their own right, and as an independent contractor. If in

exercise of such authority or entitlement, a building is constructed by the developers, it cannot be said that such building is caused to be constructed by the Society within the meaning of Section 2(c) of MOFA.

16.9 Any other interpretation would lead to anomalous consequences, which could never have been contemplated by MOFA. The owners of land entering into agreements for sale or development agreements with promoters / developers would be held subject to all liabilities of a promoter, such as liability of disclosure of plans and specifications, outgoings etc. under Section 3 of MOFA, entering into agreements in accordance with Section 4, giving possession of flats and suffering the consequences of Section 8, forming co-operative societies of flat purchasers under Section 10, and so on. This would be plainly inconceivable."

18. On careful reading we find that non existence of privity of contract between flat purchaser on one hand and society and Rustomjee on the other was one of the important considerations before the Hon'ble High Court.

19. In the present case, Ld. Authority in paragraph 8) to 10) of the impugned order observed thus –

"8. The order passed by the Hon'ble High Court in Vaidehi's case cited Supra shows that the society is the land owner. I say that the respondent no.2 is the owner of the land by following the same logic. It is fact that the development agreement clearly shows that the respondent no.1 has to act as a principal for the purpose of executing agreement with the purchasers of the flats. However, it is pertinent to note that the respondent no.2 has not relinquished / released its control / ownership over the sale component. It is again necessary to note that the Hon'ble High Court drew the conclusion that the society being the owner is not responsible for the specific performance of the contract entered into by its developer with flat purchasers mainly on relying upon the definition of promoter defined by MOFA. It reads as under:

Section 2 (c) of MOFA – promoter "means a person and includes a partnership firm or a body or association of persons, whether registered or not 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 person who sells are different persons, the term includes both;"

9. In this context it is also necessary to read the definition of promoter defined by RERA which reads as under:

"(zk)" promoter " means, --

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees ; or

(ii) a person who develops land into a project, whether or not the person also constructs structures on any of the plots, for the purpose of selling to other persons all or some of the plots in the said project, whether with or without structures thereon; or

(iii) any development authority or any other public body in respect of allottees of --

- (a) buildings or apartments, as the case may be, constructed by such authority or body on lands owned by them or placed at their disposal by the Government; or
- (b) plots owned by such authority or body or placed at their disposal by the Government, for the purpose of selling all or some of the apartments or plots; or

(iv) an apex State level co-operative housing finance society and a primary co-operative housing society which constructs apartments or buildings for its Members or in respect of the allottees of such apartments or buildings; or

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale; or

(vi) such other person who constructs any building or apartment for sale to the general public.

Explanation – For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the persons who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified, under this Act or the rules and "

10. This definition clearly mentions that a person who constructs or causes to be constructed a building consisting of apartments or converts the existing building or part thereof into apartment for the purpose of selling all or some of the apartments to other persons becomes the promoter. This definition clarifies that the redevelopment project is covered and the liability of the persons constructing or converting building into apartments and those who sell apartments to different persons shall be joint as such for the functions and responsibility specified under the Act. Therefore, the owner of the land who wants to redevelop the land and the person who is engaged for redeveloping it and selling it also became the promoters and their liability is joint. Such provision is not there in MOFA. Respondent no.2 by cancelling the development agreement of respondent no.1 and revoking their power of attorney regains the control and ownership of the sale component. Therefore, the definition of promoter defined by RERA is comprehensive definition which in my humble opinion includes the land owners who retain, share their area free of cost and allows to regain the control over sale component also."

20. Needless to state that applicability or non applicability of judicial precedent is to be examined on the touchstone of facts and change in laws if any. In the present case Ld. Member found decision in Vaidehi not applicable on the basis of definition of 'Promoter' under MOFA and RER Act. Ld. Member did not visit the terms in clauses of the Agreements / Allotment letters to arrive at the conclusion that society falls within the definition of promoter.

21. It is pertinent to note that specific defences have been raised by the society in its submissions before the Authority. Paragraph 3(1) of written submissions reads thus -

" I. Without prejudice to the aforesaid and in any event, these Respondents are absolute owners of the property and their ownership right to the property cannot be curtailed or compromised at the behest of the complainants who claim from Respondent No.1. The following questions inter alia arise in a dispute such as the present one which cannot be adjudicated in a summary procedure before this Authority and the Complainants would have to be relegated to file a civil suit. Some of the questions (which are illustrative and not exhaustive) arise are as under:-

- (a) Whether ownership rights of owner of a property can be curtailed or compromised by persons claiming through a promoter who has himself defaulted in performing his agreement with the owner ?*
- (b) Whether the provisions of RERA can be construed so as to defeat the rights of the owners who have neither any privity of contract with investors / allottees nor have defaulted in any obligations towards such investors / allottees ?*
- (c) Whether investors or financiers of a promoter can be construed to be flat purchasers under RERA ?*
- (d) Whether unstamped / unregistered documents can be relied in support of alleged claims of flat purchasers ?*
- (e) Whether documents purportedly executed by Respondent No.1 are for security and merely in nature of a finance transaction?"*

22. On perusal of written submissions it can be further seen that society referred to MahaRERA Circular no. 12 of 2017 dated 04.12.2017 to submit that society is excluded from the purview of definition of promoter. Copy of the said Circular is part of written submissions.

23. We find no whisper in the impugned Order regarding above defences raised by the society. These defences would go to the root of maintainability of complaints.

(PER : S.S. SANDHU)

24. I fully agree with the observations made and views expressed by my learned sister with regards to the main issues involved in these appeals related to maintainability of complaints of the Respondent No. 1 and others before the learned Member. However, in view of the fact that the subject issues have wider ramifications for deciding role and responsibilities of the various stakeholders such as Societies, the promoters/developers and the purchasers etc., I wish to add certain observations of mine with reference to relevant averments of the parties. To avoid repetition, I do not wish to record the said averments since my learned sister has already narrated them in sufficient length while expressing her views thereon.

25. After giving due consideration to the rival contentions of the Parties, the tenability of the impugned order is to be examined for taking necessary view in the matter. It may be noted that as provided in the preamble as well as Section 44(1) of the RERA, the Appellate Tribunal has been established to hear appeals arising out of the grievances from the decisions, directions or orders of the RERA and the Adjudicating officer and for matters connected therewith or incidental thereto. In view of these provisions, the examination is restricted only to the issues which are discussed and decided in the impugned order. In this regard, it is observed that the impugned order has mainly decided that the society being a land owner was the promoter and on termination of the development agreement with the Respondent Developer, it steps into the shoes of the Promoter/Developer to be liable for all commitments of the developer towards the third party purchasers. The learned Member

has also held the view that the definition of promoter under RERA is more comprehensive than the definition under MOFA relied upon in aforementioned judgment of Hon'ble High Court in Vaidehi's case and therefore the said judgment was not held to be applicable in the cases at hand.

26. From perusal of the impugned order, it is seen that after considering the contentions of the Appellant Society, the learned member went through the definitions of Promoter under MOFA as well as RERA for examining the applicability of the judgment in Vaidehi's case. Upon this, the learned Member recorded his observations by stating that the Appellant Society is a land owner as is the case in Vaidehi. Then he observed thus:

"It is a fact that the development agreement clearly shows that the Respondent No.1 has to act as a principal for the purpose of executing the agreements with the purchasers of flats. However, it is pertinent to note that the Appellant Society has not relinquished/released its control/ownership over the sale component...."

However, it appears that by leaving the above observations there only and without dilating further for drawing any definite conclusion to decide the issue at hand, the learned Member then proceeded further to discuss the Vaidehi's case in the light of definitions of promoter under both the respective enactments by observing thus:

"It is again necessary to note that the Hon'ble High Court drew the conclusion that the society being the owner is not responsible for the specific performance of the contract entered into by its developer with flat purchasers mainly relying upon the definition of promoter defined by MOFA"

After this point, the learned member reproduced the definitions of promoter existed under MOFA as well as RERA. Immediately thereafter, he clarifies the concept of promoter as is defined under Section 2 (zk) read with the explanation appurtenant thereto under RERA and observes that the owner of the land who wants to redevelop the land and the person who is engaged for redeveloping it and selling it also became the promoters and their liability is joint. With these observations, he concluded that such provision is not there in MOFA. It appears based on the above observations, he concluded as follows:

"Respondent no.2 by cancelling the development agreement of Respondent no.1 and revoking their power of attorney regains he control and ownership of the sale component. Therefore, the definition of promoter defined by RERA is comprehensive definition in my humble opinion includes the land owners who retain, share their area free of cost and allows to regain the control over the sale component also".

Probably based on the aforementioned observations and conclusions and after making certain observations with regards to provisions under Section 15 of the RERA, the learned Member concluded in the last part of para 11 of the impugned order that because of RERA, legal position has changed and hence the case of Vaidehi is not applicable to the facts and circumstances of the case. Accordingly, he held the Complaints as maintainable.

27. After having gone through the observations and conclusions by the learned Member as reproduced and mentioned hereinabove, it is observed that no convincing attempt appears to have been made in the order to determine and decide the material difference between the two definitions of promoter provided under MOFA and RERA for concluding that such provisions, as are available under RERA for the term promoter are not available under MOFA. Also there is no analysis to show that the definition of promoter under RERA, particularly the relevant one under Section 2(zk) read with the explanation attached thereto, is more

comprehensive or different than the one provided under MOFA for holding the law laid down by the Hon'ble High Court in Vaidehi case inapplicable for the cases at hand. It is our considered view that before concluding that Vaidehi's case was not applicable in deciding the maintainability of the complaints, there was a need to have a deeper and comparative scrutiny coupled with justifying reasons to substantiate that the provisions related to the definition of promoter in RERA were not available under MOFA or that they were materially different or more comprehensive than the provisions related to the term promoter under MOFA as relied upon in Vaidehi's case. In the absence of such an exercise, it is hard to accept the conclusions drawn in the impugned order with regard to the applicability of law laid down in Vaidehi's case.

28. The other aspect related to the applicability of Vaidehi's case for deciding the maintainability of the complaints is the issue of privity of the Appellant Society. In this regard, it is appropriate to observe that in the Vaidehi's case, the privity of the land owner society was at the foundation of the order therein while deciding the liability of the Society in the agreements executed by the purchasers of flats with the terminated developer of Vaidehi. In that case, on the principal to principal basis contract, the land owner society had given all rights to the developer to execute the purchase agreements with the third party purchasers and later, the society was in the seize of the sale component which it had assigned to Rustumjee by terminating the agreement with Vaidehi. Referring to the law laid down in this case, the learned Counsel had raised the issue of absence of privity of the Appellant Society before the learned Member. However there appears no considered examination in the impugned order of the terms of the contractual agreements to decipher the privity of the Appellant Society before somehow concluding that because of RERA, legal position has changed and hence the case of Vaidehi is not applicable to the facts and circumstances of the case. In this regard too, in the absence of any serious examination of the aspects related to the privity of the Appellant Society, as ruled by

Hon'ble High Court in the Vaidehi's case, it is difficult to accept and sustain the conclusions drawn with regards to applicability of Vaidehi's case in the impugned order.

29. In view of the above, I fully agree with the views of my learned sister on the aforesaid issues. I also endorse her view that no cognizance is taken in the impugned order of the submissions by the Appellant Society that it is excluded from the purview of the definition of promoter in view of Circular No.12 of 2017 dated 4th December, 2017.

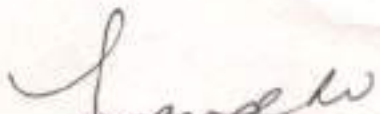
CONCLUSION:

Therefore, in our view, re-examination is required as to whether the definitions of promoter under MOFA and RERA are materially different from each other alongwith the issue as to whether the comprehensive nature of provisions of RERA, has any effect on the applicability of law related to Applicant Society's privity as laid down in Vaidehi's case for deciding the maintainability of the complaints in these appeals. The claim of the Appellant Society also needs proper adjudication that it does not fall under the definition of promoter as clarified in aforementioned Circular No. 12 of 2017.

30. In the above premise, we hold the impugned order unsustainable in law. It calls for interference in these appeals. Hence the following order:

- i] All 15 appeals are allowed.
- ii] Impugned common interim order dated 6th August, 2018 is set aside.
- iii] Matters are remanded to the Ld. Member & Adjudicating Officer, to decide within four weeks from the date of communication of this order, issue on maintainability of complaints afresh without being influenced by the observations made supra.

- iv] Parties to appear before the Ld. Member and Adjudicating Officer on 5th February, 2019.
- v] No costs.


(S.S. SANDHU)


(INDIRA JAIN J)