

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE SIDE JURISDICTION****WRIT PETITION NO. 4473 OF 2015
WITH
CIVIL APPLICATION NO.2648 OF 2015
IN
WRIT PETITION NO. 4473 OF 2015**

Dreams The Mall Commercial Premises Co-op ... Petitioner
Society (Proposed) & Anr.

Vs.

The State of Maharashtra & Ors. ... Respondents

...
Mr.Anand Mishra i/b. Mr.Ashok M. Saraogi for Petitioner.
Mr.Bharat R.Zaveri for Respondent No.5.
Mr.Anil Mishra a/w Mr.Bangera for Respondent No.4.
Mr.S.D.Rayrikar AGP for Respondent No.1.

...
CORAM : A. K. MENON, J.
DATE : SEPTEMBER 15, 2015.

P.C.

1. This Civil Application No.CA/2648/2015 has been taken out by the petitioners pursuant to the liberty granted on 24th August, 2015 at the request of Advocate for the petitioners to place on record additional documents which were not before the authorities below. Pursuant to the aforesaid liberty the present Civil Application has been taken out. The learned counsel for the Petitioner submitted that in the interests of justice the Civil Application may be allowed. Having considered the facts, the petitioners are permitted to rely upon the documents annexed to the Civil Application no. 2648 of 2015 which is made absolute in terms of prayer clause (a).

2. Learned Counsel for the parties were also heard on the petition. The petition is filed challenging the order of the Divisional Joint Registrar dated 3rd February 2014 dismissing an appeal filed by the petitioners. The Divisional Joint Registrar confirmed an order dated 8th August 2013 passed by Assistant Registrar, C.S, S-ward, Mumbai. The order dated 8th August 2013 passed by the Assistant Registrar is annexed in Exhibit-G to the present petition and by the said order the petitioner's application questioning the formation of a limited company of unit purchasers was decided against the Petitioners. The Divisional Registrar vide the impugned order has held under provisions of section 10 of the Maharashtra Ownership's Flat Act, 1963 (MOFA) every developer is obliged to form either a Company or a Society for management of the common areas and construction put up pursuant to the said agreement of sale under Maharashtra Ownership Flat Act, 1963 (MOFA).
3. The facts of the present case reveal that respondent no.3 has already registered a Public Limited Company namely "Dreams – The Mall Company Limited" which has been duly registered by the Registrar of Companies at Mumbai under the Registration no. U74120MH2013PLC243197.
4. The impugned order records the appellants statement that out of a total of 1071 units, 658 unit owners have applied for membership of Co-operative Housing Society and therefore more than 60% of the total members are agreeable and desirous of forming a Co-operative Society.

5. Learned Counsel for the petitioner submits that by virtue of additional documents that have now been filed pursuant to the Civil Application, it will be seen that on 2nd July 2015 the proposed society addressed a letter to the Chairman of HDIL setting out some of their grievances regarding maintenance and running of the mall resulting in the interests of innumerable shop owners being affected and calling upon HDIL which had initially constructed the Mall to formally hand over to management to the proposed society, to appoint a new Mall Manager etc.
6. The Learned Counsel for the petitioner also relied upon the letter dated 23rd February 2015 issued by HDIL in which HDIL granted a conditional “No Objection Certificate” for formation of Society of shop owners of Dreams Mall situated at LBS Marg, Bhandup (West), Mumbai-400 078 subject to the condition laid down therein. Therefore it is submitted that the HDIL having so consented, it was not open for the respondent to avoid formation of a society. Further documents relied upon in the Civil Application refer to various complaints made to Senior Inspector, In-Charge Bhandup Police Station regarding protest march proposed to be held by the shop owners against the alleged disconnection of water supply and basic amenities. The additional documents also include a copy of Writ Petition No. 2411 said to have been filed by some petitioners which is pending in this court and wherein no orders have been passed.
7. The Respondent no. 6 Company appears through counsel and makes a statement that shares have already been issued to 966 unit purchasers out of whom 725 members have received the shares certificates and have acknowledged receipt of the same. Thus

according to the Respondent no.6 out of total of a 1094 units constructed 22 units were allotted to the Municipal Corporation. He relies upon Certificate of Incorporation of the respondent company which is annexed Exhibit 'P'. Perusal of the said certificate of Incorporation reveals that the said Company "Dreams The Mall Company Limited" is incorporated under the Companies Act, 1956 with effect from 10th May, 2013.

8. Mr Zaveri learned counsel appearing for Respondent no.5 submits that his clients have stepped into the shoes of Respondent no. 4 and he points out the agreements entered into between unit purchasers reveal that the Respondent no. 5 were confirming parties to the agreements for sale. He makes specific reference to the provision of Agreement for Sale dated 12th November, 2007 annexed to the petition between M/s. HDIL, the purchaser Mr. Kormure and his clients who were the confirming parties. He submits that similar agreements were executed with all unit purchases between 2006 to 2009. He refers to "Certificate of Incorporation" of the Company and pointed out that under the various clauses of the agreement viz clauses 33 and 34. While this submission is factually correct provided for the formation of limited company.

9. Specific reference is made to clause 51 of the agreement wherein the unit purchasers have agreed to join in formation of Limited company to be known by such name as the Promoter would decide, so that it would constitute the organisation of purchasers contemplated under section 10 of the said Act. He submitted that there is no challenge to these clauses of agreement and petitioner are all claiming rights pursuant to the Promoters

obligation under clause 53 of the said agreement. Relying upon the aforesaid points Mr. Zaveri submitted that this is clearly a case where the petitioners are acting in breach of the agreement of the sale under which they claim. He further submitted that the petitioners had initially filed a suit No.591 of 2014 in the Bombay City Court seeking mandatory reliefs and wherein a Notice of Motion was taken out for interim reliefs. However, no application for interim relief was made but the suit filed is pending.

10. Mr.Zaveri submitted that the petitioners have also filed a Writ Petition lodging no 2411 of 2015. In Para 9 the following averment has been made :

“The Petitioners state that in view of the said certificate, now the Petitioners have applied for reservation of a name of the society which has been granted by the concerned authorities and accordingly, hereto annexed and marked Exhibit-“D” is the copy of the approval letter and accordingly, the Petitioners are in the process of getting the said society registered.”

By the aforesaid averment an impression is sought to be created by the petitioners that pursuant to the No objection certificate issued by the aforesaid HDIL dated 23rd February 2015, the petitioners have applied for reservation of name for the proposed society and which has been granted by the concerned authority. A copy of such permission is however not produced before this court although the same is said to have been annexed to the said petition.

11. According to Mr Zaveri this is obviously an incorrect statement. Moreover, he submits that the No Objection Certificate upon which petitioners now rely is dated 23rd February 2015 whereas the company was already incorporated on 10th May, 2013.

12. Having heard learned counsel for the parties and having placed the documents relied upon by them, I am convinced that the petitioners cannot insist on formation of a society in the face of the express provisions of the Agreement for Sale, assuming all agreements are containing the same provision as shown by Mr.Zaveri the learned counsel for the Respondent no.5. None of the other respondent or the petitioners have contended Mr.Zaveri's submission that all agreements are similar on this aspect. In fact although Mr.Zaveri relied upon clause 33, 34, 51 and 53 of the agreement, I find that since the recitals of the agreement refer to execution of a conveyance or lease in favour of a Limited Company to be formed of purchasers of Units. Recital J(i) reads as follows:

Upon completion of the Shopping Mall and receipt of Occupation Certificate in full, the Promoter shall cause the Original Owner to execute a Deed of Conveyance or Lease Deed in respect of the said property in favour of a Limited Company (hereinafter referred to as "the said Association") to be formed of all the purchasers of the units and other premises in the said Shopping Mall.

13. Apart from the recitals clauses 14, 15(B), 16, 19, 23, 24, 29, 31, 33, 34 refer to formation of the company. In fact the purchasers have vide clause 41(i) consented with the promoter that

they would observe rules of the Limited Company. Clause 42 expressly refers to the Promoters right to form a limited company. Clause 42(a) & (b) reproduced below for ease of reference.

“Notwithstanding any other provisions of this Agreement the Promoter shall be entitled to, at the Promoters sole and absolute discretion :

(a) To have a limited company and/or any other body or bodies of Purchasers formed and constituted as contemplated herein.

(b) To cause to be conveyed and/or leased and/or transferred the building and/or buildings together with the said property in favour of such limited company and/or other associations as the case may be.”

14. It was thus agreed between Promoter and purchaser right from the inception that within statutory period a limited company would be formed and there was no real challenge to the discretion vesting in the promoter in formation of any particular type of entity and it was entirely within the scope of the promoters to determine the kind of entity they wished to register. This Company having been incorporated under provision of agreement which in specific terms required incorporation of limited company read with the fact that Company Respondent no.6 herein has already issued shares, there is no merit in the Petitioners contention. The fact remains that although the petitioner claims to have filed the Petition in a representative capacity for a proposed society along with Chairman of the proposed society, company's counsel has made a

statement that 966 unit holders have already been issued share certificates out of whom 725 have received and accepted the shares.

15. In my view this is not case which calls for interference and no fault can be found with the orders of the Divisional Joint Registrar, Co-operative Societies, Mumbai Division, Mumbai dated 23rd February, 2014 or the order of the Assistant Registrar dated 8th August 2013. In the circumstances there is no case made out that calls for interference with the impugned orders. Accordingly I pass the following order :-

- (i) The Writ Petition is dismissed.
- (ii) There will be no order as to costs.
- (iii) The Respondent no.6 shall forthwith commence the work of administering the affairs of the Mall and perform their obligation including obtaining the conveyance / lease of the land as contemplated in the agreement for sale so as to protect the interests of all purchasers.

(A.K.MENON, J.)

CERTIFICATE

Certified to be true and correct copy of the original
signed Judgment / Order.