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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4705 OF 2015

M/s.B.S.M. Construction and others

.. Petitioners

Vs.

Rajani Corner II Co-operative

Housing Society Ltd. and another

.. Respondents

Mr.A.V.Anturkar, Senior Advocate i/b Mr.S.B.Deshmukh, Advocate for the Petitioners.

Mr.Avinash B.Avhad, Advocate for Respondent No.1.

Ms.M.S.Bane, AGP for Respondent No.2 – State.

CORAM : R. G. KETKAR, J.

DATE : 31th AUGUST, 2015

P.C. :

. Heard Mr.A.V.Anturkar, learned Senior Counsel for the petitioners, Mr.Avinash B.Avhad, learned Counsel for respondent No.1 and Ms.M.S.Bane, learned AGP for respondent No.2 – State at length. After the arguments were concluded, the matter was kept today for passing order. Accordingly, I proceed to pass order.

2. By this Petition under Articles 226 & 227 of the Constitution of India, petitioners have challenged the judgment and order dated 03/03/2015 passed by the 2nd respondent herein namely the Competent Authority and District Deputy Registrar, Co-operative Housing Societies, Pune. By that order, respondent No.2 allowed the application filed by first respondent under Section 11 of the Maharashtra Ownership Flats (Regulations of the Promotion of

Construction, Sale, Management and Transfer) Act, 1963 (for short 'MOFA') and directed execution of unilateral conveyance to the first respondent in respect of land admeasuring 886.64 sq.meters together with construction admeasuring 1102.22 sq.meters.

3. In support of this Petition, Mr.Anturkar relied upon Section 11(1) & (3) of the MOFA. He submitted that Section 11(1) lays down that a Promoter shall execute all the relevant documents in accordance with the agreement executed under Section 4. He relied upon clauses 50, 51, 55, 56, 57 & 58 of agreement for sale dated 07/12/2009 executed by the petitioners on one hand and one of the members of the first respondent-Society on the other. In particular, he submitted that in terms of clause 51, the Promoter is entitled to amalgamate plots with the adjoining property/properties or vice-versa. In terms of clause 56, the Promoter is entitled to use the marginal open space/s as an access for another building, land and allow such access to any other person/s and the flat purchaser/s herein or the organization in which he will become a member and shall not be entitled to object the said use by the Promoter or its nominee/s or assignee/s and the flat or the property shall be covered subject to the said right of the Promoter and this term is the essence of this agreement. Mr.Anturkar submitted that originally plot No.8 was shown as an amenity space. The said amenity space thereafter is shifted elsewhere. The petitioners are entitled to develop plot

No.8. The petitioners amalgamated plot No. 8 along with plots No. 1 & 2. Accordingly, they have also obtained sanction on 03/02/2014 for amalgamation of plots No. 1 & 2 with plot No. 8 from the Planning Authority namely Pune Municipal Corporation. In short, Mr.Anturkar submitted that on the basis of the agreement for sale, the petitioners are entitled to have access through plots No. 1 & 2 for approaching plot No.8. In any case, he submitted that respondent No.2 is not a Civil Court and has summary powers to decide the application made under Section 11 of MOFA. Respondent No.2 has no authority/jurisdiction to decide the easementary rights. Mr.Anturkar, upon instructions from Mr.Amit Kishore Mahindrakar, Partner of the petitioner No.1-firm, submits that petitioners will not press this Petition and approach the Civil Court if it is clarified that respondent No.2 has no jurisdiction to decide the easementary rights.

4. On the other hand, Mr.Avhad supported the impugned order. He submitted that the agreement for sale dated 07/12/2009 is in respect of plots No. 1 & 2. The various clauses referred to in the agreement for sale are in respect of plots No.1 & 2 only. The scope of the agreement for sale cannot be enlarged so as to include plot No. 8 for giving access to the petitioners through plots No. 1 & 2. He further submitted that in fact, respondent No.1 has objected to amalgamation of plot No. 8 with plots No. 1 & 2. He has invited my

attention to the letters dated 23/06/2015 & 10/07/2015 addressed by the first respondent to the Building Department of Pune Municipal Corporation. He, however, did not dispute that the Competent Authority has no authority to decide the easementary rights.

5. I have considered the rival submissions made by the learned Counsel for the parties. I have also perused the material on record. Perusal of the provisions of MOFA shows that the Competent Authority cannot be treated as a Civil Court. Perusal of provisions of MOFA indicates that the Competent Authority has no power to summon the witnesses, record the evidence of the parties. In other words, the Competent Authority has summary powers to decide the application under Section 11 of MOFA. The Competent Authority has no power/authority to decide the question of title as also the question of easementary rights.

6. In view thereof, on the motion made by Mr.Anturkar, Petition is allowed to be withdrawn with liberty to institute Suit. It is made clear that I have not expressed any opinion on merits of the proposed proceedings either way. All the contentions of the parties are expressly kept open. If the petitioners institute Suit, the same shall be decided on the basis of the material on record and in accordance with law.

(R. G. KETKAR, J.)