

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO.4523 OF 2014****WITH****WRIT PETITION NO.1445 OF 2015****WITH****WRIT PETITION NO.11234 OF 2014****WITH****WRIT PETITION NO.11235 OF 2014****WITH****WRIT PETITION NO.11236 OF 2014**

Kapadia Development Co-operative
Housing Society Ltd.

... Petitioner

vs.

The State of Maharashtra & Ors.

... Respondents

WITH**WRIT PETITION NO.4667 OF 2014**

Karishma Co-operative
Housing Society Ltd. & Ors.

... Petitioners

vs.

The State of Maharashtra & Ors.

... Respondents

WITH**WRIT PETITION NO.4826 OF 2014**

Kavita Co-operative
Housing Society Ltd. & Ors.

... Petitioners

vs.

The State of Maharashtra & Ors.

... Respondents

Mr.Anil Sakhare a/w Mr.Rakesh Agarwal a/w Mr.M.A.Ansari for the Petitioner in
WP/4523/2014, WP/11234/2014, WP/11235/2014, WP/11236/2014 &
WP/1445/2015.

Mr.Ashok B. Mishra i/b Mr.Vijay B. Mishra for the Respondent in WP/4667/2014.

Mr.Yusuf Khan a/w Mr.Brijesh Shukla a/w Mr.G.P.Khan for the Respondent No.3
in WP/11234/2014, WP/11236/2014 & WP/1445/2015.

Mr.R.M.Kadam, Sr.Advocate a/w Mr.S.R.Nargolkar a/w Mr.Swapnil Mohite i/b.
Mr.S.G.Wadte for the Respondent No.3 in WP/4523/2014.

Mr.S.U.Kamdar, Sr.Advocate a/w Mr.Gajanan Sangle a/w Mr.M.K.Shaikh for the
Respondent No.3 in WP/11235/2014.

Mr.S.D.Rayrikar, AGP for State.

Mr.R.S.Apte for the Respondent No.3 in WP/11234/2014.

Mr.P.S.Dani, Senior Advocate a/w Mr.Vikram Chavan for the Petitioner in
WP/4826/2014.

CORAM : A. K. MENON, J.
DATE : OCTOBER 13, 2015.

P.C.

1. The present group of petitions seek to challenge orders passed by the District Deputy Registrar Co-operative Societies (2), East Suburbs, Mumbai granting of deemed conveyance in respect of different plots of land in favour of the Respondent No.3 Society in each of the writ petitions.

2. The Petitioners are aggrieved by the grant of conveyance to the Respondent No.3 Societies. The Petitioner is a Co-operative Housing Society registered under the provision of the Maharashtra Co-operative Societies Act, 1960. It devised a scheme under which the petitioner sought to develop a large plot of land as set out in agreements for sale which the petitioner and Respondent No.4 (the actual developer) entered into with various flats purchasers. The aforesaid development was contemplated in Articles of Agreement dated 24th June, 1975 between one Popatlal Chaganlal Kapadia, Nimjibhai Chhaganlal Kapadia on one hand described therein as the Vendors and one Abdullabhai Oomer Merchant on the other, described therein as the Purchaser, the vendors granted to the purchaser the right to develop the land described in the schedule to the agreement ad-measuring about 39349.89 sq.mts. including through a nominee. Vide Clause 6 of the agreement the purchaser was to be in physical possession of the land with full authority to proceed with the

construction work upon the said land. The sale of flats and shops/sale of premises was to be conducted and to be undertaken at the sole risk of the purchaser or his nominees and vendors were not to be responsible. The purchaser was also entitled to assign the benefit of the agreement in favour of nominees for the purpose of exploitation of the said land. Vide Clause 15 of the agreement the vendors agreed that they would execute separate conveyances, if desired by the purchasers, in respect of each of the buildings or execute one conveyance in favour of the purchaser or the Society or Societies as may be directed by the purchaser.

3. Pursuant to this agreement, a further agreement came to be executed on 4th February, 1980 between the present Petitioner and the said Abdullabhai Oomer Merchant and the Respondent No.4 Deepak Builders (the Society's authorized developer) to proceed with and complete construction. Under the said agreement, the schedule mentions the entire area 39349.89 sq.mts. It is in this manner that the said property came to be the subject matter of diverse agreements for sale of flats and premises the construction of which was taken up by the Respondent No.4.

4. The various premises were in due course to be sold to interested purchasers under agreements for sale as contemplated by the Maharashtra Ownership of Flats (Regulation of the promotion of

construction, Sale, Management and Transfer) Act, 1963 (herein referred as "MOFA"). One such agreement for sale appears at Exh.K and the intention of the Respondent No.3 was to enforce the obligation of the petitioners and the Respondent No.4 in conveying the land to the Respondent No.3.

5. On behalf of the Respondent No.3, an application was filed under Section 11 before the Competent Authority and this application came to be allowed. The impugned order dated 15th March, 2014 resulted in a Certificate of deemed conveyance to that effect being issued on the same day. It is this order and Certificate that is being called into the question in this proceeding.

6. Mr.Sakhare, the learned Senior Advocate appearing for the Petitioners in all above matters contended that the Respondent No.3 which had filed its application seeking a deemed conveyance under Section 11(3) was only occupying one of the 24 buildings that have come up on the said larger plot of land. He submitted that each of the buildings had formed Societies and out of these 24 Societies 6 had applied for separate conveyances being executed in their favour. The Petitioners in the present group of Petitions are aggrieved by the deemed conveyance applications filed by the Respondent No.3 societies in each of these Petitions. Mr. Sakhare submitted that of the remaining societies, 14 Societies are opposing the grant of conveyance to

individual societies. In any event, it is submitted that the Respondent No.3 seeks conveyance of the property by virtue of a tripartite supplementary agreement dated 31st May, 1987 between the Petitioners, the erstwhile Abdullabhai Oomer Merchant therein described as the "Confirming Party" and the Respondent No.4 Developer. It was agreed that the Plaintiff Society had passed resolution in its General Body Meeting in 31st May, 1980, thereby resolving to amend its bye-laws and to take effective steps for registering separate Societies for each of the said 24 buildings and to demise unto each of the said Societies a lease of the land appurtenant to each building for a period of 999 years at a nominal rent of Rs.1/- per annum and thereafter, to form and register an Association of all the Societies, so as to handover the maintenance and up-keep of the common areas to the association.

7. Mr.Sakhare submitted that by virtue of the said agreement, separate societies came to be registered and at best the Respondent No.3 could only seek a lease and that too restricted to the area appurtenant to its buildings and nothing beyond. The Respondent No.3 in the Writ Petition No.4523 of 2014 occupies building No.6 and it applied for deemed conveyance on 22nd March, 2013. The Petitioner Kapadia Development Co-operative Housing Society Ltd. opposed the application and vide an order dated 27th May, 2013 the competent authority passed an order granting deemed conveyance. This order

was challenged in this Court by filing a Writ Petition No.1084 of 2013. At the hearing of the said petition on 17th December, 2013 by consent of all the parties the order impugned therein dated 27th May, 2013 came to be set-aside and the matter was remanded to the competent authority to be decided afresh as expeditiously as possible. All parties agreed to co-operate for early disposal of the Respondents' applications filed under Section 11(3).

8. Mr.Sakhare submitted that the Respondent No.3 did not pursue its original application dated 22nd March, 2013 but filed a fresh application on 24th December, 2013. According to him this fresh application ought not to have been considered. However, to a query from the Court as to whether the scope of the fresh application was enlarged as compared to the earlier application, Mr.Sakhare conceded that there was nothing in the fresh application that travelled beyond the scope of the original application. Mr. Sakhare in all fairness did not labour this objection.

9. Mr.Sakhare then submitted that the Petitioner had sought inspection of documents relied upon by the Respondent No.3 in its application before the Competent Authority but inspection was not granted. On perusing the various documents that were relied upon, I find that the Respondent No.3 relied upon the very documents which

were all within the Petitioners knowledge, inasmuch as they were referred to and the relied upon in the applications for deemed conveyance, a copy of which appears at Exh.L to the present petition. I may clarify that reference to facts made in this order pertain to Writ Petition No. 4523 of 2014. Similar documents are to be found to be relied upon in the other applications under Section 11(3). Thus, the documents relied upon did not include any document which was not within the petitioners' knowledge nor would it cause any prejudice to the petitioners since it is not the petitioners case that they were put to disadvantage of any kind by virtue of the documents filed and inspection of those which were allegedly not given. This objection is also in my view a red herring.

10. Mr.Sakhare then referred to the obligation of the Petitioner to convey/grant of lease in respect of the land appurtenant to the building of the society. He referred to the agreement for sale and in particular the contents of recital clause "O" and "Q". According to Mr.Sakhare the only obligation that the Petitioner had to convey/grant of lease in respect of the portion of land that each society would be entitled by virtue of the said agreement for sale and in particular clause 33 of the agreement which in specific terms mentions as following.

"33] The said Kapadia Development Co-operative Housing Society Ltd. will become a Federal/Parent Society and in turn transfer and convey the said sub-divided units separately to the Societies to be formed

and registered along with the flat/shop Purchasers of the respective plots, and/or alternatively cause to convey directly to the Society formed in respect of the said building. The Kapadia Development Co-operative Housing Society as a Federal/Parent Society will look after common amenities, including roads, street lights, water, electricity, garden maintenance, security services, recreation and other similar amenities.....”

11. These provisions entitled the societies to be formed and obtain conveyance in respect of land. According to Mr.Sakhare, the Petitioner was to become the federal/parent society and look after the common amenities including roads, street light etc. These common areas include access roads to the buildings and management of such common areas were the lookout of all the petitioners so that the buildings and societies would not face dispute/claims inter se. He submitted that when recital clauses “O” and “Q” are read with clause 33 and clause 34, it was evident that the builders as the Respondent No.4 was described, would cause a deed of conveyance or Deed of agreement to be executed in favour of the said society or limited company. The contents of clause 34 is reproduced below ease for reference.

“34] After the Building is complete and ready and fit for occupation and after the Society or the Limited Company is formed and registered, and only after all the units in the said building and/or buildings to be constructed by the Builders as aforesaid have been

sold and disposed off by the Builders and the Builders have received all dues payable to them under the terms of the agreement with various purchasers, the Builders shall cause execute a Deed of conveyance and/or Deed of Agreement in favour of the said Society or Limited Company as hereinabove provided.”

Thus, from a fair reading of the agreement, Mr.Sakhare contended that in compliance of the provisions of MOFA the land appurtenant to the buildings would have to be leased to the Society in question and there is no question of executing a conveyance.

12. Mr.Sakhare then submitted that Competent Authority has not given a proper finding as contemplated in Rule 13(5) of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Rules, 1964 (for short, “the MOFA Rules”). Rule 13(5) deals with scrutiny of applications received pursuant to Section 11. Mr.Sakhare relied heavily upon the provision of Rule 13(5) which is reproduced here for ease of reference.

“13. Scrutiny of applications and notice to the parties, etc.”

(1).....

(2).....

(3).....

(4).....

(5) Procedure for hearing the application.

(a) On receipt of the statement of the opponent, the applicant shall prove contents of the application and also deal with the contention of defenses. The opponent likewise may file reply in support of the defense on the

next date, if he so desires. No cross-examination of any of the parties shall be permitted.

(b) On receipt of the replies, the Competent Authority shall proceed to hear oral arguments of the parties and after hearing, shall close the proceedings for the order.

(c) The Competent Authority shall, within reasonable time and in any case not later than six months from the date of receipt of the application, after making such enquiry deemed necessary and after verifying the authenticity of the documents submitted by the parties and after hearing them and giving the parties sufficient opportunities as required under the Act and the principles of natural justice, pass such appropriate order as it deems fit, as provided under the Act."

13. According to Mr.Sakhare, Rule 13(5)(a) is a specific rule which required that the applicant shall prove the contents of the application and deal with the contentions of the opponent which was allowed to file a reply. Although no cross-examination of the parties was permitted in view of the proceedings being summary in nature, according to Mr.Sakhare the applicants had failed to prove their case in respect of the contents of their application. He contended that there is a violation of the procedure adopted. He submitted that the Respondent No.3 had not filed any affidavit in support of the application nor were original documents filed. Only photo copies were filed and therefore, the Respondent No.3 failed to prove its contentions in the

application despite which the Certificates came to be issued.

14. Mr.Sakhare then contended, without prejudice to his other submissions that the Certificates were invalid as the area to be conveyed by virtue of the impugned order is not what the Respondent No.3 in the first petition is entitled to. According to him the body of the order incorrectly mentions an area of 2470.58 sq.mtr. When in fact the application was made for an area 2750.77 sq.mtr. He made reference to the impugned order and submitted that the Petitioner at the outset disputed the claim for 2470.58 sq.mtr. The contention of the Petitioner is that as per the approved plan of 1988, the area to be leased could not be more than 1954.47 sq.mts. i.e. the area certified to be conveyed was in excess of the area appearing in the 1988 plan. Another contention taken by the Petitioner in its opposition is that the signature on the plan dated 7th November, 2007 a copy which is produced today during the hearing and which is the sanctioned plan relied upon by the Respondent No.3, is false. No explanation is forthcoming as to why this contention was taken up. When I enquired of Mr.Sakhare as to what according to the Petitioner the area to be conveyed/demised by way of lease was. He submitted on instructions that the entire area of 39349.89 sq.mts. to be conveyed as per the agreement to the Federal Society.

15. Before the Competent Authority and even before this Court

it is not the case of the Petitioner that the area of 2470.58 sq.mts. certified to be conveyed was incorrect and/or that the correct area was lesser. The Petitioner is therefore unable to specify the area that is required to be conveyed/demise unto the Respondent No.3. Save and except for the solitary reference in its opposition and which has been dealt with in the impugned order at point No.7 that the area is 1954.47 sq.mts., there is nothing else that has been pointed out to the Court by either Mr.Sakhare or any of the other counsels appearing for the other Petitioners in each of these petitions. In none of these petitions have the Petitioner come forward with a positive case as to what is the correct area to be conveyed/leased was. Thus, Mr.Sakhare submitted that for all the above reasons the impugned order is bad.

16. In support of his contention Mr.Sakhare relied upon a decision of this Court in **Mazda Construction Company & Ors. Vs. Sultanabad Darshan CHS Ltd. & Ors.** in Writ Petition No.3912 of 2012 where in a single Judge of this Court (S.C.Dharmadhikari, J.) had dealt with the scope of the application under Section 11. The challenge in that writ petition was to the scope of the provisions of MOFA and entitlement to a Certificate of conveyance under Section 11(3). In that case Mr.Sakhare submitted there were 16 buildings out of which some Societies had filed suits and some had proceeded to file applications under Section 11(3). He submitted that in the case of Mazda Construction (Supra) the challenge was that there was no procedure

prescribed to considering the grant of deemed conveyance and that certificates were granted arbitrarily. After having considered the various contentions, this Court found that the procedure was in built in the statutory provision itself and that the Competent Authority before issuing the certificate would be required to satisfy itself within the provisions of the law and the agreement between the parties. If the agreement stipulated conveyance of right, title and interest in the land which was not crystallized but contemplated Sub-Division of plots then such stipulation is binding on both sides and cannot be overlooked. In particular however, Mr.Sakhare relied upon observations in paragraph 22 of the said Judgment in which the Court recorded that there was serious dispute as to whether the areas referred to as “garden” and “access” are forming part of the entitlement of the occupants and residents of the building on one plot or sub plot. It was observed in the said decision in Mazda (supra) that the expression “unilateral” had some definite significance and once the unilateral deemed conveyance is contemplated by the Competent Authority, then all the more, when litigation is pending (to which both are parties), as to the areas of garden and open access, there area should not have been included in the order and the certificate issued by the Competent Authority.

17. However, I find that in the present case it is not the Petitioners contention that conveyance of the common areas has been unilaterally granted. The grievance made by Mr.Sakhare is that while

dealing with the application the Competent Authority has observed that the societies would collectively be entitled to the benefit of the common areas as a whole and that such a observation in the order may be misconstrued. As a result that individual societies might take advantage of such observation and seek a right to utilize FSI from common areas as part of their own. Mr.Sakhare submitted that for all the aforesaid reasons the impugned order was bad and is required to be set-aside. Mr. Sakhar however fairly conceded that the certificate which was issued pursuant to the impugned order did not and could not confer any such right to use FSI of common areas and it was restricted to the area of 2570 sq.mts.

18. Mr.Sakhare also relied upon another decision of this Court in *Tushar Jivram Chauhan & Anr. Vs.The State of Maharashtra & Ors.* in Writ Petition (Stamp) No.17637 of 2014 passed by the another single judge (Anoop V. Mohta, J.) of this Court. Mr.Sakhare relied upon observations in paragraph 20 to the effect that grant of unilateral conveyance followed by the registration is more serious issue. Therefore, the competent authority needs to follow prescribed procedure in every aspect even if one party is absent. This judgment was cited in support of the contention Respondent No.3 Competent Authority was in breach of provisions of Rule 13(5). In my view there was no breach of Rule 13(5) and hence this judgment is of no assistance.

19. Mr.Kadam, learned Senior Advocate on behalf of the Respondent No.3 Society has supported the impugned order and contended that the certificate issued by the competent authority pursuant to the impugned order has been registered with the Sub-Registrar of Assurances on 27th April, 2014. Mr.Sakhare sought to dispute this contention alluding to the registration being challenged. However there has been no challenge to this registration which has been brought to my notice.

20. Mr.Kadam, relied upon the fact that the impugned order was passed granting the certificate on the basis of area which has mentioned in the sanctioned plan. He pointed out the computation of the area and submitted that in view of the said document which is binding upon the Petitioner, there was no case that the Petitioner could make out that area in excess of the Respondent No.3's entitlement was certified as conveyed. In any event, the contents of the sanctioned plan are not denied by the Petitioner, save and except for a passing reference, contending that the signature appearing on the plan is false as referred to above. Mr.Kadam referred invited my attention to paragraph 6 of the impugned order wherein the Competent Authority had made specific reference to the Property Card submitted by the Society. He then referred to the agreements for sale which contains reference to Articles of agreement dated 24th June, 1975 between the

original owners and Abdullabhai Oomer Merchant and pointed out that all the parties were required to execute a conveyance in favour of the purchasers of the society or societies as may be directed by the purchaser. He submitted that the contention of the Petitioner that instead of granting a lease, a conveyance has been granted was no avail since according to the Petitioner's own document they were obliged to convey the land. The tripartite supplementary agreement dated 31st May, 1980 Exh.O to the petition clearly referred in its recital, a proposal grant of a demise to each of 24 buildings for 999 years at a nominal rent of Rs.1/- per annum. Therefore, he submitted that there is no substance in the contention that a conveyance was granted in lieu of a lease.

21. Having considered the submissions of the learned counsel I do not find any perversity or element of arbitrariness in the order of the competent authority. The competent authority has considered all the documents filed and has placed specific reliance on the sanctioned plans of a buildings and that of other plot in arriving at a decision and specify the area in respect of which a certificate of deemed conveyance has been issued. The Petitioners are not able to satisfactorily explain as to what area the Respondent No.3 Society in each of these petitions would have been entitled to. It is common ground that the areas mentioned in the certificate issued under Section 11(4) are of derived from the sanctioned plan which is an admitted document. There is no

challenge to this aspect before me today. There is no dispute that the plan (except for the signature of the Society) is false or fabricated. There is no other specific reason offered as to why the plan cannot be relied upon.

22. As far as the other petitions are concerned numerous civil applications have been taken out all of which have been disposed of today by a separate order. In Writ Petition No.11235 of 2014 Mr.Kamdar the learned counsel appearing for the Respondent No.3 Society contended that area of that Society was entitled to area 1616 sq.mtr. and under Section 5 of the Transfer of Property Act, a conveyance would include lease hold rights. Mr.Apte who appears for the Petitioners in Petition Nos.11234, 11236 and 1445 of 2014 has adopted the arguments made by Mr.Sakhare. The contentions of the petitioner are identical. There are only differences in the area of the plot in respect of which deemed conveyance has been granted. In petition No.11234 of 2014 the area is stated to be 1616 sq.mts. and in petition No.11236 of 2014 the area is stated to be 1199.81 sq.mts. In support of the Petitioners contentions in Writ Petition No.11236 of 2014, Mr.Apte contended that there was no sub-division of the land and therefore, the Competent Authority could not have granted the Certificate.

23. In this view of the matter I do not find that the competent authority has failed to follow the appropriate procedure required to be

followed under Rule 13(5) and Rule 13(5)(a) in particular. Mr.Sakhare's contention that the authority has not given a finding as contemplated under Section 13(5) has no merit. His other contentions that what is conveyed is not an area that the Respondent No.3 entitled to is also not sustainable, in view of the fact that the Petitioners have failed to specify the area which according to them the Respondent No.3 would be entitled to. On the other hand the Respondent No.3 has relied upon a plan which was sanctioned by the Municipal Corporation and Planning Authority and on the basis of which the buildings have been constructed and stand today. Mr.Sakhare's contention that the observations in the order apropos common area would be misconstrued and misused by the Respondent No.3 to utilize FSI over common areas is also seems far fetched.

24. Today this Court has disposed of the Civil Application No.2757 of 2015 in Writ Petition No.4523 of 2014 taken out on behalf of the Petitioner contending that the Respondent No.3 was guilty of violation of an order of status-quo granted by this Court. In support of their contentions in the Civil Application the Petitioner has annexed a copy of the development agreement executed by the Respondent No.3 with a third party developer dated 17th December, 2014. This development agreement is executed pursuant to the Certificate granted under Section 11(4) and the impugned order. The development agreement does not suggest that the Respondent No.3 Society has

sought to take advantage of these observations as to common areas. I am of the view that there is no merit in Mr. Sakhare's contention that the Respondent No.3, by virtue of the observations in the impugned order, would expand the scope of the relief and exploit FSI of the common areas which areas are obviously for the benefit of all concerned, as per the scheme propounded by the Petitioner's themselves.

25. In the circumstances there is nothing to show that the Competent Authority has over stepped its limits and/or has exceeded the scope of Section 4 while granting the relief under Section 11(3). In the absence of any material before the competent authority that would enable the authority to take a different view, the deemed conveyance as prayed appears to be correctly granted in exercise powers conferred upon the authority. In view of there being no perversity or arbitrariness in the impugned order forming the basis of the impugned Certificate, no interference is called for in any of the petitions.

26. In view of the above, I pass the following order;

- (a) The Writ Petitions are dismissed.
- (b) There will be no order as to costs.

(A. K. MENON, J.)