

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 7052 OF 2014

Ms. Tasneem Mohammed Yakut Khan & Ors. .. Petitioners
Vs.
Ankur Co-operative Housing Society Ltd. & Ors. .. Respondents
...

Mr. Samir Arunkumar Vaidya for petitioner.

CORAM : A. K. MENON, J.
DATE : SEPTEMBER 22, 2015.

P.C.:

1] The present petition is seeks to challenge the order passed by the District Deputy Registrar of Co-operative Societies under the provisions of Section 11 (3) of the Maharashtra Ownership of Flats (Regulation and Promotion of Construction, sale, management and transfer) Act, 1963 (MOFA), and the issuance of a certificate of deemed conveyance under section 11(3) of the said Act.

2] The respondent society was registered in the year 1983 under the registration No. BOM/HSG/K-West/7313/Year-1983. The society consists of residential flats purchased by the various members under diverse agreements for sale entered into between

the developers and the purchases. The agreements have been executed in and around 1978. The admitted position is that during execution of the agreements, the petitioner's predecessors were confirming parties. The petitioners who are heirs of the original owners however now contend that the confirming parties had not willingly executed the agreements for sale and therefore they are aggrieved by the impugned order.

3] Mr. Vaidya learned counsel appearing for the petitioners submitted firstly that the application under section 11 made by the respondent no. 1-society was not maintainable since the society had already filed a suit in the City Civil Court, Bombay seeking the same relief. The said suit bearing No. 5900/2002 came to be dismissed for default and the respondent no. 1 - society has without applying for restoration of the said suit, preferred to file the present application before the appropriate authority seeking a direction against the petitioners to convey the property forming subject matter of the agreements for sale to the respondent no.1 society.

4] According to Mr. Vaidya the dismissal of the suit in the City Civil Court is operates as Res Judicata or in any event

principles analogous to Res Judicata would come into play and the filing of the present application before the competent authority amounts to a fraud upon the Court and apart from being a case of forum hunting. Mr. Vaidya submits that the fact of filing the suit in the City Civil Court has not been disclosed in the application for deemed conveyance. The respondent no. 1 is guilty of suppression and is therefore not entitled to pursue this remedy. He also submitted that there is gross delay in applying for deemed conveyance. According to him the agreements are stated to be executed in the year 1978. The suit came to be filed in the year 2002 and the suit was dismissed on 3rd September 2012.

5] Yet no application was made to pursue the issue of the conveyance. He therefore submitted that on account of delay the respondent no. 1 cannot be permitted to seek advantage to the amended provisions of the Act and seek conveyance on the basis of this amended provision. It is admitted that the agreements were executed in 1978 although it is the petitioners case that the confirming parties have since disputed their signatures. The petitioners have contended that their predecessors in title did not execute the agreements for sale willingly and the execution of the

agreements was vitiated by fraud at the relevant time. Mr. Vaidya also contended that the petitioners were not liable under the amended provisions of the Act since according to him neither the original owners who were the petitioner's predecessors in title nor the present petitioners were “promoters” as recognized by the MOFA. Apart from these three grounds, no other ground of challenge was urged before me.

6] I have examined the facts and have heard learned counsel for the petitioner. On the first issue of filing of the suit in the City Civil Court, it is evident from the prayers in the said suit as obtaining from the copy of the summon at Exhibit 'A', that the suit was filed against the defendants who are the petitioners in the present petition seeking enforcement of obligations under the MOFA and for other allied reliefs such as injunction, restraining the petitioners from utilizing any FSI that may be available on the suit plot etc. The suit came to be filed in the year 2002 and the same was being prosecuted. The defendants therein had also filed the written statement however in the year 2012, the suit and notice of motion came to be dismissed for default. Thereafter no further steps were taken to restore the suit.

7] Relying upon the dismissal of the suit the learned counsel had submitted that the present application is not maintainable. However, I find no substance in this submission inasmuch as the impugned order is passed pursuant to an application made under section 11(3) which expressly provides for a deemed conveyance in a fact situation where the original owners have failed and/or declined to perform their statutory obligation under the MOFA. Thus the issues in the suit are not the same as in the present application in which the impugned order has been passed.

8] As far as the question of delay is concerned, the petitioners cannot take advantage of the omissions by their predecessors in title, inasmuch as their predecessor entitled had executed the agreements for sale as far back in 1978 and they failed to take any steps whatsoever to perform their statutory obligation to convey the land after coming into force of the Act. The question of the delay cannot be held against the respondents. In the circumstances this ground also is not sustainable.

9] The last ground that the petitioners are not promoters and hence not bound by the impugned order is devoid of merit.

The expression promoter would certainly include the owners in the facts of the present case.

10] In my view the impugned order is neither arbitrary nor perverse and calls for no interference. The petition is dismissed. There will be no order as to costs.

(A. K. MENON, J.)

CERTIFICATE

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