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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION (STAMP) NO. 17637 OF 2014

1 Tushar Jivram Chauhan,
an adult Indian inhabitant,
having address at 8,
Shreeniwas Building, 3rd floor,
Zaver Road, Mulund (West),
Mumbai – 400 080

2 Jivram Lalji Chauhan,
an adult Indian inhabitant,
having address at 501,
Ganesh Krupa Building,
Zaver Road, Mulund (West),
Mumbai-400080

.... Petitioners

vs

1 The State of Maharashtra, through
Ministry of Co-operative Affairs,
Mantralaya, Mumbai-400032,
through Government Pleader,
High Court

2 The Dist. Dy. Registrar,
Co-operative Societies (2),
Mumbai City Eastern Suburban
having office at 201, 2nd floor,
Konkan Bhavan, Navi Mumbai-614.

3 Shri Ganesh Krupa Towers
Co-operative Housing Society Ltd.,
a society registered under the

provisions of Maharashtra Co-operative Societies Act, 1960 having its office at Junction of J. N. Road and Zaver Road, Mulund (West), Mumbai 400080

- 4 M/s. Umiya Developers,
a partnership firm having its address
at Shyam Vihar, M. G. Road,
Mulund (West), Mumbai 400 080 Respondents

Mr. R.S. Apte, Senior Advocate with Mr. Rakesh Agrawal for the Petitioners

Ms. P. S. Cardoz, AGP for Respondent Nos.1 & 2.

Mr. Pankaj R. Thatte with Ms. Suchita Joshi-Dongre for Respondent No.3.

CORAM: ANOOP V. MOHTA, J.

CLOSED FOR JUDGMENT ON : FEBRUARY 12, 2015

PRONOUNCED ON : March 24, 2015

JUDGMENT :

Rule. Rule is made returnable forthwith. Heard finally by consent of parties.

2 The Petitioners being owners of the suit property have challenged order and deemed conveyance certificate dated 18.11.2013 passed by Respondent No.2, granting deemed conveyance of the suit property in favour of Respondent No.3-Society and subsequently also challenged unilateral registration of conveyance dated 18.07.2014.

3 The case and submissions of the Petitioners are as under :

 The Petitioners are the owners of the plot of land bearing plot no. 60, Survey no. 1000 (part) having CTS No. 1188 and 1188/1 to 1188/20 admeasuring about 1672.80 sq.mtrs or thereabout situated at junction of J. N. Road and Zaver Road, Mulund West, Mumbai-400080 (for short, “the suit property”).

4 There are two buildings namely Shrinivas Building A and Shrinivas Building B already exist on the suit property. On 17.1.2001, the Petitioners allowed Respondent No.4 to develop the balance part of the suit property.

5 In 2002, Respondent No.4-developer applied to Municipal Corporation for Greater Mumbai (MCGM) for necessary permissions for construction of building on the balance part of the plot out of suit property, leaving Shrinivas Building A and B untouched and with plinth area of 227.87 sq.mtrs. Respondent No.4 made tripartite registered agreements with various flat purchasers. The agreement stipulates that :

(g) The said Lalji Chauhan constructed two buildings on suit

property and let out tenements therein to the occupants on monthly tenancy basis as per IOD;

(h) The recital clause also provides that the two buildings on suit property is assessed to MCGM and all the tenants in the said buildings A and B were existing since 1961 and 1966 respectively.

(i) The recital further provides that Respondent No.4 is permitted to 'further develop' said property by consuming balance FSI and erecting 'new building' on a portion of the suit property

(j) The recital provides that since property is having built up areas, the provisions of Urban Land Ceiling Act, 1976 is not applicable to suit property;

(k) The recital further provides that the flats in new building shall be sold on ownership basis whereas occupants in the Shrinivas Buildings A and B are on tenanted basis;

(l) The new building was proposed to name as "Ganesh Krupa" keeping name of earlier building as Shrinivas building.

6 Respondent No.3 made an application before Respondent No.2 authority under Section 11 of Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short, "MOFA") in June, 2013. Respondent

No.3 falsely stated that, it is in possession of entire plot admeasuring 1672.80 sq.mtrs, and the petitioners and respondent No.4 agreed to convey the suit premises with entire building to respondent No.3. Petitioner Nos. 1 and 2 though hold flats in Ganesh Krupa Building, reside at Shrinivas Building. This fact was well within the knowledge of respondent No.3. No notice for deemed conveyances was ever received by Petitioners. On 18.11.2013, respondent No.2 has granted unilateral deemed conveyance in favour of respondent No.3 (“Society”) of the suit property.

7 Respondent No.3 tried to couple said conveyance with FSI. The TDR part was deliberately ignored by Respondent No.3 society. Further, as per sanction plan area of 162.83 sq. mtrs is set back area, which cannot be conveyed. In June, 2014, Petitioner No.1 gained knowledge of said proceeding and order from one of the flat purchaser in casual discussion. Hence, the present petition.

8 The learned counsel appearing for the Respondent-Society supported the order/action in all respects. He relied upon the following judgments:-

(i) Bombay High Court Judgment dated 23.09.2014 in Writ Petition

No.9116-2013-Farhat Co-op Housing Society Ltd. vs. M/s. Malkani Enterprises and ors. And connected matter

(ii) Bombay High Court Judgment dated 5.2.2014 in Writ Petition No.1585 of 2013-M/s. Sawant Constructions and anr. vs. Shri Guruchhya Cooperative Housing Society Ltd. & ors.

(iii) Supreme Court judgment in Civil Appeal No.8470 of 2014 – M/s. Sawant Construction v. Guruchhaya Coop. Housing Society Ltd. and ors., (arising out of SLP (Civil) No. 8224 of 2014) dated 9.9.2014

9 The learned senior Counsel appearing for the Petitioners has also relied upon a judgment of this Court by distinguishing the judgments. In Mazda Construction Company v. Sultanabad Darshan CHS Ltd.,¹ in para 19, this Court held thus:

“To my mind, reading of sections 10 and 11 together with section 5A would make it amply clear that what is to be performed by the Competent Authority is a duty and obligation which the promoter is to perform in law. That is to convey the title and execute the documents according to the agreement”. Thus, competent authority cannot travel beyond agreement under MOFA. Section 11(1) of MOFA provides interalia as follows :

..... in accordance with the agreement executed under section 4 There is no answer to this issue in entire reply of respondent no.3.

¹ 2013 (2) All MR 278

10 I am in agreement with the observations made by this Court in Mazda (supra) so far as the object, purpose and scheme of MOFA and the Rules framed thereunder which reads as under :-

“19 There are inbuilt checks and safeguards inasmuch as what is to be issued is a certificate entitling a unilateral deemed conveyance. It is not a document which stands alone or is a distinct transaction. It is a grant or conveyance in terms of what the agreement between parties stipulates and provides for being conveyed to the flat purchasers. Therefore, the Applicant is permitted to apply to the Competent Authority u/s 11(3) and such application is to be accompanied by true copies of the registered agreements for sale executed by the Promoter with each individual member/flat purchaser and other relevant documents. It is to further that and to insist on the promoters fulfilling their obligations within the prescribed period, but noticing that their failure has resulted in hardship to flat purchasers, that the Legislature has stepped in. To my mind, this not a power which can be exercised by the Competent Authority in ignorance of or by brushing aside the earlier provisions and contents of the agreement with the flat purchasers. Equally, the Competent Authority has to take into consideration the contents of other relevant documents.”.

11 The relevant rules of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Rules, 1964 (for short, “the MOFA Rules”) are as under and specifically Rule 13, which deals with the aspect of scrutiny of application and notice to the parties, including the procedure to be

followed before registration of applications, maintenance of registers and procedure for issuing notices, appearance of parties and consequences of non-appearance, production and inspection of documents, procedure for hearing the application and signing of order and the notice and the official seal. The details of sub-clause 3 and 5 of Rule 13 are as under:-

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

“(3) Appearance of parties and consequences of non appearance.-

(a) On the date fixed as aforesaid, the opponent shall appear either in person or through his Advocate or his authorized Representative before the Competent Authority and shall file a written statement.

(b) On the date of hearing, if the applicant appears and the opponent or any of the opponents, does not or do not appear, as the case may be, the Competent Authority shall decide the application ex-parte:

Provided that, before deciding the Application, if the Opponent appears and shows a sufficient cause for his non-appearance on the earlier occasions, he shall be heard in the matter as if he had appeared before the Competent Authority on the first day

(c) If on the date fixed for hearing or on any other day to which the hearing may be adjourned, the applicant does not appear either in person or by his Authorised Representative, when application is called for hearing, the Competent Authority may dismiss the application.

(d) If, on the date fixed for hearing or any other day to which the hearing may be adjourned, the Opponent/s does/do not appear either in person or through his/their Authorised Representative, when the Application is called for hearing, the Competent Authority may decide the same on merits after hearing the Applicant or his Authorised Representative, if present”

“(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.”

12 The Apex Court, while dismissing the special leave petition against the judgment of this Court in Sawant Constructions (supra) has modified the order as under :

“3 Para 25 of the agreement dated 26.09.1979

states, inter alia, as under :-

“Nothing contained in these presents shall be construed to confer upon the Purchaser any right, title or interest of any nature whatsoever into or over the said Building or any part thereof”

4 Having regard to the above, although we maintain the order of the Deputy Registrar, Cooperative Societies confirmed by Court, but we clarify that deemed conveyance in favour of respondent No.1 shall not be understood to mean to convey constructed portion i.e. building standing on final plot No.52.”

13 The Apex Court thereby, though maintained the order, as maintained by the Division Bench (supra), but restricted the deemed conveyance to the above extent as quoted in the order of Supreme Court.

14 A single Judge of this Court in *Farhat Coop. Housing Society (supra)* granted a deemed conveyance by noting as under :

“30 For the reasons aforestated, the impugned order insofar as it makes the grant of deemed conveyance subject to the final decision of the Suit being T.E & R. Suit No.4/4 of 2013 would have to be quashed and set aside and is accordingly quashed and set aside to the said extent. The Petitioner in Writ Petition No. 9116 of 2013 i.e. the Society would therefore be entitled to deemed conveyance without any conditions. Resultantly, Writ Petition No.9116 of 2013 would stand allowed, Rule is accordingly made absolute in the said Petition in the aforesaid terms. Insofar as Writ Petition No. 10356

of 2013 is concerned, the same would stand dismissed. Rule would accordingly stand discharged in the said Petition. The parties to bear their respective costs of the Petitions.”

15 At this stage, it is relevant to note that, whenever there is a question of transfer of property and/or interest of transferor in favour of transferee, the basic principles of the Transfer of Property Act, 1882 (for short, “the TP Act”) are applicable. The MOFA and/or the Maharashtra Apartment Ownership Act, 1970 (for short, “the MAO Act”) and Rules made thereunder, need to be followed along with the provisions of the TP Act.

16 Chapter II of the TP Act, deals with the Transfer of Property by act of parties. The concepts “Conveyance”, “Deemed Conveyance” and/or “Unilateral Conveyance”, as contemplated, are not specifically defined under the MOFA Act. The person competent to transfer and/or may transfer the property along with interest, but the transferor must be capable of passing the same. The person cannot transfer the interest in the property if he/she does not have entitlement and/or right to transfer. It is settled that one cannot transfer any movable and immovable property unless he possesses the

right to do so in accordance with law. There are various facets and/or aspects of transfer of property movable and/or immovable. Therefore, every transfer of property which includes also the conveyance and subsequent sale-deed based upon the same.

17 The Registration Act, 1908 (for short, the Registration Act”) is also necessary when the order of unilateral deemed conveyance ultimately results into the registration of documents/sale-deed. All these transfers and registration are important issues for transferor, as well as, for the transferee, apart from giving finality in the respective transactions and agreements to avoid further complications including further transfer of such property.

18 Considering the scheme of MOFA Act and specifically Sections 10 and 11 so read and referred by the parties, in the facts and circumstances, play important roles for transfer of property, based upon the agreement between the Promoter/Purchaser of the respective portion of the Flat/Property/plot/land. All the parties, therefore, are bound by the agreement/contract before applying for conveyance and/or deemed conveyance and/or unilateral conveyance of the agreed property. It is settled that the description of the

property in all respect is essential factor before granting/permitting such transfer and/or for registered agreement and/or registered sale deed. Uncleared/without description/vague boundary description are always a matter of issue when it comes to transfer of such property between the parties. The Competent Authority, therefore, in my view, is under obligation to see that deemed conveyance and/or unilateral conveyance, must confirmed and satisfied, based upon the written agreement between the parties before passing and/or granting the order/judgment on such Applications.

19 There is no issue that the Competent Authority under the MOFA Act, has limited scope and power to deal with and decide the Applications for deemed conveyance and/or unilateral conveyance. The scheme itself contemplates after satisfying the documents and by following the procedure so prescribed, including giving fair and equal opportunity to all the concerned including, Owner, Promoter, Builder and the Purchaser of the property mentioned in the agreement. The disputed questions of law and/or complicated questions of facts if are involved based upon the pleadings placed by the parties, the scope and power of the Competent Authority under this Act, as restricted, and as stated to be of summary nature, it would be difficult for the

Competent Authority to adjudicate and/or determine the rights of the parties in summary manner. The Competent Authority also needs to consider the reason for delay and/or unintentional delay in filing such application for conveyance and/or Promoters/Builder's inaction to grant the conveyance within the stipulated period so prescribed after formation of the Society. The delay, even if any, that should not be the reason for the Competent Authority to overlook the agreement and documents between the parties. It is also necessary to consider the existing provisions of law including Development Rules, respective Municipal Council/Corporation Acts/Rules and Policies. In my view, all are interconnected and necessary at least for the Competent Authority to satisfy before passing the order of unilateral conveyance and/or deemed conveyance, as such order ultimately takes away all immovable property rights and interest of Promoters /Developers/ Owners and create interest in Purchasers of the property in question. The right, title and interest of the property to be transferred to the transferee of flat/property purchaser, based upon the agreement/contract between the parties.

20 The transferability is also important element which, the Competent Authority needs to verify by giving equal opportunity to all

the parties concerned. The provisions in question, basically contemplates the basic principle of natural justice. It is also necessary that the Competent Authority should follow it strictly. It is settled law that any order/judgment and/or the decision given by any statutory authority, including quasi-judicial authority where the Civil rights of the parties are involved, the factual and actual hearing and equal and fair opportunity to all need to be given and recorded accordingly in the order/judgment. The summary power and/or jurisdiction does not mean and/or include that the Competent Authority can proceed summarily by overlooking the basic principles of clauses, merely because there was delay and/or intentional delay and/or Promoter and/or Developer failed to grant conveyance in favour of the Society and/or its members. The grant of unilateral conveyance followed by the registration is more serious issue, therefore, the Competent Authority need to follow the prescribed procedure in every aspect even if one party is absent. The basic burden, in all such matters, lies upon the person who applied and/or filed such application, as contemplated under the MOFA Act and/or the similar Acts. The Competent Authority still required to follow the basic principle before passing such unilateral and/or deemed conveyance order/judgment, considering the clauses and documents of agreement between the

parties, apart from the provisions of law so referred above.

21 The agreement for sale, even if any, cannot be contrary to the provisions of law. The Development Regulation and the Municipal Rules and the Society Bye-Laws, such agreement for sale needs to be within the framework of law and the record with supporting materials/documents. It has to be based upon the plans and specifications, subject to approval by the Local Authority; carpet area of flat/apartment, utility area, total price of the flat, proportionate price of the limited common area, facilities and parking space, if any. The description of limited “common area and facilities of a building” the aggregate area of park, garden, recreation ground and playground provided for in a “Layout”, description of common area and amenities and facilities of a layout and percentage of undivided interests, in the limited common areas and facilities of the building and flat, agreed to be sold.

22 The property of such nature, where tenants are occupying the premises on same layout, their interest cannot be restricted in such fashion by giving/granting deemed conveyance of the land even beneath their respective tenanted flat/apartment. The common area,

utility/facility of layout plot cannot be restricted for future, so also the undivided interest. The Competent Authority needs to consider all such related aspects/interest of all, who occupied the portion of flat/apartment on the common layout/plot, and at least must provide the reasons, if still wants to grant such unilateral conveyance.

23 The future use and utilization of layout also required to be seen. The consent or permission of existing registered Society or consent of all the occupants of the flat/apartment for future development in accordance with law, is also important element before granting such conveyance. The Competent Authority cannot skate it out. The scope and authority and jurisdiction even of summary nature, must be used judicially with the framework of law and Rules, apart from natural justice. If no jurisdiction or authority or restricted power, it must be noted and acted accordingly to avoid further complications of law and the facts.

24 The Petitioners have made specific averments, which remained uncontroverted and which is clear from the impugned order that the envelop sent by the office of Respondent No.2 returned

undelivered, though the Petitioners are holding flats in Ganesh Krupa Building, but they are not permanently residing there. Respondent No.3, inspite of this gave incorrect address of the Petitioners. The paper publication, even if any, though directed, that cannot be the basic for passing unilateral order, behind the back of the Petitioners. As noted, the Competent Authority, as well as, the Applicant-Society are under obligation to serve the Petitioners and/or such person who are the owners of the property, and after giving the hearing to the parties, may pass the order even though it is stated to be unilateral deemed conveyance. The concept of “unilateral deemed conveyance” nowhere permitted and/or entitled the Authorities and/or the parties, to insist upon the ex-parte order and/or order behind the back of the owners/promoters in such circumstances. The procedure so prescribed under the Act and the Rules and if the order is against the principle of nature justice, such order, in my view, needs to be interfered with.

25 The averment is also made, which also remained uncontroverted, that deemed conveyance order so passed was not communicated and/or known to the Petitioners till June 2014. The Petitioners came to know from one of the member about the order, as

well as, the certificate. An Application for certified copy was also moved of entire proceedings. The Petitioners filed the present Petition on 30 June 2014 and challenged the impugned order and certificate. The Respondents, inspite of pendency of the Writ Petition, got registered deemed conveyance dated 18 July 2014, in spite of receipt of notice by Respondent No.3 of the present Petition. Apart from breach of above basic principles, even on merits, there is a substance in the submission so raised by the Petitioners that the conveyance so granted, was beyond the plinth area of the building and that of other area. The entitlement of deemed conveyance, even if any, cannot be beyond the agreement between the parties. The Authorities, based upon the incorrect statement/false statement, passed the impugned order and granted the Certificate. There is nothing to show that the Society is in possession of plot admeasuring 1672.80 sq. mtrs; the Petitioners and Respondent No.4 agreed to convey the Suit premises with entire building with Respondent No.3; there was no Occupation Certificate granted by the Municipal Corporation. Therefore, no question of granting deemed conveyance in favour of Society. It is specifically mentioned in the agreement under MOFA itself, that the plinth area of the “Ganesh Krupa Building” could be conveyed and not entire suit property. The plinth area of new building is 227.87 sq.

mtrs. and therefore, there was no question of conveying the property of this area/plot/building No. (A) and (B) consisting of various tenants on the suit property. They will be affected by this conveyance/certificate. The Petitioners have been collecting rent from the said tenants as landlord. There is nothing to show that the agreement of flat purchasers in question, are registered. The agreement so read and referred between Respondent Nos. 2 and 4 was without reading the clauses of the agreement itself, where it is specifically mentioned that only the plinth area 227.87 sq. mtrs. would be conveyed. The order of deemed conveyance is beyond the said area and so also, the certificate. It is also beyond the sanctioned plan submitted by Respondent No.3. The Petitioners have no objection if deemed conveyance is granted in respect of 227.87 sq. mtrs. and not more than that.

26 The registration of deemed conveyance on 18 July 2014 inspite of notice of circulation of present Writ Petition on 17 July 2014, based upon the impugned order of the Competent Authority is also, therefore need to be interfered with. As it is illegal and not sustainable in the eyes of law. The impugned order provides the consequential action, including the registration of documents on 18

July 2014. This is also for the reason that the Competent Authority's order, if is in accordance with the provisions of law, which permits such unilateral deemed conveyance, but if the same action/order itself is bad in law, the registration of such documents inspite of pendency of the Writ Petition and with intention to frustrate the present challenge, is also liable to be set aside.

27 Taking over all view of the matter, the following order.

ORDER

(i) Impugned order dated 18.11.2013 passed by the Competent Authority so also the Deemed Conveyance Certificate are quashed and set aside.

(ii) Application No. 283/2013 filed by Respondent No.3-Society is restored for reconsideration by giving opportunity to all the parties and decide the same in accordance with law as early as possible and preferably within four months.

(iii) Liberty is granted to add and/or file additional documents and materials, if any.

(iv) Deemed Conveyance of Shri Ganesh Krupa Tower CHS Ltd dated 18.07.2014 (Exhibit "L" to the Petition) is also quashed and set aside.

- (v) Office objections, if any, are dispensed with.
- (vi) Parties are directed to appear before the Competent Authority on 20.04.2015 at Konkan Bhavan, Navi Mumbai for directions.
- (vii) Rule is made absolute accordingly.
- (viii) There shall be no order as to costs.
- (ix) Parties to act on the basis of an authenticated copy of this order.

(ANOOP V. MOHTA, J.)