

**IN THE HIGH COURT OF JUDICIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.7139 OF 2014

The Kukreja Palace Co-operative Housing
Society Ltd.

... Petitioner

vs.

The Competent Authority and District
Dy. Registrar Co-operative Society (2),
Eastern Suburbs, Mumbai & ors.

...Respondents

Mr. Ravi Kadam, Senior Advocate a/w Mr. Rohan Kadam, Ms. Jyoti Sinha, Mr. Fujuta Patil i/by Negandhi, Shah and Hinmyatullah, Advocates for the petitioner.

Mr. Prasad Dani, Senior Advocate a/w Mr. K. Tamboli, Mr. Nasir Ali Rizvi, Mr. H. N. Thakar i/by Thakore Fariwala and Associate, Advocates for the respondent No.8.

Coram : Smt. R. P. SondurBaldota, J.

Date : 4th September, 2015.

P.C. :

Rule. Made returnable forthwith. Heard the counsel.

1) This petition filed under Article 226 of the Constitution of India, challenges the order dated 30th December, 2013 passed by the Competent Authority under the Maharashtra Ownership of Flats (Encouraging Construction, their Sale And Regulation of Management and Transfer) Act, 1963 ('MOFA', for short) and District Deputy Registrar, Eastern Sub-urban Mumbai, rejecting the petitioner's application under Section 11 (3) of MOFA.

2) The petitioner is a registered Co-operative Housing

Society. Respondents No.2 to 7 are the owners of the property at Survey No.249, Hissa No.3 (part) and C.T.S. No.195/3A admeasuring 14954 sq. mts. at village Ghatkopar, Mumbai. Respondent No.8 is the Developer, who is developing the owner's property. He has constructed the petitioner's building known as Kukreja Palace consisting of three wings with 77 flats. The petitioner was registered in the year 1997. On 3rd April, 2013 it filed application under Section 11 (3) of MOFA to seek the following relief :-

“(a) This Hon’ble Competent Authority be pleased to grant a certificate that the Applicant society is entitled to have an unilateral Deemed Conveyance of the said consumed area 6215.10 sq.mtrs. of the said larger land bearing C.T.S No. 195/3A, Village Ghatkopar, Taluka Kurla, District Mumbai Suburban and building under section 11 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 and to have it registered.”

The prayer was supported by an averment at para-10 of the application that the area consumed for construction of the building of the petitioner is 6215.10 sq.mtrs. The petitioner had obtained Certificate from an Architect to that effect.

3) Respondents no.2 to 8 opposed the application on the grounds, inter-alia of suppression of material facts and making of false statements. They also claimed that, the time to grant conveyance had not yet reached and that, they would be conveying the property in terms of the agreement and discharging their

obligations under the agreement strictly in accordance with law, in due course of time.

4) The factual details needed to be noted for deciding the challenge to the impugned order are that, as per the city survey records, by the order dated 6th September, 1988 the property bearing CTS No. 195/3/A admeasuring 14,954 sq.mts was subdivided into two properties i.e. CTS No.195/3/A admeasuring 10239 sq.mts and CTS No. 195/3/B admeasuring 4,715 sq.mts. After obtaining the necessary permissions, respondent No.8 was issued Intimation of Disapproval (IOD) for construction on CTS No.195/3/B and had entered into agreements for sale of flats with some of the members of the petitioner. Thereafter, the two lands were again amalgamated and the net area of plot - CTS No. 195/3/A became 14,954 sq.mts. By obvious consequence there was change in both, the recitals as well as the schedules to the agreements for sale executed subsequently. The earlier agreements carried four schedules. The first schedule describes the entire property admeasuring 14,920.01 sq. mts. The second schedule describes the land admeasuring 4,715.41 sq. mts. i.e. a portion of the entire property initially available for development. The third schedule states the common area and common facilities and the fourth schedule describes the amenities to be made available inside the respective flats. The subsequent agreements carry only

two schedules. The first schedule is for description of only the larger property, the description of the smaller portion having become irrelevant, and the second schedule is for listing the common as well as individual facilities available to the flat purchaser.

5) The three recitals from the earlier agreement and one of the clauses i.e. Clause No.14 that would be relevant for the present proceedings read as under :

“ii) *Out of the larger property a portion bearing Survey No.249 Hissa No.3 (part) and C.T.S. No.195/3 (part) and admeasuring 5639.77 sq. yards equivalent to 4715.41 sq. metres is within the residential zone and is available for development (hereinafter called the said property) which is more particularly described in the Second Schedule hereunder written.*

ix) *The present layout and design got sanctioned may be required to be amended from time to time by the Promoters. The flat Purchaser has entered into the present Agreement knowing fully well that the scheme of development proposed to be carried out by the Promoters on the suit property is very large. Therefore the Promoters may require to amend, from time to time, the plans and design and the flat purchaser has no objection to the Promoter making such amendments.*

xvi) *The flat purchaser is aware that development of the said property is of a very large scheme and that the Promoters shall be developing the same over a*

lengthy period of time and that although the building in which the flat/premises hereby agreed to be sold may be completed and the Promoters may permit the flat purchaser to occupy the flat/premises, however, only on completion of the entire work of development of the said property the Promoters shall cause to be transferred the said building and the land underneath in favour of a Co-operative Society to be formed of the flat/premises purchasers. The Purchaser has been informed and has entered into this Agreement knowing that the Promoters shall in due course put up additional construction in the building now under construction or wholly new structures on basis of F.S.I. available under scheme awaiting sanction known as Transfer of Development Rights. This Agreement is entered into by the flat purchaser on a specific understanding that the flat purchaser shall not insist upon the conveyance being executed until the development of the entire property is complete.

14. *The Purchaser is aware that the scheme of development envisaged by the Promoters of the property described in the Second Schedule hereunder written, is very large. The Promoters are expecting that additional F.S.I. shall be available to construct additional building on finalisation of the Development control Rules and/or Development Plan for Greater Bombay. The Flat Purchaser agrees not to insist on formation of any Society until the Promoters have completed the entire development of the property*

described in the Second Schedule hereunder written only upon completion of the development of the entire project of development on the said property described in the Second Schedule, hereunder written shall the Promoters register one or as many Societies or Companies as may be deemed convenient and profitable to the Promoters and only thereupon shall the Promoters cause to be transferred to the Society or Limited Company all the rights, title and interest of the owners of property more particularly described in the Second Schedule hereunder written together with the Bulking/s by obtaining/or executing one or as many Conveyances and the said building/s in favour of such Society or societies or Limited Company or Limited Companies as the case may be such conveyance shall be in keeping with the terms and provisions of this Agreement.”

As regards the subsequent agreements, the relevant recital is recital 'x', which states that the larger property is available for development and construction plans in respect thereof have been sanctioned and I.O.D. issued. The first I.O.D. issued dated 13th October 1990 bearing No. CE/5265/BPES/AN was in respect of C.T.S. No.195/3-B Survey No.249. After the amalgamation the second I.O.D. was issued on 21st October, 1993 bearing No. CE/5615/BPES/AN in respect of C.T.S. No. 195/3-A and B.

6) The abovequoted recitals and the clauses indicate that

members of the petitioner have always been aware that the development of the property is a large scheme and the development is in a phase-wise manner and it is still not complete. The application of the petitioner made under Section 11(3) of MOFA and the order passed thereon needs to be considered against the said undisputed factual background.

7) Respondent No.8 contested the petitioner's application, essentially on four grounds. They are (i) awareness of the members of the petitioner of the phase-wise development of the property and a specific clause in the agreement that till completion of the whole project they shall not insist on formation of society and to convey the land, (ii) the property being a larger property and the sub-division of the property not being possible the conveyance as prayed by the petitioner is not possible, (iii) construction of the last building in the project is still pending and (iv) the members of the petitioner have made certain unauthorised alterations in their flats that need to be restored to the original petition without which conveyance is not possible.

8) The Competent Authority by the impugned order rejected the petitioner's application stating following reason.

"Total area of said plot is 14954.00 sq. meters and perusal of the certificates issued by Architect Sunil Ambre shows that entire permissible TDR on the said

plot has been utilized elsewhere by the Developer and exact area in the name of Applicant Society cannot be determined. This may create difficulties if said property is transferred in the name of the Society. Therefore it would be proper to give joint conveyance of the said property on entire plot getting developed.”

9) Mr. Kadam, the learned senior counsel appearing for the petitioner submits that the Competent Authority failed to appreciate that the building of the petitioner society is already constructed and occupation certificate in respect thereof granted by the Mumbai Municipal Corporation in August-1997. There is no development outstanding on the property mentioned in the second schedule to the earlier agreement for sale. In that circumstance, respondents No.2 to 8 are legally bound to execute the conveyance in favour of the petitioner and the delay in respect thereof ought to have been treated by the Competent Authority as dishonest. According to Mr. Kadam, there can be no objection for respondents No.2 to 8 in executing conveyance at least in respect of land at C.T.S. No.195/3/B admeasuring 4,715 sq. mts. in favour of the petitioner and the building constructed thereon.

10) Mr. Dani, the learned senior counsel appearing for the respondent No.8 submits on the other hand that the claim for deemed conveyance by the petitioner in respect of the building constructed with three wings i.e. wing 'A', wing 'B' and wing 'C' and

the land beneath, is not possible, and as agreed under the agreement for sale the members of the petitioner have to necessarily wait until the entire construction under the project is complete.

11) The building of the petitioner stands on the land admeasuring 6215.10 sq. mts. None of the members of the petitioner has an agreement of sale in respect of construction over land admeasuring 6215.10 sq. mts. As already seen above the agreements are either in respect of construction over land admeasuring 4,715 sq. mts. Or 14,920.01 sq. mts. The conveyance of the property in favour of the petitioner can only be in respect of the property as described in the agreements for sale with the members of the petitioner. Therefore, conveyance as demanded by the petitioner in it's application was not possible. Further, conveyance of land admeasuring 4,715 sq. mts. and the building of the petitioner as per the submission advanced before the Court is also not possible for obvious reasons. The portion of the building falling beyond 4,715 sq. mts. would then amount to either encroachment or unauthorised construction. In the peculiar facts of the case some members of the petitioner will be entitled, under the agreements of sale in their favour, to conveyance only in respect of land admeasuring 4,715 sq. mts. whereas for the other members, the entire work of construction under the agreement for

sale in their favour not being yet complete, the time to execute the conveyance for them has not yet arrived. Next until the work of the construction on the larger property is complete, there cannot be any sub-division of the property. In fact, it would be in the interest of the petitioner itself to wait until the construction is complete so that there can be conveyance of at least the land admeasuring 6215.10 sq. mts. consumed by the construction of its building in its favour. Besides respondent No.8 has utilized permissible TDR on the plot elsewhere. Therefore, the exact area of the land to be conveyed to the petitioner needs to be determined by taking various factors into consideration. Thus, if deemed conveyance as prayed by the petitioner is granted the same is likely to create complications and disputes not just for the petitioner but also for the third parties i.e. purchasers of flats in other buildings constructed under the project. There could not have been any order other than that passed by the Competent Authority in the circumstance of the case. Hence, the petition is dismissed.

[Smt. R. P. SondurBaldota, J.]