

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO. 11802 OF 2013

WITH

CIVIL APPLICATION NO. 3068 OF 2013

AND

CIVIL APPLICATION NO. 1780 OF 2014

- 1 Marathon Next Gen Realty Limited,
 (Formerly known as Marathon
 Next Gen Realty & Textiles Ltd.)
 having its Registered Office at
 Marathon Max, 3rd Floor,
 Mulund Goregaon Link Road,
 Mumbai (West), Mumbai-400 080.
- 2 Marathon Realty Private Limited,
 (Formerly known as Marathon
 Realty Limited) having
 its Registered Office at
 Marathon Max, 3rd Floor,
 Mulund Goregaon Link Road,
 Mumbai (West), Mumbai-400 080. ...Petitioners.

Vs.

- 1 The Competent Authority,
 District Deputy Registrar of
 Co-operative Societies,
 Malhotra House, Sixth Floor,
 Opposite G.P.O. Mumbai-400 001.
- 2 Marathon Era Co-operative Housing
 Society Limited, a Registered
 Society having Registration No.

MUM/WGS/HSG/TC/8936/09-10-2-10
having office at CS No. 2/142, Veer
Santaji Lane, Opp. G.K. Marg, Lower Parel,
Mumbai-400 013.

- 3 Maplewood Trading Pvt. Ltd.,
a company incorporated under the
provisions of the Companies Act, 1956,
having its registered office at 511,
Embassy Centre, Nariman Point,
Mumbai-400 021.

....Respondents.

Mr. Pravin Samdhani, Senior Advocate a/w Mr. Karl Tamboly, Mr. Kunal Vajani, Ms. Pranaya Goyal, Mr. Raghav Gupta and Ms. Dhvani Shah with Mr. Sumanth Anchan i/by Wadia Ghandy & Co. for the Petitioners.

Ms. M.S. Bane, “B” Panel counsel and Mrs. Vaishali Nimbalkar, AGP for Respondent No.1.

Mr. V.A. Thorat, Senior Advocate a/w Mr. Chirag S. Balsara, Mr. H.N. Vakil, Mr. S. Patel i/by M/s. Mulla and Mulla & C.B. & C. for Respondent No.2.

Mr. P.S. Dani, Senior Advocate a/w Mr. Suraj Iyer i/by Ganesh & Co. for Respondent No.3.

CORAM: ANOOP V. MOHTA, J.

CLOSED FOR JUDGMENT ON : March 10, 2015

PRONOUNCED ON : April 18, 2015

JUDGMENT :

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

2 The Petitioners-Owners-Developers of land bearing Survey No. C.S. No. 2/142, Veer Santaji Lane, Opposite G.K. Marg, Lower Parel, Mumbai, admeasuring 35499.83 sq. mtrs. (“the whole land”) have challenged order and certificate dated 22 November 2013 passed by the Competent Authority (Respondent No.1) under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short, “MOFA”), thereby allowed an Application filed by Respondent No.2 – a Co-operative Housing Society Ltd (‘the society’) for unilateral deemed conveyance of the whole land by overlooking the fact of incompleteness of remaining projects/buildings named ‘Innova’ and ‘Icon’ and others, which are also part of the whole land. The entitlement/rights of members of other apartment/flats as they have agreed to be governed by the provisions of Maharashtra Apartment Ownership Act, 1970 (for short, “MAO”) are also required to be taken into consideration while passing such order.

3 The Petitioners commenced development on the whole land and have constructed four wings of the residential tower known as Era I, Era II, Era III and Era IV some time in the year 2004-2008. The development on the part of land is in progress and so also

construction of other buildings. The whole project is still incomplete. The commencement certificate is issued by the Bombay Municipal Corporation (BMC) on 05.02.2004. Various agreements for sale have been entered into between the individual apartment owners in the residential tower and P-1 during these years. The schedule of property is provided in the agreement. The relevant clauses are as under :

“10. It is expressly agreed that the right of the Purchaser under this Agreement or otherwise is restricted to the said Premises and remaining part of the Larger Property shall be the sole property of the Owner. The purchaser confirms and consents to the Owner surrendering (at an appropriate stage, after completion of the development of the entire project) the Larger Property to the provisions of the Maharashtra Apartment Act, 1970 (“the Apartment Act”) and constitute the flats in the two wings of the Residential Tower, Era I and IV and the car parking spaces in the podium as a condominium of apartments and each of the flat/car-parking as “an apartment.”

“11. The Purchaser agrees to join in the scheme of condominium of holders whereby the Owner shall surrender the residue of the Larger Property admeasuring 27803.72 Square Meters or part thereof, referred to in recital (iii) above, as indicated in red outline on the Plan, Annexure 'A' hereto, and the buildings thereon, including the two wings of the Residential Tower, Era I and IV, all the common amenities of the Residential Tower, Era I, II, III and IV to the operation of the Apartment Act. The Owner shall after surrendering the Larger Property to the operation of the Apartment Act and at any appropriate

stage thereafter execute in favour the Purchaser a Deed of Apartment conveying the said Premises and the proportionate share and amenities in the common areas of the Residential Tower, Era I, II, III and IV. As a holder of the Apartment, the purchaser shall be entitled to the benefit of the common Recreational Ground at the ground level and on the podium level, internal Road use between points 1-2-3-4-5-6 to be used jointly with other occupants/users of the layout as shown on the plan annexed and club house usage on payment of fees.”

“18. The Purchaser confirms that he/they are aware that the development being undertaken by the Owner of the said Property is extremely large and that the completion thereof may take a long time. Accordingly, the Purchaser agrees that he/they have no objection to the Scheme under the Apartment Act, as indicated hereinabove, being put into effect only after completion of the entire development”.....

4 On 21.12.2009, the apartment purchasers of Era I, Era II, Era III and Era IV of the residential tower made an application to the Deputy Registrar, Maharashtra Cooperative society, G-S Ward to form a Society under Section 9(1) of the Maharashtra Cooperative Societies Act, 1960 (MCS Act). On 19.01.2010 an order was passed by Deputy Sub-Registrar, G/S Ward, Mumbai under Section 9(1) of MCS Act whereby Respondent No.2-Society was formed and classified as a housing society and on the same day, the Registration Certificate of Respondent No.2 -Society was issued. On 25.05.2010, the Occupation

Certificate was issued by the BMC. On 16.06.2012, the members of Respondent No.2 and the Petitioners met in order to resolve their differences and disputes but failed to do it.

5 On 30.05.2013, Respondent No.2 filed Application No. 14 of 2013 (The Application) before Respondent No.1-Competent Authority for an unilateral deemed conveyance of the entire whole land and the property. On 23.09.2013, an Intervention Application was filed by Respondent No.3 for being impleaded as a Respondent in Application No.14 of 2013. On 19.10.2013 an order passed by Respondent No.1 dismissing the Intervention Application. On 28.10.2013, an order was passed by this Court in Writ Petition No.10183 of 2013 setting aside the order dismissing the Intervention Application.

6 On 19.11.2013, Application was heard. On 22.11.2013 the order was passed by Respondent No.1 allowing the Application of Respondent No.2 for deemed conveyance. The certificate of conveyance issued in favour of Respondent No.2 of an area admeasuring 6787.92 sq.mts out of undivided right, interest and claim in the whole land.

7 The gist of Petitioners' contentions are as under :

(I) The Application under Section 11 of MOFA is incompetent and incomplete.

(II) The conveyance can only be in terms of the Agreement

(III) The exercise of jurisdiction by the Competent Authority.

(IV) The Project is ongoing and incomplete.

8 The supporting Respondent No.3 has adopted the above contentions. The contesting Respondent No.2 resisted the case of Petitioners on various grounds and supported the impugned orders/certificate by filing their replies and written submissions.

9 The learned senior counsel appearing for the parties read and referred the provisions of law and the following judgments in support of their respective case.

(i) Harsharansingh Pratapsingh Gujrat & or v.
Lokhandwala Builders Ltd and ors., 1998(1) Bom C.R.
516;

(ii) Ramesh Shankar More v. Ramesh Mataprasad Dube and ors., 1991 (1) Bom. C.R. 649;

(iii) Sushil Samir Co-operative Housing Society Ltd. v. District Deputy Registrar and ors., decided on 24.01.2014 in Writ Petition No.2410/2012 by V.M. Kanade & Girish S. Kulkarni, JJ.

(iv) Mazda Construction Company & ors v. Sultanabad Darshan CHS Ltd and ors., 2013 (2) ALL MR 278;

(v) Nazir Ahmad v. Emperor (No.2) = Vol. XXXVIII Bom. L. R. 987 (Privy Council).

(vi) P. Malaichami v. M. AndiAmbalam and ors., (1973) 2 SCC 170

(vii) Pappu Sweets and Biscuits and anr. v. Commissioner of Trade Tax, U.P. Lucknow, (1998) 7 SCC 228.

(viii) Shiv Kumar Chadha v. Municipal Corporation of Delhi and ors., (1993) 3 SCC 161.

10 Mr. V.A. Thorat, learned senior counsel along with Mr. C.S. Balsara relied upon the following cases :

- (i) Vrindavan (Borivali) CHS Ltd v. Karmarkar Bros and ors., 1982 Mh. L. J. 607
- (ii) Grand Paradi CHSL & or. v. Mont Blane Properties & Industries Pvt.Ltd., 2011 (5) Bom. C.R. 249
- (iii) Mazda Construction Company v. Sultanabad Darshan CHSL, 2013 (2) All MR 278
- (iv) Mrs.Angeline Reni Pereira & ors v. M/s. Pearl Heaven CHSL in WP No.5083 of 2012 dated 15.10.2012 by Hon'ble Mr. Justice S.C. Dharmadhikari
- (v) Shri Sidharth Construction Building and Developers vs. Shri Saraswati Apt CHSL dated 17.10.2013 in WP No.1439/2012.
- (vi) Shri Sidharth Construction Building and Developers vs. Shri Saraswati Apt CHSL, dated 19.11.2013 passed by Hon'ble Justices T. S. Thakur and Vikramjit Sen
- (vii) Sushil Samir CHSL v. District Deputy Registrar,Coop. Societies judgment dated 24.01.2014 by Hon'ble Mr. Justice V. M. Kanade and Mr. Justice G.S. Kulkarni.

(viii) Messers Sawant Constructions v. Shri Guruchhaya CHSL, 2014 (3) All MR 563

(ix) Farhat Coop. Housing Socy Ltd. vs. M/s. Malkani Enterprises, judgment dated 23.09.2014 in WP/9116/2013 by Mr. Justice R. M. Savant.

(x) White Towers Coop. Hsg. Socy Ltd vs. S.K. Builders, 2008 (6) Bom. C.R. 371

(xi) Ratna Rupal Coop. Housing Society Ltd. vs. Rupal Builders, 2011 (5) Bom. C.R. 561.

(xii) M/s. Rahul Enterprises v. Abineha Park Sahakari Gruha Rachana Samstha Maryadit, 2013 (1) All MR 756.

(xiii) Madhuvihar Coop. Housing Society vs. Jayantilal Investments, 2011 (1) Mh. L. J. 641;

(xiv) Jayantilal Investments vs. Madhuvihar Coop. Housing Society, (2007) 9SCC 220.

11 I have recently dealt with the scheme and purpose of the MOFA Act in Writ Petition (Stamp) No. 17637 of 2014 – Tushar Jivram Chauhan and Anr. Vs. The State of Maharashtra and Ors. decided on 24 March 2015. The relevant paragraphs are as under :-

“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.”

“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.”

12 Those observations are also, apart from the facts, based upon the same provisions and some of the Judgments cited by the parties in the present matter, including Mazda Construction (Supra).

M/s. Sawant Constructions (Supra) and others.

13 The Application, in the present case, for deemed conveyance filed by the Society and not by the individual members. The respective registered agreements for sale of each of the individual members were not annexed with the Application. As per the agreement, a Deed of Apartment was intended. The Competent Authority is bound to exercise the summary jurisdiction. [*P Malaichami (Supra)*, *Ramesh More (Supra)*, *Credit Suisse Vs. Allerdale Borough Council (1996) 3 WLR 894*, *Collector of Central Excise, Ahmedabad Vs. Orient Fabrics (P) Ltd., (2004) 1 SCC 597*, *Union of India Vs. Valecha Engineering Limited & Anr. (WP No. 2540 of 2008, decided on 29 August 2009, Bombay High Court)*]

14 The question of interpretation, if any, of the clauses between the parties and considering the scope and purpose, the Competent Authority has no jurisdiction to adjudicate disputed facts and law and so also no power to decide the disputed interpretation of the clauses, so entered into referring to the provisions of MOFA Act and/or any other Act. The remedy is elsewhere. I am not dealing

with the situation, where the clauses/agreement and/or sale, agreed and settled between the parties. The Petitioners' "project" on whole land/ layout is on going project. The development/construction work is not over. By the impugned order, inspite of above, the Competent Authority has granted unspecified and undivided interest even in the whole land in the Society.

15 The Judgments so cited by the learned Senior Counsel appearing for the Respondent are in the matter of Civil Suits [*Jayantilal Investments and Ratna Rupal (Supra)*]. However, merely because the proceedings initiated by the Society before the Competent Authority under the provisions of MOFA Act, the aspects of complicated questions of law and the facts and the requirement of passing order by the Competent Authority, based upon the provisions of Sub-sections (1) and (3) of Section 11 to consider the relevant documents and pass order in accordance with the agreement executed under Section 4, ought not to have been overlooked in the present case. The Judgments cited, read and referred by the learned Senior Counsel are *M/s. Rahul Enterprises (supra)*, *Farhat (Supra)*, *Sushil Samir (Supra)*, *Siddharth Construction(Supra)*. In view of these judgments, and considering the scope, purpose and jurisdiction, I

am inclined to observe that the Competent Authority has no jurisdiction, if the related and connected complicated issue between the parties, referring to the properties and the agreements, is also a subject matter of Civil Suits. The submission that there was no Civil dispute pending at the time of filing of the Application for deemed conveyance and during its pendency, is of no assistance. Admittedly, two Suits (Suit No. 900 of 2014 and Suit No. 901 of 2014) initiated by Respondent No.2 themselves even after the registration of Society on 19 January 2010 and the order of deemed conveyance dated 13 November 2013, as the builder-Petitioners stated to have entered into an agreement to allot car parking spaces in the podium and thereafter entered into the deed of rectification. The submission that those two Suits have nothing to do with the deemed conveyance, cannot be accepted as the property and the basic contesting parties are same and similar. The right and entitlement of builder-Petitioners, on the land in question and so also the right and entitlement of the Society and its members referring to the area, other than the agreement, need determination. The Competent Authority, therefore, unless these issues are determined and finalized, cannot invoke the summary power jurisdiction and transfer the property in such fashion, permanently.

16 The Supreme Court Judgment in Nihaalchand Laloochand Vs. Pancholi Co-op. Hsg. Society [2010(9) SCC 536] referring to right of promoters and builders to sale parking areas, even if any, not dealt with by the Competent Authority while passing the deemed conveyance. The area and/or parking area of respective Society and/or members, excluding the other area and the right of use of remaining area by the promoter and/or builder, therefore, unless made clear by agreed terms and/or by final determination and/or adjudication, the impugned order so passed in the present facts and circumstances, would cause injustice and hardship. In future it will create complications in transferring the right, title and interest of the respective flats/apartments and the related areas, as per the existing agreement. All the parties are bound by the agreement between the parties.

17 The benefit of circular, which provides that IT Park would be entitled to an additional FSI aggregate to 4, enable the builder to construct an additional tower to the extent of 4 FSI, in the background of pending of other construction on the property of the same lay out, just cannot be overlooked. The claim of society and as granted a

deemed conveyance in respect of 6787.84 sq. mtrs. along with an undivided interest, therefore, requires re-consideration.

18 The Competent Authority, apart from the above, has failed to take note of the respective contentions so raised by the Petitioners and Respondent No.3. It would also affect the subsequent purchasers of the units in the developing commercial building. Even the certificate of Architect so referred and relied by the Society that itself noted about the additional built up area as per the IT policy which comes to 19201.86 sq. mtrs. This additional area/FSI if to be loaded only on Building Nos. 2 and 7, which are IT buildings, the total built up FSI of IT/ITES and the commercial buildings would be 30617.85 sq. mtrs. The effect of impugned order is that the percentage of share of the Society in the land is 56.77%, while the percentage of the commercial area in land would be 26.02%. Therefore, also, the Competent Authority extended the jurisdiction and overlooked the total effect of such deemed conveyance, which has caused injustice and hardship to the others, as well as, to the commercial unit holders. This would cause even to the commercial building, whose construction is on, treated as illegal and the entire project would be affected, inspite of the fact that the commercial unit

holders/purchasers are also the purchasers under Section 4 of the MOFA Act and all have equal rights and interest as per the agreement.

19 Therefore, for the proper calculation of FSI and for giving equal and undivided right, title and interest for the respective units, all the parties along with the right and dues of surrounding area/land, without division and/or creating the individual rights, required to be tested and decided by the Competent Authority, before passing the order of deemed conveyance.

20 The Competent Authority, therefore, is required to consider the whole land project agreement between the parties, apart from the provisions of MOFA Act and also the provisions of Maharashtra Housing (Regulation and Development) Act, 2012 (for short, MHRD Act”) which came into force on 8 July 2014, whereby Section 19 of the MHRD Act has been brought into force. The Application for the deemed conveyance was made on 30 May 2013 and decided on 13 November 2013. Therefore, no provisions of new MHRD Act was applicable, though it was placed on record, is the submission of one side, but resisted by other side. The provisions of MOFA Act are in force so also, certain provisions including Section 19

of the MHRD Act. The other provisions, which brought into force are Sections 1, 18, 21, 22, 23, 36, 51 and 52 of MHRD Act. All these Sections and the scheme of new Act, therefore, needs to be read together.

21 The Petitioners have no other alternative, but to challenge the impugned order in the present Writ Petition. There is no statutory Appeal provided under the MOFA Act. The challenge, therefore, so raised by the Petitioners by filing the Writ Petition on 13 December 2013 and the related submissions so made referring to Section 19 of the MHRD Act, need to be tested, as both the counsel read and referred those provisions of MHRD Act also.

22 The MOFA Act is of the year 1963. The Petitioners invoked the same in the year 2013. The MHRD Act 2012 was announced without effective date. Now, 8 July 2014 is the date provided and certain provisions are brought into force of MHRD Act. The related and relevant concepts for such “layout” and “joint projects” and “individual rights of Flat/Apartment ownership and/or Society members” based upon the Society and their “surrounding area” and “the related common area for all other units and or projects”,

therefore, required to be considered by the Competent Authority by taking note of present situation of law by giving supporting reasons. Merely because there was delay and the promoter and/or the builder failed to grant and registered the conveyance, that itself cannot be the reason to overlook the submission of the promoter and builder, based upon the agreement between the parties and that unless the whole project is completed then only the individual Society and/or apartment owners/flat owners would be entitled to get the deemed conveyance, if any, and/or related certificates, just cannot be overlooked specifically in view of Section 19(2) and (3) of the MHRD Act, if applicable. New provisions are applicable or not, that itself requires consideration from the Competent Authority first. The contention that the construction of commercial area after 2002 was illegal, the Competent Authority, has not even dealt with the same. The parties cannot add the grounds and reasons for the first time in the Writ jurisdiction. The commercial construction, is legal or no and what is its effect and what is the effect of impugned order of creating bifurcation of FSI and bifurcation of sub-division of land, which are relevant but not adjudicated. The impugned order so passed, therefore, required to be quashed and set aside and the matter is required to be remanded back for reconsideration on every aspects.

This will include either to reject the application, for want of jurisdiction and/or by reasoned order by considering the submission so raised and so also the reasons so recorded above to pass fresh order.

23 Once the order is bad, so also the consequential action so initiated based upon the same. The right in the respective flats and/or building of the Society and the related beneath land and building, of common use of members, in any way, would not be disturbed, if the matter is remanded back for reconsideration. The right and interest in the property need to be in accordance with law, including the law of Transfer of Property Act , The Municipal laws and the Development Regulation and not only on the basis of MOFA Act, as sought to be contended and insisted by the learned counsel appearing for the Respondent-Society. We have to avoid further complications and to avoid situation, where the other Society and the condominium of the commercial units would not get the title to the land, but only to the structures and the FSI consumed, specifically when all the building constructions are on the whole land or in one single layout. The presence of local bodies including “the planning authority”, “the Municipal Corporation and or Council” may be useful and be added as

party.

24 Resultantly, the following order :

ORDER

(i) The writ petition is allowed in terms of prayer (a) which reads thus :

“(a) that this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction under Article 226 and Article 227 of the Constitution of India calling for the papers and proceedings in Application No.14 of 2013 filed by Respondent No.2 Society before Respondent No.1, and after going into the legality and propriety thereof, to quash and set aside the impugned order dated 22nd November, 2013 and the Certificate dated 22nd November, 2013 (being Exhibit A herein).”

(ii) However, Application No.14 of 2013 is restored to file before Respondent No.1. The concerned Authority to reconsider the Application by giving equal opportunity to all the persons.

(iii) The parties are at liberty to file additional affidavit and/or material, if any, in support of their contentions.

(iv) The concerned Authority is directed to dispose of the Application as early as possible in accordance with law and in any event within a period of twelve weeks.

(v) In view of disposal of writ petition, Civil Application Nos. 3068/2013 and 1780/2014 also stand disposed of accordingly.

(vi) There shall be no order as to costs.

(ANOOP V. MOHTA, J.)