

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**APPELLATE SIDE CIVIL JURISDICTION****WRIT PETITION NO. 7169 OF 2014**

- 1 M/s. Ganga Bhaskar Builders,
(A Partnership firm registered under
the Indian Partnership Act 1932,)
Through it partner Parag
Jagnnath Choudhary, age adult,
Occu- Business, having address at
Near Railway tower, Manvelpada
Road, Virar (E), Dist. Thane.
- 2 Shri Kamlakar Bhaskar Choudhary,
Age: Adult, Occu-Nil,
Residing at Vartak Ward, Opp. Lake
Virar (W), Tal. Vasai, Dist. Thane.
- 3 Shri Jagnnath Bhaskar Choudhary,
Age: Adult, Occu-Nil,
Residing at Vartak Ward, Opp. Lake
Virar (W), Tal. Vasai, Dist. Thane.
- 4 Shri Hemanth Bhaskar Choudhary,
Age: Adult, Occu-Nil,
Residing at Vartak Ward, Opp. Lake
Virar (W), Tal. Vasai, Dist. Thane.
- 5 Kamal Bhalchandra Vartak,
Age: Adult
- 6 Smt. Pushpalata Suresh Churi,
Age Adult,
Residing at Chinchani, Tal. Dahanu
Dist. Thane.
- 7 Hemangi Hareshwar Churi,
Age Adult, Occu: Nil,

Residing at Vartak Ward, Opp. Lake
Virar (W), Tal. Vasai, Dist. Thane.

(Petitioner Nos. 2 to 7 are represented by
their Constituted Attorney Shri
Parag Jagannath Choudhary,
Age Adult, Occu. Business,
having address at Ganga Bhaskar,
behind Chintamani Mandir,
Opp. Railway Subway,
Virar (E), Dist. Thane,
Thane-401 305.

....Petitioners

Vs.

- 1 The Competent Authority and the
District Deputy Registrar,
Having office at Opp. The District
Central Co-operative Bank, Near
Santoshi Matha Hall, Vardhavat
Mansion, 1st Floor, Station Road,
Thane (W), Thane-400 0601
 - 2 Ajita Complex Co-operative Housing
Society Ltd. (A Society registered
under the Maharashtra Cooperative
Societies Act, 1960) having
Registration No. TNA (VSI)/SHG/
(TC)/14730, through its
Secretary having address at
Santh Pandarinath Choudhary
Marg, Manvelpada Road,
Virar (W), Tal. Vasai, Dist. Thane
-Respondents

Mr. Siddharth R. Ronghe for the Petitioners.

Mr. A.R. Metkari, AGP for Respondent No.1.

Mr. A.M. Kulkarni a/w Mr. A.P. Shinde for Respondent No.2.

CORAM:- ANOOP V. MOHTA J.
RESERVED ON:- 10 FEBRUARY 2015
PRONOUNCED ON:- 7 APRIL 2015.

JUDGMENT:-

Petitioner No.1-the firm-the builder/promoter, in the Application for deemed conveyance filed by the Society (Respondent No.2), before the Competent Authority and the District Deputy Registrar (Respondent No.1), under Section 11(3) of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, management, Transfer) Act, 1963 (for short, “the MOFA Act”), have challenged impugned order dated 5 May 2014 and also the consequential certificate. The Petitioners have also prayed for re-hearing of the proceedings to the extent of balance FSI admeasuring 161.57 sq. mtrs. (the property) in the land bearing survey No. 253(Pt), Hissa No. 9/2, 15 to 18, 19/2, 20/2, 22/2, 23, 24, 25, 26/2, 27 to 30, situated at Village Virar, Tal. Vasai, Dist. Thane.

2 Most of the members, about 14 in numbers, entered into an agreement to sale in respect of the property in favour of Petitioner No.1 (the firm) in which Parag Jagannath Choudhary is a partner. The

other Petitioners executed a Power of Attorney in favour of Petitioner No.1. On 26 November 2001, Petitioner No.1 agreed to sell flat bearing No. 16 on the 4th Floor admeasuring 510 sq. ft. to one Rajendra Dattaram Rane. Clauses 20, 25 and 26 will indicate that Petitioner No.1 was specifically entitled to avail any additional FSI which may exist in the future. On 27 November 2006, the Architect of Petitioner No.1 issued a letter indicating that as per the area statement and as per sanctioned DC Rules, the balance FSI in respect of the entire plot of 3770 sq. mtrs. was 161.57 sq. mtrs. On 29 November 2011, the Architect of Petitioner No.1 submitted amended building plan for the building proposed on the property to the Deputy Director of Town Planning, Vasai Virar City Municipal Corporation.

3 On 20 April 2013, Respondent No.2 Society filed an application under Sub-Section 3 of Section 11 of the MOFA Act with the District Deputy Registrar, Thane and also the Competent Authority under the MOFA Act. On 11 December 2013, the Vasai Virar Municipal Corporation addressed a correspondence to the Petitioners in respect of pending Development permission of the property. On 16 January 2014, Petitioner No.1 filed a written notes of argument in

deemed conveyance Application. On 29 January 2014, the Petitioners addressed a correspondence to the Deputy Director of Town Planning, Vasai Virar Municipal Corporation for Development permission in respect of the property. On 5 May 2014, Respondent No.1 passed the impugned order.

4 Agreement dated 26 November 2001 between the members of the Society and the builder-the firm (the Petitioner) though referred, total land admeasuring 3770 sq. mtrs., but the special provision in case of any additional FSI as agreed binds both: Clauses 25 and 26 are relevant which read as under :-

“25 IT IS AGREED BETWEEN the Builders and Purchaser/s that in case any additional F.S.I is granted or construction of additional floor or floors are allowed then the Builders are entitled to construct and dispose of the said additional construction and the Builders have reserved the right to construct the same additional construction mentioned above and dispose the same. The necessary covenant in the deed of conveyance to be executed in favour of Cooperative Housing Society shall be incorporated.

26 It is agreed that the Builders shall be entitled, without affecting the rights of the Purchaser/s to the said premises including the area thereof, to revise the Buildings plans in respect of the said buildings and to utilise the total F.S.I and the development rights available in respect of the said property by suitably modifying the Buildings plans in respect of the said premises as the

Builders may desire and the Purchaser/s hereby irrevocably consent to the right of the Builders to revise and modify the Buildings plans in respect of the said premises from time to time.”

The Competent Authority, inspite of specific submissions, failed to take note of above clauses and the agreement between the parties.

5 The following judgments are read and referred in the matter-

- a) *Ratna Rupal Co-operative Housing Society Ltd. Vs. Rupal Builders & Ors.*¹
- b) *Madhuvihar Co-operative Housing Society, Mumbai & Ors. Vs. Jayantilal Investments, Mumbai & Ors.*²
- c) *M/s. Noopur Developers Vs. Himanshu V. Ganatra & Ors.*³
- d) *Sai Smrat Co-operative Housing Society Ltd. Mumbai & Anr. Vs. Chandru Tahilram Tolani & Ors.*⁴

6 The judgments so cited above are of no assistance, as on facts, in view of the specific agreement so referred above, the society's case that without consent and/or permission, the builder cannot add

1 2011(4) AIR(Bom) R 606

2 2011 (1) Mh.L.J. 641

3 2010(2) All MR 791

4 2006(6) Mh.L.J.166

and/or develop the property based upon additional FSI, is not the only and the final point. The specific clauses so referred above between the parties, as bind them and so also restrict the right to claim the deemed conveyance except the agreement of the property. There were no such clauses read and referred in those judgments. Even otherwise, at this stage, we are concerned with the conveyance so granted and the certificate so issued in favour of the society. The formality, even if any, required to be completed by the builder for the future and/or the further development needs to be tested at an appropriate stage, when such consent and/or permission only if required or necessary. I am considering the facts and circumstances of this case in view of the factual position so recorded above and so also of the law. The aspect of permission and/or illegal construction cannot be gone into in this proceedings by the Competent Authority. The issue of extra construction and/or land, just cannot be overlooked before passing such order of deemed conveyance/certificate.

7 The chart is also placed on record in support of the contention that area of 1738 sq. fts. is available for construction as per the DC Regulations of the Municipal Corporation, after sanction of

new development plan for the area of Vasai-Virar, as a part of agriculture reservation was deleted. The relevant clauses of the agreement, (page 81 to 82) specifically clauses 25 to 27 not referred and/or dealt with by the Competent Authority before passing the order and granting the certificate. The scope and jurisdiction of the Competent Authority, therefore, needs to be tested in the present matter.

8 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, while dealing with the various provisions of the MOFA Act, I have already observed 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.”*

9 A zone confirmation statement for land dated 4 July 2014, is also relevant document to decide the deemed conveyance issue of the society as prayed, but not considered by the Competent Authority. Due to change in the development plan and the zonal certificate, as the land falls within the ambit of residential zone, Petitioner No.1 is, entitled to keep balance FSI of 161.57 sq.mts. In view of the specific clauses so referred above, the Petitioners/developers are entitled to get the benefits. The society cannot insist for deemed conveyance and/or certificate on the entire land as done in the present case, based upon the society's wrong averments that “*There is no balance FSI*

available as per the prevailing D.C. Rules and the Bye-laws.”.

10 The Petitioners never objected for the deemed conveyance in favour of the society except for the portion of the land admeasuring 161.57 sq.mts. The Competent Authority and the District Deputy Registrar have failed to take note of this and passed the order contrary to agreement between the parties, even by overlooking written submissions filed by Petitioner No.1. In impugned order dated 5 May 2014, though there is an observation made that Petitioner No.1 has right to avail the balance FSI, but the operative part and the certificate so issued are silent about the same.

11 Therefore, taking overall view of the matter, I am inclined to interfere with the order so passed to the extent of restricting the same as per the agreement between the parties excluding the balance FSI of 161.57 sq.mts. However, for that impugned order dated 5 May 2014 and the consequential certificate so issued are required to be quashed and set aside. The certificate has a foundation of the impugned order. The parties may appear before the Competent Authority and end the matter by filing a Consent Terms and/or make

their respective submissions again. The parties are at liberty to get the matter disposed of accordingly. The Competent Authority to re-hear the matter and pass the fresh order by giving opportunity to all the parties in case the parties want to contest the issues again.

12 Resultantly, the following order :

ORDER

- (i) Impugned judgment and order dated 5 May 2014 passed by Respondent No.1/Competent Authority is quashed and set aside and so also the deemed conveyance and the related certificate granted in favour of the Society.
- (ii) Deemed Conveyance Application No. 283 of 2013 filed by the Society is restored to file for re-hearing before Respondent No.1-Competent Authority. The same be disposed of, as early as possible, by giving equal opportunity to all the parties.
- (iii) Liberty is granted to the parties to add and/or file additional documents and material, if any.

- (iv) Parties are directed to appear before Respondent No.1-Competent Authority on 30 April 2015 at Thane, for directions.
- (v) The Writ Petition is allowed.
- (vi) Rule made absolute accordingly.
- (vii) There shall be no order as to costs.
- (viii) The parties to act on the basis of an authenticated copy of this order.

13 The learned counsel appearing for Respondent No.2-Society submitted to stay the effect and operation of this order. The learned counsel appearing for the Petitioners, however, opposed the same. Considering the reasons so recorded and also in view of the fact that impugned order dated 5 May 2014 has already been stayed by this Court on 11 August 2014 and as the said order has been in force till this date, I am inclined to grant stay of this order for four weeks.

(ANOOP V. MOHTA, J.)