

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Writ Petition NO. 4474 OF 2014

1. Smt. Gracy Germane Dmello @ Gracy Mary Dmello)
 2. Shri.Mark Joseph D'mello)
 3. Shri.Martin A. D'mello)
 4. Smt.Evelyn Alphonso)
 5. Smt.Marian Concessio)
 (Legal heirs of German John D'mello))
 48 Ceason Road Amboli, Andheri (W), Mumbai-58.)...Petitioners

Versus

1.Andheri Amarendra Co-op.Hou Soc. Ltd,)
 CTS no.72, Survey No.43, Ambivali, Andheri (W),)
 Mumbai-400058, (through the Chairman/Secretary)
 (original Applicant))

 1A M/s.Kush Buildcon Pvt.Ltd (through Directors)
 Shri.Parag S. Shah and Shri.Nilay S.Shah), Unit No.101,))
 Janki Centre, 29 Shah Industrial Estate, Off Vira Desai)
 Road, Andheri (West), Mumbai-400053.)
)
 2.Shri.Bertrand A. D'mello)
 48, Ceason Road, Amboli, Andheri (W), Mumbai-58.)
)
 3.Shri.Troy I D'mello)
 B/102, Omkar Classic CHS Ltd., Matarpada, Amboli,)
 Andheri (@), Mumbai-400058.)
)
 4.Shri.Marutirao N. Tanpure)
)
 5.Shri.Tejbahadur Singh)
 C/o. Flat No.3, Nathkrupa, V.N.Puran Marg,)
 Mumbai-400022.)
)
 6. M/s.Munic Enterprises)
 Through Shri.Tegbahadur Singh, Flat No.3, Nath Krupa)

VN.Puran Marg, Mumbai-400022.)
)
7.The Competent Authority and District Deputy)
Registrar, Co-op. Societies (3), Mumbai Gruhanirman)
Bhavan, Ground Floor, Ward No.69, Bandra (East))
Mumbai-400051.)....Respondents

Mr.Anantkumar L.Gore, for the Petitioners.

Mr.J.P.Singh, for Respondent No.3.

CORAM : G.S. KULKARNI, J.

DATE : 24th August, 2016.

PC.:-

1. Heard Mr.A.L.Gore, learned Counsel appearing for the Petitioners and Mr.J.P. Singh, learned Counsel appearing for Respondent No.3.

2. The challenge in this petition is to an order dated 13 February 2014 passed by the Competent Authority / District Deputy Registrar, Co-operative Societies, under Section 11(3) of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act,1963 (for short “the MOFA”), whereby the Competent Authority has granted a deemed conveyance in favour of Respondent No.1 in respect of Plot bearing CTS No.72, Survey No.43, Ambivali, Andheri

(East), Mumbai-400058. In assailing the impugned order, the learned Counsel for the Petitioners submits that the rights of the Petitioners who claim to be landlord are seriously affected and that sufficient opportunity is not granted to them to present their case before the Authority. The second contention as urged on behalf of the Petitioner is that a dispute in this regard was subject matter of Civil Suit No.3314/2013 filed before the City Civil Court. Hence an application under section 11(3) of the MOFA was barred by res-judicata.

3. I have perused the impugned order as also the grounds as urged by the Petitioners in the Writ Petition. A perusal of the impugned order indicates that necessary notices were issued to all the parties including the present Petitioners. Not only that but Respondent No.1 – the applicant before the competent authority has also published the notices in two newspapers on 7 November 2013 which was in pursuance of the directions of the competent authority in his order dated 31 October 2013. A report of such communication was also placed on record before the competent authority. This was in addition to the notices addressed to the Petitioners. In pursuance of these notices, the Petitioners had appeared before the competent authority through their Advocate Mr.S.Sridhar. The averments in the Writ Petition does not dispute this position.

4. As regards the contention which is urged by the Petitioners that Respondent No.1 had filed a civil suit seeking conveyance it is quite clear that the Petitioners had made statement in the suit that they were ready and willing to grant a conveyance.

5. A perusal of paragraph (4) of the Petition also indicates that there is some monetary dispute between the Petitioners, Respondent No.1 and the developers. Further the averments in the Petition also indicate that the Petitioners were always ready and willing to grant conveyance in favour of Respondent No.1-Society.

6. As regards the contention of the learned Counsel for the Petitioners that when a dispute was pending in the suit, an application under Section 11(3) of the MOFA was not maintainable as it amounts to res-judicata. I am not inclined to accept this contention as urged on behalf of the Petitioners. The proceedings in the suit stand on a completely different footing wherein the scope of inquiry is as regards the basic rights of the parties in the context of the prayers in the suit.. Admittedly, an application under Section 11(2)(5) of the MOFA stands on a different footing which jurisdiction the Competent Authority would exercise within the limited scope and purview of the said statutory provisions under the

MOFA and in the context of an entitlement to a deemed conveyance a party has applied for. Further it is also quite clear that the Petitioners are not opposing the granting of conveyance, however, there is some monetary dispute. If that be the case, then, certainly such rights of the Petitioners to seek an appropriate relief in respect of any money claim or any other right, title and interest in the property in question are not affected.

7. The position in law in regard to an order granting deemed conveyance is clear from the decision of the learned Single Judge of this Court in the case of “Mazda Construction Company & Ors. Vs. Sultanabad Darsh CHS Ltd. & Ors.” in Writ Petition No.3912 of 2012 decided on 31 August 2012. The relevant portion reads thus:-

“20 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. If that is the duty which is to be performed by the promoter, but which he fails to perform, then, the Competent Authority steps in to fulfill it. That is a duty towards the flat purchasers and which duty cannot be avoided except at the cost and pains of legal proceedings including a criminal prosecution. In these circumstances and when sections 10 and 11 are read together and harmoniously with the preceding sections including those which contain the particulars of the agreement, then, it becomes absolutely clear that what has to be conveyed even by a deemed conveyance, which is an unilateral act and which enables the flat purchasers to acquire the Promoter's right, title and interest in the land and the building. Therefore, it cannot be

said that an unilateral deemed conveyance conveys something more than what belongs to the Promoter. Section 11(1) provides for conveyance of Promoter's right, title and interest in the land and building as is clear from the words "his right, title and interest..." appearing therein. I am not in agreement with Mr.Samdani that there are no guidelines guiding and enabling the Competent Authority to grant a deemed conveyance and therefore, the powers are likely to be abused or exercised arbitrarily in every such case. 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 is 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.

25.....Equally this order does not prevent or preclude the Respondent Nos.1 and 2 from filing any independent civil suit or other proceedings so as to assert their rights under the agreements which have been executed in their favour by the Petitioners. All contentions in such proceedings are also kept open.

8. The Competent Authority has granted the application of the Respondent No.1 Society to enable the Society to enjoy its rights in terms of the documents. However the grant of a deemed conveyance by the Competent Authority cannot be said to affect the legal rights if any in the

property which the Petitioners can assert in a Civil Suit. Such right can in no manner be said to be concluded in view of the impugned orders of the Competent Authority. The Petitioners can certainly as per law seek adjudication of their right, title and interest by approaching the appropriate Civil Court or in the pending Civil Suit.

9. In the above circumstances, the Writ Petition does not call for any interference and it is accordingly rejected. However, it is clarified that in view of clear position in law, the rights of the Petitioners to assail their appropriate rights in respect of the property remain intact to be assailed by the Petitioner in a Civil Suit before the appropriate Court.

(G.S.KULKARNI, J.)