

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9203 OF 2016

M/s. Tanish Associates and ors.

.. Petitioners

vs.

The State of Maharashtra and ors.

.. Respondents

Mr. Nikhil Sakhardande a/w S. Swami i/b Pralhad Paranjape for the
Petitioners.

Mr. S.D. Rayrikar, AGP for Respondent Nos.1 and 2.

CORAM : M. S. SONAK, J.

DATE : 6 SEPTEMBER 2016.

P.C. :-

1] The challenge in this petition is to the order dated 28 March 2016 made by the competent authority under the provision of the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA"), by the impugned order deemed conveyance has been ordered.

2] Mr. Sakhardande, learned counsel for the petitioners, has submitted that the petitioners had raised preliminary objection to the jurisdiction of the competent authority to entertain the respondent's application seeking deemed conveyance under the provisions of MOFA. The objection was based upon the premise that

several complicated issues of law and fact arise in this matter and therefore, the competent authority under the MOFA lacks jurisdiction to entertain or decide the same. Mr. Sakhardande placed reliance upon the decision of this Court in *Marathon Next Gen Realty Ltd., Mumbai and anr. Vs. Competent Authority, District Deputy Registrar of Cooperative Societies, Mumbai and ors.*¹, to submit that the powers of competent authority are summary in nature and complicated issues of law and fact cannot be adjudicated by the competent authority.

3] Mr. Sakhardande also submitted that without prejudice to such preliminary objection, the petitioners had applied for time to file reply on merits, in case the objection as to jurisdiction were found to be unsustainable. Mr. Sakhardande submits that such opportunity was denied to the petitioners and the impugned order is therefore, made in violation of principles of nature justice and fair play.

4] Having considered the submissions made by Mr. Sakhardande and perused the record, in my judgment, no case is made out to interfere with the impugned order in exercise of jurisdiction under

1 2015(5) Mh.L.J. 318

Articles 226 and 227 of the Constitution of India. This is more so because the impugned order has not shut out the rights of the petitioners, if any, in the context of claims to location of transformer, parking, open space access, etc. Notwithstanding the impugned order, in case the petitioners have any rights or grievances on such aspects, it is always open to the petitioners to institute Suit so as to establish and enforce any such alleged rights or claims.

5] If the application dated 20 January 2016 made by the petitioners at Exhibit-C (page 44-A of the paperbook) is perused, it is quite clear that the petitioners, apart from objecting to the jurisdiction of the competent authority, had specifically stated its defence on merits, as well. The objection to jurisdiction was on the basis that there are various issues like location of transformers, parking places, open spaces, clubhouse, development of convenience shopping building, internal road access rights, demarcation, pending maintenance, accounts settlement, undivided rights etc., which are yet to be sorted out between the parties and the competent authority, which exercises only summary jurisdiction lacks jurisdiction to adjudicate upon such issues and in absence of such adjudication, there is no question of making any order for deemed conveyance.

6] The objection as to jurisdiction on the aforesaid basis appears to be quite misconceived. Practically, in several cases, promoters resist execution of conveyance on the basis of such issues, that is why, provisions have been made under the MOFA to afford some remedy to ensure that the duties, which a promoter is required to discharge are duly discharged by such promoter within some reasonable period. In case of failure, the competent authority steps into fulfill the same. On the basis of objections raised, it cannot be said that the competent authority is denuded of jurisdiction to exercise its duties under the MOFA. The promoters cannot be permitted to raise all kinds of issues, whether they arise or not and on such basis seek ouster of jurisdiction the competent authority under the provisions of MOFA. Such an approach will frustrate the very purpose for enactment of MOFA.

7] In several cases, however, this Court has time and again held that the proceedings under MOFA stand on a different footing as compared to proceedings in a regular civil suit instituted by any of the parties. The jurisdiction of the competent authority under the provisions of MOFA is no doubt summary as well as narrow in nature. Therefore, notwithstanding a deemed conveyance, the

parties, including in particular, the promoter is not precluded from asserting and enforcing its right by way of institution of a civil suit before the competent civil court.

8] In *Mazda Construction Company Vs. Sultanabad Darshan CHS Ltd.*², the learned Single Judge of this Court (S.C. Dharmadhikari,J) has explained the position regards an order for deemed conveyance under the provisions of MOFA in the following words:

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

2 2012 SCC OnLine Bom 1266

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.”

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25 *I have only noted the rival contentions with a view to appreciate the challenge to the impugned order and for scrutinizing whether the Competent Authority has exceeded its powers in terms of Section 5A r/w 11 of the MOFA. Beyond that any reference to the rival contentions or any observations in this order shall not preclude the parties from raising appropriate pleas or prevent the competent court from adjudicating the issues in the pending civil litigation. In none of the matters that are pending, the documents which would be produced or evidence which would be led, will be appreciated only in the light of what has been observed in this order. **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.***

(emphasis supplied)

9] The aforesaid decision has been accepted and reiterated by learned Single Judge of this Court (G.S. Kulkarni, J.) in ***Smt. Gracy Germane Dmello @ Gracy Mary Dmello and ors Vs. Andheri Amarendra Co-op. Hou.Soc.Ltd. and ors.***³.

10] The Division Bench of this Court dealing with objections similar to ones raised by the petitioners herein, in ***Surendra C. Gupta Vs. Hemresha Cooperative Housing Society Limited and ors***⁴, declined to interfere with the order of deemed conveyance made by the competent authority whilst granting liberty to promoter to institute action before the Civil Court or any other competent forum, by applying the principles laid down in ***Mazda Construction Company (supra)***.

11] There is no merit in the contention based upon failure on principle of natural justice and fair play. As noted earlier, if the application dated 20 January 2016 made by the petitioners is perused, it is quite clear that the petitioners, apart from objecting to jurisdiction of the competent authority, had specifically raised objection on merits as well. The perusal of the impugned order

3 Writ Petition No. 4474 of 2014 decided on 24 August 2016

4 Writ Petition No. 1172 of 2014 decided on 8 July 2016

indicates that the competent authority, no doubt within bounds of its limited jurisdiction, has adverted to and considered such objections, both on the aspect of jurisdiction as well as merits. In these circumstances, it cannot be said that the impugned order is in excess of jurisdiction or that there was no compliance with principles of natural justice and fair play, before the same was made.

12] The decision in *Marathon Next Gen Realty Ltd. (supra)*, is restricted to facts. In any case, the view taken in *Marathon Next Gen Realty Ltd. (supra)* is really not in variance with view taken in *Mazda Construction Company (supra)*. In paragraph 15 of the *Marathon Next Gen Realty Ltd. (supra)*, the learned Single Judge (Anoop V. Mohta, J.) has held 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 subject matter of the civil suits. This, in other words, means that the competent authority, cannot go into issues of title or adjudicate contentious issues of law and fact whilst exercising summary jurisdiction under the provisions of MOFA and any observations or findings in the order of competent authority, upon such matters will not preclude parties from asserting or enforcing their rights, if any,

by resort to proceeding before a civil Court. Accordingly, the decision in *Marathon Nex Gen Realty (supra)* is inapplicable and in any case, the same hardly supports the contentions of the petitioners.

13] For all the aforesaid reasons, there is no necessity to entertain the present petition and interfere with the impugned order. However, it is clarified that notwithstanding the impugned order, if the petitioners are of opinion that any of their civil rights under the agreements or otherwise have been infringed, the petitioners are always at liberty to institute proceedings before the civil court in order to assert or enforce the same. All contentions of all parties in such proceedings, if instituted, are kept open.

14] With liberty as aforesaid, the present petition is dismissed. There shall however, be no order as to costs.

(M. S. SONAK, J.)

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