

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1145 OF 2015

Eksar Laxmi Narayan (Building No. 1)
Cooperative Housing Society Ltd. ... Appellant
Vs.
M/s. Laxmi Narayan Constructions & Ors. ... Respondents

Mr. S.A. Abhyankar a/w. Ms. Jyoti Pande i/b. Anjali N. Helekar, Advocate
for the appellant.

Mr. K.K. Jadhav, Advocate for respondent nos. 2 and 3.

CORAM	:	MRS.MRIDULA BHATKAR, J.
RESERVED ON	:	5th February, 2016.
PRONOUNCED ON	:	11th April, 2016

JUDGMENT:

Notices were served to respondent nos. 1, 2 and 3, however, none appeared for respondent no. 1. The respondent no. 1 did not appear before the trial Court also and suit proceeded ex-parte against him. The learned counsel Mr. Jadhav appeared for respondent nos. 2 and 3.

2. Admit. The learned counsel for the respondent waives service. By consent of the parties, the matter is heard finally and decided at the stage of admission, as short issue is involved.

3. This First Appeal is directed against the judgment and order dated 29th August, 2015 passed by the learned Judge of the City Civil Court, Dindoshi, Mumbai by which Suit No. 163 of 2011 is dismissed for want of jurisdiction under Rule 2(2) of Order XIV of Code of Civil Procedure. The

appellant, who is the original plaintiff, have filed a suit for mandatory injunction that the defendants are to be directed to execute conveyance in favour of the plaintiffs in respect of Survey No. 96 Hissa No. 1A bearing CTS No. 2262 admeasuring about 2510 sq. mtrs. with a building consisting of ground plus 4 storied with land appurtenant thereto, out of total land of 7600 sq. mtrs. Alternatively, it is also prayed that if the defendants fail to execute the conveyance within one month from the date of passing of the judgment and order, then he be directed to execute the same and lodge the same for registration with the Sub-Registrar of Assurance in whose jurisdiction the property situates. Defendant No. 1 Laxmi Narayan Construction is having a business of development and construction. Plaintiffs and defendant nos. 2 and 3 are the Cooperative Housing Societies duly registered under the provisions of Maharashtra Cooperative Societies Act of 1960. The residential plot of defendant nos. 2 and 3 were constructed by defendant no. 1. The structures of defendant nos. 2 and 3 are standing on a common plot of land, i.e., Survey No. 96, Hissa No. 1A bearing CTS No. 2262 jointly occupied area situated at Village Eksar Taluka Borivili admeasuring 6081.74 sq. mtrs. of the land. However, the area occupied by each Society is not earmarked by defendant no. 1/developer while carrying out the development. However, defendant no. 1 has entered into registered agreement of sale with each flat owners of all the Societies

separately. Though the possession of the flats are handed over by defendant no. 1 to the respective flat owners and other purchasers have occupied the flats in all these three Societies, defendant no. 1 did not take steps to execute conveyance in favour of the Societies. Many requests were made by the plaintiff/Society to the builder/defendant no. 1 and the original landlord Mr. Mhatre, however, both the parties did not respond and defendant no. 1 completely ignored his duty of registering conveyance of the land in favour of the Societies. Hence, the plaintiff/Society has filed the suit thereby praying the order of mandatory injunction that approximately 1/3rd portion of the total land where the plaintiff's building is standing is to be conveyed by registered conveyance in favour of the plaintiff/society. Defendant no. 1 did not appear though the notice was served and on 30th March, 2011 the Court proceeded ex-parte against defendant no. 1. However, defendant nos. 2 and 3 filed their written statement. They did not object for granting relief of registered conveyance but it was stated in the written statement by defendant nos. 2 and 3 that the area occupied by each Society is not earmarked while carrying out the developments. They did not dispute that Tukaram Dattu Mhatre and his legal heirs are the owners of the plot. It is also not disputed by them that the total plot is admeasuring 6081.74 sq. mts. It was stated that the entire plot is taken as a unit while constructing total 5 buildings and no separate

area was earmarked to any particular building. It was contended in the written statement that a common recreation ground and a common open roads are shown for all the 5 buildings of these three Societies and it is used commonly for all the members as a playground and parking. Defendant nos. 2 and 3 also raised an objection that the Court has no jurisdiction to try the suit in view of Section 5A of MOFA where the government has created a Competent Authority to deal with the issues under sections 5, 10 and 11 of MOFA which pertains to conveyance of the land to the Societies. In the written statement, defendant nos. 2 and 3 are not objecting the unilateral deed of conveyance. Defendant no. 1 did not respond at all. All the Societies want a conveyance as it is their right under MOFA.

4. After considering the averments made in the plaint and the contentions raised by defendant nos. 2 and 3, the learned trial Judge framed issues under Order XIV and also framed issue no. 1(c) on the point of jurisdiction under section 11 of the MOFA which the Court answers that it has no jurisdiction to try this matter and dismissed the suit under Rule 2(2) of Order XIV of Code of Civil Procedure.

5. The learned counsel for the appellant has submitted that the learned

Judge has committed error in dismissing the suit on the point of jurisdiction. He submitted that the learned trial Judge has erroneously interpreted the ratio laid down by the High Court in the case of **Mazda Construction Co. & Ors. vs. Sultanabad Darshan CHS Ltd. & Ors., reported in (2013) 2 ALL. Mh. 278.** He submitted that the appellant wants a division of open plot to the extent of 1/3rd share of the Society for which it is entitled to and this issue cannot be decided by the Competent Authority under section 11 of MOFA. In support of his submissions, he relied on the judgment of the Single Bench in the case of **Marathon Next Gen Reality Ltd., Mumbai & Anr. vs. Competent Authority, District Deputy Registrar of Cooperative Societies, Mumbai & Ors., reported in (2015) 5 Mh. L.J. 318.** He further relied on the judgment of Supreme Court in the case of **Mahalchand Laluchand Pvt. Ltd. vs. Pancholi Cooperative Housing Society, reported in 2010 9 SCC 539.**

6. The learned counsel for the respondents submitted that the Competent authority has specifically created under section 5A of the MOFA to decide the issue of conveyance. It is a special statutory body created which can certify execution of unilateral deed of conveyance. The appellant/Society should have filed the Application/Petition before the Competent Authority. The respondents/societies have no objection for

deemed conveyance when defendant no.1/builder is not paying any heed to the request made by the appellant and the respondents/societies. However, this cannot be decided by the Civil Court. Before the competent authority, the matter can be decided expeditiously and that is a proper forum. It is further submitted that it is a open plot which is jointly owned by all the societies. Thus, the order passed by the learned trial Court is legal and is to be upheld.

7. I have gone through the plaint so also the written statements filed by respondent nos. 2 and 3/societies. The appellant and respondents/societies unanimously agreed that the deed of conveyance is to be executed by respondent no. 1/developer, however, he is adamant or has some other interest in not taking requisite steps under the provisions of MOFA. Not handing over this land by conveyance by respondent no. 1/developer is undoubtedly illegal act and all the societies have right to have conveyance in their favour. However, the issue involved is when on a common plot the buildings are constructed by the builder and the residents or developer/builder form different societies of the flat purchasers in different buildings with earmarking the area of each society independently then how the Deeds of Conveyance can be entered by each society. Thus, further issue is that who will decide the issue, what is the entitlement of each

society in respect of the land. Under Section 5A of MOFA, the competent authority is created so that the issues in respect of conveyance between the builder/developer and flat purchasers and societies can be clear expeditiously. Section 11(4) of MOFA reads as follows:

“11(4) The Competent Authority, on receiving such application, within reasonable time and in any case not later than six months, after making such enquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promotor a reasonable opportunity of being heard, on being satisfied that it is a fit case for issuing such certificate, shall issue a certificate to the Sub-Registrar or any other appropriate Registration officer under the Registration Act, 1908, certifying that it is a fit case for enforcing unilateral execution of conveyance deed conveying the right, title and interest of the promoter in the land and building in favour of the applicant, as deemed conveyance.”

8. Under section 11(4) the powers of the Competent Authority are defined so the competent authority has power to certify for unilateral execution of conveyance in favour of the Society as deemed conveyance. The said section gives power to the competent authority to make enquiry about the title and entitlement of the appellant/Society after giving audience to the promoter/builder.

9. In the present case, as submitted by the parties before the Court, i.e. original plaintiff and defendant nos. 2 and 3, the promoter/defendant no. 1 did not earmark the land of each society but he has left open plot

which is utilized as a common parking area and playground by all the societies. Thus, in the present case, the dispute is to what extent the area of joint plot is to be given to each society as per its entitlement and share. Whether the entire plot is to be divided into different portions and it is to be separately allotted to each society, so that each society may avail of further benefit of FSI if excess land is available to them or whether it's a common open place as a playground for all the societies is to be decided. Admittedly, the builder is not coming forward. In spite of the service of notice in the suit, defendant no. 1/builder did not appear before the Civil Court and did not file written statement. This shows that he is not interested in handing over the land to these three societies which is against the provisions of MOFA.

10. The learned Judge of the Civil Court has taken a view that the Civil Court has no jurisdiction in view of Sections 5A and 11 of MOFA. However, while relying on the judgments of the Bombay High Court, the view taken by the learned Judge appears erroneous.

11. In the case of **Mazda Construction Co.** (*supra*), a Writ Petition is filed under Article 226 and 227 of the Constitution of India wherein the petitioner/developer has challenged the order passed by the competent

authority under section 5A of MOFA issuing the certificate of entitlement of land and of unilateral Conveyance Deed in favour of the respondent/Society. In the said case, though a Civil suit was pending in respect of dispute of land of the Society, the Competent authority has passed the order and it was held that what is to be performed by the Competent authority is a duty and obligation which the promoter is to perform in law. It was held that the competent authority cannot permit the parties to claim something which is beyond their agreement with the promoters or other relevant documents. What should guide the competent authority in each case is the entitlement in terms of the documents which are referred to in Sections 10 and 11 and equally in the preceding provisions including the particulars and details of the agreements with the flat purchasers. In the case of **Mazda Construction**, there was a serious dispute in respect of area of garden and access and the Competent Authority without taking into account the pendency of the dispute before the Civil Court, has passed the order of unilateral conveyance and therefore, the Writ Petition was partially allowed. Thus, in the said case, the learned Single Judge has outlined the scope of the enquiry conducted by the competent authority and so also defined the limitations of the enquiry.

12. In the case of **Marathon Next Gen Reality Ltd.** (*supra*), similar issue cropped up before the learned Single Judge and the learned Single Judge has observed thus:

“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.”

13. Thus, though the competent authority has power to enquire into the issue of pending Deed of Conveyance also to give audience to both the parties and decide the same and issue certificate when the builder has not specified the areas to either of the Societies or has not specifically mentioned that the remaining residuary open plot is joint property of all the Societies and accordingly the conveyance is to be executed, then this issue of entitlement, title and interest itself cannot be decided by the Competent Authority but it is subject matter within the jurisdiction of the Civil Court, as the Civil Court will have to look into the language used in the agreements so also the obligation of the builder under MOFA, rights of the flat purchasers and legality approach in said issues. Though the learned counsel for the respondents/Societies are opposing this appeal, surprisingly, in paragraph 22 of the written statement of defendant no.

2/Society and in paragraph 25 of the written statement of defendant no. 3, both the Societies have supported the claim made by the appellant that they are entitled to 1/3rd share of the plot and in fact the parties are not at issue. Therefore, I am of the view that the judgment passed by the learned Judge of the City Civil Court holding that he has no jurisdiction under Order 2 Rule 2 of Order XIV of Code of Civil Procedure is not correct and he should not have dismissed the suit by holding that the Civil Court has no jurisdiction but the Competent Authority can decide this matter. Hence, the order passed by the learned Judge of the City Civil Court is hereby set aside. The suit is restored. The parties are directed to appear before the City Civil Court. The learned trial Court to decide this matter by issuing a fresh notice to defendant no. 1/builder by giving him an opportunity to appear before the Court. The matter is to be decided on merit on or before 31st August, 2016.

14. First Appeal is allowed.

(MRIDULA BHATKAR, J.)