

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2163 OF 2014

ZAINUL ABEDIN YUSUFALI MASSAWAWALA)
AND OTHERS)...PETITIONERS

V/s.

THE COMPETENT AUTHORITY DISRICT)
DEPUTY REGISTRAR OF CO-OPERATIVE)
HOUSING SOCIETIES, MUMBAI, & ORS.)...RESPONDENTS

Mr.Mayur Khandeparkar a/w. Mr.Phiroze Merchant i/b. M/s.Apex
Law Partners, Advocate for the Petitioners.

Mr.Milind More, Addl.Govt.Pleader for the Respondent Nos.1, 2
and 4.

Mr.D.S.Joshi, Advocate for Respondent No.3.

CORAM : S.C.DHARMADHIKARI &
DR.SHALINI PHANSALKAR-JOSHI, JJ.

DATE : 29th JUNE 2016.

P.C. :

1 By this petition under Article 226 of the Constitution
of India, the petitioners challenge the order passed by the District
Deputy Registrar of Co-operative Housing Societies, Mumbai, in
Application No.3 of 2014 dated 6th May 2014.

2 The proceedings are under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, for short the MOFA. The petitioners' predecessor in title executed a Development Agreement in favour of one M/s.Zurriyat Developers, a partnership firm on the footing that the said predecessor is a owner of the immovable property and the partnership firm carrying on business of construction and development of property had approached and requested it to grant development rights. The builders namely the partnership firm agreed to develop the property belonging to the owner by constructing building of dwelling units as can be appropriately and conveniently so constructed on the said land admeasuring 713.22 sq.mts. out of the total land of 1791.96 sq.mts. belonging to the owner and situate as more particularly described in the Schedule to this agreement.

3 Following this agreement, the developer executed an Agreement for Sale with individual flat purchasers. It is common ground that the Maharashtra Ownership Flats Act, MOFA for short, has been enacted so as to provide for the regulation in the State of Maharashtra, of the promotion of the construction, sale and management and transfer of flats on ownership basis. The State Government having realized that there is acute shortage of housing in the several areas of Maharashtra, there are sundry abuses, malpractices and difficulties relating to the promotion of the construction and sale and management and transfer of flats taken on ownership basis existing and increasing, that it intervened and enacted this law. This act therefore has several provisions and particularly the general liabilities of promoter, promoter before accepting advance payment or deposit to enter into agreement and that agreement to be registered. The obligation of the promoter also is to maintain separate account of sums taken as advance or deposit and to be trustee therefor and to disburse them for the purpose for which it was given. There are competent authorities and then there are responsibilities for

payment of outgoings till the property is transferred. Thus, it is common ground that those who hold themselves as promoters, primary engaged in the business of property development and styled as builders and developers, if they are termed as promoters, then the broad definition of the said term would mean that such builders and developers need not necessarily be the owners of the property, on which the development and building activity takes place. The term “promoter” is defined in Section 2(c) and means a person and includes a partnership firm or a body or association of persons, whether registered or not, who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons or to a company, co-operative society or other association of persons and includes his assignees and where the person who builds and the person who sells are different persons, the term includes both.

4 The law postulates that after execution of an agreement for sale of immovable property / flat / unit in a building to be constructed, obtaining an advance sum or

consideration for the same, maintaining accounts, if the promoter upon construction and putting the parties like the respondents before us (flat / unit purchaser) in possession fails to take steps for formation of co-operative society or fails to convey title etc. and execute documents according to the agreement, then, these obligations of respondents can be enforced by approaching the Competent Authority. It is in that sense, that Section 11 enables the Competent Authority to take note of the grievance of those flat purchasers / co-operative housing societies or other entities into which these purchasers have formed themselves, to entertain an application for unilateral deemed conveyance and to be executed in their favour and have it registered. It is a self contained mechanism for that purpose in Section 11 of the Act. Having understood this background in which the law has been enacted, we must turn to the facts and only a few of them need to be referred. An application in terms of sub-section 3 of Section 11 was made by the co-operative housing society which is respondent no.4 before us and it impleaded the developers as respondents / opponents. The application sets out the basic facts and relying

upon the agreement, proceeds to claim the relief of deemed conveyance.

5 It is on such an application that the impugned order has been passed.

6 Mr.Khandeparkar, the learned counsel appearing for the petitioners submits that the predecessor in title of the petitioners is the owner of the immovable property or land on which the building was put up by the promoters / builders and developers. However, upon his demise, the petitioners have not been impleaded as opponents to this application. Secondly, the firm of developers which was impleaded as an opponent already stood dissolved in 1988. The partners are not impleaded and this is fatal to the proceedings. Thirdly, it is contended that what the agreement between the petitioners' predecessor and the developer contemplates is consumption of only a certain and specified area for the purpose of construction of building containing flats. It does not enable the builder and developer to claim the entire land

admeasuring 1791.96 sq.mts. as described in the Schedule to the Development Agreement. Further, if the Development Agreement and the Agreement for Sale with the individual flat purchaser is perused, it would be apparent that the builder and developer derived his right to construct the buildings from the Development Agreement. Therefore, that is specifically referred in the individual agreement with flat purchasers. Thereafter, the construction of buildings as permitted in terms of the said agreement and the right in that behalf is referred. Hence, if the flat purchasers agreement is looked into, it would be evident that it is not the intention of the owner to allow the builder and developer to claim the entire land. His rights are restricted and to the extent of the area which is consumed by the construction. In such circumstances, his limited right would get transformed into the entitlement of the society respondent no.3 before us. Yet, in the application, it is stated that the society is in possession of 1748.81 sq.mts. and the deemed conveyance therefore is pertaining to this entire premises / property. Thus, in the absence of the petitioners, an adjudication has taken place and they have been deprived of

their right, title and interest in the property. This has been done by the Co-operative Housing Society, although it is aware that for failure of the obligation to execute a conveyance, it had brought a civil suit namely Short Cause Suit No.8141 of 1990 against the deceased Batulbai, the predecessor in title of the petitioners. That suit came to be dismissed for default on 2nd August 2000. In such circumstances, belatedly an application has been made and it was entertained and despite the absence of the petitioners. For all these lapses, the petitioners are not to be blamed, they being unaware of the proceedings. The manner in which the proceedings have been dealt with and concluded is contrary to the law laid down by this court in two decisions.

7 On the other hand, Mr.Joshi appearing on behalf of the society submitted that the Act defines the term “promoter” and that definition must be understood as including a person who constructs. Thus, a person who constructs or causes to be constructed a block or building of flats and where the person who builds and a person who sells are different persons, the term

includes both. Therefore, there is no obligation to implead anybody other than the person holding himself out to be a promoter. It is stated in the agreement with the flat purchasers that the Development Agreement was executed on 1st June 1984 between the deceased Batulbai called as owner and the developer, with specific reference to the entitlement of the developer. It is that, which is enabling the Developer and Promoter in this case to construct the building, sell the flats therein, and thereafter to convey the right, title and interest in the property to the legal entity. If an obligation is discharged only partially and though the co-operative housing society is formed, but no conveyance is executed, then, the remedy under Section 11 was available to the society. It is in such circumstances, that the application was made and it is fallacious to state that the petitioner was not aware of the same. Our attention is invited to page 83 of the paper book and it is submitted that in terms of this communication, the petitioner no.3 was aware of the proceedings. Else, he would not have communicated to the Competent Authority and informed it that as the petitioner no.3 was out of Mumbai, the firm of developers /

promoters would not be able to attend the proceedings. It is, therefore, submitted that there is nothing which would enable the petitioners to seek the intervention of this court and particularly when there are disputed questions of fact. It is open for the petitioners to take recourse to such remedies as are permissible in law.

8 We have perused the entire petition with the assistance of the counsel appearing for the parties as also the annexures to the same. We have also perused relevant provisions of MOFA and the decisions that have been brought to our notice.

9 It is not necessary to make a detailed reference to the decisions or to interpret the legal provisions, once we understand the essential controversy. The essential controversy is that the petitioners claiming to be the heirs of one Batul Zainul Abedin Massawawala, also known as Batul Kurban Hussein Zaveri, further claim to be entitled to the land admeasuring 1791.96 sq.mts., more particularly described in Exhibit A to the petition and in

paragraph 1. That is claimed to be a “said Larger Property.” The respondent no.3 is the Co-operative Housing Society of the flat purchasers. The first and the second respondent are the statutory authorities. In the petition, how Batulbai acquired the properties has been set out and how an agreement for development was executed on 1st June 1984 with a partnership firm. Pertinently, and from the narration in the petition, as also one of the annexures on which Mr.Joshi relied, it is apparent that the legal heirs namely one of the legal heir – petitioner no.3 is associated with the Developer-partnership firm as well. According to the petitioners, the partnership firm is claimed to have been dissolved and against that dissolved firm for enforcement of the obligations under the agreement, styled as MOFA Agreement, the proceedings were commenced by the society. It is stated that the petitioners were partners of the Developer Firm. This is a clear averment in paragraph 3 of the petition. It is stated that the firm was dissolved. However, it is also stated that on 9th December 1985, a Agreement for Sale which is subsequent to the Development Agreement, was executed and which enabled the sale of flats in

the building of ground plus six floors styled as “Jamali” building. It is also stated in the petition itself that the developer sold flats on what is commonly known as ownership basis to several purchasers. Therefore, the existence of a Development Agreement, a MOFA Agreement is undisputed. What is disputed is that the firm of developers and now styled as promoter under MOFA was not granted the rights to deal with and dispose of the larger property. They were entitled to develop a portion of the property and to construct building thereon and dispose of the units or flats therein. The writ petition goes in great details as to how the MOFA and Development Agreement were restricted and they could not have been in any way brushed aside by the society as the society was aware of the same. We are of the clear opinion that the society approached the Competent Authority with a limited request, namely, that having formed a legal entity namely the co-operative housing society of the flat purchasers, it is the obligation now of the promoter to convey the right, title and interest in the building and the land beneath, so that the legal entity will be entitled to enjoy the right, title and interest in the

property. If while granting the deemed conveyance, the Competent Authority has in any manner, traveled beyond the stipulations in the agreement, and the grievance of the petitioners is that a larger property is allowed to be claimed by the society contrary to the covenant and recitals of the two agreements, then the remedy of the petitioners even in terms of two decisions of this court in Tushar Jivram Chauhan & Anr. vs. State of Maharashtra & Ors. 2015(4) Mh.L.J. and Mazda Construction Company vs. Sultanabad Darshan CHS Ltd. 2012 SCC Online Bom 1266 relied upon by Mr.Khandeparkar is not to file a writ petition under Article 226 in this court, but to approach competent civil court and establish this right, title and interest in relation to the larger property. While establishing and seeking to prove it, the petitioners can also allege that contrary to the Development Agreement and a MOFA Agreement, the society claimed a larger property and relying upon those submissions the Competent Authority has granted the relief in relation thereto. That is the prejudice caused and which the petitioners can seek a redressal thereof by approaching such a court. During the course

of such proceedings, the petitioners can highlight the alleged wrongful conduct of the society in firstly bringing a suit and withdrawing it and for the same relief namely for failure to discharge MOFA obligations, then approaching the Competent Authority belatedly and obtaining the Deemed Conveyance in the absence of the petitioners. Therefore, that adjudication, if at all one can term it, and the order therein, would not be binding on the petitioners, ought to be the eventual declaration. That, they can claim irrespective of any application under Section 11 of MOFA, which has been made in this case. From the contents thereof or the observations and conclusions in the impugned order, we are of the opinion that the jurisdiction of the competent civil court is not barred, despite such document being placed on record and relied upon by respondent no.3. The Civil court will adjudicate the issue of right, title and interest of the petitioners in the larger property by independently applying its mind and on a total appraisal of the oral and documentary evidence before it. Once all such remedies are intact, then, we do not think that in writ jurisdiction we should entertain such a dispute.

10 Having clarified the position, we do not think that the writ petition should be entertained.

The Writ petition is dismissed. No costs.

(DR.SHALINI PHANSALKAR-JOSHI, J.) (S.C.DHARMADHIKARI, J.)