

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.4737 OF 2015
IN
CHAMBER SUMMONS NO.771 OF 2013
IN
S.C.SUIT NO.395 OF 2007

1 Mahendra Jayantilal Vora
2 Hemang Mahendra Vora
3 Chirag Mahendra Vora

4 All three of Mumbai Indian
Inhabitants residing at 5/29,
Chandradeep Hatkar Society,
J.V.P.D.Scheme, Juhu,
Vile Parle West, Bombay 400 056

... Petitioner

Vs

1 Vasant Complex Co. Op.
Housing Society Ltd., Mahavir
Nagar, Kandivali (West),
Mumbai 400 067.

2 Renuka Builders and Developers,
now known as Sheth Realcon
Ventures Pvt. Ltd., 11, Vora Palace,
M.G.Road, Kandivali (West),
Mumbai-400 067

... Respondents

...

Mr. G.S.Godbole I/by Mr. Yatin R. Shah for the Petitioners.
Mr. Rajeev B. Khanolkar for the Respondent No.1.
Mr. Kishor Salunke I/by Mr. D.S.Retiwala for Respondent No.2.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : AUGUST 7, 2019
PRONOUNCED ON: AUGUST 28, 2019

JUDGMENT:

Vasant Complex Co-operative Housing Society Ltd, registered under the Maharashtra Co-operative Societies Act, 1960 instituted Short Cause Suit No. 396 of 2007 against M/s. Renuka Builders and Developers Pvt. Ltd. (Defendant), a promoter within the meaning of Section 2(c) of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (In short 'MOFA' Act) for enforcement of obligations under Section 11 of the MOFA.

2. Pending suit, the promoter (Defendant) sought impleadment of Mahendra Jayantilal Vora and two others as defendants in the suit in Chamber Summons No.771 of 2013. The

learned Trial Court allowed the Chamber Summons vide order dated 19th December, 2014 and directed the plaintiff to carry out consequential amendment in the plaint as well as notice of motion on record, within fourteen days from the date of the order. It is against this order, the proposed defendants have preferred this Writ Petition under Article 227 of the Constitution of India.

3. Before I deal with the contentions of the petitioners, let me place on record relevant facts for deciding the present petition. One Mrs. Verna Jovita Nagpal, was owner of the property bearing Survey No.163(Part) and CTS No.128 Part admeasuring 29,680 square yards equivalent to 24,752.65 sq.mtrs. (hereinafter called 'Larger Property'). On 24th December, 1981, Mrs. Verna Nagpal (Owner) executed an agreement whereby agreed to sell and said Mahendra Jayantial Vora and others agreed to purchase the said larger property for consideration on certain terms and conditions therein contained. It appears that by an agreement dated 29th November, 1991, Mahendra Jayantilal Vora and others agreed to sell

to ('Vendors' for short) M/s. Renuka Builders (Promoter/defendant no.1), five portions of said larger property, more particularly described therein for consideration upon certain terms and conditions (Hereinafter referred to 'Subject property'). Defendant-M/s. Renuka Builders then constructed, in all, 14 buildings on the Subject Property consisting of 516 shops and flats. By the agreement dated 29th November, 1991, vendors therein agreed to execute conveyance as well as other documents in favour of Renuka Builders or their nominees including co-operative society or condominium of apartments without any delay or default. Clause No.38 of the agreement dated 9th November, 1991 reads as under:

“38 The Vendors agree to execute conveyance or conveyances as all other deeds, denouements or nominees including any co-operative society, limited company of condominium of apartments as may be required by the Purchasers without any delay or default. It is agreed that any persons or party nominated by the Purchasers shall be deemed to be the Purchasers in the place and stead of the Purchasers herein without any consent or concurrence from the vendors in that behalf.”

4. M/s. Renuka Builders thus in terms of the rights derived under Agreement dated 29th Day of November, 1991 developed the subject property by constructing 14 buildings in all and executed

agreements with the flats/shop purchasers. All these agreements are subject to provisions of the MOFA. Thus it is the case of Plaintiff that Defendant/Promoter, under the agreement with the flat purchasers is under the statutory obligation as per Section 11 of the MOFA to take all necessary steps to complete his title and convey to the society of the flat purchasers his right, title and interest in the said land.

5. Mr. Godbole the learned counsel for the petitioner submits that ordinarily, impleadment of a party to the suit, either proper or necessary is at the instance of the plaintiff but in this case, defendant-promoter, sought impleadment of the petitioners, which according to Mr. Godbole is contrary to the scheme of the Order 1 Rule 10 of the Code of Civil Procedure, 1908 (In short '**CPC**'). Mr. Godbole further submits that execution of consent arbitral award dated 26th January, 2000 between the petitioners and defendant-promoter is pending before this Court in Execution Application No. 488/2004. It is further submitted by Mr. Godbole that unless

obligations on the part of the promoter-defendant in terms of the consent award are satisfied, the Court cannot grant a decree as sought by the plaintiff in the suit in terms of Section 11 of the MOFA. Mr. Godbole, thus, submits, if the petitioners are impleaded and decree is passed in the suit, it will frustrate the consent Arbitral Award.

6. M/s. Renuka Developers filed the Written Statement to contend that he alone will not be in a position to convey the subject property in favour of the society without concurrence of owners (The Petitioners) herein. The Promoter would thus submit that though he called upon owners-petitioners, herein to convey the said property in favour of the society, there has been no response from them. It is under these circumstances, promoter-defendant sought impleadment of the petitioners, who are owners of the subject property of which conveyance is sought by the plaintiff-society. Defendant/promoter thus relies upon Clause 38 of the Articles of agreement dated 29th November, 1991 executed by the petitioner/owner in favour of the

promoter-defendant inter-alia agreeing to execute conveyance in favour of M/s. Renuka Builders or its nominees.

7. It is in these circumstances, promoter-defendant requested the trial Court to implead the petitioners as the defendants for effective adjudication of dispute.

8. It appears from the proceedings that a dispute arose between the promoters M/s. Renuka Builders and the petitioners herein concerning the agreement dated 29th November, 1991. Thus, the promoter-M/s. Renuka Builders had filed Suit No. 191 of 1996 against the owners- Mahendra Jayantilal Vora and others. By consent terms filed on 2nd February, 1998, all parties connected to the suit agreement dated 29th November, 1991 were referred to the sole arbitrator for adjudicating all the claims between them arising out of agreement dated 29th November, 1991. Mr. S.P. Rao was appointed as sole arbitrator. On 26th January, 2000, the sole arbitrator passed an award. The award is in two parts. I have perused the award

wherefrom it is evident that the part of the claim was settled between the parties and consent terms were executed on 26th January, 2000 in terms of which the sole arbitrator has passed the impugned award which is at Annexure 'A' which contains reciprocal obligations.

. The second part of the award has resolved and has been adjudicated issue at hand which has bearing over the issue in this suit instituted by the plaintiff. The second part of the award reads as under:

“ However, on one major point of dispute no settlement could be arrived at between the parties. The said Development Agreement dated 29 November 1991 had provided that the Claimants had a limited right to construct 5 buildings consisting of 15 wings as per the plans approved as the first stage only on portions of the said property. This right of development had been defined as, “the first phase”. Respondent Nos. 1, 2 and 3 had retained to themselves right to the remaining development which would comprise of balance FSI remaining in the said property as well as any additional FSI as may become available to Respondent Nos. 1, 2 and 3 on the said property as more particularly set out in clauses 17 and 19 of the said Agreement. Thus Claimants were by that Agreement authorised to develop only part of the land which development was described by the parties to that Agreement as “first phase”.

Clauses 21, 38 and 42 of that Agreement inter alia had put an obligation upon Respondent Nos. 1, 2 and 3 to execute one or more conveyances in respect of portions of land described in the Schedule

thereunder in favour of Claimants and/ or their nominees and inter alia provided that the Claimants shall not insist on obtaining order of sub-division of any of the said portions. Also there is a possibility of rectification of the total area of the larger portion of the land and consequent upon the said rectification there was the feasibility of additional construction which development right was not passed on to the Claimants.

By clause 42 of the said Agreement it was provided that the Respondent No. 1 shall execute or cause to be executed necessary Deed of Conveyance in favour of the Claimants or their nominee or nominees within a period of 60 months from the date of sanction of lay out and building plans and obtaining works commencement certificate. No such conveyance could be executed upto date.

Respondent Nos. 1, 2 and 3 are still to develop “second phase” by availing of the balance FSI, additional FSI if any and TDR if available in accordance with rules and regulations after obtaining requisite permissions from the authorities. Consequently, if a conveyance were even now to be executed it would necessitate obtaining a specific sub-division and the Claimants cannot insist for obtaining an order of sub-division.

The Claimants have disposed of various units in this development on what is popularly known as ownership basis and for that purpose they had entered into Agreements for Sale of the various units with the intended flat purchasers. These Agreements for Sale are by a standard form of articles of agreement and under the said Agreement under clause 10 it was stipulated that the promoters (M/s. Renuka Builders and Developers Private Limited, the Claimants) shall themselves execute or cause to be executed a conveyance or conveyances in respect of the said property or any part thereof or execute lease or sub-lease or under lease in respect of the said property or any part thereof either portion wise or wing wise or building wise as the Claimants may desire etc. Thus it is seen that there was the option to the Claimants that the flat purchasers could be granted lease of the property under development or portion thereof. Hence I am of the

opinion that Claimants would not be in breach of the terms of their Agreement for Sale with the flat purchasers if for a limited period of time, not exceeding 9 years a lease were to be granted to the body of the flat purchasers by Mahendra J. Vora as a power of attorney holder of the original owners Mrs. Verna Jovita Nagpal on the distinct understanding that at the end of that period of 9 years whether the remaining development is completed or not the property under development will ultimately be conveyed to the flat purchasers alongwith such other flat purchasers in the further developments in the second phase to be carried out by Respondent Nos. 1, 2 and 3. Under these circumstances, I hereby order that upon the Claimants obtaining full occupation/ completion certificates of the five buildings of 15 wings constructed by them, within 30 days of the Claimants and / or the registered co-operative societies calling upon the Respondent Nos. 1, 2 and 3, a lease of the portions as per the Second Schedule to the Agreement dated 29 November 1991 (however building no. 3 of Sector B is now of ground and seven upper floors instead of eleven upper floors) will be granted to the registered society/ societies of the flat purchasers by Mahendra J. Vora as a constituted attorney of the Respondent No. 4. For the purposes of safeguarding the rights of the flat purchasers that Lease Agreement shall provide for free ingress and egress to the flat purchasers, their servants and agents on and over the remaining balance land, provided that such ingress and egress shall not affect, impede or disturb the balance development/ construction by Respondent Nos. 1, 2 and 3 over the remaining portions of the said land. The flat purchasers their servants and agents shall also be entitled to use of all the recreation grounds as may finally be constructed by shifting/ constructing the recreation grounds as per the final development by the Respondent Nos. 1, 2 and 3 on the balance land provided that the Respondent Nos. 1, 2 and 3 shall construct new recreation grounds before removing the old recreation grounds and provided that such shifting shall not cause any delay to the Claimants in obtaining the full commencement certificate and occupation certificates for the 5 buildings

*developed by the Claimants. A draft of the lease as recommended by me is annexed hereto as **Annexure “B”**.*

Hence on this one solitary point of dispute on which no settlement could be arrived at between the parties I have given my decision and award thereto.

(emphasis supplied)

9. This part of the award has not been challenged or disputed either by promoter/defendants or by the petitioners herein. In terms of this award, the arbitrator directed the petitioners being land owners to execute the conveyance in favour of the plaintiff/society.

10. Thus, upon consideration of the award dated 26th January, 2000, in my view, the petitioners are not only proper but necessary party required to be impleaded for complete and final decision on the question involved in the proceedings before the trial court. Though I am not satisfied with the reasons recorded by the learned Trial Judge while allowing the Chamber Summons of the defendant-promoter, but facts of the case warrants me to allow the Chamber Summons in exercise of the powers under Order 1 Rule 10(2) of the Code of Civil Procedure, 1908. That even otherwise, in

the case of the **Nahalchand Laloochand Pvt. Ltd. v. Panchali Co-operative Housing Society Ltd.** 2010 (6) Bom. C.R.(S.C.) 74, the Hon'ble Apex Court had an occasion to consider the enacting of the MOFA wherein Their Lordships had observed in paragraph 40 of the judgment, which reads thus;

57. In the recent judgment dated 31st August 2010, in the case of Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Ltd. (Civil Appeal No. 2544 of 2010), the Supreme Court had an occasion to consider the purpose for enacting MOFA by the legislature, wherein Their Lordships have observed in paragraph 40 of the judgment, thus :

"MOFA was enacted by the Maharashtra Legislature as it was found that builders/developers/promoters were indulging in malpractices in the sale and transfer of flats and the flat purchasers were being exploited. The effect of MOFA May be summarized as follows. First, every promoter who constructs or intends to construct block or building of flats in the area to which MOFA applies has to strictly adhere to the provisions contained therein, i.e., inter alia, he has to make full and true disclosure of the nature of his title to the land on which the flats are constructed and also make disclosure in respect of the extent of the carpet area of the flat and the nature, extent and description of the common areas and facilities when the flats are advertised for sale. Secondly, the particulars which are set out in [Section 4\(1A\)\(a\)\(i\)](#) to (x) have to be incorporated in the agreement with the flat purchaser. Thirdly, the promoter has to apply to the Registrar for registration of the organization (cooperative society or company or

condominium) as soon as minimum number of persons required to form such organization have taken flats. As regards unsold flats, the promoter has to join such organization although his right to dispose of unsold flats remains unaffected. Fourthly, and more importantly, the promoter has to take all necessary steps to complete his title and convey to the organization his right, title and interest in the land and building and execute all relevant documents accordingly. "

11. The Trial Court shall decide the suit independently without being influenced by this order. Thus, taking into consideration facts of the case and for the reasons stated herein, the Petition fails and is dismissed accordingly.

(SANDEEP K. SHINDE, J.)