

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2834 OF 2018

Mayfair Housing Private Limited	]	
Through its Authorized Representative	]	
Mr.Samad Mirajkar, having its	]	
Registered Office at 1, Mayfair Meridien,	]	
Ceaser Road, Near Saint Blaise Church,	]	
Andheri (West),	]	
Mumbai – 400 058.	]	..Petitioner

vs.

1]	State of Maharashtra	]
	Through Office Government Pleader,	]
	Original Side, High Court, Bombay.	]
2]	Mayfair Kumkum Co-operative	]
	Housing Society bearing Registration	]
	No.MUM/WKW/HSG/TC/15833/	]
	2013-14, having its address at	]
	CTS No.722A, Plot No.21,	]
	S.V.Road, next to Bank of India Bldg.	]
	Andheri(W), Mumbai – 400 058.	]

- | | | | |
|----|---|---|---------------|
| 3] | Competent Authority, |] | |
| | District Deputy Registrar of |] | |
| | Co-operative Societies, Mumbai City(3) |] | |
| | having office at Room NO.69, |] | |
| | Ground floor, MHADA Building, |] | |
| | Bandra (East), Mumbai – 400 051. |] | |
| 4] | Municipal Corporation of Greater Mumbai |] | |
| | Through Legal Cell BMC HQ, Opp. CST, |] | |
| | Fort, Mumbai. |] | |
| 5] | Registrar of Sub Assurances |] | |
| | Registrar General Andheri |] | |
| | Through Government Pleader |] | |
| | High Court Bombay. |] | ..Respondents |

Mr.Saket Mone alongwith Mr.Vishesh Kalra I/by Vidhi Partners for the Petitioner.

Ms.Geeta Shastri, Addl. GP for Respondent Nos.1, 3 and 5.

Mr.Arun Panickar alongwith Mr.Mangesh Sawant for Respondent No.2.

**CORAM : INDRAJIT MAHANTY &
A.M.BADAR, JJ.**

JUDGMENT RESERVED ON : 10TH APRIL, 2019.

JUDGMENT PRONOUNCED ON : 3RD MAY, 2019.

JUDGMENT [Per : INDRAJIT MAHANTY, J.]

- 1] The Petitioner viz. Mayfair Housing Private Limited as a Developer/Promoter has filed the present Writ Petition seeking to

challenge the order dated 31st May, 2018 passed by the Competent Authority constituted under Section 5A of The Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short “MOFA”), whereby, a certificate was granted to Respondent No.2- Society for effecting deemed conveyance of the suit land.

2] Learned counsel appearing for the Petitioner inter alia raised two contentions in support of his challenge viz : i]

Impugned order dated 31st May, 2018 was passed contrary to the provisions of the Agreement dated 17th July, 2015 vis-a-vis the time period mentioned therein and ii] that the impugned order does not take into consideration the increase in Floor Space Index (FSI) in terms of clause (9) of the Agreement dated 17th July, 2015.

3] In support of the first contention raised by the Petitioner reliance was placed upon the provisions of Section 11 of the MOFA, which is quoted hereunder :

11. Promoter to Convey title, etc., and execute documents according to agreement – [1] A promoter shall take all necessary steps to complete his title and convey, to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or

to an association of flat takers [or apartment owners] his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

[(2) It shall be the duty of the promoter to file with the Competent Authority, within the prescribed period, a copy of the conveyance executed by him under sub-section (1).

(3) If the promoter fails to execute the conveyance in favour of the co-operative society formed under section 10 or, as the case may be, the company or the association of members of such co-operative society or, as the case may be, the company or the association of apartment owners may, make an application, in writing, to the concerned Competent Authority accompanied by the true copies of the registered agreements for sale, executed with the promoter by each individual member of the society or the company or the occupation certificate, if any), for issuing a certificate that such society, or as the case may be, company or association, is entitled to have an unilateral deemed conveyance, executed in their favour and to have it registered.

(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 promoter 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 (16 of 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.

(5) On submission by such society or as the case may be, the company or the association of apartment owners, to the Sub-Registrar or the concerned appropriate Registration Officer appointed under the Registration Act, 1908, the certificate issued

by the competent Authority along with the unilateral instrument of conveyance, the Sub-Registrar or the concerned appropriate Registration Officer shall, notwithstanding anything contained in the Registration Act, 1908 (16 of 1908), issue summons to the promoter to show cause why such unilateral instrument should not be registered as 'deemed conveyance' and after giving the promoter and the applicants a reasonable opportunity of being heard, may, on being satisfied that it was a fit case for unilateral conveyance, register that instrument as 'deemed conveyance'].

4] It is asserted on behalf of the Petitioner that in terms of sub-section (1) of Section 11 of MOFA, a promoter was required to convey the land to the Society in accordance with “**the Agreement**” executed under Section 4 of the MOFA. It is submitted that sub-section (1) of Section 11 of the MOFA could only apply if no period for execution of conveyance was agreed between the parties and the Promoter and since the Agreement contain the terms and the purchaser too agreed that the Conveyance Deed was to be executed in favour of Respondent No.2-Society after expiry of period of at least 5 years from the date of Agreement.

5] Clause 8 of the Agreement dated 17th July, 2015 reads thus :

“8. Purchaser/s to become members of the said Society and conveyance :

(i) The Developer shall make the requisite application to the said Society for inducting the Purchaser/s as member/s in the said Society. The Developer shall require the Purchaser/s to become the member of the said Society by paying the admission fee of Rs.100/- (Rupees One Hundred Only) and an amount of

Rs.500/- (Rupees Five Hundred Only) towards the consideration for 5 (five) fully paid up Shares of the said Society and paying the amounts towards proportionate sinking fund/corpus fund to the said Society.

(ii) Upon completion of the entire project, viz. completion of construction of the said Building and after exploiting the full available construction potential of the entire said Property (including the additional potential that is likely to accrue to the said Property at anytime hereafter as aforesaid), the Developer shall execute in favour of the said Body, a Conveyance in respect of the said Property and the said Building (herein referred to as "the said Conveyance"). It is hereby clarified that for the purpose of Section 11 of MOFA the period of execution of the said Conveyance is agreed upon as being a date after the expiry of a period of at least 5 (Five) years from the date of this Agreement."

Consequently, in the present case, since Respondent No.2 -Society had placed reliance on Agreement dated 17th July, 2015, the application made by the Respondent no.2-Society before the Competent Authority for seeking direction for deemed conveyance in terms of Section 11 of the MOFA, was premature contrary to the terms of the Agreement and also contrary to Section 11 (1) of the MOFA read with Rule 9 of MOFA Rules, 1964.

6] Learned counsel appearing for Respondent No.2-Society submitted that the application under Section 11(1) of the MOFA was made for and on behalf of the Respondent No.2-Society which constitute of all the purchasers of flats constructed by the Petitioner/Promoter and although a sample purchase deed dated 17th

July, 2015 had been filed alongwith the application, yet it is an admitted case of the Petitioner that the Petitioner has sold all the flats between the years 2012 to 2015 and in the counter-affidavit Respondent no.2-Society had appended an Agreement dated 30th March, 2013 (Exhibit I). No further response to the same was filed by the Petitioner. On the contrary, in the written notes of submission made on behalf of the Petitioner, the Petitioner has fairly admitted that all the flats were sold to the members of Respondent No.2-Society between 2012 and 2015 and in each of the Agreements, clause No.8 contains similar description.

7] Consequently, after perusing the impugned order dated 31st May, 2018 as well as the pleadings made in the present case, it is clear therefrom that the Petitioner has entered into similar agreements with all the purchasers who are now members of the Respondent No.2-Society and admittedly the agreements had been entered into between 2012 and 2015. The Petitioner, even in terms of these Agreements, had failed to act within the period as stipulated in its own Agreements, consequently compelling Respondent No.2-Society to approach the Competent Authority for passing directions of deemed conveyance.

8] It would also be pertinent to note here that mere submission of an Agreement dated 17th July, 2015 in support of Respondent no.2-Society's application would not render such an application premature inasmuch as the said Agreement had been merely submitted by way of an example and while the Petitioner repeatedly has been stating that they were ready and willing to effect the conveyance deed in favour of Respondent No.2-Society, also clearly admitted that the Agreements had been entered into prior to 2015 i.e. since 2012 itself. At this point, it would also be important to take note of the fact that the Petitioner had received full occupation certificate in favour of the building on 4th September, 2014 and also the Petitioner had received completion certificate for the entire building on 16th September, 2014 and further the Petitioner also admitted that upon receiving full occupation certificate on 4th September, 2014, possession of the premises had also been given in favour of the parties with whom Agreements had been entered into. Further, equally more importantly, the Petitioner had formed the Respondent No.2-Society on 12th December, 2013. In other words, once full occupation certificate was received by the Petitioner and possession had been handed over to the members of Respondent No.2-society, there is no justifiable cause for

having not issued the Conveyance Deed in favour of Respondent No.2-Society and in any event the period of 5 years (if computed from the first date of Agreement of Sale, admittedly 2012) had already lapsed. Consequently, reliance placed on clause (8) of the Agreement in the present case, in our considered view, is really of no legal consequence. Since admittedly, first Agreement was entered into between the Petitioner and member of Respondent No.2- Society in 2012, plea advanced by the Petitioner that it was not obliged to effect Conveyance Deed in favour of Respondent No.2-Society, until the period of five years had lapsed, becomes wholly academic, since, by the date and time on which the impugned order came to be passed i.e. 31st May, 2018, period of more than 5 years had already lapsed from the date of the first Agreement that the Petitioner had entered into. Therefore, such a plea, in our considered view cannot be accepted as a ground for challenging the impugned order.

9] Here, it would be appropriate to take note of the contentions advanced by learned counsel for Respondent No.2-Society that clause (8) of the Agreement which entitled the Builder to deem conveyance of the land in favour of the society for a period of 5 years

amounts to “an unfair trade practice”. It is submitted as an alternate argument that the Court should declare the said clause as unenforceable in law on account of it frustrating the attainment of the statutory intent which requires a builder/promoter to effect conveyance deed in favour of the society within four months of completion of the project. We have recorded the aforesaid submissions. But in our considered view in the facts of the present case, even if the said clause which is relied upon by the Petitioner is accepted and enforced, since more than 5 years have lapsed from the date of first agreement and completion of construction of the building as well as obtaining the full occupation certificate from the appropriate authority, we are of the considered view that we need not enter into the said controversy since even in terms of the Agreement between the Petitioner and members of Respondent No.2 -Society, the Petitioner was obliged under its agreement to effect to its obligation by executing conveyance deed. In this respect, reliance was placed by Respondent No.2-Society on a Judgment rendered by the Hon'ble Supreme Court in the case of **Pioneer Urban Land & Infrastructure Ltd. vs. Govindan Raghavan** in Civil Appeal No.12238 of 2018 decided on 2nd April, 2019.

10] The second issue raised on behalf of the Petitioner relates to entitlement of the Petitioner to the increased FSI in terms of clause 9 of the Agreement, which is quoted hereunder :

“9. The Developer has further informed the Purchaser/s that the Developer retains the right to sell, transfer, assign in favour of any person/s and/or deal with (a) future rights in respect of the said Property, (b) the balance development potential/rights in respect of the said Property (i.e. after having utilized the FSI presently available and already consumed for the construction of the said Building and as per the plans and as per the proposed total scheme of development) and (c) various rights that may accrue to and over the said Property in the future including additional development potential as recited above and (d) the rights for advertising, signage and hoarding for advertising in the compound, common areas and facade of the said Property (the rights referred to in above are hereafter collectively referred to as “the Incidental Rights”). The Incidental Rights include the right of use of the said Property as a receiving plot and/or to consume or fully exploit by utilising TDR and/or DRC which the Developer and/or its nominee/s may be entitled to, from time to time, at the Developer's sole and absolute discretion. The Developer is also entitled from time to time to deal with and/or dispose of all or any of the Incidental Rights, by way of sale, assignment, lease, transfer, mortgage and/or in any other manner whatsoever as it may in its absolute discretion think fit and proper from time to time and at its entire discretion and convenience transfer such rights to any person/s. The Purchaser/s expressly consent/s and agree/s that the Purchaser/s shall not claim any rebate or reduction in the purchase price in respect of the said Residential Flat and/or any other benefit/right from the Developer and/or such persons, now and/or in future as a result of any development that may be undertaken either by the Developer and/or its nominee/s and/or person/s. The Purchaser/s further agree/s and acknowledge/s that the Developer shall be solely and exclusively be entitled to use and exploit all common areas and the compound of the said Building, the facade of the said Building and the terrace on the top of the said Building for advertising purposes and shall be entitled to create such third party rights in respect of such advertising rights and shall be entitled to the entire consideration in that behalf and the

Purchaser/s shall not object thereto either in his/her/their personal capacity/ies or in his/her/their capacity/ies as the member/s of the said Society.

11] In terms of the Builder/Promoters Agreement with the purchasers, the Builder/Promoter retained the right in terms of increase in FSI. It is an admitted case of the Petitioner that the building approval was accorded by the Municipal Authorities in accordance with the existing FSI norms and maximum extent of construction that was permissible, was granted in favour of the Builder/Promoter. In fact, the Builder/Promoter, in accordance with its sanctioned building plan made necessary construction and thereafter also obtained necessary full occupation certificate from the appropriate authorities as early as on 4th September, 2014. Further, although Respondent No.2-Society came to be formed on 12th December, 2013 and possession had also been handed over to the members of Respondent No.2-society yet, the petitioner did not effect the Conveyance Deed in favour of Respondent No.2-Society.

12] Insofar as the present claim of FSI is concerned, it is submitted that the Petitioner relies upon the recent change in FSI as published by the Government of Maharashtra in the Urban

Development Department dated 8th May, 2018. Clearly such reliance and or relevance are of no avail to the Petitioner, since the order impugned came to be passed on 31st May, 2018, whereas, the Development Control Regulations providing for amended FSI/TDR came to be issued on 13th November, 2018, i.e. much thereafter.

13] Apart from the above, it would also be relevant to take note of the submissions advanced by the learned counsel appearing for Respondent No.2-Society. In this respect, insofar as the claim of balance or additional FSI is concerned, it is submitted that the entire construction on the land is completed and Planning Authority has issued Building completion Certificate on 16th September, 2014 and it would not be possible for claiming additional FSI without demolishing the present building itself. Apart from that, it is asserted by Respondent No.2-Society that the maximum height permissible in or around the said land is 41.720 meters since the land is situated in “Funnel area” and near to the Airport where maximum height of 41.720 meters was granted to the Petitioner by Airport Authority of India vide its letter dated 8th February, 2010. Consequently, there is no possibility of either the Petitioner or even Respondent No.2-Society to explicit any

further FSI on the said land. It is further contended that the Petitioner is not entitled to explicit any additional FSI once occupation certificate and building completion certificate have been issued by the Mumbai Municipal Corporation.

14] Insofar as the claim for additional FSI is concerned, reliance was placed by the Petitioner in the case of **Ganga Bhaskar Builders, Virar, Thane & Ors. vs. Competent Authority And District Deputy Registrar, Thane & Anr.**¹. In the said case, an Agreement had been entered into by the Developer with the Purchaser on 26th November, 2001, in which a similar clause like clause No.8 was in existence. It appears that on 27th November, 2006 an Architect of the Petitioner/Builders issued a letter indicating that, as per the area statement and as per sanctioned DC Rules, the balance FSI in respect of the entire plot was sought for from the Deputy Director of Town Planning.

In other words, the additional FSI sought for by the Petitioner in the above-referred case was based on the DC Rules which have already come into existence prior to the impugned order dated 5th May, 2014 in that case.

1 2015(4)Mh.L.J. 721

15] In the present case, the impugned order came to be passed on 31st May, 2018. The DC Rules being relied upon by the Petitioner enhancing FSI came into force on 13th November, 2018. Consequently, the Judgment relied upon by the Petitioner in the present case is of no real consequence.

16] In conclusion, we are of the considered view that the Petitioner by not affecting the Conveyance Deemed in favour of Respondent No.2-Society has infringed requirement of Section 11(1) of the MOFA and Competent Authority was wholly justified in issuing direction under Section 11(4) of the MOFA for deemed conveyance. Hence, we uphold the said order passed by the Competent Authority though for reasons noted in the present Judgment.

17] Accordingly, Writ Petition No.2834 of 2018 stands dismissed. Rule stands discharged and interim orders stand vacated.

[A.M.BADAR, J]

[INDRAJIT MAHANTY, J]