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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.613 OF 2018
ALONGWITH
CIVIL APPLICATION NO.1396 OF 2018
IN
SECOND APPEAL NO.613 OF 2018**

Smt. Snehalata Vasant Deshpande
Since deceased, through her heir
and legal representative:

Prafulla Vasant Deshpande

.... Appellant.

V/s

Sudhakar Vasudev Khanzode

Since deceased through his heirs and legal
representatives

1(a) Saudamini S. Khanzode and Others

.... Respondents.

Mr. Rajesh S. Datar for the Appellant.

Mr. S.S. Patwardhan i/b Mr. Ashish T. Suryavanshi for Respondent
Nos. 1A to 1C.

CORAM: NITIN W. SAMBRE, J.

DATE: JANUARY 14, 2020

P.C.:-

1] Respondent No.1/original Plaintiff initiated Regular Civil Suit
No.590 of 2003 for enforcement of statutory obligations.

2] Respondent No.2 entered into an agreement with the present
Appellant/Defendant No.1 for development of plot which was owned
by her. The said agreement between Defendant No.1 and Defendant

No.2 is dated 16/4/1982 and further Power of Attorney for developing property of Defendant No.1 i.e. Appellant herein came to be executed on 2/5/1982 which is at Exhibit-44.

3] Based on Exhibit-44, original Defendant No.2 entered into registered agreement of sale of the suit property on 2/12/1982 at Exhibit-53 in favour of Plaintiff i.e. present Respondent No.1. It is out of this agreement-Exhibit-53, agreement between Defendant No.2 and original Defendant No.1 dated 16/4/1982 and Power of Attorney-Exhibit 44, suit came to be initiated by Respondent No.1 with the following prayers:-

- “a. Defendants be directed to execute conveyance in favour of the Plaintiff.
- b. Defendants kindly be directed not to obstruct Plaintiff to use common areas and common facilities.
- c. Defendant No.1 kindly be directed to remove lock of the terrace and permit this Plaintiff to carry out waterproofing of the terrace and permit the Plaintiff to construct overhead water

tank on the terrace and defendant may kindly be directed to use said terrace as common terrace without obstructing plaintiff from using it in any manner.

d. The Defendant no.1 kindly be directed to remove lock of the front gate and remove benbu partition in the front side of the suit property and permit this Plaintiff to park his car inside the gate.

e. Any other orders in the interest of justice may be passed.

f. Cost of the suit may be awarded to the Plaintiff.”

4] The claim was resisted by the present Appellant on the ground that it was never agreed between the parties to transfer the common area which is for parking and terrace in favour of Respondents.

5] Considering the claim put-forth by the rival parties, Trial Court framed issues at Exhibit-38. The said issues and findings thereon read

as under:-

Sr.No.	Issues	Findings
1	Whether the plaintiff proves that defendant no.2 had agreed to complete the construction of flat no.3 within the period of eight months as per agreement dt. 02.12.1982?	Yes
2	Whether the plaintiff proves that the defendant no.2 had agreed to transfer the title of the land along with super structure thereon in favour of the plaintiff as per agreement dt. 02.12.1982?	No.
3	Whether the plaintiff proves that defendant no.1 is depriving the plaintiff from using the common area including open space and terrace, spaces, as alleged?	Yes
4	Whether the suit is barred by the principle of res-judicata in view of the dismissal of the suit no. 1302/85 on 03.04.1995?	No
5	Whether the suit is barred by law of limitation?	No
6	Whether the suit is maintainable	Yes
7	Whether the defendants should be directed to execute the conveyance deed in favour of the plaintiff, as prayed?	No
8	Whether the plaintiff is entitled for injunction relating to common areas and common facilities against the defendants as prayed?	Yes
9	Whether the plaintiff is entitled for mandatory injunction against defendant no.1 for removal of lock of the terrace for permitting the plaintiff to carry out the water proofing and to construct over head tank on the terrace?	Yes

10	Whether the plaintiff is also entitled for injunction against defendant no.1 for removal of lock of front gate and Bamboo partition in the front side of the suit property and to permit the plaintiff to park his car inside the gate?	Yes
11	What order and decree?	As per final order.

Trial Court accordingly decreed the suit vide its judgment and order dated 10/12/2012 which was confirmed in appeal by the learned District Judge vide judgment and order dated 27/8/2018. As such, present second appeal.

6] Shri Datar, learned Counsel for the Appellant/original Defendant No.1 would urge that the Courts below committed an error apparent on the face of record in recording a finding that Appellant/original Defendant No.1 is a promoter within the meaning of sub-clause (c) of Section 2 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as “the Act”). According to him, restricted leasehold rights are conferred on the Appellant and as such, Appellant’s authorization in favour of original Defendant No.2 to develop the property will not bring him within the meaning of

aforesaid sub-clause to mean to be a promoter.

7] Next contention is, the agreement entered into between Respondent No.2 and original Plaintiff i.e. Respondent No.1, is contrary to the terms of agreement dated 16/4/1982 between Defendants and also Power of Attorney at Exhibit-44. According to him, as such, both the Courts below have granted such relief to which Respondent No.1/original Plaintiff was not entitled to.

8] While countering the aforesaid submissions, learned Counsel for Respondents would urge that the relief granted is based on interpretation of sub-clause (c) of Section 2 of the Act. He would invite my attention to very language employed in the said sub-clause (c), so as to emphasize that the Appellant is very much covered within the meaning of the word “promoter” as defined under sub-clause (c) of Section 2 of the Act. Both the Counsel, with their respective articulations, would rely on the terms of Power of Attorney dated 2/5/1982 at Exhibit-44, agreement of development inter se entered into between Defendants dated 16/4/1982 and also terms of registered agreement-Exhibit-53 dated 2/12/1982.

9] Considered rival submissions.

10] This Court is required to analyse, as to whether the Appellant could be termed as “promoter” within the meaning of sub-clause (c) of Section 2 of the Act. The term “promoter” is defined under sub-clause (c) of Section 2 of the Act, which reads thus:

2(c) [“promoter” 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;”

11] The language employed in the aforesaid sub-clause (c) of Section 2 of the Act is quite clear, as “promoter” could be termed to be a person who constructs or cause to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons.

12] Though learned Counsel for the Appellant has claimed that the Appellant has restricted leasehold rights and no absolute ownership rights of the suit property, the said submission cannot be stretched to mean that embargo is created on the right of the Appellant to transfer the leasehold rights pursuant to agreement entered into inter se between Defendants and in turn by Defendant No.2 in favour of the Plaintiff. Plain reading of terms of the Power of Attorney-Exhibit-44, agreement of sale executed between Defendant No.2 in favour of Plaintiff at Exhibit-53 and inter se agreement between Defendants dated 16/4/1982 in categorical terms establish that the Appellant has authorized Defendant No.2 to enter into agreement of sale of flat in favour of Plaintiff. Such authorization of sale cannot be termed to mean transfer of such interest, may be restrictive interest, as is claimed by the Appellant in property in question in the form of leasehold rights.

13] Parties are in agreement that Respondent/Plaintiff is already admitted as a member of the Society who has executed lease deed in favour of the Appellant in the backdrop of the transfer agreement in

favour of the Appellant.

14] Though learned Counsel for the Appellant has relied on clause-6 of the Power of Attorney to mean that power to transfer absolute right in favour of Respondent/Plaintiff about parking space and terrace area was not provided for. However, such transfer was not agreed to be effected by Defendant No.2 in favour of Plaintiff for right of enjoyment of terrace and upon parking space.

15] In the aforesaid backdrop, the submission of the learned Counsel for the Appellant that the Appellant cannot be termed as “promoter” within the meaning of sub-clause (c) of Section 2 of the Act, cannot be accepted.

16] In my opinion, no interference is called for in this second appeal which is against concurrent findings. Appeal fails and the same stands dismissed. As a consequence of dismissal of the appeal, all pending applications, if any, also stand rejected.

(NITIN W. SAMBRE, J.)