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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5394 OF 2013
WITH
WRIT PETITION NO.5754 OF 2013**

Sanjay Jayant Pawar and Ors.Petitioners

V/s

Messrs Indira Complex Co-operative
Housing Society Ltd and Ors.Respondents

Mr. S.V. Palsuledesai for the Petitioners in both the Writ Petitions.

Mr. R.S. Apte, Sr. Advocate i/b Mr. Chetan Patil for Respondent No.1
in both the Writ Petitions.

Mr Vikram Walawalkar a/w Mr. Amey Sawant i/b Mr. Ashish Loke for
Respondent No.3 in Writ Petition No.5394 of 2013 and for
Respondent No.4 in Writ Petition No.5754 of 2013.

CORAM: NITIN W. SAMBRE, J.

DATE: AUGUST 24, 2021

P.C.:-

1] Both these Petitions, by consent, are disposed of by this
common order.

2] Both these Petitions are preferred by the judgment debtors Nos.
4(a) to 4(d), who claim to be the owner of suit property, questioning
the order dated 5th October, 2012 and 9th April, 2013 passed below
Exhibit-1 and Exhibit-24 respectively.

3] Facts necessary for deciding present Petitions are as under:-

4] Special Civil Suit No.61 of 2011 initiated by Respondent No.1 came to be decreed on 22nd April, 2009. The decree reads thus:-

“ORDER

1] The suit is partly decreed with proportionate Costs.

2] It is declared that the Plaintiff Society having two buildings “SHRI SADAN” AND “SHRI BHAVAN” is the Co. Operative Housing Society and is entitled for all rights and privileges under MAHARASHTRA OWNERSHIP OF FLATS ACT.

3) The Defendants Nos. 1 to 4 are hereby directed to execute within four months the conveyance deed in respect of suit premises “SHRI SADAN” AND SHRI BHAVAN” situated on the suit Plot No.192 admeasuring area 2476 Sq. mtrs in favour of the plaintiff society on getting the consent of society for utilizing the additional F.S.I. of 881 sq. meters.

4] The Defendants Nos. 1 to 4 are hereby restrained from making additional construction over the suit plot till execution of conveyance in favour of plaintiff society.

5] The suit of the plaintiff for the decree of Rs 1,28,000/- as well as for the decree of Rs 8,66,411/- is hereby dismissed with costs.”

5] Application-Exhibit-1 in Misc. Application No.53 of 2011 was taken out by the Petitioners for clarification of Item No.3 of the operative part of the aforesaid judgment and decree. It is claimed by

the Petitioners that in the decree, Defendant Nos. 1 to 4 were directed to execute Conveyance Deed of suit premises known as “SHRI SADAN” and “SHRI BHAVAN” situated at suit Plot No.192 admeasuring 2476 sq. meters in favour of the Plaintiff-Society on getting consent of Society for utilizing FSI on 881 sq. meters adjoining of open area. As such, clarification is sought as to whether Conveyance Deed is to be executed alongwith consent for utilization of FSI on 881 sq. meters i.e. from decree holder-Society. As far as Application-Exhibit-24 is concerned, same was moved by decree holder in execution of the Conveyance Deed and the Executing Court vide another impugned order dated 9th April, 2013 appointed Court Commissioner for execution of the Conveyance Deed.

6] Contentions of Mr. Palsuledesai, learned Counsel for the Petitioners in both the Petitions are, Court below committed an error in clarifying that it is not binding on the part of decree holder-Society to give consent for utilization of balance FSI in lieu of conveyance. According to him, decree has to be read as a whole. Reading of issue No. 3 and 4 together demonstrates that the Petitioners were permitted to carry out construction on the balance FSI over 881 sq. meters of

open area, after executing conveyance in favour of decree holder-Society. His further contentions are, the Court below which has granted clarification has misread the decree to mean that execution of consent by decree holder is not necessary, particularly having regard to reasons mentioned in the decree under execution. Further contention of learned Counsel for the Petitioners are, the Court below should have appreciated the order dated 16th March, 2004 in Appeal from Order No.68 of 2004, so also the reasoning given by the Court below while answering issues, particularly issue No.7, which along with its answer reads thus:-

Issue	Answer
“7. Do defendants prove that the construction is not carried out on the complete land admeasuring 2746 sq.mtrs and the land admeasuring 976 sq. mtrs is still lying vacant as F.S.I. for which the defendants are having right to carry on the construction?”	“FSI of 881 sq. mtrs is available for which defendants have right to construct but with consent of plaintiff.”

He would claim that once the said findings have attained finality against the decree holders, as findings to that effect have not been

challenged, Petitioners are entitled for relief of carrying out construction on the FSI which is available on the balance plot area of 881 sq. meters.

7] While countering the aforesaid submissions, Mr. R.S. Apte, learned Senior Counsel appearing for Respondent No.1 would support the judgment impugned and would urge that orders impugned are in tune with the law laid down by the Apex Court in the matter of *Shailaja Kamalakar Limaye and Ors vs. Nilkant Ganesh Pethe and Ors* reported in **2010 (3) All MR 678** and *Madhuvihar Co-operative Housing Society and Ors vs. M/s. Jayantilal Investments and Ors.* reported in **2010 (6) ALL MR 600**. According to him, even in the matter of *M/s Noopur Developers vs. Himanshu V. Ganatra and Ors* reported in **2010(2) ALL MR 791**, this High Court has clarified the position as regards consent to be extended by members of the Society. He would urge that Court below has rightly held that execution of consent is not mandatory and still the Respondent-Society is entitled to get the conveyance executed in their favour.

8] Counsel for Respondent No.3 in Writ Petition No.5394 of 2013

and for Respondent No.4 in Writ Petition No.5754 of 2013 have supported the cause of the Petitioners and urged that it is necessary that decree holder who is Respondent No.1 herein must execute the consent.

9] I have considered rival submissions.

10] The order impugned passed below Exhibit-1 which is questioned in Writ Petition No.5394 of 2013 clarifies that second part of the decree, particularly Clause-2 is held to be not binding on the Plaintiff-Society. For such clarification, basis is formed to be the law laid down in the three judgments viz *Shailaja Kamalakar Limaye, Madhuvihar Co-operative Housing Society and M/s Noopou Developers* cited supra. The fact remains that alongwith other Defendants, present Petitioners i.e. Defendant Nos. 4(a) to 4(d) were directed to execute the Conveyance Deed in respect of the land admeasuring 2476 sq meters situated on plot No.192 in favour of the decree holder. Such conveyance was to be executed after getting consent of the decree holder-Society for utilization of FSI on 881 sq. meters of open area. Clause-4 of the said decree further restrains the Petitioners and other

Defendants from making additional construction over the suit plot till execution of the conveyance. In para 16 of the judgment, it has been specifically held as under:-

“16) AS TO ISSUE NO.7

As discussed in the reasoning to the issue no.5, it is proved that the entire construction is not carried out over the land admeasuring 2476 sq. mtrs. and the FSI of 881 sq. mtrs is still available. Hence, I answer this issue that FSI of 881 sq. mtrs. is available for which defendants have right to construct but with consent of plaintiff.”

11] Once the aforesaid findings are not challenged by the Petitioners or by the aggrieved parties to decree, such observations will govern the lis between the parties. Hence, it cannot be said that Court below has committed an error in passing the order impugned, thereby clarifying the decree.

12] Since Executing Court cannot go beyond decree and the Court passing decree has already substantiated its finding by giving sufficient

reasons that it is not necessary for decree holders to give consent, in my opinion, for interference in extraordinary jurisdiction in the order impugned dated 5th October, 2012 passed below Exhibit-1, no case is made out by the judgment debtors/Petitioners.

13] That being so, Writ Petition No.5394 of 2013 stands dismissed.

14] As far as Writ Petition No.5754 of 2013 is concerned, the order impugned is dated 9th April, 2013 appointing Court Commissioner which is a consequence of the order dated 5th October, 2012 challenge to which is rejected vide aforesaid order. The appointment of Court Commissioner vide order impugned dated 9th April, 2013 is for execution of decree. Since steps taken vide order dated 9th April 2013 are as consequences of decree and execution proceedings, in my opinion, no legal infirmity or illegality could be noticed. Petition No.5754 of 2013 as such fails and same stands dismissed.

15] Both the above Writ Petitions are accordingly disposed of.

(NITIN W. SAMBRE, J.)