

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

WRIT PETITION NO.5138 OF 2017

M/s. National Building

..Petitioner

Versus

Sanjeev Enclave Co-operative Housing
Society Ltd.

..Respondent

Mr. P. S. Dani, Senior Advocate a/w Mr. D. V. Deokar & Mr. Pinakin Modi i/by M/s. Parimal K. Shroff & Co., for the Petitioner.

Mr. Chanchal Choudhary i/by Xpress Legal, for the Respondent.

CORAM : NITIN W. SAMBRE, J.

DATE : 15th FEBRUARY, 2022

P.C.

1. This petition is arising out of order dated 18th January, 2017 passed by the City Civil Court at Mumbai in Misc. Application No.116 of 2013 in Execution Application No.107 of 2011 arising out of consent decree dated 3rd August, 2004 passed in Suit No.2197 of 2019 for execution of conveyance under the provisions of Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "the MOFA Act" for the sake of brevity).

2. The facts necessary for deciding the present writ

petition are as under :-

Suit No.2197 of 1999 was initiated by the respondent/decreed holder alleging that the petitioner has statutory obligation under the provisions of the MOFA Act to convey right, title and interest in respect of land, obtain completion certificate from the Corporation, regulate water connection, injunction restraining the petitioner from altering existing structure, removal of obstruction and rendition accounts of the amount.

3. The petitioner, a developer has entered into a development agreement with third party owner, namely, Mr. Anand and accordingly developed the suit property.

4. In the aforesaid suit, consent terms were tendered between the parties on 3rd August, 2004 and from very same day, the suit came to be disposed of in view of consent terms.

5. The petitioner having not performed his part of obligation under the consent terms, Execution Application No.107 of 2011 was taken out by the respondent/decreed holder seeking execution of the aforesaid consent decree dated 3rd August, 2004.

6. Since the execution proceedings were taken out

after a period of more than two years, a notice under Order XXI Rule 22 of the CPC was served on the petitioner/judgment debtor.

7. The said notice was made absolute by the order of the Registrar of the City Civil Court on 28th April, 2011. As a sequel of above, alleging the said Notice of Motion to be *ex-parte* the petitioner has taken out Chamber Summons questioning the same.

8. The fact remains that the order of Registrar on the said notice under Order XXI Rule 22 of the CPC remained absolute in favour of the respondent/decreed holder.

9. A draft conveyance pursuant to the provisions of Order XXI Rule 34 of the CPC was furnished by the respondent to be executed pursuant to the terms of consent decree.

10. At this stage of the execution proceedings, the petitioner/judgment debtor has taken out application for dismissal of execution vide MA No.116 of 2013, which is rejected vide impugned order dated 18th January, 2017. As such, this petition.

11. Learned senior counsel Mr. P. S. Dani, appearing

for the petitioner/judgment debtor would urge that the execution is not maintainable having regard to the fact that the consent decree is sought to be executed against a third party. According to him, the objection in the aforesaid background raised by the petitioner pursuant to the provisions of Section 47 of the CPC has to be held to be sustainable in law, as mandate to the third party for specific performance cannot be ordered in execution. He would further urge that even if the petitioner has signed the consent terms and a decree is passed, the respondent has not complied or discharged of its obligation including that of under the provisions of the MOFA Act. In this background, he would urge that the Executing Court cannot compel the petitioner to execute deed of conveyance in favour of the decree holder. A support is specifically drawn from the provisions of Section 47 of the CPC.

12. While countering aforesaid submissions, counsel for the respondent/decreed holder would urge that the claim put forth by the petitioner is without any legal basis and used as means for arm-twisting of the members of the society. According to him, the petitioner is interested in the open space and somehow avoiding to discharge its obligation under the consent decree. He would urge that the consent terms in categorical terms speaks of

obligations of the petitioner. As such, he has sought dismissal of the petition.

13. I have appreciated the said submissions. The fact about the consent terms being tendered in the suit and accordingly a consent decree was drawn on 3rd August, 2004 is not disputed by either of the parties. Such consent terms cast a specific obligation on the petitioner not only of execution of conveyance in favour of the respondent/decree holder but also discharging the financial liability towards payment of maintenance by the owner. This consent deed was duly signed by Power of Attorney holder of the petitioner, namely, Mr. D. G. Ghai.

The development agreement entered with the owner Mr. Anand and the petitioner demonstrates that the petitioner has entered into the shoes of owner in the matter of execution of conveyance deed under the provisions of Section 5A r/w Section 11 of the MOFA Act. As such, the petitioner cannot take shelter of the owner being not party to the consent decree, as the obligation is on the petitioner and not the owner to execute the conveyance deed under the provisions of MOFA Act.

14. The terms of the obligation to be discharged by the petitioner/judgment debtor are quite clear as regards execution of the conveyance.

15. The consent terms speaks of the forwarding of the conveyance for execution within three months of the occupation certificate. As far as the shelter taken by the petitioner *qua* the execution of conveyance by the third party is concerned, the third party/owner has not raised any objection in the present proceedings till this date, rather he appears to be in possession of the developed property and enjoying the same without paying any maintenance to the respondent/society. The occupancy certificate is issued on 23rd February, 2005 by the Corporation. Amongst the other obligations in the consent decree which were to be discharged are at page No.33 clause 5(x) which admittedly are not complied till this date by the petitioner.

16. In this background, the claim put forth by the petitioner that the consent decree cannot be executed against third party will be of hardly any significance, particularly, when the petitioner cannot canvass the case of third party with whom he has entered into development agreement and equally authorized to execute the transfers, so also the conveyance.

17. Once the development agreement between the owner and the petitioner is not disputed by the petitioner and pursuant thereto the members of the society were put in possession of the respective flats, it is obligatory on the

part of the petitioner to execute the conveyance deed. The shelter taken by the petitioner that the owner is not party can be of hardly any significance, as same has no legal basis.

18. In this background, in my opinion, no case for interference in extraordinary jurisdiction is made out. The petition as such fails, stands dismissed.

[NITIN W. SAMBRE, J.]