

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

FIRST APPEAL NO.390 OF 2006

Mrs. Sicily Varghese Kadamthottu

...Appellant
(Org. Plaintiff)

Vs

Shri Ramanlal Jayshankar Trivedi
(Deceased) By Legal Heir & Anr.

...Respondents
(Org. Defendants)

...

Mr. Arun Panickar for the Appellant.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : APRIL 28, 2022.
PRONOUNCED ON: MAY 2, 2022.

JUDGMENT :

This Appeal challenges the order dated 22nd December, 2005 rejecting the plaint, i.e. ‘Deemed Decree’, purportedly passed in exercise of powers under Order 7 Rule 11(d) of the Code of Civil Procedure, 1908 (‘Code’ for short).

2 At the outset, it may be stated that the learned trial court, fell in error, in exercise of the jurisdiction, by rejecting the plaint under Order 7 Rule 11(d) of the Code, after framing the issues. Law, is to reject the plaint, for the suit being barred by any law

under Order 7 Rule 11(d) of the Code, the Court needs to be guided by averments in the plaint and not the defence taken. Herein, plaint was rejected after framing the issues. On this ground alone, appeal deserves to be allowed by quashing the 'Deemed Decree' passed in Suit No.3049 of 1995. However, having regard to the facts of the case, I deem it appropriate to deal with certain issues arose for consideration in this Appeal.

3 Briefly stated facts of the case are as under;

Defendants are promoters within the meaning of Section 2(c) of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963 ('MOFA' for short). M/s. Sushma Builders, proprietary concern of defendant no.2, agreed to sell Flat No.25 admeasuring 43.25 sq.mtrs built-up area in Building No.2, Radha-krishna Nagar, Andheri (East), Bombay ('Suit Flat' for short) to the appellant on 29th June, 1988. Defendant No.2 reduced its offer to sell the Suit Flat, in writing and it was accepted by the appellant/plaintiff. Offer in writing reads as under;

“Subject to Bombay Jurisdiction

No. _____

Date: 29.6.1988

SUSHMABUILDERS

BUILDERS, ENGINEER & CONTRACTORS

Esplanade Mansions, 4th Floor, Room
No.3, Mahatma Gandhi Road, Kala Ghoda, Fort,
Bombay-400 023.

*RECEIVED with thanks from Shri/Smt. Sieily
Verghese Kadamthattu, Address 59, Great Western
Building, Maharashtra of Chambers of Commerce, Fort,
Bombay 400 093 sum of Rupees One Thousand One
only by Cheque/Cash in part/full payment for booking
of flat/shop/garage/parking space at the rate of Rupees
Two Hundred Fifty One Only per sq.foot built up area
in Radha Krishna Nagar on 5th Floor
flat/shop/garage/Parking Space No.25 app. Built up area
43.25 sq.m. plinth area at Building No.2 Village Mogra
Andheri (East) Bombay.*

Rs.1000/-

For SUSHMA BUILDERS

*As per the terms and
conditions mentioned in the
Agreement for Sale
(Subject to Realization of Cheque)”*

Sd/-

Dated: 29.6.1988

. Whereafter, in pursuance to the offer, plaintiff paid
Rs.1,82,000/- towards the consideration of the Suit Flat and it was
accepted by the defendant no.2. Although the plaintiff demanded the
receipts of such payments and requested defendant no.2 to execute

the agreement in terms of Section 4 of the MOFA concerning the Suit Flat, defendant no.2 avoided to issue receipts and neglected to execute agreement in writing. Thus, vide notice dated 15th April, 1995, plaintiff called upon defendants to execute the agreement and discharge the obligations under the MOFA. Notice was not responded by the defendant no.2. Neither defendant no.2 executed agreement nor discharged the obligations under the MOFA. Therefore, appellant instituted suit in April, 1995, seeking enforcement of statutory obligations under the MOFA, by valuing the suit under Section 6(iv) (j) of the Bombay Court-fees Act, 1959. The decree he sought, was that defendants be directed to execute agreement for sale in respect of Flat No.25, (now Flat No.503), 5th floor, Building No.2, Radha-Krishna Nagar, Andheri (East), Bombay and register the same as provided in Section 4 of the MOFA as also the parking slot that was agreed to be sold by the defendant no.2 to the plaintiff.

4 Defendants resisted suit contending that in, absence of agreement in writing, much less a registered document, suit seeking enforcement of statutory obligations was not maintainable under

Section 4 of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963.

5 The learned trial Judge upon appreciating the pleadings, framed seven issues. Out of which, second issue was;

“Whether Plaintiff proves that suit is maintainable in absence of written agreement for sale ?”

6 The learned trial Court held that ‘party seeking enforcement of statutory obligations under the MOFA, formal agreement in writing cannot be dispensed, with and since in the case in hand, there was no agreement in writing, suit was hit by Section 4 of the MOFA. As a result, the trial Court held, the suit was not maintainable. Resultantly, the plaint was rejected.

7 Feeling aggrieved by the order rejecting the plaint, being ‘Deemed Decree’, plaintiff has preferred this Appeal.

8 Heard learned counsel for the appellant. Though

respondents/defendants were served, they remained absent.

9 Section 4 of the MOFA requires that promoter, who intends to construct flat for sale on ownership basis shall before he accepts any sum of money as advance payment or deposit, enter into a written agreement for sale, with each of the persons, who were to purchase the flats and the agreement shall be registered under the Registration Act, 1908. In **Association of Commerce House Block Owners Limited v. Vishndas Samaldas (1981) 83 Bombay Law Reporter, 339**, the High Court had held that *‘Section 4 contains an absolute enactment, which must be obeyed absolutely. If such absolute enactment was not obeyed, the consequence is that, the agreement between the promoter and the purchaser was wholly invalid and altogether void, creating no rights between the parties.’* In view of this judgment, many purchasers were not able to take proceedings for specific performance of such agreements and to get conveyance from the promoter for transferring his right, title and interest to them. This ruling has virtually defeated rights of *bona fide* purchasers. In the fact situation, Section 4A was inserted by

Maharashtra Act No.5 of 1984 in principal Act, which provided that where an agreement for sale entered into, whether entered into before or after the commencement of MOFA, remains unregistered for any reason, then notwithstanding anything contained in any law for the time being in force, or in any judgment, decree or order of any Court, it may be received as evidence of a contract in a suit for specific performance under Chapter II of Specific Relief Act, 1963 or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument. Thus, Section 4A has overriding effect over Section 4 of the MOFA. In the case of **M/s. Harshal Developers Pvt. Ltd. v. Mr. Manohar Gopal Bavdekar**, this Court has held that *‘In view of Section 4A of the Act, non-registration, of document does not become non-est or valueless. It does carry a character and value of the regular agreement for sale for immovable property. Therefore, a suit for specific performance or performance of a contract can be instituted on the basis of an unregistered agreement of sale.’* In the case in hand, offer letter dated 29th June, 1988, annexed to plaint,

substantially, adhere to particulars of ‘Suit Flat’ in terms of Clause (a) of Sub-section (1A) of Section 4 of MOFA. Likewise, offer letter, by defendant-builder, signified to the plaintiff their willingness to offer Flat No.25, with a view to obtain assent of plaintiff. Therefore, defendant no.2 made the offer and proposal to which plaintiff signified his assent by paying Rs.1,82,000/-. Thus, agreement was arrived at between the appellant and defendant no.2 and it was enforceable in law.

10 Thus, for the foregoing reasons, Appeal is allowed and impugned decree drawn in terms of order dated 22nd December, 2005 in Suit No.3049 of 1995, passed by the Bombay City Civil Court at Bombay, is quashed and set aside. Hence, following order;

- (1) Suit No.3049 of 1995 is restored to file.
- (2) Learned Judge, shall conclude the trial in Suit No.3049 of 1995 on/or before 31st December, 2022, in accordance with law.
- (3) Parties to suit shall appear before the trial Court on 10th June, 2022.

11 First Appeal is disposed of.

(SANDEEP K. SHINDE, J.)