IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION 8442 OF 2022

Rukshana Fazal Baig … Petitioner
Versus
Kanchan Harshad Bongale and Anr. … Respondents

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Mr. Yatin R. Shah a/w Harsha Shah and Divya Tekwani for the Petitioner.
Mr. D. S. Rajapurkar for the Respondents.

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CORAM : ROHIT B. DEO, J.
DATE : 29th JULY, 2022

P.C. :-

. The petitioner is the original defendant and the respondents are the original plaintiffs in Suit 3222 of 2011 which is brought for specific performance of the agreement for sale dated 24th March, 2010 (suit agreement) the subject matter of which is flat 283 situated at building 6 of Khernagar Ekta Co-operative Housing Society Ltd., Khernagar, Bandra (West), Mumbai.

2. The defendant took out Notice of Motion 3241 of 2019 seeking impounding of the suit agreement. The defendant contended that the suit agreement is an unregistered document which is not stamped as required by law and is inadmissible in evidence.

3. The plaintiffs filed affidavit in response to the notice of motion contending that the notice of motion is taken out only to delay the proceedings. The plaintiffs contended that an unregistered document can be the basis of plea for specific performance of contract.

4. The learned Trial Judge was pleased to dismiss the notice of motion vide order dated 19th March, 2022, which is impugned herein. The learned Trial Judge referred to the provisions of Section 17 of the Indian Registration Act, 1908 (for short 'Registration Act') and Section 53A of the Transfer of Property Act, 1882 (for short 'T.P. Act'). The learned Trial Judge held that the suit agreement is not a document of which registration is compulsory and all that Section 53A of the T.P. Act provides is that such document cannot be the basis of claiming protective relief under Section 53A of the T.P. Act. The learned Trial Judge then considered the proviso to Section 49 of the Registration Act and observed that an unregistered document may be received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. Discussing, the decisions which the defendants pressed in service to buttress the submission that every agreement of sale is compulsorily registrable, the learned Trial Judge noted that the

decisions are rendered in the context of the provisions of Section 4 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short 'MOFA'). The learned Trial Judge held that Section 4 of the MOFA obligates a developer, promoter or builder to execute registered agreement in favour of the purchaser after receipt of not more than 20% of the sale consideration and the said provisions do not apply to the suit agreement. The learned Trial Judge then noted that the suit is for specific performance of the suit agreement and not for enforcement of statutory rights under the MOFA.

5. The learned counsel for the defendant reiterated the submission which did not find favour with the learned Trial Judge. It is vehemently submitted that every agreement of sale is compulsorily registrable. The learned counsel for the defendant submitted that the issue involved is not whether the suit agreement is required to be stamped as deemed conveyance by virtue of Explanation I to Article 25 of Schedule I of the Bombay Stamp Act, 1958 (for short 'Stamp Act'), rather, the issue is whether the document is compulsorily registrable in view of the provisions of the MOFA.

6. It is apparent that the suit agreement is not within the scope and

ambit of Explanation I to Article 25 of Schedule I of the Stamp Act since the possession of the subject property is to be delivered after the fulfillment by the parties of their respective obligations. The only issue is whether the learned counsel for the defendant is right in submitting that in view of the provisions of Section 4 of the MOFA, the suit agreement is compulsorily registrable.

7. Section 4 of the MOFA reads thus :-

> *"4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered.— (1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before he accepts any sum of money as advance payment or deposit, which shall not be more, than 20 per cent. of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (Act 16 of 1908) (hereinafter in this section referred to as Registration Act)] and such agreement shall be in the prescribed form.*
>
> *(1-A) The agreement to be prescribed and sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b)—*
>
> *(a) particulars.—*
>
> *(i) if the building is to be constructed, the liability of the promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force;*
>
> *(ii) the date by which the possession of the flat is to be handed over to purchaser;*
>
> *(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;*

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;

(v) the precise nature of the organisation to be constituted of the persons who have taken or are to take the flats;

(vi) the nature, extent and description of limited common areas and facilities;

(vii) the nature, extent and description of limited common areas and facilities;

(viii) percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;

(ix) statement of the use of which the flat is intended and restriction of its use, if any;

(x) percentage of undivided interests in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(b) copies of documents,—

(i) the certificate by an Attorney-at-law or Advocate under clause (a) of sub-section (2) of Section 3;

(ii) Property Card or extract of Village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the promoter to the land on which the fiats are constructed or are to be constructed;

(iii) the plans and specifications of the flat as approved by the concerned local authority.

(2) Any agreement for sale entered into under sub-section(1) shall be presented by the promoter or by any other person competent to do so under Section 32 of the Registration Act, at the proper registration office for registration, within the time allowed under Sections 23 to 26 (both inclusive)of the said Act and execution thereof shall be admitted before the registering officer by the person executing the document or his representative, assign or agent as laid down in Sections 34 and 35 of the said Act also within, the time aforesaid:

Provided that where any agreement for sale is entered into, or is purported, to be entered into, under sub-section (1), at any time before the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer), (Amendment and Validating Provisions) Act, 1983 (Mah. Act 5 of 1984), and such agreement was not presented for registration or was *presented for registration but its execution was not admitted before the registration officer by the person concerned, before the commencement of the said Act, then such document may be presented at the proper registration office for registration and its execution may be admitted, by any of the persons concerned referred to above in this sub-section, on or before the 31st December 1984, and the registering officer shall accept such document for registration, and register it under the Registration Act as if it were presented, and its execution was admitted, within the time laid down in the Registration Act:*

Provided further that on presenting a document for registration as aforesaid if the person execution such document or his representative, assign or agent do not appear before the registering officer and admit the execution of the document the registering officer shall cause a summons to be issued under Section 36 of the Registration Act requiring the executant to appear at the registration office, either in person or by duly authorised agent, at a time fixed in the summons. If the executant fails to appear in compliance with the summons, the execution of the document shall be deemed to be admitted by him and the registering officer may proceed to register the document accordingly. If the executant appears before the registering officer as required by the summons but denies execution of the document, the registering officer shall, after giving him a reasonable opportunity of being heard if satisfied that the document has been executed by him, proceed to register the document accordingly."

8. Section 4 of the MOFA obligates the promoters to enter into a written agreement for sale with the purchaser of the flat before accepting any money as advance or deposit and provides that such advance payment of money shall not be more than 20% of the agreed sale consideration. Section 4 (1-A) stipulates that the agreement shall be in the prescribed form and shall contain, *inter-alia* the particulars as prescribed in Clause (a). It would be relevant to notice the provisions of Section 4 (1-A) which reads thus :-

"Section 4(1A) further provides that the agreement shall be in the prescribed form and to contain, inter alia, particulars as specified in clause

(a) and to such agreement there shall be attached the copies of the documents specified in clause (b). Particulars to be contained in the agreement are set out in clause (a)(i) to (x) and copies of documents to be attached to such an agreement are set out in clause (b)(i) to (iii). It is not disputed that agreement in question is in compliance with these provisions in all material respects. It is therefore not necessary to set out the particulars contained in clauses (a) and (b) of sub-section 1-A of section 4 of MOF Act. We may therefore straightway refer to some of the terms in the agreement which would be decisive to conclude as to whether the agreement in question is merely an agreement for sale or virtually a conveyance without any further obligation on promoter to execute a conveyance of sale later on. Agreement is at Exh. A. Clause (ii) of the said agreement refers to the Development Agreement dated 20-9-1982 entered into between the developer Century Builders and the Priyadarshani Co-operative Housing Society. That agreement is not before the Court. We are told that under this Development Agreement certain rights were given to the developers in respect of some flats to sell."

9. In the context of the provisions of the MOFA, which are noted supra, the decision in the ***State of Maharashtra v/s. Mahavir Lalchand Rathod, 1992 (2) Bom. C.R. 1*** which is pressed in service by the learned counsel for the defendant, may now be considered.

10. Factual matrix in ***Mahavir Lalchand Rathod*** (supra) reveals that the subject agreements were executed by the builders - developers in favour of the purchasers of the flats in terms of Section 4 of the MOFA. The Division Bench proceeds on the premise that such agreements are required to be registered under Section 17(1) of the Registration Act. The issue which really fell for consideration before the Division Bench was whether such agreements for sale can be subjected to payment of stamp duty in terms of Section 32-A read with Article 25 of Schedule I

of the Stamp Act.

The Division Bench noted in paragraph 10 that the subject agreements are drawn in terms of Section 4 of the MOFA and are executed by the developers in favour of the flat purchasers. The Division Bench then took a resume of the provisions of the MOFA and the recitals in the subject agreements and concluded that although the subject agreements are described as agreement to sell, in effect for all purposes the agreements are conveyance within the meaning of Section 2(g) of the Stamp Act in as much as the right, title and interest stand transferred in favour of the flat owners on payment of installments. The Division Bench then held that even it is assumed that the subject agreements are agreements of sale, Explanation I to Article 25 of Schedule I is attracted since there is no clause in the agreement which requires the developers to execute any other or further Deed of Conveyance at a later stage. The Division Bench sums up the conclusion, which read thus :-

"19. After considering the submissions, in our opinion, on construction of the agreement in question it must be held that although it has been described as an agreement to sell in effect and for all purposes it is a conveyance falling under section 2(g) of the Act inasmuch as the right, title and interest in the writ flat stands transferred in favour of the purchaser on payment of instalments as provided therein. Assuming that Mr. Bhandari is

right that document in question is an agreement of sale only yet such agreement of sale is dutiable under the Act by virtue of Explanation 1 to Article 25 of Schedule I of the Act. There is no clause in the agreement which requires the developers to execute any other deed of conveyance at a later stage and this position militates against the contention of the petitioner. On careful scrutiny of document in question it is difficult to hold that it is a mere agreement of sale and does not create any right, title and interest in them. It may also be stated the every agreement of sale of flat has got to be in terms of section 4 of MFO Act. We, therefore, hold that the agreement in question is a conveyance, and whether possession is given on that date or not is not the relevant and decisive factor. Such a document therefore is liable to stamp duty under article 25 in Schedule I of the Act."

In my considered view, the decision in ***Mahavir Lalchand Rathod*** (supra) does not take the case of the defendant any further. The suit agreement is not an agreement between builder or developer or promoter in favour of flat purchaser. Section 4 of the MOFA does not come into play.

In contradistinction with the agreements which the Division Bench considered, the recitals of the suit agreement do not suggest that on the payment of the consideration no further documentation is necessary for transferring effective title in favour of the plaintiffs. In the premise, it is difficult to accept the submission of the learned counsel for the defendant, that the suit agreement must be treated as deemed conveyance on the touchstone of the observations of the Division Bench in ***Mahavir Lalchand Rathod*** (supra).

11. My attention is further invited to the decision of the Apex Court in ***Hanuman Vitamin Foods Pvt. Ltd. v/s. State of Maharashtra, AIR 2000 SC 2571***. The question considered by the Apex Court was whether transfer of shares in a co-operative society is subject to levy of stamp duty under the Stamp Act. The Apex Court referred to its earlier decision in ***Veena Hasmukh Jain v/s. State of Maharashtra, AIR 1999 SC 807*** and noted that it is already held that such agreements would be covered by Article 25 of the Stamp Act. The Apex Court noted that it is held in ***Veena Veena Hasmukh Jain*** (supra) that such agreements of transfer of shares in society are in effect agreements to sell immovable property as the possession is transferred to the purchaser.

> It is important to note that the factual matrix in ***Hanuman Vitamin Foods Pvt. Ltd.*** (supra) was that the appellant was a member of the co-operative society and held 5 shares and was in occupation of office premises on the 9th floor of the building owned by the society. By agreement dated 31st March, 1986, the appellant transferred his shares for consideration of Rs.9,46,900/-. The instrument of transfer highlighted that the transferor was holding shares and one of the incidence of membership was the right to occupy the specific office premises

in the building. It is in this view of the matter, that the instrument of transfer of shares in the society is held to be deemed conveyance.

In the factual matrix, even it is assumed that the classification of the society is such, that the right to possess the apartment shall be transferred or assigned *ipso facto* by transferring the shares in favour of the plaintiffs and subject to the approval of the society, the occasion to pay stamp duty shall arise only at the stage of transfer of shares in the society.

12. The other decision which is referred is ***M/s. Deepak Corporation v/s. Pushpa Prahlad Nanderjog, AIR 1994 BOMBAY 337*** to buttress the submission that it is the duty of the Court to impound a document under Section 33 of the Stamp Act if such document is inadequately stamped and that the power can be exercised at any stage since the Court cannot become *functus officio* for the purpose of initiating action under Section 33 of the Stamp Act.

13. In my considered view, it may not be necessary to delve deeper in the articulation of the decisions which consider the scope and ambit of the provisions of the Stamp Act in the context of the power of

impounding of a document which is insufficiently stamped, since, in the present case, the suit agreement is properly stamped and is not compulsorily registrable document. The suit agreement is not an agreement envisaged under Section 4 of the MOFA. Further, the suit agreement is not an agreement which can be treated as deemed conveyance as would attract the provisions of Explanation I to Article 25 of Schedule I of the Stamp Act.

14. I do not see any error in the view taken by the learned Trial Judge. Petition is dismissed.

15. The learned Trial Judge shall expedite the hearing of the suit and is requested to dispose of the suit finally within the next nine months.

BIPIN DHARMENDER PRITHIANI

Digitally signed by BIPIN DHARMENDER PRITHIANI
Date: 2022.07.29 14:20:43 +0530

[ROHIT B. DEO, J.]