

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

WRIT PETITION NO. 14212 OF 2016

Bombay Gow Rakshak Mandali
through its Trustees 1. Shri Anil Kumar Hirjee & Ors. ...Petitioners

Versus

M/s. Alica Nagar Building No.5, Co-operative
Housing Society Ltd. & Ors. ...Respondents

Mr. Rohan Sawant with Ms. Kirtida Chandarana & Ms. Rukayyah Mahuwala, i/b. Mahernosh Humranwala, for the Petitioners.

Mr. Ganesh Ambekar, i/b. Thakare Jariwal & Associates, for Respondent No.2.

Mrs. V. S. Nimbalkar, AGP, for the Respondent No.15-State.

CORAM : MADHAV J. JAMDAR, J.

DATED : 6th OCTOBER 2022

P.C. :

1. Heard Mr. Rohan Sawant, learned counsel appearing for the Petitioners, Mr. Ambekar, learned counsel appearing for the Respondent No.2 and Mrs. V. S. Nimbalkar, learned AGP appearing for the Respondent No.15-the District Deputy Registrar.

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2. The Petitioner No.1-Trust is the owner of land admeasuring 8,71,857 sq.mtrs. situated at village Akurli, Kandivali (East). The Petitioners entered into development agreement dated 13th December 1984 with Respondent No.2 regarding entire said land.

3. The Petitioners by the present Writ Petition are challenging legality and validity of order dated 9th July 2016 passed by the Respondent No.15-District Deputy Registrar, Co-operative Societies, Mumbai City (4) @ Competent Authority under section 5A of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (hereinafter referred to as “**MOFA**”) in Application No.93 of 2014.

4. Mr. Rohan Sawant, learned counsel for the Petitioners submitted that the said agreement dated 13th December 1984 has been revoked and cancelled by the Petitioners by notice dated 25th November 2011. He therefore, submitted that Respondent No.2 has no right, title and interest to proceed with the development after the said termination. He submitted that the layout is for the entire land and therefore, conveyance should have been granted in favour of all

the societies i.e. Respondent No.1 in whose favour by the impugned order, Deemed conveyance has been granted as well as in favour of Respondent Nos. 3 to 14. He further submitted that as per the said agreement, project is not completed and therefore, as per section 11 of MOFA the stage specified for execution of conveyance is yet to come. Therefore, Deemed Conveyance should not have been granted. He also submitted that though it was pointed out to the DDR that the dispute is going on between the Petitioners and Respondent No.2 and inspite of that, he proceeded with the hearing of the said application and passed the impugned order. He submitted that the Deemed Conveyance proceedings should have been kept in abeyance. He also submitted that the other societies have filed application raising preliminary issue and after hearing the parties, the matter was adjourned for deciding the preliminary issue and matter was proceeded without deciding the said preliminary issue. Thus, he submitted that the present Writ Petition be admitted and interim relief be granted.

5. Mr. Sawant, learned counsel for the Petitioners also pointed out the Award dated 29th June 2020 passed by learned sole Arbitrator in

Reference No.2 of 2015 and Reference No. 3 of 2015.

6. In support of his submissions, Mr. Sawant, learned counsel for the Petitioners relied on the following judgments:-

- (1) *M/s. Shree Chintamani Builders vs. State of Maharashtra & Ors.*¹
- (2) *Sushil Samir Co-operative Housing Society Ltd., Mumbai vs. District Deputy Registrar, Co-operative Societies, Mumbai & Ors.*²
- (3) *M/s. Gia Construction & Developers vs. Mangesh Park Co-operative Housing Society, through Secretary & Ors.*³
- (4) *Mazda Construction Company & Ors. vs. Sultanabad Darshan CHS Ltd. & Ors.*⁴
- (5) *Order dated 8th November 2021 passed by Supreme Court by which leave and interim relief has been granted. In said SLP challenge is to the order dated 11th April 2018 passed by this Court in Writ Petition No.4373 of 2017 in the matter of Angeline Randolph Pereira & Ors. vs. Suyog Industrial Estate Premises Co-operative Society Ltd. & Ors.*⁵.

1 2016 SCC OnLine Bom 9343

2 [2014 (4) Mh.L.J.]

3 Writ Petition No.576 of 2021

4 2012 SCC OnLine Bom 1266

5 2018 SCC OnLine Bom 687: (2018) 3 AIR Bom R 825

7. The Respondent No.1-society has not entered appearance inspite of service.

8. Mr. Ambekar, learned counsel appearing for the Respondent No.2 pointed out paragraph 7 and 9 of the affidavit in reply dated 3rd July 2017 filed by Respondent No.2. He submitted that entire construction regarding Respondent No.1-society building is completed and therefore, society is entitled to get the Deemed Conveyance executed.

9. Learned AGP supported the impugned order.

10. The factual position on record clearly show that the Petitioners executed agreement dated 13th December 1984 in favour of Respondent No.2. The said agreement is in the nature of development agreement. The affidavit-in-reply filed on behalf of Respondent No.2 sets out that the plot C bearing CTS No. 171/1A/14 admeasures 54,277.70 sq. mtrs. The development and construction of said plot C is completed. Therefore, Respondent No.2 has stated in the affidavit-in-reply that conveyance of said plot is required to be

executed in favour of Respondent No.1-society and all other societies having building on said plot C. On the said plot C, the buildings are constructed wherein members of Respondent No.1-society as well as Respondent Nos. 3 to 14-societies are residing. The said affidavit specifically states that the Respondent No.2 has no objection for execution of conveyance.

11. The Petitioners have raised contention that the said agreement dated 13th December 1984 was terminated by the Petitioners by notice dated 25th November 2011 and therefore, the Respondent No.2 has no right, title and interest to develop the said property. With respect to said contention, it is stated in the affidavit-in-reply by the Respondent No.2 that purported termination of said agreement dated 13th December 1984 is illegal. It is stated that the said agreement dated 13th December 1984 is valid, subsisting and binding on the Petitioners. It is further pointed out that with respect to the said dispute arbitration proceedings are pending between the Petitioners and the Respondent No.2. In this behalf, Mr. Rohan Sawant, learned counsel appearing for the Petitioners has placed on record copy of Award dated 29th June 2020. The following Award is passed by the

learned sole Arbitrator.

AWARD

"1. The Agreement between BGRM and LCIL dated 13th Dec 1984 Exh C-1 as modified/clarified in correspondence including by Exh C-10 and power/s of Attorney Ex C-2 and Ex C-8 are valid subsisting and Binding.

2. Specific performance of the Agreement is hereby ordered with the following specific directions:-

i. BGRM shall execute conveyance/power of attorney in favour of LCIL or the respective cooperative societies or in favour of nominees of LCIL as prayed for in prayer (a) of the statement of claim filed by LCIL within 2 months from the date of award in respect of all lands mentioned in the schedule of agreement EXHIBIT C-1 except S. No.171/1B (which is already vested in MCGM); and 15 Acre Plot in possession of BGRM.

ii. BGRM is hereby directed to comply with all the terms and conditions of sanctioned layout plan and conditions imposed by competent authorities under ULC Act in respect of and as applicable to the 15 Acre plot now in possession of BGRM including handing over possession thereof or any part thereof to MCGM, State Govt or Such other Govt organisation on demand;

3. BGRM is entitled to retain the amount of Rs.5,64,57,403/- deposited as per the consent terms dated 6th May 2015.

4. BGRM shall pay the costs fixed at Rs 30,00,000/- to LCIL within 4 weeks from the date hereof."

12. Thus, it is clear that there is dispute between the owner and the developer, i.e. between Petitioners and Respondent No.2. The said

Sonali

dispute has been decided by learned sole Arbitrator. Learned sole Arbitrator has very categorically held that said agreement executed between the Petitioners and Respondent No.2 dated 13th December 1984 as modified/clarified in correspondence are valid/subsisting and binding.

13. Mr. Sawant, the learned counsel submitted that the proceedings filed under section 34 of the Arbitration Act being Commercial Arbitration Petition No.470 of 2022 is pending regarding the said Award passed by learned sole Arbitrator. It is admitted position that there is no stay operating in said Commercial Arbitration Petition. Mr. Sawant fairly pointed out that no interim relief was operating even during pendency of the arbitration proceedings before learned sole Arbitrator. Therefore, in the light of Award which has been passed in the dispute between Petitioners and Respondent No.2, there is no substance in the submission of the Petitioners that as the agreement dated 13th December 1984 was cancelled, the Respondent No.2 should not have proceeded with the development work and therefore, no right, title and interest accrues to the Respondent No.1-society. It is significant to note in this behalf

Sonali

that learned sole Arbitrator has specifically held that said agreement executed between the Petitioners and Respondent No.2 dated 13th December 1984 as modified/clarified in correspondence is valid/subsisting and binding.

14. Mr. Sawant, learned counsel appearing for the Petitioners raised contention that the layout for all the societies is common and therefore, conveyance granted in favour of Respondent No.1-society is illegal. It is relevant to note that impugned order is dated 9th July 2016 and all the other societies who are on plot C, are the parties to said Deemed Conveyance proceedings. All societies, i.e. Respondent Nos. 3 to 14 who are parties to the said Deemed Conveyance proceedings, have not challenged the impugned order dated 9th July 2016 issued in favour of Respondent No.1. It is also significant to note clause Nos. 1 and 2 of operative part of the impugned order granting Deemed Conveyance. The same reads as under:

“1 I certify under section 11(3) of the Maharashtra Ownership Flats (regulation of the promotion of construction, sale, management and transfer) Act, 1963 that the Alica Nagar Building no. 5 Co-operative Housing Society Limited situated at plot number C, bearing CTS No. 171/1A/14, is entitled to and is a fit case to grant Unilateral Deemed Conveyance for conveying the rights,

title and interests of the Owners/ promoters/ developers and builder in the land and building and execute as Deed of 'Unilateral Deemed Conveyance and title in favour of the applicant society and have it registered.

2 Thus the Applicant Society is entitled to have Unilateral Deemed Conveyance of all that portion of piece and parcel of plot C, the plinth area of building admeasuring 874.23 square metres along with building constructed thereupon, reserving its right to have the proportionate area of land with recreation ground, Community Hall, Swimming pool, roads for building No.5 as per sanctioned lay out plan and excluding of Recreation Ground and internal road as per total property card area 54277.70 sq. mtrs., bearing CTS No. 171/1A/14 in village Akurli, Kandivali east, Taluka Borivali, Mumbai 400101, along with building known as Alica Nagar Building number. 5 Co-operative Housing Society Limited situated at plot No. C, bearing CTS No.171/1A/14, is CHSL, consisting of 4 wings, A, B, C and D, having stilt + upper 7 floors and consisting of 112 flats situated at ALICA NAGAR, Lokhandwala Complex, Kandivali (East), Mumbai 400 101 AND proportionate share in RG and internal roads as per built up area stated in Lay Out plan in favour of it and also as provided under section 11(5) of the Act, direct the Sub Registrar or the concerned appropriate registration Officer, appointed under the Registration Act, 1908 (16 of 1908) to register this certificate. The Conveyance Deed shall be executed by me. As I have been exempted under the Act to appear before the Registration Authority, and after complying with the provisions of the law, register such Conveyance deed as Deemed Conveyance.”

(Emphasis added)

15. Thus, the impugned order granting Deemed Conveyance

clearly show that DDR took into consideration the fact that plot C was very huge plot admeasuring 54,277.70 sq.mtrs. He also kept in mind that the other societies viz. Respondent Nos. 3 to 14 have right, title and interest to get rights in proportionate area apart from the rights on the specific portion on which their buildings are constructed. Therefore, the DDR has granted Deemed Conveyance reserving right to have the proportionate area of land with recreation ground, community hall, swimming pool and roads etc. and excluding certain portion. In any case, the Petitioners will not be affected in any manner whatsoever by the impugned order granting Deemed Conveyance.

16. It is admitted position that Respondent Nos. 3 to 14 i.e. other societies have not challenged the impugned order and they have accepted the same. It is apparent that by the impugned order only rights are given to Respondent No.1 in respect of plinth area of the building and proportionate share in recreation ground, roads and other aspects and therefore, it is obvious that other societies are also not affected by the impugned order. Thus, there is no substance in the submission raised by Mr. Sawant that other societies are adversely

affected by the impugned order.

17. The third submission of the Petitioners is that as per the development agreement, conveyance is required to be executed only after entire portion of 8,71,857 sq.mtrs. is developed and till that time, societies are not entitled for conveyance, therefore, DDR committed illegality in passing the impugned order. To substantiate this contention, Mr. Sawant has relied on clause 25 of the agreement executed between the Respondent No.2 and flat purchasers. The said clause 25 reads as under:-

“25. On the completion of the project of development of the whole layout of the said lands, the Developers shall cause the said Trust to execute a conveyance and/or any other documents of transfer of inter alia the said Plot 'C' or any part thereof (or to such extent as may be permitted by the concerned authorities), and the Developers shall execute a conveyance and/or any other documents of transfer of the said building along with other buildings constructed on the said plot in favour of the apex society / body referred to hereinabove, if such apex society/body is formed and registered or in favour of a society or a corporate body comprising of - allottees/acquirers of premises in all the buildings constructed on the said plot, if only one such society/ corporate body is formed and registered comprising of all such allottees/acquirers. However, the Developers shall have an option to grant to the Society or other corporate body which may be formed, of all the acquirers of flats/units (if such society or corporate body also desires) a lease of

99 years at a nominal annual rent of Re.1/- in respect of the area under the building only.”

(Emphasis added)

18. The said clause No.25 is to be read in the light of the affidavit-in-reply filed in the present proceedings by Respondent No.2. The relevant portion of said affidavit-in-reply is set out hereinbelow:-

“7. With reference to the contents of the Petition, it is submit that the this Respondent has been at all times and is ready and willing to render all necessary co-operation to ensure that the conveyance of such plots forming part of the larger property is granted where the development and construction of all the buildings are completed. It is submitted that the building of Respondent No.1 Society is situated on Plot C bearing CTS Nos.171/1A/14 admeasuring 54,277.70 square meters. The development and construction of the said Plot C is complete, hence it is submitted that conveyance of the said plot is required to be granted in favour of Respondent No.1 and all the other building societies having buildings on the said Plot C. The Petitioner has deliberately and willfully failed and neglected to grant the said conveyance without any basis or justification.

9. It is submitted that insofar as building No.5 of Respondent No.1 is concerned, the same is constructed on Plot C bearing CTS No.171/1A/14 admeasuring 54,277.70 square meters forming part of the larger property. It is submitted that the entire development and construction work on the said Plot C admeasuring 54,277.70 square meters forming part of the larger property has been completed and that conveyance of the said Plot C admeasuring 54,277.70 square meters is required to be executed either in favour of the Societies of the building constructed thereon or in favour of the

federation or apex society to be formed of all the societies of the building constructed on the said plot. It is denied that this Respondent has in any manner failed and neglected to comply with any of its obligations under the said Agreement dated 13.12.1984. It is denied that this Respondent failed and neglected to pay the full consideration amount that was payable under the terms of the contract and the letter dated 18.3.1992. It is denied that there was any breach, fundamental or otherwise, of the contract by this Respondent as alleged or at all. It is submitted that as there was no breach by this Respondent of any of its obligations under the said agreement, the question of curing the said alleged breach by this Respondent does not arise. The purported termination of the said Agreement dated 13.12.1984 vide Petitioner Advocates' letter dated 25.11.2011 is illegal and does not in any manner bind this Respondent. The said Agreement dated 13.12.1984 is valid, subsisting and binding and this Respondent is entitled to specific performance of the same as set out in detail in the plaint in Suit No. 837 of 2014 and in the Statement of Claim filed in arbitration proceedings bearing No.1 of 2015 pending before the learned Sole Arbitrator Shri Nitin Thakkar, Senior Advocate. Similarly, the purported revocation of the Powers of Attorney is also illegal null and void and not binding upon this Respondent. As has been clearly demonstrated in the proceedings initiated before the Hon'ble Court and now pending before the learned Arbitrator, the Petitioner has itself waived and / or given go bye to the purported termination of the Agreement.”

(Emphasis added)

Thus, it is clear that construction of entire project is completed.

It is very relevant to note that it is also the statutory responsibility of the promoter i.e. Petitioners alongwith Respondent No. 2 to execute

the conveyance in favour of the society.

19. In any case, it is required to be noted that the Petitioners are not adversely affected by the impugned order of granting Deemed Conveyance. The dispute between the Petitioners and Respondent No.2 appears to be mainly monetary in nature, as it can be seen from the operative part of the Award. Therefore, in view of this, there is no substance in the contention raised that as the dispute was pending between the Petitioners and Respondent No.2, the DDR should have kept the proceedings regarding Deemed Conveyance in abeyance. In any case, there is no stay during the arbitration proceedings before the learned sole Arbitrator as well as in the proceedings under section 34 of the Arbitration Act. Apart from that learned sole Arbitrator has specifically held that said agreement executed between the Petitioners and Respondent No.2 dated 13th December 1984 as modified/clarified in correspondence is valid/subsisting and binding.

20. As far as the contention that the matter was adjourned for deciding preliminary issue and thereafter without deciding the same, the proceedings were heard and decided, it appears that on 10th November 2014, the Deemed Conveyance proceedings were

adjourned to 11th December 2014 for deciding the preliminary issue. However, it appears that thereafter without deciding the said preliminary issue, the proceedings were continued and all the parties including the Petitioners participated in the proceedings. However, it is to be noted that the said application for seeking decision on the preliminary issue was taken out by Respondent Nos. 3, 4, 6 and 7-societies. The said societies are not aggrieved by the impugned order for not deciding the preliminary issue. It appears that the real dispute is between Petitioners and Respondent No.2 regarding alleged non-compliance of obligation by Respondent No.2 in favour of the Petitioners as set out in the development agreement dated 13th December 1984. For deciding the dispute between the Petitioners and Respondent No.2, Deemed Conveyance granted in favour of the Respondent No.1-society could not have been indefinitely kept in abeyance. In any case, Award shows that the claim of the Petitioners if any, is mainly of monetary nature and sole Arbitrator has held that said Development Agreement dated 13th December, 1984 is valid, subsisting and binding.

21. As far as the judgments, cited by learned counsel of the

Petitioners, it is sufficient if reference is made to the judgment decided by a Division Bench of this Court in the case of ***M/s. Shree Chintamani Builders*** (supra), for ready reference entire order passed in said matter is reproduced hereinbelow:-

“Having heard both sides, we do not find that we should interfere with the impugned order granting the deemed conveyance in favour of respondent no. 3 society.

2) The petitioner's contention is that **respondent no. 3 has no right, title and interest of whatsoever nature in CTS No. 2396/2 and that is wrongly included in the deemed conveyance. The apprehension is that this area would be usurped by the society (respondent no. 3) on the strength of this deemed conveyance and the order in that behalf.**

3) We do not think that the petitioner's apprehension has any basis. This court in number of judgments and particularly in the case of Mazda Construction Company vs. Sultanabad Darshan Chs. Ltd. and Ors.¹ has clarified that an order granting deemed conveyance will not conclude the issue of right, title and interest in the immovable property and to such an extent as is apprehended by the petitioner. It is not as if such an order is passed that the petitioners have no remedy to question the act of the society on the strength of such deemed conveyance. The petitioner can still bring a **substantive suit on title** and point out therein that as far as CTS No. 2396/2 is concerned, the reservation was shifted. The petitioner was not allowed to put up any construction and both plots, namely, CTS No. 2396/2 and 2396/1A are separate having separate property cards and survey numbers. The possession of the respective plot sold to respondent no. 3 was given and the occupation certificate is also handed over. The

possession of CTS No. 2396/2 still continues with the petitioner. All these assertions and by pointing out the relevant documents and records so also by leading oral evidence can be substantiated by the petitioner in the substantive suit. **We do not think that in writ jurisdiction and in the garb of examining the legality and correctness so also validity of deemed conveyance we can examine these issues. They concern the right, title and interest in the immovable property. Therefore, by clarifying that the order of deemed conveyance shall not preclude or prevent the petitioner from filing a suit and claiming therein appropriate reliefs, we dispose of this writ petition.**"

(Emphasis added)

The above observations are squarely applicable to the present case.

22. In view of above, there is no substance in the challenge raised by the Petitioners. The Writ Petition is dismissed with no order as to costs.

23. However, it is clarified that if, any civil suit is filed against the Respondent No.1-society, the same shall be decided uninfluenced by this order as well as order passed by the DDR.

MADHAV J. JAMDAR, J.