

Santosh

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO. 5230 OF 2022
WITH
INTERIM APPLICATION (L) NO. 3700 OF 2023**

1 M/s. ACME Enterprises
A partnernship firm registered under
the Indian Partnership At, 1932 having
its registered office at 322, Commerce
House, 140, Nagindas Master Road,
Fort, Mumbai – 400 023.

2 Mr. Ummedra K. Vardhan
Partner of Petitioner No.1, Having his
office at 322, Commerce House, 140,
N. M. Road, Fort, Mumbai – 400 023

...Petitioners

Versus

1 Deputy Registrar, Co-operative
Societies (2), Eastern Suburb, Mumbai
& Competent Authority, under Section
5A of MOFA having his office at Room
No.201, 2nd Floor, Konkan Bhavan,
CBD Belapur, Navi Mumbai – 400 614

2 Neelam Nagar Building Nos.11A to 11J
Co-operative Housing Society
Association Limited, an Association
registered under the Provisions of
Maharashtra Co-operative Societies
Act, 1960, having its office at Plot
No.D, CTS No.43, 44, 45/A, Neelam
Nagar Phase – II, Mulund (East),
Mumbai 400 081

3 Vasant Ramchandra Patil
4 Trimbak Ramchandra Patil
Both residing at Phule Road,
Gavanpada Mulund (East),
Mumbai – 400 081

5 Prabhavati Kamlakar Patil
6 Nutun Shashikant Kini
7 Kanchan Kantilal Dev

8 Milinda Jagdish Waralika
9 Santosh Kamalakar Patil
10 Bhavana Ashok Dev
11 Arun Raghunath Patil
12 Janaki Raghunath Patil
13 Ashok Raghunath Patil
14 Nandu Raghunath Patil
15 Dilip Raghunath Patil
16 Vinod Raghunath Patil
17 Aasha Narendra Patil
18 Nini Narendra Patil
19 Shashikala Kamalakar Keni
Respondent Nos.5 to 19 residing at
Chandakutir, Rejendra Prasad Road,
Mulund (West), Mumbai 400 080

...Respondents

Mr. Ashish Kamant, Senior Advocate, a/w Sandeep Bhagwat
and Ms. Sarita Zarapkar, for the Petitioner.
Mr. Kedar Dighe, AGP for the Respondent/State.
Mr. Mayur Khandeparkar, a/w Ajinkya Udane and Vinayak
Pandit, for Respondent No.2.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 27th FEBRUARY, 2023

PRONOUNCED ON: 5th JUNE, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of the learned Counsel for the parties heard finally.

2. The petitioners take exception to an order dated 26th November, 2019, passed by the District Deputy Registrar, Cooperative Societies and the Competent Authority, granting an unilateral deemed conveyance under Section 11 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("the

MOFA, 1963”) in respect of the premises Nilam Nagar, Building Nos.11A to 11J situated at City Survey No. 43 + 44 + 45/4A village Mulund (East), Taluka Kurla, Mumbai Suburban District, admeasuring 18,602.20 sq. mtrs. (including Layout RG area) (“the subject premises”).

3. Shorn of unnecessary details, the background facts can be stated as under:

(a) Petitioner No.1 is a registered partnership firm. Petitioner No.2 is the partner thereof. Under a Development Agreement dated 9th June, 1979 and Consent Decree dated 14th April, 1981, petitioner No.1 firm had acquired development rights in respect of a larger property comprising of various plots admeasuring 77,823 sq. mtrs. from the erstwhile owners thereof (“the larger property”). The larger property was divided into two Layouts. Layout-I has been fully developed. Out of Layout-II Plots A, B and E have been fully developed. Plot “C” has been partly developed. Plot “D” out of Layout-II admeasuring 1860.20 sq. mtrs. is the subject matter of the instant petition.

(b) The petitioners claim, in respect of Plot “D” plans were sanctioned by Brinhanmumbai Municipal Corporation (“BMC”) for construction of buildings, namely, Building No.1 having 3 Wings and Building No.2 having 10 Wings and Building

No.3 with total FSI of 21,069.99 sq. mtrs. inclusive of DP Road FSI. The petitioners entered into Agreement for Sale in respect of flats in Building No.2 comprising of 10 wings which were eventually named as Nilam Nagar Building Nos.11A to 11J. The petitioners also claim to have constructed plinth of Building No.1 having 3 wings. It is the case of the petitioners that in the year 2005, BMC sanctioned plans in respect of Plot “D”.

(c) Eventually, vide letter dated 25th September, 2014 BMC permitted subdivision of Plot “D” into two plots namely Plot “D” admeasuring 1,54,02.85 sq. mtrs. and Plot “D1” admeasuring 3200 sq. mtrs. on the condition that PR card for the subdivided plots shall be obtained and submitted to BMC and layout RG shall be conveyed in the name of Society – Federation of Societies. The petitioners claimed that the petitioners have been and continue to be in possession of Building No.1 constructed upto plinth level and Plot “D1”, carved out of Plot “D”.

(d) On 6th November, 2012, Nilam Nagar Building Nos.11A to 11J Co-operative Society Association Limited, respondent No.2, was formed and registered. Respondent No.2, in turn, consists of 10 Societies.

(e) On 14th September, 2018, respondent No.2 addressed a notice to the petitioners seeking conveyance in respect of the entire area of Plot “D” and “D1” i.e. 18602.20 sq. mtrs. That was followed by an application before the Deputy Registrar and Competent Authority, respondent No.1, for an order of unilateral deemed conveyance in respect of the subject property admeasuring 18602.20 sq. mtrs.

(f) The petitioners resisted the application by filing a reply. The petitioners, *inter alia*, contended that Plot “D” has since been divided in two parts. BMC had sanctioned the subdivision of original Plot “D”. The petitioners have all along been in possession of building No.1 which was initially erected upto plinth level. BMC had granted CC beyond plinth level. The petitioners were entitled in law to develop Building No.1 and utilize the balance FSI. Therefore, respondent No.2 Society was not entitled to have conveyance in respect of the entire area of original Plot “D” i.e. 18,602.20 sq. mtrs.

(g) By the impugned order the competent authority was persuaded to hold that a case for grant of deemed conveyance under Section 11 of the MOFA, 1963 was made out. The competent authority was of the view that respondent No.2 Society was entitled to claim ownership of the buildings

alongwith land admeasuring 18,602.20 sq. mtrs. on the strength of the property card, building plans approved by BMC and the Agreements for Sale executed by the petitioners in favour for the purchasers of the units in the said buildings. It was noted that the petitioners had committed default in executing conveyance in accordance with the provisions contained in the MOFA, 1963 within the stipulated period. The competent authority was not prepared to accede to the submission on behalf of the petitioners that original Plot "D" has since been sub-divided into Plot "D" and Plot "D1" and respondent No.2 Society was not entitled to have conveyance in respect of the area covered by Plot "D1". A certificate of entitlement for unilateral deemed conveyance in respect of the subject property thus came to be granted.

4. Being aggrieved, the petitioners have preferred this petition.

5. I have heard Mr. Kamat, the learned Senior Counsel for the petitioners, Mr. Dighe, the learned AGP for respondent No.1 and Mr. Khandeparkar, the learned Counsel for respondent No.2. With the assistance of the learned Counsel for the parties I have perused the material on record including the pleadings before the competent authority and the impugned order.

6. Mr. Kamat submitted that the impugned order singularly lacks consideration of the points which were raised by the petitioners and are germane to determine the prayer for grant of unilateral deemed conveyance. Mr. Kamat strenuously submitted that though the competent authority has copiously incorporated the contentions of the parties and the submissions canvassed on behalf of the respective parties yet it proceeded to pass the impugned order sans consideration of any of those contentions and submissions. On this sole count of infirm consideration the impugned order deserves to be quashed and set aside, urged Mr. Kamat.

7. Amplifying the submission, Mr. Kamat would urge that the power to be exercised by the competent authority under Section 11 of the MOFA, 1963 is neither unregulated nor uncanalized. The exercise of the power is guided by the provisions of Section 11 and a number of decisions of this Court. The competent authority was duty bound to consider all the relevant materials especially the MOFA Agreement and plans, sanctioned by BMC, which each of the then prospective purchasers had been specifically apprised of. However, the competent authority has, by a stroke of pen, ordered unilateral deemed conveyance.

8. Taking the Court through the clauses in the MOFA Agreement especially Clauses 9 to 13 and 14 Mr. Kamat submitted that the facts that the petitioners have been developing Building No.1 and the agreements were subject to the said development were within the full knowledge of the members of the constituent societies. At any rate, the conveyance could not have been ordered to be executed in excess of the proportionate FSI consumed in the construction of the units for which respondent No.2 Association was formed. Grant of conveyance of entire area of 18,602.20 sq. mtrs. clearly constituted an unjust enrichment qua respondent No.2 Society.

9. To bolster up the submission that the competent authority was enjoined to take into account all the relevant factors including MOFA Agreement and the plans sanctioned by the BMC and the relevant documents, Mr. Kamat placed reliance on the judgments of this Court in the cases of *Mazda Construction Company and ors. vs. Sultanabad Darshan CHS Ltd. & ors.*¹, *Ganga Bhaskar Builders, Virar, Thane and others vs. Competent Authority and District Deputy Registrar, Thane and another*², orders dated 7th September, 2021 and 5th July, 2021

1 2012 SCC Online Bom 1266.

2 2015(4) Mah.L.J.721.

passed by this Court in *Writ Petition No.5277 of 2021* in the matter of *Guatam Enterprises vs. State of Maharashtra*.

10. Per contra, Mr. Dighe, the learned AGP, stoutly supported the impugned order. It was urged that the competent authority had correctly exercised the discretion to order unilateral deemed conveyance within the four corners of the provisions contained in MOFA, 1963. The competent authority, being a creature of the statute to exercise a limited authority, rightly did not delve into the aspects which touch upon the title to the subject premises.

11. Mr. Dighe would urge that, by a catena of decisions, it is now fairly well recognized that the determination by the competent authority does not preclude a party to institute the proceedings before the Civil Court for adjudication of disputed questions of title and rights as to development. Thus, the challenge in the instant petition does not deserve to be entertained and the remedy of the petitioners, if aggrieved, is to approach the Civil Court, submitted Mr. Dighe.

12. Mr. Khandeparkar, the learned Counsel for respondent No.2, supplemented the submissions of Mr. Dighe. It was urged with tenacity that the consideration in the impugned order addresses the core issues which the competent authority was

called upon to decide. Thus, according to Mr. Khandeparkar, the challenge to the impugned order on account of inadequate consideration of the grounds urged on behalf of the petitioners does not merit acceptance.

13. Mr. Khandeparkar would submit that the competent authority found that there were agreements for sale of the units for the building by the petitioners/developers, those agreements described the property which was to be conveyed, with sufficient clarity, and there was breach on the part of the petitioners to execute the conveyance within the stipulated period of the formation of the Society. Therefore, the competent authority was well within its right in ordering the execution of unilateral deemed conveyance.

14. Mr. Khandeparkar submitted that even if the case of the petitioners is taken at par and construed rather generously, with reference to the recites in the MOFA Agreement, it becomes explicitly clear that the petitioners had agreed to convey entire Plot "D" admeasuring 18,602.20 sq. mtrs. of land. At best, it would be a case of the petitioners having failed to construct a building on a portion of Plot "D" and that, according to Mr. Khandeparkar, even if taken at par, does not furnish a ground to defer the execution of conveyance. Mr. Khandeparkar

further submitted that the entire endeavour on the part of the petitioners has been to obtain undue advantage of the change in Development Control Regulations and derive benefit of the enhanced development rights to the detriment of respondent No.2 and its members. Such benefits, on account of change in law, accrue to the Society and not the developer, submitted Mr. Khandeparkar. To lend support to this submission Mr. Khandeparkar placed reliance on the decisions of this Court in the cases of *Ravindra Mutenja and others vs. Bhavan Corporation and others*³ and *Vidhi Builders Pvt. Ltd. vs. Arenbee Media Consultants Limited*⁴.

15. Mr. Khandeparkar further submitted that this Court has repeatedly enunciated in no uncertain terms that an order granting deemed conveyance does not conclude the issue of right, title and interest in the property in respect of which deemed conveyance has been ordered and the aggrieved parties are entitled to institute a suit before the Civil Court to substantiate their claim. In the case at hand, the petitioners under the garb of assailing the order passed by the competent authority seek a determination as to title to the property which

3 2003(3) Mh.L.J. 23.

4 2012 SCC Online Bom 219.

according to the petitioners was never agreed to be conveyed to the Society of the flat purchasers.

16. Mr. Khandeparkar placed reliance on the decision of this Court in the case of *Mazda Construction* (supra), and a judgment in *Writ Petition No.4373/2017* in *Angeline Randolph Pereira & ors. vs. Suyog Industrial Estate Premises & Ors.*, a Division Bench judgment in the case of *Zainul Abedin Yusufali Massawawala and others vs. Competent Authority, District Deputy Registrar of Co-operative Housing Societies, Mumbai and Others*⁵, another Division Bench judgment in the case of *M/s. Shree Chintamani Builders vs. State of Maharashtra and others*.⁶ an order in *Writ Petition (ST) No.31966 of 2018* in the matter of *M/s. Mahanagar Housing Partnership Firm and others vs. District Deputy Registrar Co-operative Society, dated 6th December, 2018*, an order dated 9th March, 2021 in *Writ Petition (L) No.2164 of 2021* in the case of *Mangala Madhusudan Sathaye and ors. vs. M/s. E-Square Premises Co-operative Housing Society Ltd. and ors.* and a judgment in the case of *PR Enterprises and others vs. Competent Authority under the Maharashtra Ownership Flat Act and others*.⁷

5 2016 SCC Online Bom 6028.

6 2016 SCC Online Bom 9343.

7 2018 SCC Online Bom 9350.

17. Mr. Kamat joined the issue by canvassing a submission that it is not an immutable rule of law that the petitioners must approach the Civil Court. Where it could be shown that the statutory authority has acted in breach of the statutory provision and the determination by the statutory authority suffers from the vice of non-consideration of the relevant material, such determination can be a subject matter of writ jurisdiction. Reliance was placed on the observations of the Supreme Court in the case of the *The D.F.O. South Kheri and others vs. Ram Sanahi Singh*,⁸ wherein it was enunciated that the Court was unable to hold that merely because source of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of writ.

18. I have given anxious consideration to the submissions canvassed across the bar. As is evident, the remit of the authority exercised by the competent authority under Section 11 of MOFA, 1963 is at the heart of the controversy. The petitioners urge that the competent authority is enjoined to consider all the relevant material and apply its mind and

8 1971(3) SCC 864.

thereafter pass an order under Section 11. The determination of the competent authority has the trappings of a *quasi judicial* power. In contrast, the respondents urge that the factors which are required to be taken into account by the competent authority are spelled out by the provisions of the MOFA, 1963, and determination of title, or for that matter the complicated questions of facts, are not within the province of the authority of the Deputy Registrar.

19. A brief recourse to the provisions contained in the MOFA, 1963 and the MOFA Rules, 1964 would be in order. The MOFA, 1963 came to be enacted with the avowed object of regulation of the promotion of the construction, sale and management and transfer of flats taken on ownership basis as it was found that consequent to actuate shortage of housing in the several areas of the State sundry abuses and malpractices were being indulged in and difficulties were faced in sale, management and transfer of flats taken on ownership basis. Under Section 4 of the MOFA, 1963 an obligation is cast on the promoter to enter into a written agreement for sale with each of the persons who are to take the flats in the building to be constructed by the promoter, in the prescribed format. Sub-section (1)(a) of Section 4 provides that such agreement shall contain the particulars as

specified in Clause (a) and to such agreement copies of the documents specified in Clause (b) shall be attached. Such an agreement is required to be registered under the provisions of Registration Act, 1908. Section 4(a) primarily insulates the purchasers from the consequences which entail the non-registration of an agreement under the Registration Act, 1908. Section 10 enjoins the promoter to take steps for registration of the organization of the persons who take flats as a cooperative society, or as the case may be, as a company. However, it does not affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of the said Act.

20. Then comes Section 11. It mandates that the promoter shall take all necessary steps to complete his title and convey to the such organization his right, title and interest in the land and the building, and execute all relevant documents therefor in accordance with the agreement executed under Section 4. If there is no agreement as to the period within which the conveyance is to be executed, the promoter shall execute the conveyance within the prescribed period. Under sub-section (3) of Section 11, if the promoter fails to execute the conveyance in favour of such organization, within the prescribed period, the members of such organization may make an application in

writing to the competent authority constituted under Section 5A, accompanied by true copies of the registered Agreement for Sale and all other relevant documents, for issuing a certificate that such organization is entitled to have an unilateral deemed conveyance executed in its favour and to have it registered. Under sub-section (4) of Section 11 the competent authority after making such inquiry as it deems necessary and after verifying authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard, if satisfied that it is a fit case for issue of such certificate, shall issue a certificate to the Registrar of Assurances certifying that it is a fit case for enforcing unilateral execution of conveyance conveying thereby right, title and interest of the promoter in the land and building in favour of such organization, as deemed conveyance.

21. Under Rule 9 of the Rules, 1964 if no period for conveying title of the promoter to such organization is agreed upon, the promoter shall, subject to his right to dispose of remaining flats, if any, execute the conveyance within four months from the date on which co-operative society or the company is registered, or as the case may be, the association of flat takers is duly constituted.

22. Under the scheme of the Act and the Rules, it becomes evident, the promoter is enjoined to first enter into an agreement for sale of the flats in a building, register it and then take steps to form an organization of the flat purchasers and after completion of development and within the time stipulated in agreement between the parties or if no time is stipulated within four months of the organization having been registered or constituted, execute an instrument conveying the right, title and interest in the land and the building in accordance with the agreement executed with the flat purchasers.

23. The general reluctance, refusal or neglect on the part of the promoters to discharge the obligation to execute the conveyance, made the legislature to step in and enforce the obligation by empowering the competent authority to certify the justifiability of the deemed conveyance. The competent authority is thus entrusted with the responsibility to enforce the obligation of the promoter. From this standpoint, only the agency which executes the conveyance, in favour of the organization of purchasers, to which they are legitimately entitled to, stands substituted as the promoter disables himself from discharging the obligation, either by refusal or neglect.

24. The competent authority is, however, required to follow fundamental principles of judicial process. Upon verification of the authenticity of the documents and after furnishing a reasonable opportunity of hearing to the promoter it must arrive at a satisfaction that a case for execution and registration of deemed conveyance is made out.

25. As noted above, the starting point of submissions, on both the sides, was the decision of this Court in the case of *Mazda Construction* (supra). In the said case, after an elaborate analysis of the provisions contained in the MOFA, 1963 and the legislative object behind insertion of Section 5A and Section 11 of the MOFA, 1963, a learned Single Judge of this Court enunciated the nature of the jurisdiction exercised by the competent authority as under:

“20. To my mind, reading of Sections 10 and 11 together with Section 5A would make it amply clear that what is to be performed by the Competent Authority is a duty and obligation which the promoter is to perform in law. That is to convey the title and execute the documents according to the agreement. If that is the duty which is to be performed by the promoter, but which he fails to perform, then, the Competent Authority steps in to fulfill it. That is a duty towards the flat purchasers and which duty cannot be avoided except at the cost and pains of legal proceedings including a criminal prosecution. In these circumstances and when sections 10 and 11 are read together and harmoniously with the preceding sections including those which contain the particulars of the agreement, then, it becomes absolutely clear that what has to be conveyed even by a deemed conveyance, which is an unilateral act and which enables the flat purchasers to acquire the Promoter's right, title and interest in the land and the building.

Therefore, it cannot be said that an unilateral deemed conveyance conveys something more than what belongs to the Promoter. Section 11(1) provides for conveyance of Promoter's right, title and interest in the land and building as is clear from the words 'his right, title and interest....' appearing therein. I am not in agreement with Mr.Samdani that there are no guidelines guiding and enabling the Competent Authority to grant a deemed conveyance and therefore, the powers are likely to be abused or exercised arbitrarily in every such case. There are inbuilt checks and safeguards inasmuch as what is to be issued is a certificate entitling a unilateral deemed conveyance. It is not a document which stands alone or is a distinct transaction. It is a grant or conveyance in terms of what the agreement between parties stipulates and provides for being conveyed to the flat purchasers. Therefore, the Applicant is permitted to apply to the Competent Authority u/s 11(3) and such application is to be accompanied by true copies of the registered agreements for sale executed by the Promoter with each individual member/ flat purchaser and other relevant documents. It is to further that and to insist on the promoters fulfilling their obligations within the prescribed period, but noticing that their failure has resulted in hardship to flat purchasers, that the Legislature has stepped in. To my mind, this is not a power which can be exercised by the Competent Authority in ignorance of or by brushing aside the earlier provisions and contents of the agreement with the flat purchasers. Equally, the Competent Authority has to take into consideration the contents of other relevant documents."

(emphasis supplied)

26. Alluding to the apprehension, expressed in the said case, that the powers conferred by the provisions of MOFA, 1963 especially Section 11, are likely to be misused or abused, the learned Single Judge dispelled the same observing, as under:

"26. The apprehension of Mr.Samdani, which he states, is not confined to the facts of this case alone, is that the powers conferred by this amendment in terms of sub-sections 3, 4 and 5 of Section 11 are likely to be misused or abused by both, the authorities, as also, by the parties. That apprehension can be taken care of if one carefully peruses these provisions and read them in their entirety. All that they indicate is that if an application is made in terms of sub-section (3) of Section 11 which prays to issue a certificate to

the society, company or apartment, then, on issuance of the certificate, it is entitled to have an unilateral deemed conveyance executed in their favour and to have it registered. Therefore, the application that is contemplated by sub-section (3) itself is to seek a certificate to have an unilateral deemed conveyance executed in their favour and to have it registered. By sub-section (4) of Section 11, the powers of the Competent Authority have been enumerated and they are that on receipt of the application, within a reasonable time and in any case not later than six months, the Competent Authority after making such inquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard and on being satisfied, issue a certificate to the Sub Registrar under the Registration Act, 1908. Thus, the Competent Authority is not obliged to issue a certificate in each case and as sought by the Appellant/s. What sub-section (4) contemplates is verification of the authenticity of the documents submitted and a reasonable opportunity of being heard to the promoter. Importantly satisfaction of the Competent Authority that it is a fit case for issuing such certificate is a mandatory requirement. Therefore, it is not as if an application being presented that issuance of certificate must follow.

(emphasis supplied)

27. It would be contextually relevant to immediately notice that the import of the aforesaid judgment was clarified by the Division Bench in the case of *M/s. Shree Chintamani Builders* (supra). It was observed that an order granting deemed conveyance would not conclude issue of right, title and interest in the immovable property. It was not as if such an order was passed that the petitioners had no remedy to question the act of the Society on the strength of such deemed conveyance. The petitioners could still bring a substantiate suit on title and point out therein that as far as CTS No.2193/2 was concerned the reservation was shifted. Referring to the aforesaid factual

background, in the case of *M/s. Shree Chintamani* (supra) this Court observed that the Court cannot examine in writ jurisdiction and in the garb of examining the legality, correctness and validity of deemed conveyance, the issues concerning the right, title or interest in the immovable property. It was reiterated that the order of deemed conveyance would not preclude or prevent the petitioner therein from filing a suit and claiming therein appropriate reliefs.

28. In the case of *Zainul Abedin Yusufali* (supra) the challenge to the order of deemed conveyance revolved around the claim that the agreement between the purchasers and developers was in respect of consumption of only a certain and specified area and it did not enable the builder and developer to claim the entire land admeasuring 1791.96 sq. mtrs. as described in the schedule to the Development Agreement. In the backdrop of aforesaid nature of the controversy, the Division Bench again clarified the nature of the jurisdiction exercised by the competent authority under Section 11 and the limited import of the said determination, as under:

“9. We are of the clear opinion that the society approached the Competent Authority with a limited request, namely, that having formed a legal entity namely the co-operative housing society of the flat purchasers, it is the obligation now of the promoter to convey the right, title and interest in the building and the land beneath, so that the

legal entity will be entitled to enjoy the right, title and interest in the property. If while granting the deemed conveyance, the Competent Authority has in any manner, traveled beyond the stipulations in the agreement, and the grievance of the petitioners is that a larger property is allowed to be claimed by the society contrary to the covenant and recitals of the two agreements, then the remedy of the petitioners even in terms of two decisions of this Court in *Tushar Jivram Chauhan v. State of Maharashtra (2015) 4 Mah LJ 867 and Mazda Construction Company vs. Sutlanabad Darshan CHS Ltd., 2012 SCC Online Bom 1266* relied upon by Mr. Khandeparkar is not to file a writ petition under Article 226 in this Court, but to approach competent civil court and establish this right, title and interest in relation to the larger property. While establishing and seeking to prove it, the petitioners can also allege that contrary to the Development Agreement and a MOFA Agreement, the society claimed a larger property and relying upon those submissions the Competent Authority has granted the relief in relation thereto. That is the prejudice caused and which the petitioners can seek a redressal thereof by approaching such a court. During the course of such proceedings, the petitioners can highlight the alleged wrongful conduct of the society in firstly bringing a suit and withdrawing it and for the same relief namely for failure to discharge MOFA obligations, then approaching the Competent Authority belatedly and obtaining the Deemed Conveyance in the absence of the petitioners. Therefore, that adjudication, if at all one can term it, and the order therein, would not be binding on the petitioners, ought to be the eventual declaration. That they can claim irrespective of any application under Section 11 of MOFA, which conclusions in the impugned order, we are of the opinion that the jurisdiction of the competent civil court is not barred, despite such document being placed on record and relied upon by respondent no.3. The Civil Court will adjudicate the issue of right, title and interest of the petitioners in the larger property by independently applying its mind on a total appraisal of the oral and documentary evidence before it. Once all such remedies are intact, then, we do not think that in writ jurisdiction we should entertain such a dispute."

(emphasis supplied)

29. The question again arose in the case of *Ganga Bhaskar Builders* (supra), on which Mr. Kamat placed reliance. A learned Single Judge of this Court after adverting to the previous pronouncements including the judgment in the case of *Tushar*

*Jivram Chauhan and anr. vs. State of Maharashtra*⁹ observed that in the facts of the said case the Society cannot insist for the deemed conveyance and/or certificate of the entire land as was done in that case, based upon the society's wrong averments that there was no balance FSI available as per the prevailing DC rules and the bye-laws.

30. From the above statutory provisions and enunciation, the position which emerges can be summarized as under. The authority to grant deemed conveyance is conditioned and controlled by the primary obligation of the promoter to convey to the organization of flat purchasers right, title and interest in the land and buildings, in accordance with the agreement executed under Section 4. Competent authority cannot convey more than what the promoter had agreed to convey under the agreement executed under Section 4. What competent authority is thus required to consider is, the extent of the obligation incurred by the promoter, whether the obligation to execute the conveyance became enforceable and whether the promoter committed default in, or otherwise disabled himself from, executing the conveyance.

9 2015(4) Mh.L.J. 867.

31. The enquiry is thus of limited nature. The competent authority cannot delve into the aspects of title. Nor the finding of the competent authority precludes a party from agitating the grievance as to the entitlement of the organization of purchasers to have the conveyance, before the Civil Court. The remit of enquiry by the competent authority is, thus, whether the conditions stipulated for enforcement of the obligation to execute the conveyance have been satisfied and, if yes, order an unilateral deemed conveyance.

32. In the light of the aforesaid nature of the jurisdiction to be exercised by the competent authority, reverting to the facts of the case, reference to the Agreement for Sale executed by the petitioners in favour of the flat purchasers become indispensable. Copy of an agreement executed by and between the petitioners and Mr. Vipin Punatar is annexed to the petition. Under the said agreement the petitioners agreed to allot Flat No.604 on the sixth floor of Building No.11 Wing “D” of Layout II Plot “D” more particularly described in the Second Schedule. The Second Schedule, reads as under:

“ALL THAT place of parcel of land or ground admeasuring 18,602.2 sq. mtrs. or thereabouts bearing C.T.S. No.43, 44, 45/4 situate lying and being at Mulund (E), Taluka Kurla, Bombay Suburban and bounded on or towards the East partly by 60’ wide Service Road and partly by the land reserved for Welfare Centre cum Dispensary on or towards

the West by Nalla on or towards the North by the land reserved for Welfare Centre cum Dispensary and 60' wide D.P. Road and on or towards the South by Nalla."

33. Under Clause 39 of the said Agreement the promoters agreed to execute the conveyance after the said building was completely ready and fit for occupation and after the organization was registered or formed and only after all the premises in the said building have been sold and disposed of.

34. Mr. Kamat would urge that the area of 18,602.20 sq. mtrs. of Plot "D" of Layout II, shown in the Second Schedule, is not decisive. Taking the Court through the recitals especially Recital Nos.9 to 15 and 17 Mr. Kamat would urge that the purchasers acknowledged that they had perused and approved the plan which included the construction of building No.1. Therefore, the petitioners cannot be said to have agreed to convey the entire area admeasuring 18,602.20 sq. mtrs. In other words, the entitlement of respondent No.2 Society to have conveyance was subject to the right of the petitioners to develop Building No.1 and utilize the FSI which would become admissible.

35. The aforesaid submission is *ex facie* in teeth of the express terms of the agreement. The petitioners cannot be permitted to draw mileage from the fact that the recitals 9 to 15 and 17

contain reference to the plans. It was the statutory obligation of the promoter under Section 4 of the MOFA, 1963 to disclose the particulars as to the sanctioned plan, in accordance with which the buildings were to be constructed. Disclosure of plans, therefore, can neither bolster up the case of the promoter nor detract materially from the case of the organization to have a conveyance of the property shown in the agreement.

36. Moreover, there are attendant circumstances which, *prima facie*, appear to be inconsistent with the case now sought to be put-forth on behalf of the petitioners that Plot “D1”, carved out of Plot “D”, post sub-division with the approval of the BMC, was not agreed to be conveyed to respondent No.2. In a communication addressed to the Tahsildar on 1st Mach, 2013 while disputing the liability of the petitioners to pay the non-agricultural tax, it was, *inter alia*, intimated that in respect of building No.11, standing on Plot “D” admeasuring 18,602.20 sq. mtrs., a society had already been formed long back and all the maintenance of the building was being done by the individual societies. The authorities were thus requested to issue notice to individual buildings and recover NA tax.

37. The question as to whether, after respondent No.2 Society came to be formed on 6th November, 2012, post issue of the

occupation certificate by the planning authority, Plot “D” could have been further subdivided, could not have been legitimately enquired into by the competent authority. The thrust of the submission on behalf of the petitioners that at the highest the competent authority could have granted conveyance in respect of an area proportionate to the FSI consumed in the construction of the buildings of which respondent no.2 Society has been formed (15,400 sq. mtrs. approximately) takes the matter in the arena of disputed questions as to the title to the suit premises. The competent authority was neither competent nor equipped to adjudicate the said issue.

38. I, therefore, find substance in the submission of Mr. Khandeparkar that the resistance sought to be put-forth on behalf of the petitioners to the execution of conveyance in favour of petitioner No.2 Society is in the realm of dispute as to title and can legitimately form a subject matter of a substantive suit. In a long line of decisions, adverted to above, right from ***Mazda Construction*** (supra) it has been reiterated that in exercise of writ jurisdiction and under the garb of examining the legality, validity and correctness of an order of deemed conveyance this Court cannot examine issues which essentially partake the character of title dispute and complicated question as to

entitlement to have further development rights. The proper remedy for the aggrieved party is to institute a substantive suit before the competent Civil Court. In my view, the facts of the instant case do not warrant a different approach. The petition thus deserves to be dismissed.

39. Hence, the following order:

: O R D E R :

- (i)** The petition stands dismissed.
- (ii)** The petitioners shall, however, have the liberty to institute a substantive suit, if not already instituted, to agitate their claim of title to allegedly carved out Plot “D1” and consequently assail the entitlement of respondent No.2 to have conveyance of the entire Plot “D” admeasuring 18,602.20 sq. mtrs.
- (iii)** In the event such a suit is instituted or has already been instituted, the same shall be decided on its own merits and in accordance with law without being influenced by any of the observations made hereinabove, which are confined to test the legality, propriety and correctness of the impugned order.

(iv) Subject to the aforesaid clarification, rule stands discharged.

(v) In the circumstances, there shall be no order as to costs.

In view of disposal of the petition, interim application does not survive and stands disposed.

[N. J. JAMADAR, J.]

The learned Counsel for the petitioners seeks continuation of the ad-interim order dated 15th October, 2020, whereby the Court had directed that no coercive steps should be taken on the basis of the order passed by the Competent Authority.

The learned Counsel for respondent No.2 resisted the prayer on the ground that, in the intervening period, the petitioners have started development on the portion of the subject property in respect of which also, the competent authority has ordered execution of an unilateral deemed conveyance.

The learned Counsel for the petitioners submits that he has no instructions to make a statement as to whether the petitioner would refrain from carrying out further construction.

In view of this statement, the petitioners do not deserve any indulgence. Hence, the oral application for stay stands rejected.

[N. J. JAMADAR, J.]