

rrpillai

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10435 OF 2023**

Rcube Realty

A registered partnership firm through its partner

Rohit Agarwal

Age : Years 41, Occ. Developer

Residing at Showroom No. 8 and 9

Agarwal Garden, Sector No. 25/5, Near IDBI

Bank Bhel Chowk, Nigdi Pradhikaran

Pune 411 044

..... Petitioner

Versus

District Deputy Registrar

Co-operative Society, Pune [Rural]

1. Maharashtra State Co-operative Building
5B, BJ Road, Pune 411 001

Secretary

Gulmohar County Coop Society

2. Plot No. 7, S. No. 88
Talegaon, Dabhade
Tal. Maval, Dist. Pune

State of Maharashtra

Department of Co-operation

3. Through Office of Government Pleader
High Court, Mumbai

..... Respondents

**WITH
INTERIM APPLICATION (ST) NO. 31634 OF 2023
IN
WRIT PETITION NO. 10435 OF 2023**

Mohan Vankatesh Phadke

Age : 71, R/at : Flat No. 23,

Sneha Anand Society

Happy Colony, Kothrud Pin : 411 038

Intervenor

In the matter between

Rcube Reality

Office AT 1386 , Shelar Vasti

Chikhali, Pune 411 015

..... Petitioner

Versus

1. District Deputy Registrar
Co-operative Society, Pune [Rural]
Maharashtra State Co-operative Building
5B, BJ Road, Pune 411 001
2. Secretary
Gulmohar County Coop Society
Plot No. 7, S. No. 88, Talegaon, Dabhade
Tal. Maval, Dist. Pune
3. State of Maharashtra
Department of Co-operation
Through Office of Government Pleader
High Court, Mumbai

..... Respondents

Mr. Yuvraj Narvankar for the Petitioner.

Mr. R. P. Saroj for Respondent No. 2.

Mr. Vishal N. Nevshe i/b. Mr. Nitesh S. Nevshe for the Intervenor

Mr. V. G. Badgujar, AGP for the Respondent Nos. 1 and 3.

CORAM : GAURI GODSE, J.

DATE : 24th APRIL 2024

Oral Judgment:

1. Heard. Rule. Rule made returnable forthwith.
2. Mr. Narvankar waives notice for the Petitioner and learned AGP waives notice for respondent nos. 1 and 3. Considering the nature of the dispute and the controversy involved, the petition is taken up for final disposal.
3. This petition is filed by the developer/promoter taking exception to the order passed under Section 11 of The Maharashtra Ownership Flat (Regulation of Construction, Sale, Management and Transfer) Act, 1963 ["MOFA"] granting unilateral deemed conveyance in favour of respondent no. 2 – society.

4. Learned counsel for the petitioner submitted that the application is allowed without giving an opportunity for hearing to the petitioner. He submits that no notice was served upon the petitioner as contemplated under Section 11 read with Rule 13(1) of The Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Rules 1964 ("MOFA Rules). Learned counsel pointed out the observations in the impugned order and submitted that the notice issued to the petitioner was returned unclaimed, as recorded by the Competent Authority. He submitted that the unclaimed notice cannot be considered as good service. The provisions of the MOFA, read with the MOFA Rules require service of notice in a particular manner.

5. He relied upon the decision of this court in the case of ***M/s. Shree Giridhar Enterprise vs. Shyam Sarita Co-operative Housing Society Limited and Others***¹ to support his submission that the Competent Authority cannot grant the unilateral deemed conveyance without hearing the petitioner and that service of notice was mandatory. He submitted that as the notice issued to the promoter was

¹ Writ Petition No. 13614 of 2023

returned unclaimed, it cannot be treated as good service. To support his submission, he relied upon the decision of this court in the case of ***Lalmani Ramnath Tiwari Vs Bhimrao Govind Pawar*** ².

6. The learned counsel for the petitioner further submitted that there are other grounds of objections also raised in the petition on merits of the application; however, the matter is required to be remitted back to the Competent Authority for fresh hearing after giving an opportunity to the petitioner to be heard. He therefore submits that the petitioner may be granted liberty to agitate all the grounds of objection on merits before the Competent Authority.

7. Learned counsel for respondent no. 2 supports the impugned order. He submits that since the notice issued was unclaimed, it is clear that the petitioner though was aware about the proceedings, chose not to appear before the Competent Authority. He therefore submits that no interference is called for by this court for remitting the matter back as contended by the petitioner.

8. Learned AGP supports the impugned order on the ground that notice was issued by post as required under the rules. Since the notice

² 2001 (2) Mh.L.J. 342

was unclaimed, the Competent Authority has rightly considered the application on merits, and no fault can be found in the impugned order. He thus submitted that it is not necessary to remit the matter before the Competent Authority for a fresh hearing.

9. I have considered the submissions. A perusal of the impugned order indicates that notice was sent to the petitioner through post; however, the same was returned as unclaimed. Apart from sending the notice by post, no further steps appear to have been taken for service of notice upon the petitioner. In the case of **M/s. Shree Giridhar Enterprise**, it is held that service of notice as contemplated under the Rules is mandatory, and for want of service of notice upon the promoter, the matter was remitted to the Competent Authority for deciding it afresh. Thus, the legal principle laid down in the said decision is squarely applicable to the facts of the present case. The relevant observations in the said decision with regard to the requirement of service of notice are in paragraphs 11 and 12, which read as under:

“ 11. I have considered the submissions made by the parties. Perused the record. Perusal of the impugned order indicates

that notice as prescribed under Rule 13 (2) was issued to the petitioner. However, there is no finding recorded by the Competent Authority that the said notice was served. Though there is a reference made that newspaper publication was issued there is nothing produced on record to show that under what circumstances the substituted service was permitted. Sub Rule (2) of Rule 13 of the MOFA Rules provides for issuance of notice in Form 'X' to the opponents calling upon them to file a written statement on the day, date, and place as may be specified therein. The said Rule further provides that said notice has to be served on the opponents by registered post acknowledgment or under certificate of posting on the last known address.

12. Thus, the aforesaid Rule indicates that issuance of notice to the opponent in the application for grant of Unilateral Deemed Conveyance is not an empty formality and the notice is required to be served upon the opponents. Thus, in the event the notice is not served as provided under said Rule, there has to be an order passed for permitting substituted service by newspaper publication. Only newspaper publication by way of substituted service cannot be said to be in compliance with Sub Rule (2) of Rule 13 of the MOFA Rules. Section 11 of MOFA provides that the Competent Authority after making inquiry and after verifying the authenticity of the documents submitted and after giving the promoter a

reasonable opportunity of being heard and on being satisfied that it is a fit case to grant unilateral deemed conveyance, can issue a certificate for Unilateral Deemed Conveyance. Thus, the proceedings under Section 11 of MOFA are summary proceedings that are required to be decided as prescribed under the said Section as well as the Rules framed under the said Act.”

11. Hence, in view of the legal principle laid down in the case of ***Lalmani Ramnath Tiwari***, the unclaimed notice cannot be said to be a good service in the present case.

12. In the present case, the owner filed an intervention application. Learned counsel for the intervenor submits that the owner was also required to be heard in the application under Section 11 of MOFA; however, respondent no. 2 – society has not made the owner as a party opponent. No opportunity was given to the intervenor while deciding the application for unilateral deemed conveyance. To support his contention that the owner is also a necessary party to the proceeding, he relied upon the decision of this court in the case of ***A. H. Wadia Trust and Others Vs State of Maharashtra and Others***³.

³ Writ Petition No. 555 of 2018

He submitted that the owner is thus a necessary party to the application.

13. Learned counsel for respondent no. 2 submitted that the decision in the case of **A. H. Wadia Trust** does not lay down any absolute proposition that the owner is a necessary party in every case. He submitted that the owner may be joined as a party only if any right, title or interest of the owner is likely to be affected. Learned counsel for respondent no. 2 – society submits that there are internal disputes between the petitioner and intervenor; hence, in the event of remitting back the matter to the Competent Authority, it may be clarified that the internal disputes between the petitioner and intervenor should not affect the rights of the society to claim unilateral deemed conveyance. Hence, he submits that by keeping the issue of whether the owner is a necessary party open, the society may be granted permission to add the owner/intervenor as a party opponent in the application.

14. In view of the aforesaid facts regarding non-service of notice to the petitioner, I find substance in the arguments made on behalf of the petitioner. Hence, the matter is required to be remitted back to the Competent Authority for a fresh hearing after giving an opportunity of

hearing to the petitioner. Regarding intervention by the owner, the society can be permitted to add the owner as a party opponent to the application without prejudice to the rights and contentions of the society. No fresh notice of hearing would be necessary to the petitioner, or the intervenor and the parties shall appear before the Competent Authority as directed in this order.

15. For the aforesaid reasons, the petition is partly allowed by passing the following order:

- (i) The Order dated 26th March 2019 passed in Application No. 56/2018-19 by respondent no. 1 is quashed and set aside.
- (ii) Application No. 56/2018-19 is restored to the file of respondent no. 1 for a fresh decision after the petitioner, other necessary parties, and the intervenor/owner are given an opportunity for hearing.
- (iii) Without prejudice to the rights and contentions of respondent no. 2 – Society, the intervenor/owner be added as party opponent to the application, by carrying out necessary amendment to the Application No. 56/2018-19.

(iv) It is clarified that the locus of the intervenor/owner to participate in the proceeding is kept open for the parties to agitate before the Competent Authority.

(v) It is clarified that internal disputes, if any, between the petitioner and intervenor/owner would not affect the society's right to claim unilateral deemed conveyance.

(vi) Parties shall attend the office of respondent no. 1 on 8th May 2024 at 11.00 am, and respondent no. 1 shall fix the schedule of the hearing.

(vii) It is clarified that this Court has not examined the rival contentions of the parties on the merits of the application for the grant of unilateral deemed conveyance; hence, rival contentions of the parties on the merits of the application are kept open.

(viii) Writ Petition is disposed of in the above terms.

(ix) Interim Application No. 1367 of 2024 stands disposed of in the above terms.

[GAURI GODSE, J.]