

Shabnoor

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2082 OF 2018

Drafted by
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Jai Jalaram Co-operative Housing
Society Ltd.

... Petitioner

V/s.

M/s Nanji Khimji & Co. & Ors

... Respondents

Mr. Rajesh S. Datar, for Petitioner.

Mr. R. S. Apte, Sr. Advocate i/by Mr. Mandar Limaye,
for Respondent No.3.

Mrs. V. S. Nimbalkar, AGP, for State/Respondent No.4.

CORAM : AMIT BORKAR, J.

DATED : FEBRUARY 9, 2024

JUDGMENT:

1. Rule. Rule is made returnable forthwith.

2. The petitioner takes explain to an order dated 3 April 2017 passed by respondent No.4 rejecting unilateral deemed conveyance under Section 11 of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA ACT") in respect of plot of land bearing Tika No.5, C.T.S. Nos.48, 49, 50 and 51 ad-measuring about 2785.12 square meters, situated at Tukaram Mahadik Road, Kharkar Ali, Thane (West).

3. The facts relevant to the adjudication of the issue involved are as under:

The petitioner is a Cooperative Housing Society registered under the provisions of the Maharashtra Cooperative Societies Act, 1960. The petitioner/society is in possession of the plot of land described above. The land consists of building 'A' comprising of ground + 8 floors containing 32 residential flats/units and 6 offices. Building 'B' consists of ground + 2 floors, having 12 flats/units and bungalows Nos.1 & 2. Respondent Nos.1 & 2 entered into an agreement to sell with purchasers as per Section 4 of MOFA Act. However, failed to execute conveyance in favour of the petitioner/society within the agreed/decided time. The petitioner/society, therefore, on 31 May 2013 filed an application for a grant of unilateral deemed conveyance under Section 11 of MOFA Act. The petitioner filed a sample copy of the agreement for sale and produced a list of bona fide members of the petitioner/society along with details of stamp duty and registration fees. Respondent Nos.1 and 2 (promoters) submitted their no objection/consent for the grant of deemed conveyance in favour of the petitioner by communication dated 14 December 2013. However, respondent No.3 claiming to be the owner objected to the grant of a certificate of deemed conveyance in favour of the petitioner.

4. The original application for a grant of a certificate of deemed conveyance contains an area of 2785.12 square meters. However, based on the subsequent architect certificate, the said area was reduced to 2345.12 square meters by amendment application. Respondent No.4, by order dated 3 April 2017 disposed of the

petitioner's application for unilateral deemed conveyance by directing the petitioner to approach the Civil Court holding that the agreement between the land owner and developer was oral. The petitioner/society, therefore, filed the present writ petition.

5. Mr. Datar, learned Advocate for the petitioner/society invited my attention to the agreement dated 5 August 1985, *wherein it has been stated that respondent No.1/promoter had acquired the property from predecessor of respondent No.3* to develop the property and accordingly based on the plan sanctioned by the Municipal Corporation, Thane, respondent No.1/promoter constructed the said building. *In the said agreement, it has also been stated that respondent No.1/promoter had right to enter in the said agreement respondent No.1/promoter had the right to enter into agreements with intending acquirers of various flats/blocks/shops/offices/garages in the said building. It is stated that the flat purchaser with whom the said Agreement has been executed intends to acquire a flat in the building which was under construction from respondent No.1/promoter and, therefore, he had the intention to acquire flat No.12 on the 3rd floor of the said building for consideration of Rs.250/- per sq. ft. The flat purchaser agreed to pay Rs.1,50,000/- towards total consideration.* Mr. Datar also invited my attention to the agreement jointly entered by respondent No.1 and the predecessor of respondent No.3 the tenant in the said area wherein the predecessor of respondent No.3 and respondent No.1 agreed to allot the flat ad-measuring 450 sq. ft. in the newly constructed building, jointly developed by the predecessor of respondent No.3 and respondent

No.1. The agreement is dated 27 October 1983. It is, therefore, submitted that the predecessor of respondent No.3, by his act caused purchasers of the building to believe that respondent No.1 was a promoter of the said building and by acting on such belief, the individual purchasers purchased flats/units in the said building. He submitted that as a part of consideration for development, the promoter allowed two flats bearing Nos.A21 and A22 in favour of the predecessor of respondent No.3 and 3 offices to the sons of respondent No.3. He, therefore, submitted that the respondent No.4 ought to have directed respondent No.1 and 2 based on their 'no objection' to execute conveyance by granting liberty to the respondent No.3 to agitate to get rights adjudicated before the Civil Court.

6. Per contra, Mr Apte, learned senior Advocate for respondent No.3 submitted that there is no privity of contract between respondent No.1 and predecessor of respondent No.3 or predecessor of respondent No.2. The predecessor of respondent No.3 (husband of respondent No.3) had orally agreed to sell the portion of property in favour of *M/s. Nanji Khimji and Bros.* and not respondent No.1. He submitted that as per the case of respondent No.3's husband, as a part of consideration, *M/s. Nanji Khimji and Bros.* allotted the husband of respondent No.3 flat Nos.A21 and A22 and allotted offices Nos.S1, S2, and S3 on the ground floor to her son. He submitted that respondent No.3 does not own any premises in the said building. He submitted that respondent No.3 is refusing to accept allotment of flat Nos.A21 and A22 in favour of the husband of respondent No.3. He

submitted some of the agreements entered with individual purchasers, are not registered and, therefore, no relief can be granted in favour of the petitioner/society.

7. I have given anxious consideration to the submissions canvassed across the bar. The parameters in the exercise of power under Section 11 of the MOFA Act by respondent No.4 are now well settled in the scheme of the said Act and Rules. The promoter is under obligation to agree to sell the flats/units in the said building, a promoter shall register it and then form an organization of flat purchasers and after completion of development execute an instrument conveying right, title and interest in the land and building, in accordance with the agreement executed with flat purchasers. The Competent Authority is conferred that power of execution of conveyance, due to refusal and neglect on the part of the promoter's to discharge the obligation to execute conveyance. The Legislature, therefore, intervened to enforce such obligation by empowering the Competent Authority to be satisfied that it is a fit case for issuing such certificate of deemed conveyance in favour of the organization of purchasers. The Competent Authority is required to follow principles of natural justice upon verification of authenticity of documents.

8. The decision of this Court in the case of **Mazda Construction Company And Others Vs. Sultanabad Darshan CHS Ltd. And Others**, reported in (2012) SCC OnLine Bom 1266 makes an elaborate analysis of the provisions contained in the MOFA Act. The Single Judge of this Court has explained the nature of power

exercised by the Competent Authority in paragraph 20 of the said judgment 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 fulfil 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....”

9. At this stage, it is necessary to refer to the Division Bench judgment of this Court in the case of **M/s. Shree Chintamani Builders Petitioner Vs. State of Maharashtra & Ors.**, reported in (2016) SCC OnLine Bom 9343 wherein it was observed that an

order granting deemed conveyance would not conclude the issue of right, title of the immovable property. It was not as if such an order was passed, the owner/builder had no remedy to question the act of society on the strength of such deemed conveyance. It is open for the developer/owner to bring a substantive suit on the title and point out the issues concerning right, title or interest on the immovable property.

10. In the case of **Zainul Abedin Yusufali Massawawala And Others Vs. Competent Authority District Deputy Registrar of Co-operative Housing Societies, Mumbai And Others**, reported in (2016) SCC OnLine Bom 6028, the Division Bench of this Court was considering challenging the order of deemed conveyance in the context of societies to claim of excess area than the schedule in the development agreement. In the context of aforesaid controversy, the Division Bench, in paragraph 9 of the judgment, again clarified the nature of power exercised by the Competent Authority under Section 11 of the MOFA Act as under:

“9....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 v. Sultanabad 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....”

11. The conspectus of the judgments of this Court can be summarized thus. The grant of deemed conveyance is the primary obligation of the promoter to convey to the organization of flat/unit purchaser's right, title and interest in the land and building, in accordance with the agreement executed under Section 4 of the MOFA Act. The Competent Authority cannot convey more than what the promoter had agreed to convey under the agreement executed under Section 4 of the MOFA Act. The Competent Authority is enjoined to adjudicate the nature of the obligation agreed upon by the promoter, whether such obligation to execute conveyance became enforceable and whether the promoter committed default in executing conveyance. This is the scope of enquiry of the power of the Competent Authority. The Competent Authority has no power to hold an enquiry into that aspect of title nor is entitled to prevent a party from agitating a grievance as to the entitlement of the organization to have conveyance, before the Civil Court. The scope of enquiry by the Competent Authority is, therefore, to consider the fulfilment of conditions in the agreement between the promoter and the purchaser and the consequential order of deemed conveyance.

12. In light of the nature of power to be exercised by the Competent Authority, in the facts and circumstances of the present case, the promoters have submitted their 'no objection' for executing of conveyance in favour of the petitioner/society. However, respondent No.3 claiming to be the owner of the property is objecting to conveyance on the ground that there is no privity of contract between respondent No.1/promoter and the husband of respondent No.3. In the context of the objection raised by respondent No.3, it necessary to decide as to whether in view of benefit derived by the predecessor in title of respondent No.3, whether respondent No.3 is entitled to object execution of unilateral deemed conveyance.

13. For adjudication of the aforesaid issue, it is necessary to refer to the agreement dated 5 August 1985 entitled “agreement to acquire”. The agreement is registered. The predecessor of respondent No.3 (erstwhile owner) accepts that he permitted respondent No.1/promoter to carry out construction and the promoter had constructed the buildings as per the sanctioned plan by the Municipal Corporation. The agreement specifically authorizes respondent No.1 to enter into agreements with intending acquirers of various flats/units. The agreement acknowledges respondent No.1 as a promoter and on payment of Rs.1,50,000/- it was agreed that respondent No.1 shall execute the sale deed of flat No.12 on the 3rd floor in favour of *flat purchaser*.

14. Moreover, in the affidavit-in-reply filed by respondent No.3, she accepted that M/s. Nanji Khimji and Company allotted her husband flat No.A21 and A22 and allotted office Nos.S1, S2 and

S3 to her sons. She states in paragraph 6 that flats No.A21 and A22 are owned by her sons and office Nos.S1, S2 and S3 are also owned by her sons. She also accepts that the petitioner/society issued a share certificate to them during the lifetime of her husband.

15. The document produced by the petitioner along with affidavit-in-rejoinder dated 4 January 2024 indicates that the husband of respondent No.3 and respondent No.1 entered into an agreement with the tenant over the said property by allotting *450 sq. ft.* flat in the redeveloped building on an ownership basis of payment of Rs.70,000/-. It was also agreed that till the new building was being constructed, the husband of respondent No.3 and respondent No.1 would arrange temporary accommodation for the tenant. The said agreement dated 27 October 1983, gives a list of amenities provided for the block of tenants.

16. The document dated 17 April 1993 issued by the husband of respondent No.3 in favour of the petitioner acknowledges that he permitted the promoter to develop his property according to the sanction plan which was signed by him. He acknowledges that the promoter constructed the building and members of the petitioner/society are its occupants.

17. Based on aforesaid documents, it is evident that the husband of respondent No.3 by his act and declaration caused the tenant and purchasers to believe that respondent No.1 was the promoter and, therefore, respondent No.3 can not be permitted in a proceeding between such person and his representative to deny

the truth of that thing. A profitable reference can be made to the judgment of the Apex Court in the case of **B. L. Sreedhar Vs. K. M. Munireddy (Dead) And Ors.**, reported in (2003) 2 SCC 355. The Apex Court in paragraphs 9, 13, 15, 18, 19, 20 and 30 held as under :

9. First we deal with the stand of the appellant that on regrant benefit enures to the members of the family. Learned counsel for the respondents fairly accepted this legal position and in our view rightly, because of what has been said by this Court in *Nagesh Bisto Desai v. Khando Tirmal Desai* [(1982) 2 SCC 79] , *Kalgonda Babgonda Patil v. Balgonda Kalgonda Patil* [1989 Supp (1) SCC 246] and *New Kenilworth Hotels (P) Ltd. v. Ashoka Industries Ltd.* [(1995) 1 SCC 161] Therefore, indisputable legal position is that even if grant is made under the Act to any member of the family, the benefit enures to the whole family. Having cleared this legal position, the contentious issues need to be noted. First comes the question whether the rule of estoppel is applicable.....

13. Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short “the Evidence Act”) which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. (See *Sunderabai v. Devaji Shankar Deshpande* [(1952) 2 SCC 92 : AIR 1954 SC 82] .)

15. On the whole, an estoppel seems to be when, in

consequences of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim *allegans contraria non est audiendus* (a party is not to be heard to allege the contrary) and is that species of presumption *juries et de jure* (absolute or conclusive or irrebuttable presumption), where the fact presumed is taken to be true, not as against all the world, but against a particular party, and that only by reason of some act done, it is in truth a kind of *argumentum ad hominem*.

18. Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. An estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess is described as estoppel by negligence or by conduct or by representation or by holding out ostensible authority.

19. Estoppel, then, may itself be the foundation of a right as against the person estopped, and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. Where rights are involved, estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. It would be useful to refer in this connection to the case of *Depuru Veeraraghava Reddi v. Depuru Kamalamma* [AIR 1951 Mad 403 : (1950) 2 MLJ 575] where Vishwanatha Sastri, J. observed : (AIR p. 405, para 7)

“Estoppel though a branch of the law of evidence is

also capable of being viewed as a substantive rule of law insofar as it helps to create or defeat rights which would not exist and be taken away but for that doctrine....”

20. Of course, an estoppel cannot have the effect of conferring upon a person a legal status expressly denied to him by a statute. But where such is not the case a right may be claimed as having come into existence on the basis of estoppel and it is capable of being enforced or defended as against the person precluded from denying it.

30. If a man either by words or by conduct has intimated that he consents to an act which has been done and that he will not offer any opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that which they otherwise might have abstained from, he cannot question the legality of the act he had sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.”

18. Therefore, in the facts of the present case, the husband of respondent No.3 by his act and declaration caused the tenant and purchasers to believe that respondent No.1 was the promoter and, therefore, respondent No.3 can not be permitted to object to conferment of deemed conveyance in favour of petitioner/society. Hence, the following order:

- i) Rule is made absolute in terms of prayer clause (a).
- ii) Respondent No.3, however, is at liberty to institute a

substantive suit to agitate her claim as regards property which is the subject matter of deemed conveyance.

19. Subject to aforesaid clarification, Rule is made absolute.

20. The writ petition stands disposed of. No costs.

21. At this stage, learned Advocate for respondent No.3 prays for stay to the order. Considering the fact that the obligation to confer conveyance was pending for last 30 years, request for stay of the judgment is rejected.

(AMIT BORKAR, J.)

Note:- This order is modified as per order dated 22 February 2024. Corrections in paragraphs 5, 6, 13 and 15 are shown italicize.