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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

VASANT
ANANDRAO
IDHOL

WRIT PETITION NO.10404 OF 2024

Sarayu Properties & Hotels Pvt. Ltd. ..Petitioner

V/s.

The District Deputy Registrar,
Co-operative Societies & Anr. ..Respondents

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Mr.Mayur Khandeparkar with Mr.Vikramjit Singh Garewal
Mr.Bharat Jain, Ms.Vasundhara Soni and Ms.Shruti Salian i/b
Economic Law Practice for the Petitioner.

Mr.Hamid Mulla, AGP for the Respondent No.1 – State.

Mr.Ashish Kamat, Senior Advocate with Mr.Rohan Sawant,
Mr.Harsh Moorjiani, Melvyn Fernandes, Anuya Pathare i/b Vaish
Associates for Respondent No.2.

CORAM : AVINASH G. GHAROTE, J.
DATE : 29TH JULY, 2024.

P.C. :-

1. Heard Mr.Khandeparkar, the learned counsel for the
petitioner. The petition questions the order dated 27.06.2024
passed by the Competent Authority under Section 11 of the
Maharashtra Ownership of Flats (Regulation of the Promotion of

Construction, Sale, Management and Transfer) Act, 1963, (“MOFA”) granting a deemed conveyance to the respondent No.2 in respect of land admeasuring 334 sq.mtrs. which is the part of the larger area admeasuring 919 sq. mtrs. of plot bearing C.T.S. No.1073-B (part) 9th Road, TPS- IV, Bandra (West), Bombay - 400 050.

2. Mr.Khandeparkar, the learned counsel for the petitioner contends, that since Section 4 agreement dated 20.07.1997 (page 44), which is the standard agreement with all the flat purchasers, contains, a clause that what would be granted to the society, would be a lease of the land and a conveyance of the building, the Competent Authority by passing the impugned order and granting conveyance of the land, has clearly erred in law, as it could not have gone beyond the terms of Section 4 agreement. He invites my attention to Clauses 20, 21, 36 and 42 of the aforesaid agreement to contend that they only contemplate grant of a lease and not otherwise. He further submits, that under the terms of the Section 4 agreement, the petitioner, has reserved its right to utilize its entire original plot,

by making additional construction by using additional T.D.R., which may be permissible to be loaded on the plot or permissible to be otherwise used, on account of change in the Development Control Regulation. He submits that clauses of the Section 4 agreement, indeed reserved such a right in the petitioner, for which he invites my attention to clauses (g) and (j) (page 46) clauses 13, 17 and other clauses of the aforesaid agreement, which permit him to do so. He therefore contends that the Competent Authority while directing a deemed conveyance under Section 11(3) of MOFA, could not have transgressed the terms of Section 4 agreement by directing the conveyance instead of lease in favour of the respondent No.2 or for that matter, done away with the rights of the petitioner to make further development in terms of the clauses, as contained in Section 4 agreement. For the purpose of substantiating his submission, that a lease cannot be construed as a title, he places reliance upon the judgment of this Court in the case of *The Collector of Bombay vs. Khatizabai Dharsi Somji Dossa*, reported in *1961 SCC OnLine Bom.32*, paragraphs 29 to 33 and the

judgment of the Supreme Court in the case of *Kiran Tandon vs. Allahabad Development Authority & Anr.* reported in 2004(10) SCC 745 paragraphs 21 and 22.

3. He also invites my attention to Rule 9 (2) (iii) of Rules under Real Estate Regulatory Authority (RERA), to contend that considering the changes in circumstances, which has occurred over a period of time, both in the law and factuality, according corrections in the law, have been reflected there, and that should also be the approach of the Competent Authority under Section 11 (3) of MOFA. He however, does not dispute, that in the present case, the petitioner is the owner of the property, having absolute title and is not a lessee of the said property from any one.

4. Mr.Kamat, the learned senior counsel for the respondent 2, submits, that though the Section 4 agreement contemplates, a lease to be granted in favour of the society, in respect of the land in question, however, Section 11(1) of MOFA, contemplates a situation of transfer of right, title and interest of the Promoter, which in view of the definition in Section 2 (c) of

MOFA includes the owner of the property and therefore, in this case, since it is an admitted position, that the petitioner owns the property, it is the title he possesses, which is required to be transferred to the society and not a lease, as may be contemplated by clauses 20, 21 and 36 of Section 4 agreement, as according to him Section 11(1) of MOFA would have an overriding effect upon the clauses of the agreement, which is supported by clause 13 of Form-V under Section 4 read with Rule 5 of MOFA. In this context, he places reliance upon the judgments of this Court in case of Nalini Thakkar & Ors. vs. Mulund Ambe Mahal Co-op. Hsg. Soc. Ltd. & Ors., reported in 2021 SCC Online Bom. 6590, paragraphs 14 and 15 and in the case of Gayatri Construction vs. State of Maharashtra & Ors., reported in 2024 SCC OnLine Bom. 438. He also relies upon the judgment in the case of Nihalchand Laloochand Pvt. Ltd. reported in 2008 (6) Mh.L.J. 47, paragraph 14 to contend that the provision of MOFA would override any clause in the Section 4 agreement. He therefore, submits that any claim by the petitioner, of grant of lease, instead of conveyance, would not

stand to reason.

5. The learned AGP appearing for the respondent No.1 supports the impugned order.

6. Section 11 of MOFA reads as under:

“11. Promoter to convey title, etc, and execute documents, according to agreement

(1) A Promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association of flat takers or apartment owners his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

(2) It shall be the duty of the promoter to file with the Competent Authority, within the prescribed period, a copy of the conveyance executed by him under subsection (1).

(3) If the Promoter fails to execute the conveyance in favour of the co-operative society formed under Section 10 or, as the case may be, the company or the association

of apartment owners, as provided by sub-section (1), within the prescribed period, the members of such co-operative society or, as the case may be, the company or the association of apartment owners may, make an application, in writing, to the concerned Competent Authority accompanied by the true copies of the registered agreements for sale, executed with the promoter by each individual member of the society or the company or the association, who have purchased the flats and all other relevant documents (including the occupation certificate, if any), for issuing a certificate that such society, or as the case may be, company or association, is entitled to have an unilateral deemed conveyance, executed in their favour and to have it registered.

(4) The Competent Authority, on receiving such application, within reasonable time and in any case not later than six months, after making such enquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard, on being satisfied that it is a fit case for issuing such certificate, shall issue a certificate to the Sub-Registrar or any other appropriate Registration Officer under the Registration Act, 1908, certifying that it is a fit case for enforcing unilateral execution of conveyance deed conveying the right, title and interest of the promoter in the land and building in

favour of the applicant, as deemed conveyance.

(5) On submission by such society or as the case may be, the company or the association of apartment owners, to the Sub-Registrar or the concerned appropriate Registration Officer appointed under the Registration Act, 1908, the certificate issued by the Competent Authority along with the unilateral instrument of conveyance, the Sub-Registrar or the concerned appropriate Registration Officer shall, notwithstanding anything contained in the Registration Act, 1908, issue summons to the promoter to show cause why such unilateral instrument should not be registered as 'deemed conveyance' and after giving the promoter and the applicants a reasonable opportunity of being heard, may, on being satisfied that it was a fit case for unilateral conveyance, register that instrument as 'deemed conveyance'."

7. The language of Section 11 (1) of MOFA contemplates that a Promoter has to take all necessary steps to complete his title and convey to the organization his right, title and interest in the land and building. This would indicate, that the title, which the Promoter, possesses, will in turn has to be transferred to the society of flat purchasers and therefore it is not necessary to go into the issue that Section 4 agreement contemplates a lease as Section 11 of the MOFA will prevail. In the instant case, it is not

disputed that the Promoter is the owner of the land and therefore, has a clear title to the land in question and not a lease, in view of which, the direction for deemed conveyance, *vis-a-vis* the title, which the respondent No.2 possesses, the order of the Competent Authority of the title of the respondent No.2 to be transferred to the society of the flat purchasers, cannot be faulted with. The plea, that as the agreement, contemplates grant of lease and therefore, under Section 4 read with Section 11 of MOFA, nothing else could have been directed to be conveyed by the Competent Authority, is mis-conceived, as what is mandated in Section 11 (1) of MOFA, would hold the field. This position, is equally supported by Form-V, clause 13, which is in pursuance to Section 4 of MOFA and Rule 5 of Rules framed thereunder and Note 1 appended thereunder, which says that clause 13 of Form-V is non-derogable. In that light of the matter, the grant of conveyance by the Competent Authority, by the impugned order cannot be interfered with.

8. That leads me to the contention of Mr.Khandeparkar, the learned counsel for the petitioner that Section 4 agreement

confers right upon the petitioner to utilize the land, by making additional construction, either by loading or making use of additional F.S.I. which may become available to the plot in question, considering the amendments in the Development Control Regulation or any other accretion, which may come with the plot on account thereof. This position, is disputed by Mr.Kamat, the learned senior counsel for the respondent No.2, contending that it is not within the domain or jurisdiction of the Competent Authority to decide this, which is correct.

9. However, it is equally necessary to state that any claim for utilization of the potential of the entire plot, on account of any accretions, to it, either by loading T.D.R. or FS.I. which may become available due to change in the Regulations, which the petitioner claims, in terms of the clauses of Section 4 agreement, is a claim which can always be agitated by the petitioner by instituting appropriate suit in that regard, and therefore, any deemed conveyance which has been granted in favour of the respondent No.2 society whether it is registered or not, would always be subject to such a claim being raised by the petitioner

before the Civil Court and any decree being passed therein.

10. In view of what has been stated above, I do not see any reason to interfere in the impugned order. The petition is dismissed however, subject to what has been stated above.

(AVINASH G. GHAROTE, J.)