

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13690 OF 2024.

- 1) India Finance & Construction Co. Pvt. Ltd.]
Having Their Regd. Office At 27, Tejpal]
Road, Vile Parle (East), Mumbai-400057.]
- 2) M/s. C R Developments Pvt Ltd. Having]
Registered Office At 27, Tejpal Road, Vile]
Parle (East), Mumbai-400057.] **...Petitioners.**

Versus

- 1) State of Maharashtra Through The]
Ministry of Co-operation, Mantralaya,]
Mumbai.]
- 2) District Deputy Registrar, Co-operative]
Societies, Mumbai City (3), Competent]
Authority U/s 5A of MOFA, 1963.]
- 3) Shyamkamal 'C' Co-operative Housing]
Society Ltd. A Society Registered under]
the Provisions of the Maharashtra Co-]
Operatives. Societies Act, 1960 Under]
Registration No.]
BOM/(W-KE)/HSG(TC)/670/84-85 Dated]
09/10/1984, Having Its Registered]
Address At Tejpal Road, Vile Parle (EAST),]
Mumbai-400057.]
- 4) Shyamkamal "A" CHS Ltd.]
A Society Registered under the]
Provisions of the Maharashtra Co-]
Operatives Societies Act, 1960 Having Its]
Registered Address At Agarwal Market,]
Opp. Railway Station, Vile Parle (EAST),]
Mumbai-400057.]
- 5) Seth Bishambharnath Agarwal]
Shyamkamal "B" CHS Ltd. Having Its]
Registered Address At Agarwal Market,]

- Opp. Railway Station, Vile Parle (EAST),]
Mumbai-400057.]
- 6) Shyamkamal "D" CHS Ltd. Having Its]
Registered Office At Agarwal Market,]
Opp. Railway Station, Vile Parle (EAST),]
Mumbai-400057.]
- 7) Adani Electricity Mumbai Limited Having]
Its Office At Devidas Lane, Off SVP Road,]
Near Devidas Telephone Exchange,]
Borivali (WEST), Mumbai- 400 103]
- 8) Padamchand Agarwal Having Last Known]
Address At Original Plot Nos. 1/1A and]
1/1B, Final Plot Nos. 2/1, 2/2, 2/3 And 2/4]
of Vile Parle Town Planning Scheme-1,]
Tejpal Road, Vile Parle (EAST), Mumbai]
400 057.] **...Respondents.**

Mr. Sanjay Jain, Mr. Dharam Juman Counsel, a/w Ms. Meenakshi Dhanuka Rungta and Ms. Archana Yadav i/by Dhanuka & Partners for the Petitioner.

Ms. V. S. Nimbalkar AGP for the Respondent-State.

Mr. Piyush Raheja a/w Chinmay Mehta i/by Rucha Jog, for the Respondent No. 3.

Adv. Kunal Bhange a/w Sonal Mishal a/w Akshay Pawar for the Respondent No. 4.

Mr. Vinay Ansurkar a/w Mr. V. Mehta, Ms. Akshita Rathudi i/by Mr. Kartik Vig for Respondent No. 5.

Coram : Sharmila U. Deshmukh, J.
Reserved on: November 27, 2024.
Pronounced on : December 12, 2024.

JUDGMENT :

1. **Rule.** Rule made returnable forthwith and taken up for final hearing with consent.

FACTUAL MATRIX:

2. By this Petition, the challenge is to the order dated 30th August 2024, passed by the Respondent No. 2 under Section 11 of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction Sale Management and Transfer) Act 1963, [for short "**MOFA**"], granting certificate for executing unilateral deemed conveyance to the Respondent No.3-Society of area admeasuring 4305.89 sq.mtrs. out of 10318.20 sq.mtrs of Sub-Plot No.P-2 on land bearing CTS No. TPS-1, F.P.No.2/2 (old CTS No. 2) of Ville Parle Town Planning Scheme – 1 at Ville Parle East, Taluka Andheri.

3. The sanctioned sub-division plan, discloses that the Respondent No. 3-Society along with Respondent Nos. 4, 5 and 6 Societies are located on Sub-Divided Plot No P-2 admeasuring 10398.23 sq. mtrs.

4. Alleging non compliance of the statutory obligations, the Respondent No. 3 filed an Application under Section 11(3) of MOFA, seeking certificate for executing unilateral deemed conveyance of land admeasuring 4879.45 sq. mtrs. out of 7424.40 sq. mtrs. from final plot No. 2 along with 440.75 sq. mtrs. out of 1573.90 sq. mtrs. from final plot No. 2/5 and 2/6 i.e. 28% proportionate rights in FSI advantage of road set back area together with the building constructed thereon. The Application was resisted by Petitioner No. 1 *inter alia* contending that

certificate for lease of built up area of building with land under the building as 3847.66 sq. mtrs. and proportionate area of additional FSI 1595.35 sq. mtrs totally aggregating 5443.01 sq. mtrs can be granted.

5. After the arguments of the parties were concluded, the Competent Authority vide letter dated 2nd April, 2024 called upon the Respondent No 3 to file its Architect's Report based on last sanctioned plan dated 28th October, 1993, which was submitted by the Respondent No 3. There was no opportunity of hearing given to the Petitioners on the fresh Architect's Certificate dated 19th July, 2024 and the Competent Authority granted the certificate for execution of the unilateral deemed conveyance based on the Architect's Certificate dated 19th July, 2024.

6. The resistance of the Petitioners to the deemed conveyance is by reason of the terms contained in the flat purchaser's agreement, the consent terms in Suit No. 1844 of 1985 and its Architect's Report contending that the area of 1039 sqr mtrs which was internal road could not be considered for computation of plot area for grant of deemed conveyance of Respondent No. 3-Society.

SUBMISSIONS:

7. Mr. Jain Learned Counsel appearing for the Petitioner would submit that the flat purchaser's agreement was executed prior to 1986 and therefore Model form-V will not be applicable and the

parties will be bound by the terms and conditions of the flat purchaser's agreement. Pointing out to the sanctioned plan of the year 1985, he submits that the area statement shows that the area of Respondent No. 3-Society as 2926.42 sq. mtrs and the built up area as 5442.96 sq. mtrs and the FSI consumed at 1.86. He submits that the additional 100% set back area was 1525.36 sq. mtrs and the FSI was loaded on the Sub plot C on which the Respondent No. 3 was constructed. He submits that the plan of 28th October, 1993, was the sub division plan which shows the boundaries of plot No. P-2 and Lala Bishambharnath Nath Agarwal road to the south of Plot No P-2, which is outside the boundary of the said plot. He submits that the Competent Authority has wrongly construed the sub division plan as the sanctioned layout plan while granting deemed conveyance. Pointing out the recitals in the MOFA Agreement, he submits that the building C, D and D-1 are constructed on land described in 2nd and 3rd Schedule and taking this Court to the 2nd and 3rd schedule, he submits that the buildings have been constructed on area admeasuring 8485.4 sqr. mtrs bounded on the south by the said Lala Bishambharnath Nath Agarwal road and therefore the said road was outside the plot.

8. He submits that the Architect's Certificate produced by the Respondent No 3 incorrectly sets out the area of the plot as per the approved layout at 10,398.23 sqr. mtrs by including the internal road.

He submits that considering the Built Up Area of Respondent No 3 Society, the proportionate share is determined at 41.41% of the entire built up area. He would further submit that the consent terms executed in the Civil Court, which constitute agreement between the parties, was produced before the Competent Authority, which have not been considered. He submits that the agreement between the parties restrict the Respondent No 3 from demanding any exclusive right to the internal road.

9. *Per contra*, Mr. Raheja, learned Counsel appearing for the Respondent No.3 would submit that the Competent Authority has taken into consideration the binding Government Resolution of 22nd June 2018. He submits that the order of Competent Authority considers the plan of 28th October, 1993 and accordingly grants deemed conveyance. He would further point out that the Petitioner's own Architect's Certificate accepts the area of plot at 10,398.20 sq. mtrs and the proportionate share as per the built up area of Respondent No. 3 at 41.41% and calculates the area at 3847.19 sq. mtrs and balance share in set back at 443.01 square meters. He submits that there is no existing set back area and these rights have been given away. He would further submit that as per the consent terms executed between the parties, it was agreed that the internal roads, storm water drains and street lights etc., shall be maintained by the Plaintiff's

till the completion of the entire complex i.e. the final plot No. 2 and thereafter the expenses to be borne by the Respondent No. 3-Society and therefore the area of the internal road has been rightly given to the Respondent No. 3.

10. Mr. Ansurkar, Learned Counsel appearing for the Respondent No. 5 would submit that the Respondent No 5 Society is located on the same plot and his application for deemed conveyance has been rejected , which is in process of being challenged. He submits that by granting larger area to the Respondent No. 3, an imbalance of FSI has been created.

11. In rejoinder, Mr. Jain would submit that the Architect's Certificate given by the Petitioners wrongly considers the share of the Petitioner at 41.41% as the consent terms does not give that right and that the road is outside the purview of consideration. He submits that set back FSI cannot be said to be non existing as the same has been consumed by the Respondent No 3 Society and will be available to the Respondent No 3. He submits that the road is not the common area of the Respondent No 3 Society and the GR of the year 2018 cannot override the flat purchaser's agreement. He submits that the order of the Competent Authority does not reflect the consideration of the plan of 1985, the various clauses of the Agreement and the consent terms. He would further submit that the fresh Architect's Certificate was

called after the matter was closed for order and no submissions were made by the Petitioner on the said Certificate based on the plan of 28th October 1993. He would further submit that there is difference between the previous and subsequent Architect's Certificate.

REASONS AND ANALYSIS:

12. There is no denial to the entitlement of the Respondent No 3 to the grant of deemed conveyance and the dispute pertains to the inclusion of area of the internal road while computing the proportionate share of Respondent No 3 in the total plot area. The Application for deemed conveyance seeks area admeasuring 4879.45 square meters out of 17424.40 square meters of Final Plot No 2/1, 2/2, 2/3, 2/4 of Vile Parle Town Planning Scheme alongwith 440.75 square meters out of 1573.90 square meters being proportionate 28% of rights in FSI advantage of the road set back area of Final Plot Nos 2/5 and 2/6 of Vile Parle Town Planning Scheme.

13. The Respondent No 3 had supported the claim for deemed conveyance of the area by the Architect's Certificate dated 9th March, 2023, which discloses that the computation is on the basis of the building plan of the year 1984. Before this Court the block plan of the year 1985 and the sanctioned sub-division plan dated 28th October, 1993 are on record.

14. I have perused both the plans. The area statement in the

plan of the year 1985 shows the area of Sub-Plot "A" at 1933.76 square meters, "B" at 2211.07 square meters and "C" at 2926.42 square meters accounting for total of 7071.25 square meters out of the larger plot of 18998.33 square meters which includes area under notification of 2470 square meters, with the net plot area aggregating to 16528.33 square meters. After deducting the constructed combined area of A, B and C, the balance area of Plot No 2 is 9457.17 square meters. The additional 100% set back area, as per the 1985 plan, is 1525.36 square meters, which is added to the balance plot area of 9457.17 square meters to show the permissible built up area on remaining plot at 10982.53 square meters. As per this plan of the year 1985, the internal roads are shown as Lala Bishambar Nath Private Road and one of the internal 44 feet wide road is stated to have been handed over as D.P road.

15. On 26th October, 1995, the sub division plan of Plot No 2 was approved and Plot No 2 came to be sub divided into four sub -plots i.e Plot No P-1, Plot No P-2, Plot No P-3 and Plot No P-4 plot was reserved for parking lot. As per the sub-division plan of 1995 the plot area of P-1 is 2175 square meters, P-2 is 10398.23 square meters, P-3 is 1931.81 square meters and P-4 is 2920 square meters. In the present case, the relevant plot is Plot No P-2 consisting of Building No B, C, D and D-1. The total plot area of P-2 is 10398.23 square meters and the combined built up area of the buildings constructed on P-2 is 13143.75

square meters. The Built up area of Building "C", which is Respondent No 3 is 5443.01 square meters.

16. The application seeks conveyance of 4879.45 square meters out of 17424.40 square meters which is the combined plot area of P-1, P-2, P-3 and P-4 alongwith 440.75 square meters being 28% proportionate right in FSI advantage of additional set back area based on Architects Certificate dated 9th March, 2023 computed on the basis of building plans of the year 1984. However the same was not considered by the Competent Authority as fresh Architect's Certificate was called based on the sub-division plan of the year 1995. In the fresh Architect's Certificate, the Architect has calculated the share of the Society at 41.41% in proportion to the built up area of Building B, C, D, and D-1. As per the percentage, the corresponding plot area of Building "C" is shown as 4305.89 square meters.

17. When the fresh Architect's Certificate is compared with Petitioners Architect's Certificate, it can be seen that the Petitioner's Architect's Certificate also computes the area of Plot P-2 at 10398.20 square meters but deducts the internal area of the layout road of 1039 square meters and plot area of electric sub station to compute the net plot area at 9292.20 square meters. The Respondent No 3's proportionate share is calculated at 41.41% of 9292.20 square meters.

The Certificate includes share in set back at 1595.11 sqr. meters, which is now being disowned by the Petitioner's as being an incorrect inclusion by the Architect. There is commonality as regards share of Respondent No. 3 at 41.41% and area of plot P-2 at 10398.20 sqr.mtrs and the dispute appears to be in respect of the area of the internal layout road.

18. According to the Petitioners, the ownership of the area of internal layout road vests in the Petitioner No 1 in accordance with the Flat Purchaser's Agreement read with the Consent Terms executed in the Civil Court which is disputed by Respondent No. 3 and therefore the issue boils down to whether the area of internal road can be considered while computing the share of Respondent No. 3. The answer lies in the agreement between the parties in view of Section 11 of MOFA. The statutory scheme of Section 11 of MOFA casts an obligation upon the Promoter to take all necessary steps to complete his title and convey to the organization of person, who takes flats, which are registered either as cooperative society or company or association of apartments, his right, title and interest in the land and building by executing a document in that regard in accordance with the agreements executed under Section 4 of the MOFA. What is of significance is the obligation cast upon the Promoter under Section 11 of MOFA is to convey his right, title and interest in the land and

building "*in accordance with the agreement executed under Section 4*".

19. It is unquestionable that the Competent Authority exercises limited jurisdiction under Section 11 of MOFA. The remit of inquiry by the Competent Authority under Section 11 of MOFA is limited to ascertain the Promoter's obligation as per the agreement between the parties and to convey the land area in accordance with the agreement read with the sanctioned plans for purpose of determining the area. The Architect's Certificate submitted by the parties assists the determination of the area required to be conveyed. In the present case, the Competent Authority has discarded the earlier Architect's Certificate produced by the Respondent No 3 and after the arguments were concluded called upon the Respondent No 3 to submit fresh Architect's Certificate, which was done by the Respondent No 3. It is also not disputed that copy of the said fresh certificate was served upon the Petitioners, however, the error is that the parties should have been given an opportunity to advance their submissions on the fresh Architect's Certificate. On record before the Competent Authority were three Architect's Certificates, two by the Respondent No 3 and one by the Petitioner. It was necessary to have some discussion on these certificates to demonstrate the reason for accepting the area as mentioned in the fresh Architect's Certificate submitted by the Respondent No 3. In addition, there is no discussion on the flat

purchasers agreement and the Consent Terms to indicate the agreement between the parties and the Promoter's obligations, which the Competent Authority was enjoined to comply.

20. The impugned order of Competent Authority indicates the only finding at paragraph 17 (p) as under:

"(p) It is observed that the architect certificate submitted by the applicant society is issued by architect after relying on the last approved building plan dated 28.10.1993 as per GR dated 22.06.2018 hence accepted."

21. The conclusion arrived by the Competent Authority is *dehors* any discussion supporting the acceptance of the area stated in the fresh Architect's Certificate. Admittedly, no opportunity was given to the Petitioners to place its submissions on the fresh Architect's report. It is also submitted that the Petitioner's Architects Certificate computing the area to be conveyed by including share in the set back area is erroneous.

22. Mr. Raheja would rely on the G.R. dated 22nd June, 2018 to contend that irrespective of the agreement between the parties, the GR provides for grant of proportionate undivided share in the internal roads and common amenities. To simplify the procedure in respect of grant of deemed conveyance and certificate, the Government of Maharashtra has issued a government resolution dated 22nd June 2018.

Sub-clauses (1), (3) and (4) of Clause 2(B) of the said Resolution reads thus :

"1) If there are many buildings on one plot and have a separate co-operative society of each building and if construction of some of them is incomplete then while making Deemed Conveyance of completed building, undivided share of occupancy right in the proportion of construction on the proportionate area of the construction of the building of such society or ground coverage or plinth area, similarly open space, common services and facilities, roads should be given."

"2) If there is more than one society in one layout and out of them only one society has made such application, similarly other societies are not co-operating for conducting measurement of the land of the applicant society then the District Dy. Registrar, Co-operative Societies, and Competent Authority shall suggest the applicant society to conduct the measurement according to the approved plan from the Architect on the panel of the Competent Authority who approved the construction plans of the concerned society and submit the report regarding area of the society."

4) If the developer did not complete the project in expectation of getting additional FSI or TDR in urban area, then in such cases, deemed conveyance of the number of flats proposed as per approved construction plan and that much flats are constructed then their deemed conveyance should be made."

23. The guidelines specifically deal with the situation where there are many buildings on one plot and have separate cooperative

societies and when the construction of some of them is incomplete. In the present case, the development of the layout is already complete and the applicability of the GR is questionable. In any event, the GR cannot override the agreement arrived at between the parties. For the purpose of computing the area to be conveyed, the agreement between the parties had to be looked into in addition to the sanctioned plans and the Architect's Certificate.

24. The dispute in the present case is considerably narrowed by reason of the willingness of the Petitioners to convey plot area of 3847.66 square meters with existing FSI of 5443.01 square meters as against the area of 4305.89 square meters granted by the Competent Authority. The debate is about inclusion of the internal road area in computing the grant of area of deemed conveyance which will have to be resolved by the Competent Authority by examining the agreement between the parties as the conveyance of right title and interest has to be in accordance with the flat purchaser's agreement.

CONCLUSION:

25. In light of the discussion above, the matter requires to be remitted to the Competent Authority for fresh adjudication as no hearing was given to the Petitioners on the fresh Architect's Certificate dated 19th July, 2024 tendered after the conclusion of the arguments and there is no discussion on the agreement between the parties as

regards the ownership rights in the internal road or on the competing Architect's Certificates placed by the parties. Hence, the following order is passed.

ORDER:

(a) The impugned order dated 30th August, 2024 and Certificate for execution of unilateral deemed conveyance dated 30th August, 2024 are hereby quashed and set aside.

(b) The Application No. 60 of 2023 is remitted to the file of the Competent Authority for fresh consideration in light of observations made herein.

(c) The Competent Authority to decide the matter afresh by taking into consideration the agreement between the parties, the plans and the Architect's Certificates and submission of the parties.

26. Rule is made absolute in the above terms.

[Sharmila U. Deshmukh, J.]