

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7493 OF 2024

Viva Vindhyagiri Tower Co-Op Hsg
Soc Ltd. Through Its Secretary

....*Petitioner*

: *Versus* :

The State of Maharashtra through
Its Competent Authority and Ors.

....*Respondents*

Mr. Aditya P. Kharkar, *for the Petitioner.*

Ms. A.A. Nadkarni, AGP *for the State.*

CORAM : SANDEEP V. MARNE, J.

Dated : 28 March 2025.

P.C. :

1) The petition challenges order dated 11 July 2023 passed by the Competent Authority and District Deputy Registrar rejecting the application preferred by the Petitioner-Society for grant of deemed conveyance of land and building under the provisions of Section 11 of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1973 (*MOFA*).

2) I have heard Mr. Kharkar, the learned counsel appearing for the Petitioner. Despite service of notices, none has chosen to appear on behalf of Respondent Nos.1 and 2, who are the Promoters. Ms.

Nadkarni, the learned AGP would appear on behalf of Respondent No.1.

3) Perusal of the impugned order dated 11 July 2023 passed by the Competent Authority would indicate that the authority is apparently swayed by the fact that though the entire plot admeasuring 4450 sq.mts formed part of Agreement under Section 4 of the MOFA, while sanctioning the plan, area of land admeasuring 510 sq.mtrs was excluded and the plan was sanctioned only in respect of the land admeasuring 3940 sq.mtrs. In my view, what the Competent Authority has ignored is the position that the Agreements executed with the flat purchasers under Section 4 of MOFA contemplated conveyance of the entire portion of land admeasuring 4450 sq.mtrs. There is no covenant in the Agreement which seeks to exclude any portion of land in the plot admeasuring 4450 sq.mtrs from being conveyed to the collective body of flat purchasers. What the Competent Authority exercises under the provisions of Section 11 of MOFA is the jurisdiction by stepping into the shoes of the Promoter for the limited purpose of transferring Promoter's right, title and interest in the land and the building in favour of collective body of the flat purchasers. In exercise of that jurisdiction, remit of which is summary in nature, the Competent Authority has to necessarily take into account the covenants of the Agreements executed with the flat purchasers under Section 4 of MOFA. Once the Promoter undertakes to convey the entire portion of land, which forms part of Section 4 Agreement, merely because the Promoter is yet to exploit the entire FSI potential, the same cannot be an answer for conveying lesser portion of land than the one contemplated under Agreement executed under Section 4. In New Sonal Industries Premises Ltd Versus. District Deputy Registrar (2), Co-operative Societies and Ors.¹, this Court dealt with a situation where the Promoter had utilised FSI of only

1 WP-10548/2024 decided on 12 February 2025

3832.30 sq.mtrs (*FSI of 0.57*) out of the total FSI potential of 8647.80 sq.mtrs. The Competent Authority had granted Certificate of unilateral deemed conveyance in respect of land admeasuring only 3832.30 sq.mtrs. The Society petitioned this Court to the extent of non-grant of conveyance of entire portion of land admeasuring 8647.80 sq.mtrs. In that case, the Promoter took a defence that since only partial FSI was utilised (*0.57 sq.mtrs*), it was entitled to exploit the balance portion of the FSI and that therefore the conveyance of entire portion of land admeasuring 8647.80 sq.mtrs could not be granted in favour of the petitioning Society. This Court held in paras-23 to 27 as under :

23. Thus, plans and specifications for construction of the building as approved by the local authority is an integral part of the Agreement under Section 4 of the MOFA. Thus, the approved plans also form part of the Agreement executed under Section 4 of the Act. This follows that when such Agreement executed under Section 4 of MOFA is produced before the Competent Authority, he would have before him the approved plans as well. Therefore, it cannot be contended that the Competent Authority cannot look into the approved plans while deciding the application under Section 11 of the Act.

24. Having held that the Competent Authority can take into consideration the approved plans for construction of the building, area statement which would obviously disclose the figures of FSI potential and FSI utilized, the issue for consideration is whether the Competent Authority can convey lesser area of land as per the FSI utilization figures contrary to the specific covenant of the agreement under which the promoter agreed to convey the entire land in favour of the Society ? The answer to my mind appears to be in the negative. In a case like present one, where the promoter agreed to assign the leasehold rights in respect of the entire land admeasuring 8647.80 sq. mtrs, he was obviously aware of the fact that he had not utilized the entire FSI potential in the land, but still made a conscious choice to assign the lease in respect of the entire land in Society's favor. Having made such a conscious choice, the promoter cannot now take a *volte face* and contend that he would retain the land corresponding the balance unutilized FSI.

25. Even otherwise, utilisation of FSI on the plot of land which is subject matter of Agreement executed under Section 4 of MOFA, would be an irrelevant factor to be considered by the Competent Authority when there is only one Co-operative Society in respect of all structures constructed on a layout. This is not a case involving construction of multiple buildings at

different points of time, in respect of which multiple societies are formed or are likely to be formed as was the case before this Court in *Marathon Era Co-operative Housing Society Ltd* (supra). This is a case involving formation of only one Society comprising of 30 industrial units spread across three buildings and the Society asking for conveyance of the entire land in respect of which Agreement under Section 4 of the MOFA is executed. In such a case, the Competent Authority ought not to have gone into the issue of utilisation or otherwise of the entire FSI potential by the Promoter. In a given case, it may happen that the promoter does not consume the entire FSI available in respect of the plot, but subjects the entire plot to provision of Section 4 of MOFA by executing agreements with flats/unit purchasers. To illustrate, on a plot admeasuring 10,000/- sq.mtrs, though FSI available is 10,000 sq.mtrs, the promoter may take a conscious call to construct only 7,000 sq.mtrs (to make the project more attractive by leaving open spaces rather than utilizing the entire FSI potential) and subject the entire land admeasuring 10,000 sq. mtrs to Section 4 Agreement. The moment the construction of the building comprising of 7000 sq.mtrs built-up area is complete and a Co-operative Society is formed, the promoter comes under legal obligation to convey the entire plot admeasuring 10,000 sq.mtrs in favour of the Society and mere non-utilisation of balance FSI representing built-up area of 3000 sq.mtrs cannot be a reason for the promoter to claim ownership in respect of land admeasuring 3000 sq. mtrs.

26. When a covenant in the Agreement to convey entire land is pitched against the consideration of built-up area in the approved plans, the former would prevail. This is particularly when the entire FSI potential is not used and the promoter has made a conscious call to convey more land than the utilized built-up area despite availability of FSI potential. In such cases, the promoter will have to carve out or exclude any portion of the land corresponding to the unutilized FSI from the agreement. Whether a promoter fails to carve out or exclude any portion of the land from purview of the agreement and agrees to convey the entire land, mere availability of unutilized FSI is no answer to escape the liability to convey the entire land. However, there can be converse cases as well, where the covenant in the agreement provides for conveyance of lesser area of land than the utilized FSI for construction of building. To illustrate, the promoter constructs building using 10,000 sq. mtrs built-up area with FSI 1.00 requiring land at least admeasuring 10,000 sq. mtrs to sustain the building, but incorporates covenant that he would convey land admeasuring only 5000 sq.mtrs. In such a case, whether the Society would be entitled to conveyance of land which is required to sustain its building (10,000 sq.mtrs) contrary to the covenant in the Agreement ? In my view, though in limited remit of inquiry under Section 11 of MOFA, the Competent Authority may not be able to travel beyond the covenants of the agreement, the Civil Court surely can be approached in such cases to have conveyance of the due area of land required for sustenance of the building. However, since this issue does not arise in the present case, the same is left to be decided in an appropriate case.

27. In the present case, where there is unequivocal agreement to convey the leasehold rights in respect of the entire land admeasuring 8647.80 sq. mtrs, I do not see any jurisdictional difficulty for the Competent Authority to direct assignment of leasehold rights in accordance with the agreement and it is not necessary to drive the Petitioner-Society to lengthy litigation before a Civil Court for that purpose.

4) In my view, the judgment of this Court in *New Sonal Industries Premises Ltd.* (supra) would squarely apply to the present case as the Competent Authority has refused to exercise jurisdiction under Section 11 of the Act only on account of land admeasuring 510 sq.mtrs being excluded while sanctioning the development plans. Once there is unequivocal obligation expressed by the Promoter through Agreement executed under Section 4 of the Act to convey entire portion of the land admeasuring 4450 sq.mtrs, mere sanctioning of development permission in respect of lesser portion of land admeasuring 3940 sq.mtrs would not create any jurisdictional difficulty for the Competent Authority in conveying the entire portion of land admeasuring 4450 sq.mtrs.

5) In my view, once the entire land admeasuring 4450 sq.mtrs was submitted to the provisions of Section 4 of MOFA under the Agreement executed with the flat purchasers, mere existence of encroachment on any portion of land admeasuring 4450 sq.mtrs could not have been a reason for the Competent Authority to refuse exercise of jurisdiction under Section 11 of the Act. If indeed there is any encroachment on land admeasuring 510 sq.mtrs as observed by the Competent Authority, the Petitioner-Society will become owner of such encroached portion of land and will have to take necessary steps for removal or rehabilitation of such encroachment. However, mere existence of encroachment on land admeasuring 510 sq.mts cannot be a reason for not conveying the entire portion of land admeasuring 4450

sq.mtrs, which was subjected to development under Agreement executed under Section 4 of the Act.

6) In my view, therefore the order passed by the Competent Authority on 11 July 2023 is indefensible and liable to be set aside. The petition accordingly succeeds. The order dated 11 July 2023 passed by the Competent Authority is set aside and the application preferred by the Petitioner-Society is restored on the file of the Competent Authority for being decided afresh in the light of the observations made by this Court in the present order. It would be open for Respondent Nos.2 and 3-Promoters to appear before the Competent Authority and defend Society's application for deemed conveyance. The Competent Authority shall issue notices of hearing to them before passing final order.

7) With the above directions, the petition is **partly allowed and disposed of.**

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[SANDEEP V. MARNE, J.]