

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10548 OF 2024

New Sonal Industries Premises Ltd.

....*Petitioner*

: *Versus* :

- 1 District Deputy Registrar (2),
Co-operative Societies
2. M/s. Nandu Builders, a
Partnership Firm
3. All legal heirs of Vrajlal Damodar Mehta
(Landowners Lessors)
 - a. Mahendra Vrajlal Mehta
 - b. Mr. Bipin Vrajlal Mehta
4. Smt. Tulsibai Narayandas Asave
 - a. Mahendra Vrajlal Mehta
 - b. Mr. Bipin Vrajlal Mehta
5. Smt. Maniben Ramjibhai Mehta
6. Smt. Jivtiben Popatlal Shah
7. Smt. Kanchanlaxmi Hargovind Mehta
8. Shri. Hargovind Mehta
9. Manharlaxmi Chhotlal Mehta
10. Shri. Hargovinddas Ramjibhai Mehta
11. Chhotlal Ramjibhai Mehta
12. Jayantilal Ramjibhai Mehta
13. Bhagwandas Popatlal Shah
14. Minal Co-op. Hsg. Soc. Ltd.
15. Aditya Vardhan Co-op Hsg. Soc. Ltd.
16. Shrushti Plaza Premises Co-op. Soc. Ltd.

....*Respondents*

Mr. Pradeep Thorat with Mr. Aniesh Jadhav i/by. Mr. Pushparaj Singh, for the
Petitioner.

Mr. Faran Khan with Mr. P. Shah, Ms. Smita Durve, Ms. Yukta Palve i/by. Mr.
Arshil Shah, for Respondent No.2.

Ms. A.A. Nadkarni, for Respondent-State.

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CORAM : SANDEEP V. MARNE, J.

Reserved On : 29 January 2025.

Pronounced On : 12 February 2025.

JUDGMENT :

1) The petition challenges the order dated 24 August 2023 passed by the Competent Authority and District Deputy Registrar granting unilateral deemed conveyance of land admeasuring 3832.30 sq. mtrs. in favour of the Petitioner-Society. The certificate of unilateral deemed conveyance is challenged to the extent that he does not convey the entire land admeasuring 8647.80 sq. mtrs in favour of the Petitioner-Society.

2) Briefly stated, facts of the case are that Respondent No.2-M/s. Nandu Builders, a partnership firm secured lease of land admeasuring 8647.80 sq. mtrs vide Indenture dated 22 September 1972 from lessor-Vrajilal Damodar Mehta. Respondent No.2-Promoter proposed to construct 30 industrial units as per plans, designs and specifications on the said leased land for sale on ownership basis to purchasers. Accordingly, Respondent No.2 entered into Agreements for Sale with various unit purchasers. In the said Agreements, Respondent No.2 agreed to execute assignment of lease of the land in favour of the Co-operative Society formed by the unit purchasers. It appears that the unit purchasers formed and registered the Petitioner-Society on 19 January 1976 under Section 10 of the Maharashtra Ownership of Flats (Regulation of the promotion of construction, sale, management and

transfer) Act, 1963 (**MOFA**). The Society filed an application under Section 11 of MOFA for grant of unilateral deemed conveyance in respect of the entire leased land admeasuring 9356.60 sq.mtrs bearing Plot No.1, CTS No.186(A), Village-Tungawa, Survey No.9 (pt), 5 (part) Taluka-Kurla, Mumbai Suburban District. The Society's application was opposed by Respondent No.2 initially on the ground that the land could not be conveyed as the same was merely leased to it. The Competent Authority proceeded to allow Society's application for deemed conveyance by order dated 24 August 2023 and held that the Petitioner-Society is entitled to get unilateral deemed conveyance of lease of land admeasuring only 3832.30 sq. mtrs. The Competent Authority excluded the balance portion of the land on the ground that FSI of 0.57 was utilised in respect of only 3832.30 sq. mtrs for construction of Society's building. The Competent Authority also deducted the area of recreational ground and internal roads and directed conveyance of lease of land admeasuring only 3832.30 sq.mtrs. The Petitioner-Society is aggrieved by the decision of the Competent Authority to the extent of not conveying the entire leased land in its favour and has accordingly filed the present petition.

3) Mr. Thorat, the learned counsel appearing for the Petitioner-Society would submit that the Competent Authority has grossly erred in not granting conveyance in respect of the entire leased land in accordance with the covenants of the Agreement executed with the unit purchasers. He would take me through various covenants of unit purchase agreements to demonstrate that Respondent No.2-Promoter had specifically agreed to assign the entire lease in favour of the Society formed by the unit purchasers. That under the Agreement,

Respondent No.2 did not carve out any portion of land for being excluded from conveyance in favour of Petitioner-Society. That therefore Respondent No.2 is under obligation to convey his right, title and interest in the entire leased land in favour of the Society.

4) Mr. Thorat would further invite my attention to the contents of the Reply filed by Respondent No.2 as recorded by the Competent Authority in support of his contention that Respondent No.2 never raised the issue of carving out any portion of land in the Agreement for being excluded in the conveyance. That on the other hand, Respondent No.2 specifically agreed to assign the entire lease in favour of the Petitioner-Society. He would therefore submit that the Competent Authority has grossly erred in deciding the issue which was not even raised by Respondent No.2. He would submit that construction of the building was completed in the year 1975 and for the last 50 long years, Respondent No.2 never showed any interest in utilising the alleged balance FSI, which was not exempted by him while executing the unit purchase Agreement. Mr. Thorat would submit that it would otherwise be illogical to deny land covered by recreational ground and internal roads from the conveyance granted in favour of the Petitioner-Society. That Respondent No.2 has constructed three buildings on the plot divided into 30 industrial units and the internal roads are created only for the purpose of accessing those buildings. That if the order of the Competent Authority is permitted to stand, the same would result in an incongruous situation where only the land beneath the plinth area of the buildings would be conveyed and the internal roads leading to those buildings would continue to be owned by Respondent No.2. He would therefore pray for setting aside the impugned order of the Competent Authority and for grant of

conveyance of leasehold rights in respect of the entire land admeasuring 8647.80 sq.mtrs.

5) The petition is opposed by Mr. Khan, the learned counsel appearing for Respondent No.2. He would submit that the Competent Authority has rightly granted conveyance of leasehold rights in land admeasuring 3832.30 sq. mtrs after noticing that at the time of construction of the buildings, FSI of only 0.57 was utilised even though normal FSI available at that time was 1.00. That the Society members were always aware that the balance land over and above the FSI utilised would remain in the leasehold rights of Respondent No.2. He would rely upon Clause-14 of the unit purchase agreement in support of his contention that the balance land after construction of 30 industrial units was specifically exempted by Respondent No.2 from the agreement. That therefore the agreement cannot be construed to mean as if the entire leased land can be conveyed in favour of the Petitioner-Society.

6) Mr. Khan would submit that the Competent Authority has acted upon the Architect's Certificate produced by the Petitioner-Society itself and has rightly granted conveyance of only 3832.30 sq.mtrs strictly in accordance with the said Certificate. He would submit that Respondent No.2 is not even craving for an additional FSI made available after construction of the buildings and is restricting his claim only to balance unutilised FSI as on the date of construction of unit purchase agreements. That therefore Respondent No.2 must be declared entitled to balance portion of leased land, which falls outside the FSI of 0.57 utilised for construction of the buildings. That Respondent No.2 is not interested in consuming any additional FSI

generated after construction of the building, but his legitimate unutilised FSI available at the time of construction of the buildings cannot be denied to him. He would submit that the impugned order of deemed conveyance is in consonance with the Government Resolution dated 22 June 2018. He would submit that the issue involved in the present petition is squarely covered by the judgment of this Court in *Solitaire Co-op. Hsg Soc. Ltd. Versus. Vertex Newton Projects Pvt. Ltd. & Anr.*¹ He would also rely upon judgment of this Court in *Marathon Era Co-operative Housing Society Ltd. Versus. The Competent Authority & District Deputy Registrar, Co-operative Societies and Ors*² in support of his contention that the Society is entitled to conveyance of only proportionate land as per FSI utilized forming the ground coverage or plinth area of the building. He would submit that Respondent No.2 cannot be deprived of carrying out construction in respect of the non-utilised FSI of 0.43 available as on the date of construction of the original buildings. He would pray for dismissal of the petition.

7) I have also heard Ms. Nadkarni, the learned AGP who would oppose the petition and support the order passed by Competent Authority.

8) Rival contentions of the parties now fall for my consideration.

9) The Petitioner-Society is aggrieved by non-conveyance of the entire leased land in its favour in accordance with the covenants of

1 Writ Petition No. 12758/2023 decided on 23 January 2024.

2 Writ Petition Nos. 180/2018 and 295/2015 decided on 18 April 2024.

the agreement executed under Section 4 of the MOFA. The total area of the plot as per the revenue records is 9356.60 sq.mtrs. Respondent No.2 secured lease of the land from the lessor-Mr. Vrajlal Damodar Mehta for a tenure of 98 years with right of construction under the Indenture dated 22 September 1972. However, when the plans were approved for construction of industrial units, it appears that area of the land was considered as 8608.00 sq. mtrs. However, this difference in the area of land as per revenue records and as per sanctioned plan is immaterial as the Petitioner-Society is willing to accept lease of land admeasuring 8608.00 sq. mtrs.

10) Respondent No.3 got sanctioned plans from the Municipal Corporation for construction of three buildings comprising of total 30 industrial units as under :

BUILDING A	12 INDUSTRIAL UNITS
BUILDING B	11 INDUSTRIAL UNITS
BUILDING C	7 INDUSTRIAL UNITS
TOTAL	30 INDUSTRIAL UNITS

11) Out of the total land of 8608.00 sq. mtrs. taken up for development, area of 1330.84 sq. mtrs was reserved for Recreational Ground (RG). Additionally internal roads were created in the land for accessing the three buildings covering the land admeasuring 484.40 sq.mtrs. On the balance land admeasuring 6792.76 sq.mtrs, FSI of 0.57 was utilized and 30 industrial units, divided into three buildings with total construction area of 3832.30 sq.mtrs, have been constructed. The dispute between the parties is whether the Petitioner-Society is entitled to have the entire leased land conveyed in its favour or only the land

proportionate to the FSI used for actual construction of the 30 industrial units.

12) Under Section 11 of the MOFA, a promoter is under legal obligation to convey his right, title and interest in the land and the buildings in favour of the Society by execution of a conveyance. Section 11 of MOFA provides thus :

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 sub-section (1).

(3) If the promoter fails to execute the conveyance in favour of the Cooperative 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 alongwith 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 fit case for unilateral conveyance, register that instrument as, ' deemed conveyance '.

(emphasis and underlining added)

13) Thus, under Section 11, a promoter is under obligation to convey his right, title and interest in the land and buildings '*in accordance with the agreement executed under section 4*'. Thus, conveyance of right, title and interest in the land and the building has to be in accordance with the agreement executed under Section 4 of MOFA.

14) It would therefore be necessary to consider the covenants of the Agreement for Sale executed with the unit purchasers under Section 4 of the MOFA. The Agreement for Sale dated 24 March 1975 executed with one of the unit purchasers is placed on record. The relevant covenants of the agreement read thus :

1. By an Indenture of Lease dated 22nd day of September, 1972 made between Vrajlal Damodar Mehta as a Lessor of the One Part and Messrs. Nandu Builders a partnership firm, as the Lessees of the Other Part and lodged for registration with the Sub Registrar of Assurances at Bombay under Serial No. 5309 of 1972 on 28th day of September 1972, the Lessor demised unto the Lessees (the Builders herein) all that piece of parcel of land situate lying and being at

Village Tungwa, Powal and more particularly described in the First Schedule hereunder written (hereinafter referred to as "the said land") for a period of 98 years from the 22nd September, 1972.

2. The Builders propose to construct Industrial Units on the said land which is leased to them by the said Vrajlal Damodar Mehta.
3. The Builders propose to sell the said Units on ownership basis. After all the Units are sold, the Builders will take steps to form a co-operative society or an incorporate body of the various purchasers of the Units at the costs of the said Unit Holders and/or the said Society or Incorporated Body
4. **After such Society or Incorporate body is formed by the Owners of various Units, the Builders herein will assign the said lease dated 22nd September 1972 to the said Society or incorporate body.**

NOW THIS INDENTURE WITNESSETH that it is hereby agreed by and between the parties hereto as follows:-

(1) The Builders shall construct 30 Industrial Units as per the Plans, designs and specifications seen and approved by the Unit Holder, with such variations and modifications as the Builders may consider necessary or may be required by any Public authority to be made.

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(10) The Unit Holder agrees and binds himself to pay Rs. 150/- (Rupees One Hundred and Fifty only) regularly every month by the 5th each month, to the Builders **until the Assignment is executed in favour of a Co-operative Society or a Limited Company as aforesaid** and thereafter to the aforesaid Co-operative Society or the Limited Company as the case may be, for (1) insurance premium (2) all Municipal and other taxes and outgoings that may from time to time be levied against the land, landlord, the Building, Society or units including water taxes and water charges (3) outgoings for the maintenance and management of the units, and/or said Society or Limited Company, common lights and other outgoings and collection charges incurred in connection with the said property and a sum of Rs. 68-05 paise (Rupees Sixty eight and zero five paise only) per month as the Unit Holder proportionate share of the ground rent under such sublease or assignment of the lease. The Unit Holder shall keep deposited with the Builders before taking possession of the said Unit a sum of Rs. 1,000/- (Rupees One thousand only) as deposit towards the aforesaid expenses and outgoings. The said sum shall not carry interest and will remain with the Builders until the Assignment is executed in favour of the Co-operative Society or the Limited Company as aforesaid and on such Assignment being executed the

aforesaid deposit shall be paid over to the Co-operative Society or limited company as the case may be. The Unit Holder shall also, keep deposited with the Builders at the time of taking possession a sum of Rs. 510/- (Rupees Five Hundred and Ten only) as the share money.

xxx

(14) Provided it does not in any way effect or prejudice the rights of the Unit Holder in respect of the said Unit the Builders shall be at liberty to sell, assign, transfer, or otherwise deal with their rights, title and interest in the said land and lease as well as the remaining portion of the said property and in the Units to be constructed thereon.

xxx

(18) On the completion of the said Units and on receipt by the Builders of the full payment of all the amounts due and payable to them by all the Unit Holders of the said Building the Builders shall co-operate with the Unit Holders in forming, registering or Incorporating a cooperative society or a limited company. The rights of members of the Co-operative Society or of the Limited Company, as the case may be, being subject to the rights of the Builders under this Agreement and the **Assignment to be executed in pursuance hereof**. When the co-operative society or a limited company is registered or Incorporated as the case may be, and all the amounts due and payable to the Builders are paid in full as aforesaid the **Builders shall execute the necessary assignment of the land mere particularly described in the First Schedule in favour of such co-operative society** or a limited company, as the case may be.

(emphasis and underlining added)

15) Thus, under the agreement executed under Section 4 of MOFA, Respondent No.2 agreed to assign lease in favour of the proposed Society in respect of the entire land described in the First Schedule. The First Schedule to the Agreement is as under:

FIRST SCHEDULE

All that piece or parcel of vacant land or ground situate lying and being at Village Tungwa, Pawai, South Salsette, Bombay Suburban District in the Registration Sub-District and District Bombay City and

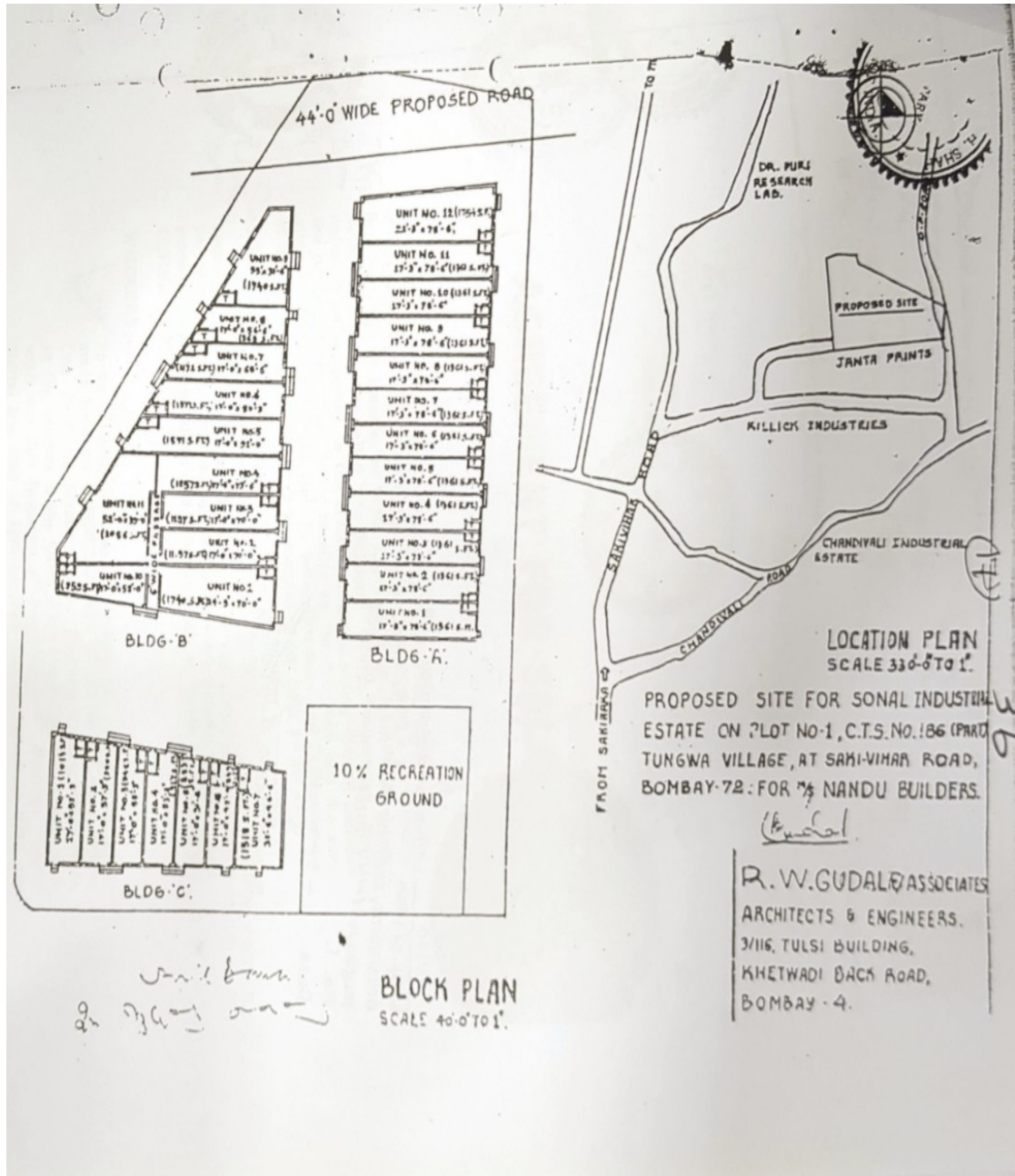
Bombay Suburban admeasuring about 8795.77 sq. metres equivalent to 10520 sq. yds. But in the sub-division sanctioned by the Municipal Corporation shown as 8647.80 sq. metres equivalent to 10295 sq. yds.

Being part of Old Khoti S. No. 27 part of Plot No. 1, 2 and 3 and Old Khoti S. No. 85 and part of Plot No. 1 and present part of Survey Nos. 9A and 5B and C.T.S. No. 186 part Plot No. 1 and bounded as follows; that is to say all towards North And North East by C.S. No. 185 or Survey No. 5(pt); on the West by C.S. No. 185 or the Survey No. 5(pt); on the South by C.S. No. 186(pt) or Survey No. 9(pt) and on the East by pro-posed 44' wide Development Plan Road.

(emphasis and underling added)

16) Thus various covenants of the agreement together with description of the property in the First Schedule would leave no manner of doubt that Respondent No.2 agreed to convey its leasehold rights in respect of the entire land admeasuring 8647.80 sq.mtrs in favour of the Petitioner-Society.

17) Mr. Khan has strenuously relied upon Clause-14 of the Agreement in support of his contention that the balance portion of the land after construction of 30 industrial units was specifically excluded by Respondent No. 2 from the purview of the agreement. I am unable to agree. Clause-14 of the Agreement needs to be read in context of construction of three separate buildings comprising of 30 industrial units spread across the entire portion of the land. For the sake of convenience, it would be appropriate to reproduce the layout plan placed on record in accordance with which the construction appears to have been carried out :



18) Thus, Respondent No.2 had proposed to cover virtually the entire portion of the plot for constructing 30 industrial units except the recreational ground. Therefore, the correct reading of Clause-14 of the Agreement would mean that mere sale of one industrial unit in favour of the purchaser was not to impinge upon the right of Respondent No.2 to carry out construction in balance portion of the land and particularly his right to construct other industrial units thereat. It must be borne in

mind that what is constructed by Respondent No.2 are large ground floor industrial units. Therefore, Clause-14 appears to have been incorporated essentially to ensure that purchaser of one unit does not question the right of promoter to construct other industrial units as per the layout. Clause-14 of the Agreement cannot be read to mean as if any portion of the land was carved out or excluded from the purview of the agreement.

19) I am therefore of the view that agreements executed with the unit purchasers under Section 4 of MOFA undoubtedly envisaged assignment of leasehold rights of promoter in respect of the entire land admeasuring 8647.80 sq. mtrs. Therefore, the Competent Authority ought to have granted conveyance in respect of the entire leased land of 8647.80 sq. mtrs in favour of the Petitioner-Society on account of use of the expression '*in accordance with the agreement executed under section 4*'. Since the agreement envisages assignment of lease in respect of land admeasuring 8647.80 sq. mtrs, I do not see any difficulty in the Competent Authority exercising its jurisdiction under Section 11 of MOFA directing deemed conveyance of lease of entire area of 8647.80 sq. mtrs. in favour of Petitioner-Society.

20) It is contended on behalf of Respondent No.2-promoter that the Competent Authority cannot turn a blind eye to the FSI utilization in sanctioned plan while granting conveyance under Section 11 of the MOFA. Mr. Khan may not be entirely wrong in contending so. This is particularly because, the agreement executed as per Section 4 of MOFA must *inter alia* include the sanctioned plans. Section 4 of MOFA provides thus :

4. Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered

(1) Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent. of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act, 1908") and **such agreement shall be in the prescribed form.**

(1A) The agreement to be prescribed and sub-section (1) shall contain inter alia the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b),---

(a) particulars,-

(i) if the building is to be constructed, the liability of the promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force;

(ii) the date by which the possession of the flat is to be handed over to the purchaser;

(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which instalments thereof may be paid;

(v) the precise nature of organisation to be constituted of the persons who have taken or are to take the flats;

(vi) the nature, extent and description of limited common areas and facilities;

(vii) the nature, extent and description of limited common areas and facilities, if any;

(viii) percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;

(ix) statement of the use for which the flat is intended and restriction of its use, if any;

(x) percentage of undivided interests in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold

(b) copies of documents,-

(i) the certificate by an Attorney-at-law or Advocate under clause (a) of sub-section (2) of section 3:

(ii) Property Card or extract of village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the promoter to the land on which the flats are constructed or are to be constructed;

(iii) the plans and specifications of the flat as approved by the concerned local authority.

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(emphasis added)

21) The Form in which the agreement under Section 4 of MOFA is to be executed is prescribed under Rule 5 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964 (**MOFA Rules**), which provides thus :

5. Particulars to be contained in agreement.-The promoter shall, before accepting any advance payment or deposit, enter into an agreement with the flat purchaser in Form V containing the particulars specified in clause (a) of sub-section (1A) of section 4 and shall attach thereto the copies of the documents specified in clause (b) of the said sub-section (1A)

22) Form V has been introduced under the MOFA Rules on 10 April 1987. One of the recitals of Form V is as under :

AND WHEREAS the copies of Certificate of Title issued by the Attorney-at-Law or advocate of the Promoter, copies of Property card or extract of Village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the Promoter to the said land on which the flats are constructed or are to be constructed and **the copies of the plans and specifications of the Flat agreed to be purchased by the Flat Purchaser approved by the concerned local authority have been annexed here to and marked Annexure 'A', 'B' and 'C' respectively.**

(emphasis added)

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 penitential 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.

28) If the lease of entire land admeasuring 8647.80 sq. mtrs is not conveyed in favour of Petitioner-Society, the same would result in an incongruous situation where the promoter would continue to claim ownership in respect of the roads leading to the 30 industrial units. This

is exactly what has happened in the present case, where the Competent Authority has excluded the land covered by internal roads. This would virtually mean that the Society would be a lessee only in respect of land beneath the 30 industrial units and Respondent No. 2 would be the lessee in respect of land covered by roads leading to those units. Though the RG was maintained as per planning norms for being used by the 30 unit holders on the plot, the promoter would claim leasehold rights in RG area.

29) Mr. Khan has relied upon the Government Resolution dated 22 June 2018, under which guidelines have been issued for dealing with applications for unilateral deemed conveyance which recognise the concepts of 'proportionate area' or 'ground coverage' or 'plinth area'. However those concepts become relevant only in cases where there are multiple buildings on a plot with separate societies and the development of the entire layout is incomplete. So far as case involving a single society of multiple buildings on a single plot of land is concerned, the concepts of proportionate area, ground coverage or plinth area would have no relevance even as per the G.R. dated 22 June 2018. The word 'proportionate' would obviously postulate the share of land proportionate to the constructed area in respect of the multiple Societies, where more than one order of deemed conveyance is required to be effected. If the Competent Authority encounters a situation where more than one Societies are formed in respect of multiple buildings constructed in a layout and where all Societies do not jointly apply for conveyance or where construction in layout is still incomplete, the GR provides that grant of conveyance need not be withheld till the entire construction on the layout is complete and it is lawful for the Competent Authority to pass an order of unilateral deemed conveyance on an application made by a single Co-operative

Society construction of whose building is already complete. While considering the conveyance of exact land area in favour of such Society, where other Societies are still awaiting conveyance or any further construction is contemplated in the layout, the Competent Authority would adopt the concept of proportionate land area by taking into consideration, the built up area in respect of each of the buildings constructed on the layout and accordingly notionally divide the area of plot of land by granting proportionate share to each Societies.

30) However, when the Competent Authority encounters a situation of only one Society being formed in respect of either one building or multiple buildings on a plot of land and if the entire plot of land is made subject matter of agreement executed under Section 4 of MOFA, there is no necessity for the Competent Authority to adopt the concept of proportionate area, ground coverage or plinth area and he can direct conveyance of promoter's right, title and interest in the entire land and building as per the terms and conditions of the Agreement. Therefore, reliance by Mr. Khan on the G.R. dated 22 June 2018 as well as on judgment of this Court in *Marathon CHS Ltd.* (supra) is clearly misplaced.

31) Mr. Khan has also relied upon judgment of this Court in *Solitaire CHS Ltd.* (supra) in which the Competent Authority had granted unilateral deemed conveyance of land admeasuring 7306.81 sq.mtrs and proportionate area in club house of 24.179 sq.mtrs (total 7330.994/- sq.mtrs.) out of total land of 8910.75 sq.mtrs. The Society was aggrieved by non-conveyance of the entire plot of land in its favour. However, the facts in *Solitaire CHS Ltd.* appear to be totally distinguishable. On Plot-A admeasuring 8910.75 sq.mtrs, the developer

had proposed construction of residential building of two wings and one commercial building. By the time, the Society was formed and conveyance was applied for, construction of the commercial building was yet to be carried out. In the light of this situation, this Court did not find fault with the order of the Competent Authority not conveying the entire Plot-A in favour of the Society. In the present case, no other building was proposed to be constructed on the plot of land apart from the three buildings comprising of 30 industrial units. Therefore, the judgment rendered by this Court in *Solitaire CHS Ltd.* rendered in the facts of that case, cannot be made applicable to the present case.

32) Even otherwise, I am unable to accept the contention of Mr. Khan that this Court has expounded the law in *Solitaire CHS Ltd.* that in every case, the Society must be driven to filing of the suit if it is not satisfied with the area of land conveyed in its favour. True it is that the certificate of unilateral deemed conveyance does not constitute an absolute document of title and that affected parties are not precluded from filing a suit challenging the area of land conveyed. However, there cannot be an absolute proposition of law that this Court cannot interfere in an order passed by the Competent Authority granting unilateral deemed conveyance of lesser area in favour of the Society and in every case, the Society must be driven to the remedy of filing a Civil Suit. The case where this Court arrives at a finding that the Competent Authority has failed to convey the land and building in accordance with the agreement executed under section 4 of MOFA, this Court would be justified in interfering in the order of unilateral deemed conveyance by directing the Competent Authority to convey the land as per actual entitlement of the Society. Mere existence of alternate remedy of filing suit cannot be a ground to deny relief in

favour of a Co-operative Society, which feels aggrieved by conveyance of lesser area than the one contemplated as per the Agreement executed under Section 4 of MOFA. The objective behind enactment of provision for unilateral deemed conveyance of land and building in favour of a collective body must be appreciated. In several cases, promoters have failed to discharge their obligations to convey their right, title and interest in the land and building in favor of Societies, whose buildings have become dilapidated and require redevelopment. In the present case, construction of the building was undertaken vide Commencement Certificate dated 29 June 1973 and the construction was complete with issuance of Occupancy Certificate dated 11 June 1974. By now, period of 51 long years has passed. Therefore, in a case where this Court is in a position to conclude that the area of the land conveyed in favour of the Society is not in consonance with the Agreement executed under Section 4 of MOFA, this Court would be justified in compelling the Competent Authority to convey correct area of land by setting aside the order of unilateral deemed conveyance. It is a settled position of law as expounded by this Court in Mazda Construction Company Versus. Sultanabad Darshan CHS³ and ACME Enterprises and another Versus. Deputy Registrar, Co-operative Society and others.⁴ that the order of deemed conveyance does not confer absolute title or that title disputes are in the domain of civil courts. However when this Court encounters a case involving an apparent erroneous order of the Competent Authority, which does not involve determination of disputes over title, this Court would be justified in directing the Competent Authority to convey land as per the covenants of the agreement.

3 2013 (2) ALL MR 278

4 (2023) SCC Bom 110.

33) In the present case, the impugned order passed by Competent Authority is clearly erroneous as it seeks to grant leasehold rights in respect of the land admeasuring only 3832.30 sq.mtrs when agreement under Section 4 of the Act envisaged conveyance of entire leased land of 8647.80 sq.mtr. In fact, Respondent No.2-Promoter who now vehemently opposes the petition did not even raise a contention before the Competent Authority that any portion of land was carved out and excluded from the purview of Agreements executed with the unit purchasers. Perusal of para-13 of the order passed by the Competent Authority would indicate that the only objection raised by Respondent No.2 was about impermissibility to convey the land on ownership basis, in view of terms and conditions of Indenture of lease dated 22 September 1972. In fact, respondent no.2 had expressed willingness to grant assignment of lease in favour of the Petitioner-Society as is apparent from Para-13 of the impugned order, which reads thus:

13. The main objection raised by the opponent no 2.1 is that the said property is lease hold property. From the tittle flow of the property it is observed that the applicant society is entitled to get the assignment of the lease as per the terms and conditions in indenture of lease dated 22/09/1972. **The applicant in his reply accepted the same fact and ready to get the assignment of lease in favour of applicant society.**

(emphasis added)

34) It appears that one Jayaben Kalyanji Shah, intervenor in Petitioner's application, did raise contention about entitlement of Respondent No. 2 to utilize the balance FSI potential. She claims to be the legal heir of one of the partners of Respondent No.2-Firm. She contended that Respondent No.2-Firm has been dissolved and that therefore she was entitled to leasehold rights in respect of the land in question. In her intervention application, she vaguely contended that the promoter, its partners and legal heirs are entitled to residual

portion of the leased land by utilising the FSI, TDR and any other benefits arising therefrom. However, this vague assertion of intervenor is unsupported by any document on record and is contrary to the covenants of the Agreement executed under Section 4 of MOFA.

35) The Competent Authority appears to have unnecessarily got swayed by the details indicated by the Architect in his Certificate dated 12 July 2023. In absence of any covenant in the Agreement for exclusion of any portion of the land from the purview thereof, it was not even necessary to look into the Architect's Certificate spelling out details about the constructed area, recreational ground or internal road, area etc. As per the Agreement, the entire plot was required to be conveyed to the Society. The only possible purpose for which Architect Certificate could be utilised was for determining the net area of the land in respect of which lease can be granted in favour of the Society. It appears that, in its prayer, the Petitioner-Society prayed for conveyance of the land admeasuring 9356.60 sq.mtrs, whereas the Architect indicated that the size of the plot as per the approved plan is 8608.00 sq.mtrs. Even in the first Schedule to the Agreement, it is clarified that in the subdivision sanctioned by the Municipal Corporation, the area of the land has been reduced to 8647.80 sq.mtrs. Thus, the Certificate ought to have been utilised by the Competent Authority for the limited purpose of ascertaining the net plot area of 8608.80 sq.mtrs. Beyond this, the Competent Authority ought not have gone into the details of FSI utilisation and the land covered by recreational ground or internal roads. The Competent Authority has grossly erred in excluding the ground covered by recreational ground and internal roads, which actually is the entitlement of the Society. It is inconceivable that the recreational ground compulsorily required to be provided as per the

planning norms for construction of three buildings, would remain in ownership of the Promoter. As observed above, retaining ownership of the land covered by internal roads with the promoter would otherwise be preposterous.

36) Considering the overall conspectus of the case, I am of the view that the Competent Authority has grossly erred in not granting conveyance of leasehold rights of the entire plot in favour of the Petitioner-Society. The order passed by the Competent Authority is thus indefensible and liable to be set aside. I accordingly proceed to pass the following order :

(i) The order dated 24 August 2023 passed by the Competent Authority is set aside.

(ii) The Competent Authority shall proceed to issue fresh certificate of deemed conveyance in favour of the Petitioner-Society by assigning lease in respect of the entire land admeasuring 8608.00 sq.mtrs in its favour within a period of 8 weeks.

37) With the above directions, the Writ Petition is **allowed**. There shall be no orders as to costs.

[SANDEEP V. MARNE, J.]