



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.5259 OF 2024

Luis Gabriel Nicholas Cardoz & Ors.

...Petitioners

Versus

Oasis CHS Ltd. & Ors.

...Respondents

Dr. Abhinav Chandrachud a/w. Mr. Janay Jain i/b. Mr. D. D. Singh,
Advocates, for the Petitioners.

Mr. Rohan Savant a/w. Mr. Atul Singh, Advocates, for the
Respondent No.1.

Mr. Akshay Patkar, AGP, for the Respondent Nos.2 and 3.

CORAM: MADHAV J. JAMDAR, J.

DATED : 27th AUGUST 2024

JUDGMENT :

1. Heard Dr. Abhinav Chandrachud, learned Counsel appearing for the Petitioners, Mr. Rohan Savant, learned Counsel appearing for the Respondent No.1 and Mr. Patkar, learned AGP appearing for the Respondent Nos.2 and 3.

2. By the present Writ Petition preferred under Article 226 of the Constitution of India, the Petitioners are challenging the legality and validity of the order dated 18th May 2022 (Exhibit-A, Pages 32 to 38) passed by the District Deputy Registrar, Co-operative Societies, Mumbai City(4), Mumbai in Application

No.123 of 2022 under Section 11 of the *Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963* (“**MOFA**”) as well as the Corrigendum issued to the said order by order dated 31st July 2023 (Exhibit-A1, Pages 40 to 44) passed by the District Deputy Registrar, Co-operative Societies, Mumbai City (4) & Competent Authority under Section 5A of the MOFA. (“**Competent Authority**”)

3. Dr. Chandrachud, learned Counsel appearing for the Petitioners raised following contentions:

(i) As per the settled legal position while dealing with the deemed conveyance application under Section 11 of the MOFA, the Competent Authority cannot go beyond the agreement executed with the flat purchasers under Section 4 of the MOFA. He submitted that while granting Deemed Conveyance, the Competent Authority has taken into consideration the property register card and therefore, order granting Deemed Conveyance is totally illegal.

(ii) He submitted that something which is not provided in the Agreement under Section 4 need not be conveyed by the Promoter.

(iii) He relied on the decision of a learned Single Judge in ***Riddhi Gardens Building No.A1, A2 Co-operative Housing Society Limited vs. District Deputy Registrar, Co-operative Societies.***¹

(iv) He submitted that as per the agreement of flat purchasers, the flat purchasers are entitled only to 919 sq. mtrs. area and deemed conveyance of area of 1002.50 sq. mtrs. could not have been granted.

(v) He submitted that the impugned order is illegal and therefore, required to be quashed and set aside.

4. On the other hand, Mr. Savant, learned Counsel appearing for the Respondent No.1 raised following contentions:

(i) He pointed out the Area Certificate dated 21st December 2021 issued by the Architect and submitted tht the earlier order was passed by the Competent Authority without taking into consideration of the same and therefore corrigendum was issued.

(ii) He submitted that the Deemed Conveyance has been earlier granted for an area of 956.75 sq. mtrs. and thereafter by issuing corrigendum, the same has been corrected for 1002.50 sq.mtrs.

¹ (2024) SCC OnLine Bom 760

(iii) He submitted that as per the property register card of C.T.S. No.302/B [Original CTS No.302 (part)] regarding which Deemed Conveyance has been granted specifically mentions area as admeasuring 1002.50 sq.mtrs.

(iv) He submitted that as per the Area Certificate issued by the Architect said area of 1002.50 sq.mtrs. has been arrived at by applying two different methods:-

(a) By taking into consideration area as reflected in the property registered card and

(b) By taking into consideration the proportionate right in plot area.

He submitted that by both the methods the architect has determined the area of 1002.50 sq. mtrs. as the entitlement of the Respondent No.1- Society.

(v) He relied on the following decisions of this Court:

(a) *Zainul Abedin Yusufali Massawawala vs. Competent Authority District Deputy Registrar of Co-operative Housing Societies, Mumbai.*²

² (2016) SCC OnLine Bom 6028

(b) *M/s. Shree Chintamani Builders vs. State of Maharashtra*³

(c) *Poonam Builders vs. Orchid Tower Co-operative Housing Society Limited*⁴

(vi) He submitted that no interference in the impugned Order under Article 226 of the Constitution of India is warranted.

5. Before considering the rival submissions, it is necessary to set out the relevant factual aspects:

(a) The plans of the building are sanctioned on 8th September 1983.

(b) The individual flat purchasers have purchased the flats in or about the year 1984 by executing the individual flat agreements (MOFA Agreement)

(c) Clause Nos.18 and 19 of the MOFA agreement executed in favour of the flat purchasers provides as follows:

“18. The Sellers agree to transfer the said plots/land described in Schedule hereunder written with the building(s) thereon on the said plots/land as whole

3 (2016) SCC OnLine Bom 9343

4 (2015) SCC OnLine Bom 7162

and not the part thereof to the Registered Co-operative Housing Society or Limited Company Incorporated Body that may be formed by the acquirers of the Flats/garages of the said building(s) including the Buyer.

*19. The Buyer alongwith the rest of the Acquirers of all the flats/garages in the said building shall when called upon by the Sellers form a Co-operative Housing Society under the name and style of “EVERGREEN APARTMENTS CO-OPERATIVE HOUSING SOCIETY LIMITED” (hereinafter called “the Society”) with the usual prescribed bye-laws with such conditions and modifications as may be necessary according to the provisions of law/or, the time being in force and on such registration of the Society forthwith inform the Sellers in writing about the date of the registration of the Society and all documents in respect thereof for inspection of the Sellers. **Within two years from the date of the registration of the said Society, the Sellers shall transfer their interest in the said building (s) and/or the said plots/and to and in favour of the Co-operative Housing Society** but this provisions is without prejudice to the rights of the Sellers to dispose off the remaining flats/garages of the said building (s). The buyer hereby agrees to join the holders of other flats/garages in the said building(s) informing the Co-operative Housing Society or Limited Company or Incorporated Body as provided hereinabove and shall become a member of the said Society and at no time hereafter he/she/they shall have a right to repudiate the allotment of the said shares. This Agreement also shall be treated as an irrevocable application and consent of the Buyer for the allotment of the shares of the said Society to him/her/them. The buyer also agrees to observe and perform all the rules, regulations and bye-laws which the said Society may adopt or pass at its inception and from time to time and at all times.”*

(Emphasis added)

Thus MOFA Agreement provides that within a period of 2 years from the registration of the Society, conveyance would be executed in favour of the Society.

- (d) The Schedule of the said MOFA agreement is as under:

....“**SCHEDULE REFERRED TO HEREINABOVE**

*All that pieces or parcels of land or ground together with the building and structures standing on **plot nos.3, 4,5 and 6 together with the right of way or passage alongwith the other plot holders 20 wide on the western side of the said plots and also togetherwith rights of way or passage 15' wide on the northern side of the said plots Nos.5 & 6 delineated on the plan lying and being at Village Valnai, Marve Road, Malad (West), Bombay 400 064 in Talika Borivali, Bombay Suburban District, Greater Bombay bearing C.T.S. No:302 (1) Part and which **plot No.3 admeasures about 442.68 sq.mts. or thereabouts and plot No.4 admeasures about 477.28 sq.mts. or thereabouts and plot No.5 admeasures about 457.80 sq.mts. or thereabouts and plot No.6 admeasures about 444.36 sq.mts. or thereabout situated in the registration District and Sub-District of Bombay and Bombay Suburban.**”.***

- (e) As per the admitted position, the building of the Respondent No.1- Society is constructed on the plot

Nos. 3 and 4 and building of Evergreen Housing Society Ltd. has been constructed on plot Nos.5 and 6.

- (f) The Petitioners who are original owners have sold their right, title and interest with respect to entire property described in above schedule in favour of the Respondent No.4- M/s R & D. Enterprises on 9th May 1979. Admittedly the Petitioners have not retained any right, title and interest in the entire property mentioned in the schedule of the MOFA agreement including plot Nos. 3, 4, 5 and 6.
- (g) The Respondent No.1 Society has been registered on 16th January 1986.
- (h) The Occupation Certificate for the Society building is issued on 26th December 1990.
- (i) The Respondent No.1- Society filed application seeking deemed conveyance under Section 11 of MOFA on 21st March 2022.

(j) The Competent Authority by order dated 18th May 2022 granted deemed conveyance for an area of 956.75 sq. mtrs..

(k) The Respondent No.1- Society filed application dated 15th September 2022 seeking corrigendum as certain structure mentioned in the application/ document is not noticed by the Competent Authority. In the impugned Order dated 31st July 2023 issuing corrigendum, the Competent Authority has set out contents of the Affidavit filed by the Respondent No.1- Society as follows:

(i) Society has filed a Deemed Conveyance application for the land admeasuring 1002.50 sq. mtrs. bearing Plot Nos. 3 & 4, CTS No.302/B of Village Valnai, Taluka Borivali and building known as Oasis CHSL and structures standing thereon.

(ii) Applicant Society stated that **there is one structure apart from the society building on the said property admeasuring 45.75 sq. mtrs. which is also mentioned in the Architect Certificate. Area of land admeasuring 1002.50 sq.mtrs. is in use, occupation and possession of the society including the land beneath the structure thereon.**

(Emphasis added)

6. In view of the above factual position, it is required to note the relevant legal position:-

(i) Section 2(C) of MOFA defines Promoter as follows:

(c) “promoter” means a person and includes a partnership firm or a body or association of persons, whether registered or not] **who constructs or causes to be constructed** a block or building of flats, or apartments **for the purpose of selling some or all of them to other persons**, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both.”

(Emphasis supplied)

Thus, in the present case, the Petitioners (i.e. original owners) as well as the Respondent No.4 (i.e. Developers), both are the “Promoters” within the meaning of Section 2(C) of the MOFA.

(ii) Section 11(1) of the MOFA *inter alia* provides that a promoter shall take all necessary steps to complete his title and convey to the organization of persons, who take flats, which is registered as a co-operative society, 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.

(iii) Rule 9 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction etc.) Rules, 1964 (Said Rules) *inter alia* provides that if no period for conveying the title of the promoter to the organisation of the flat purchasers is agreed upon, the promoter shall (subject to his right to dispose of the remaining flats, if any) execute the conveyance within four months from the date on which the Co-operative society.

(iv) Section 13(1) of the MOFA *inter alia* provides that any promoter who, without reasonable excuse, fails to comply with or contravenes, the provisions of Section 11 shall, on conviction, be punished with imprisonment for a term which may extend to three years or with fine, or with both is duly constituted.

7. The following position emerges from the above factual and legal aspects:-

(i) As noted hereinabove, as per the MOFA agreement executed with the flat purchasers, the Promoters have agreed to execute the

conveyance within a period of 2 yrs from the date of registration of the Society.

(ii) The Respondent No.1- Society has been registered on 16th January 1986.

(iv) The Petitioners who are also *inter alia* the promoters are under statutory obligation to execute the Conveyance within a period of two years from 16th January 1986 i.e. the date of formation and registration of the society. Thus, the promoters i.e. the Petitioners were under statutory obligation to execute the Conveyance within a period of two years w.e.f. 16th January 1986 i.e. on or before 16th January 1988.

(iv) The factual position on record clearly shows that the Petitioners who are the promoters have failed to perform their statutory duty of executing the Conveyance for last about 36 years.

8. In view of above factual and legal position, it is required to be noted that the present Writ Petition is preferred under Article 226 of the Constitution of India. It is settled legal position that the

jurisdiction under Article 226 of the Constitution of India is equitable and discretionary jurisdiction⁵.

9. The Petitioners who have failed to perform their statutory obligation for about 36 years are not entitled for any relief under Article 226 of the Constitution of India. In this context, it is also required to be noted that failure to perform statutory duty under Section 11 of the MOFA of execution of conveyance in favour of the Respondent No.1- Society within stipulated time is an offence under Section 13 of MOFA. Thus, the Petitioners are not entitled for any relief under Article 226 of the Constitution of India, which is an extraordinary jurisdiction.

10. It is also required to be noted that as per the settled position, order granting deemed conveyance does not conclude the issue of title and the aggrieved parties can file Civil Suit to establish title to the property in question. Thus, the Petitioners are not entitled for any relief under Article 226 of the Constitution of India

11. Dr. Chandrachud, learned Counsel appearing for the Petitioners submitted that the Deemed Conveyance has been granted for the area which is much more than agreed to be allotted

⁵ (2008) 2 SCC 41 (UP State Sugar Co. Ltd. Vs.Kamal Tondon

as per the agreement. He pointed out the schedule which is set out in the agreement. He relied on the decision of a learned Single Judge in *Riddhi Gardens Building No.A1, A2 Co-operative Housing Society Limited* (supra) and particularly, on paragraph No.34 of the same.

12. In *Riddhi Gardens Building No.A1, A2 Co-operative Housing Society Limited* (supra), a learned Single Judge has held that under Section 11 (1) of the MOFA, a promoter is under obligation to transfer his right, title and interest in the land and building in accordance with agreement executed under Section 4, which in turn needs to be executed in Form V as prescribed in Rule 5 of the MOFA Rules. It has been held that something which is not provided in the Agreement under Section 4 need not be conveyed by the Promoter under subsection (1) and cannot be conveyed by the Competent Authority under sub-sections (3) and (4).

13. The schedule of the MOFA Agreement executed with the flat purchasers on which Dr. Chandrachud has relied is already set out hereinabove. It is the submission of Dr. Chandrachud on the basis of schedule and the Application filed by the Respondent No.1-Society that the Petitioners on their own claim are entitled to only

for plot Nos.3 and 4 and therefore, they are entitled for 918 sq.mtrs. He therefore, submitted that granting Deemed Conveyance of land admeasuring 1002.50 sq.mtrs. is totally illegal.

14. However, in this case, Architect's Area Certificate dated 21st December 2021 is submitted by the society. The impugned order dated 18th May 2022 has been passed granting deemed conveyance for an area of 956.75 sq. mtrs. ignoring the said Architect's Certificate dated 21st December 2021. The said Area Certificate shows that plot Nos.3 and 4 which are part of CTS No.302 are now given CTS No.302/B and area of said CTS No.302/B is 1002.50 sq.mtrs.

15. It is the submission of Mr. Savant, learned Counsel appearing for the Respondent No.1 that said Architect's Certificate also determines said area of 1002.50 sq. mtrs. by various methods. He submits that the schedule which is appended to the agreement not only mentions plot Nos.3 and 4, however, the same also mentions right of way or passage along with the other plot holders 20` wide on the western side of the said plots and also together with right of way or passage 15` wide on the northern side of the said plot. He therefore submitted that therefore area to which the Respondent

No.1- Society is entitled can not be arrived at only on the basis of areas of Plot No.3 and Plot No.4. He also submitted that while passing the earlier order, material showings the rights of the Respondent No.1- Society to the existing structures are ignored by the Competent Authority.

16. Mr. Savant, learned Counsel appearing for the Respondent No.1 is right in contending that the area of only plot Nos. 3 and 4 can not be only taken into consideration while determining the entitlement of the Respondent No.1- Society as the property mentioned in the schedule of the MOFA agreement executed with the flat purchasers makes reference to the right of way or passage alongwith the other plot holders 20 wide on the western side of the said plots and also together with rights of way or passage 15' wide on the northern side of the said plots.

17. It is also required to be noted that on plot Nos.3 and 4, the building of Respondent No.1 is constructed as well as on plot Nos.5 and 6 building of Evergreen Co-operative Housing Society Limited is constructed. It is also required to be noted that as far as plot Nos.3, 4, 5 and 6 are concerned, which are mentioned in the schedule of the MOFA agreement, nothing is retained by the

present Petitioners. As far as Plot Nos. 3 and 4 are concerned, the Society building of Respondent No.1- Society is constructed on the same whereas as far as plot Nos. 5 and 6 are concerned, the building of Evergreen Co-operative Housing Society Limited is constructed on the said plots.

18. It is also important to note that the impugned Deemed Conveyance order is not challenged by the said Evergreen Co-operative Housing Society Limited. Thus, challenge to the order granting Deemed Conveyance at the instance of original owners, who have not retained any right with respect to both set of plots i.e. plot Nos. 3 and 4 or plot No.s 5 and 6 and the entire property mentioned in the Schedule, is not sustainable and the challenge is misconceived.

19. The factual position on record clearly shows that as far as these plot Nos.3, 4, 5 and 6 are concerned, no rights are retained by the Petitioners and therefore, on that ground also no interference is warranted in the impugned orders of granting Deemed Conveyance.

20. Mr. Savant, learned Counsel appearing for the Respondent No.1 is right in relying on the decision of Division Bench of this Court in ***Zainul Abedin Yusufali Massawawala*** (supra), it has been held in paragraph No.9 as follows:

“9.We are of the clear opinion that the society approached the Competent Authority with a limited request, namely, that having formed a legal entity namely the co-operative housing society of the flat purchasers, it is the obligation now of the promoter to convey the right, title and interest in the building and the land beneath, so that the legal entity will be entitled to enjoy the right, title and interest in the property. If while granting the deemed conveyance, the Competent Authority has in any manner, traveled beyond the stipulations in the agreement, and the grievance of the petitioners is that a larger property is allowed to be claimed by the society contrary to the covenant and recitals of the two agreements, then the remedy of the petitioners even in terms of two decisions of this court in Tushar Jivram Chauhan v. State of Maharashtra (2015) 4 Mah LJ 867 and Mazda Construction Company v. Sultanabad Darshan CHS Ltd., 2012 SCC OnLine Bom 1266 relied upon by Mr. Khandeparkar is not to file a writ petition under Article 226 in this court, but to approach competent civil court and establish this right, title and interest in relation to the larger property. While establishing and seeking to prove it, the petitioners can also allege that contrary to the Development Agreement and a MOFA Agreement, the society claimed a larger property and relying upon those submissions the Competent Authority has granted the relief in relation thereto. That is the prejudice caused and which the petitioners can seek a redressal thereof by approaching such a court. During the course of such proceedings, the

petitioners can highlight the alleged wrongful conduct of the society in firstly bringing a suit and withdrawing it and for the same relief namely for failure to discharge MOFA obligations, then approaching the Competent Authority belatedly and obtaining the Deemed Conveyance in the absence of the petitioners. Therefore, that adjudication, if at all one can term it, and the order therein, would not be binding on the petitioners, ought to be the eventual declaration. That, they can claim irrespective of any application under Section 11 of MOFA, which has been made in this case. From the contents thereof or the observations and conclusions in the impugned order, we are of the opinion that the jurisdiction of the competent civil court is not barred, despite such document being placed on record and relied upon by respondent no. 3. The Civil court will adjudicate the issue of right, title and interest of the petitioners in the larger property by independently applying its mind and on a total appraisal of the oral and documentary evidence before it. Once all such remedies are intact, then, we do not think that in writ jurisdiction we should entertain such a dispute.”

(Emphasis added)

Thus, it is clear that the order granting deemed conveyance does not conclude the issue of title and the Petitioners are at liberty to file Civil Suit for establishing their title to the subject property.

21. For the reasons set out herein above and in view of the settled legal position, that the order granting Deemed Conveyance doesn't conclude the issue of title and aggrieved party can file a

Suit to establish their right to the property, no interference in the order granting Deemed Conveyance is warranted.

22. Accordingly, the Writ Petition is dismissed, however, with no order as to costs.

[MADHAV J. JAMDAR, J.]