

(2023) 07 BOM CK 0007

Bombay High Court

Case No: Writ Petition No. 5439 Of 2022

Saurin Ketan Jariwala

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision: July 3, 2023

Acts Referred:

- Maharashtra Ownership Of Flats (Regulation Of The Promotion Of Construction, Sales Management And Transfer) Act, 1963 - Section 2(c), 4, 11
- Indian Contract Act, 1872 - Section 23

Hon'ble Judges: Arif S. Doctor, J

Bench: Single Bench

Advocate: Anshul Anjarlekar, P. H. Kantharia, Ankit Lohia, Usha Tiwari, Manshi Jain

Final Decision: Dismissed

Judgement

Arif S. Doctor, J

1. The present Petition impugns (i) an order as also (ii) a certificate of Deemed Conveyance both dated 17th October 2019 passed by Respondent No. 2 i.e. the District Deputy Registrar Co-Operative Societies, Mumbai, being the Competent Authority under the provisions of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sales Management and Transfer) Act, 1963 ("MOFA") on an Application filed by Respondent No.3 under Section 11 of MOFA.

The relevant facts are as follows :-

2. The Petitioner claims to be the successor in interest of a partnership firm known as Venisons. By and under a Deed of Assignment and Transfer dated 14th November 1979 entered into between one Ms. Tehmina Khorshed Karanjia and Venisons, the building known as "Quetta Terrace" ("the said building"), and land bearing Plot No.10, Cadastral

Survey No.427 of Malabar Hill Division in D Ward ("the said land") was leased to Venisons. The members of Respondent No. 3 were the tenants in respect of the flats in the said building.

3. Since the said building was in dilapidated condition, Venisons decided to redevelop the same. It was for this purpose that from the year 1991 Venisons entered into various agreements with the tenants of the said building for redevelopment of the same and to provide alternate accommodation to the existing tenants.

4. Venisons thereafter applied for the requisite permission for redevelopment of the said building. The Bombay Building Repair and Reconstruction Board granted an NOC dated 9th March, 1993 and Condition No. 1 whereof was as follows, viz.

"1. The Co.Op. Housing Society along with minimum 70% of Old occupiers of the Old Building shall be formed before occupation in the building to be reconstructed."

5. In the year 1994 Venisons entered into an Agreement dated 21st July 1994 whereby new flat numbers were allocated in the to be constructed building to the existing tenants.

6. Thereafter Venisons entered into another Agreement dated 15th January 1997 with the tenants for inter-alia settling the terms and conditions of the Co-operative Society that would be formed by the tenants.

7. It is this Agreement that falls consideration in the present Writ Petition and based on which the Application for Deemed Conveyance had been filed. It is useful at this juncture to set out the following relevant clauses of the said Agreement viz. :-

1. The Landlords recognize the Tenants as the owners of the said flat no.202 on Second floor in the new building (as per the condition imposed by "MHADA") called "PARSHWA KUNJ" (Previously known as "Quetta Terrace") tenements i.e. the accommodation given to the tenants in the new building. The construction cost of the said flat Rs.10,56,600.00 has been borne and paid by the tenants.

2. The Landlords and the Tenants along with other Tenants in the building will co-operate with each other and jointly form a Co-operative Housing Society to be called '[ARSJWA LIMK Co-OPERATIVE HOUSING SOCIETY LIMITED" if approved or such other name as may be approved and sanctioned by the Registrar of Co-Op Housing Society Ltd. and the Landlords, the Tenants herein and other Tenants of various premises in the New Building will joint in and become members of the said "PARSHWA KUNJ CO-OPERATIVE HOUSING SOCIETY LIMITED." There upon and after receipt of the full construction cost, Taxes and other outgoing due and payable to the authorities concerned, the Landlords undertake to execute and register such documents as may be required to confirm the ownership of the

Tenants in respect of the said flat and the rights power and authorities of the said society to manage, look after and attend to the affairs and matters of the said new building. All costs, charges and expenses of the formation, incorporation and registration of the said Society and or any other documents and or agreements will be shared by the members of the said Society in proportion to the area of their respective premises.

3.

4. This Agreement and the relations between the parties hereto and other Tenants/Occupants will be governed by the provisions of the Maharashtra Ownership Flats Act and by the Maharashtra Housing and Area Development Act which provides for the Tenants to become owners of the premises occupied by them.

5.

6. The Landlords shall continue to be the exclusive owner of the land on which the super structure i.e. the said building is constructed and that the Landlord alone shall have undisputed exclusive rights to the future F.S.I. or any other construction right, use of every open space in the compound, terrace, basement, parking space, etc. The Tenants/Occupiers shall form the said Co-Operative Housing Society to which the right of ownership to the building if called upon by the said society, shall be conveyed other than all rights, interest, claims as stated herein above. The Landlord shall have the right to sell, transfer assign or give on rent, lease or deal in any manner they like about their right to the aforesaid remaining property with them and the Tenants/Occupiers including the Co-Operative Housing society shall give consent as and when demanded by the Landlord in this regard. The landlords have allowed the said new building to be constructed on the said plot of land on the basis of irrevocable licence in that behalf granted by them to the tenants.

7. It is declared that since this agreement does not constitute an agreement to sell and also the value of the property is less than Rs.75.00 Lacs the parties are not required to obtain sanction of No Objection Certificate from the Appropriate Authority under the provisions of Chapter 20-C of the Income Tax Act and accordingly the same is not applied for and obtained."

8. Respondent No.3, basis this Agreement, filed an Application for Deemed Conveyance in the year 2018.

Submissions of Mr. Anshul Anjarlekar, on behalf of the Petitioner.

9. Mr Anjarlekar, placing reliance upon Clause 6 of the said Agreement, submitted that the members of Respondent No. 3 were only entitled to ownership of their respective flats and nothing more. He submitted that Clause 6 was explicit and clear inasmuch as the land on which the said building stood as also all the rights in the said land were to be retained by the Petitioner. He submitted that therefore the question of Respondent No.3 being entitled to a conveyance of the said land based on this Agreement did not arise. He submitted that all that the members of Respondent No.3 were entitled to was ownership of their respective flats and nothing more.

10. Learned Counsel then submitted that infact, the said flats were never sold for any monetary consideration. He submitted that the tenants had only paid construction cost for their respective flats and nothing more. He pointed out that as per Section 2 (c) of MOFA the term promoter includes only a person who sells the property, i.e. building, apartment, or flat to any person. He submitted that in the present case, Venisons, admittedly, had not sold a single flat to any person and thus the question of Venisons being a Promoter, as defined under MOFA did not arise. He therefore submitted that there was no question much less any obligation in law for Venisons to convey and transfer the said land and/or any rights therein in favour of Respondent No. 3.

11. Learned Counsel then submitted that the Agreement was ex-facie not in accordance with Section 4 of the MOFA and therefore Respondent No.2 could not have in law passed the Impugned Order. Learned Counsel submitted that Clause 6 was explicit and Respondent No.2 was to act strictly in terms of the Agreement, and not interpret the same. He therefore submitted that given Clause 6 of the Agreement, Respondent No.2 could not have allowed the Application for a Deemed Conveyance. He then submitted that it was well settled that in an Application filed under Section 11 of the MOFA, the Competent Authority cannot adjudicate upon the issues of title as also the civil rights of the parties to the Agreement in respect of which the Deemed Conveyance has been sought. In support of his contention, he placed reliance upon the following two judgments:-

(1) Mazda Constructions Company vs. Sultanabad Darshan CHS Ltd. Writ Petition No.3912 of 2012.

(2) Marathon Next Gen Realty Limited vs. The Competent Authority, District Dy. Registrar of Co-operative Societies Writ Petition No.11802 of 2013.

12. Learned Counsel then invited my attention to recital (D) and (G) of the said Agreement and pointed out that the same specifically recorded that the tenants shall be recognized as the owners of their respective flats allotted to them under the said Agreement dated 21st July 1994 and that Venisons shall continue to be the exclusive owner of the plot of land on which the said building stood. Basis the said recitals he submitted that therefore, a tenant only had the right limited to their respective flat and

not with regards to the land, which was under exclusive ownership of the Petitioner. He pointed out that Venisons would therefore have undisputed and exclusive rights to the future F.S.I. or any other construction right, use of every open space in the compound, terrace, basement, parking space etc. Learned Counsel reiterated that Venisons had never sold a single flat in the entire building or in the property and the tenants were recognized as owners by the said Agreement only with respect to the flats allocated to them and nothing more.

13. He additionally submitted that the said Agreement was not governed by the provisions of MOFA since, viz.

i. MOFA provided that a Promoter before accepting any money as advance payment, was required to enter into a written Agreement for Sale. In the present case, he submitted that there was no such sale price, hence the Agreement did not fall within the ambit of MOFA.

ii. That an Agreement under MOFA had to be in the format prescribed in Form V of the MOFA Rules. He pointed out that the said Agreement was also not in the form or format as prescribed under the MOFA Rules.

14. For all of the aforesaid reasons, Mr. Anjarlekar submitted that both the Impugned Order and the said Certificate issued on the basis thereof were required to be set aside and recalled and cancelled.

Submissions of Mr. Ankit Lohia, on behalf of Respondent No.3.

15. Per contra, Mr. Lohia, Agreement was squarely governed by in Clause 4 of the said Agreement.

16. Learned Counsel then submitted that it was not in dispute that (i) the members of Respondent No.3 were originally the tenants in respect of the flats in the said building; (ii) Venisons was granted permission to redevelop the said building after obtaining requisite consents of the Co-operative Housing Society to be formed by the tenants; (iii) the tenants on payment of consideration became owners of their respective flats in redeveloped building; and (iv) the said agreement specifically provided that the provisions of MOFA would govern the rights and obligations between the parties. Basis this, he submitted that there was no manner of doubt that the provisions of MOFA would apply in all its rigour and that therefore Respondent No.3 was entitled to a Deemed Conveyance as prayed for in the said Application made before Respondent No.2.

17. Learned Counsel then submitted that Venisons had been granted permission for redevelopment vide the NOC dated 9th March, 1993 which did not contemplate Venisons recovering the construction cost from the members of Respondent No. 3. He

submitted that the construction was carried on by Venisons pursuant to the said NOC in its capacity as a developer/redeveloper of the said land and building. He thus submitted that this coupled with the fact that Venisons had recovered the cost of construction from the members of Respondent No.3 made plain that Venisons was a Promoter as defined under MOFA.

18. Learned Counsel, then submitted that the use of the nomenclature construction cost in the said Agreement was only for the purpose of tax management/planning of the Petitioner and nothing else. He submitted that this was plain from the fact that two of the tenants namely Anilaben Mahendrabhai Shah and Mahendrabhai Surchandbhai Shah had in the year 2005 paid stamp duty on the market value of the said flat being Rs. 3,73,000/- whereas under the said agreement, the 'construction cost' paid was Rs. 10,56,600/-. He therefore submitted that construction cost could never be more than the market value and that to three times more. He submitted that it was therefore evident that what was paid under the said agreement was consideration for sale of the said flat though the nomenclature used was construction cost.

19. Learned Counsel then placed reliance upon the judgment of this Court in the case of Ramniklal Tusidas Kotak & ors v/s. M/s. Varsha Builders and others AIR 1992 Bom. 62 to submit that the members of Respondent No.3 having paid valid sale consideration to the lessee (i.e. Venisons) and the lessee having given ownership right under the said Agreement to the tenants (the members of Respondent No.3), the lessee (the Petitioner) would fall within the definition of "Promoter" as defined under Section 2(c) of the MOFA. He submitted that once the provisions of the MOFA were applicable, any clause and/or provision in the Agreement to which the MOFA would apply which was contrary to the mandate of the MOFA would be void. He, therefore, submitted that Clause 6 of the said Agreement was clearly bad in law and null and void. In support of his contention, he placed reliance upon the judgment of this Court in the case of Ratna Rupal Co-op. Housing Society Ltd vs. Rupal Builders & others 2011 (5) Bom. C.R. 561 in which this court in paragraph 5 thereof has held as under:-

"5. It is settled law that agreements between the flat purchasers and the Developers are required to be in accordance with the statutory provisions contained in MOFA and the model agreement. The clauses which give the rights of the parties and agreement of the kind executed by and between the flat purchasers in the plaintiff Society and the Developers cannot be inconsistent with or in derogation of the statutory provisions under MOFA. Any clause in any agreement by any flat purchasers or the developer which is inconsistent with or against the mandate of the statute would be, to that extent void under section 23 of the Indian Contract Act being against the provisions of MOFA and against public policy reflected therein. The reliance upon them is completely in vain."

20. Without prejudice to above, Learned Counsel then placed reliance upon the judgment of this Court in the case of Tushar Jivram Chauhan and another v/s. State of Maharashtra and others 2015(4) Mh. L. J. 867 to submit that the Agreement for Sale cannot be contrary to the provisions of law. Learned Counsel then submitted that the Agreement being governed by MOFA and Venisons being a Promoter it was incumbent upon Venisons in terms of Section 11 of MOFA to have taken all the necessary steps to convey its right, title and interest in the said land and building in favour of Respondent No.3.

21. In answer to the judgments relied upon by the Petitioner, Mr. Lohia Learned Counsel for Respondent No.3 submitted that in the present case there was no question of interpretation of any clauses of the said Agreement. He submitted that the Impugned Order was not based on interpretation of any clauses of the said Agreement but based on the provisions of the MOFA. Without prejudice, he then submitted that in any event the Petitioner's right under Clause 6 of the said Agreement would not be affected by the grant of Deemed Conveyance as it was well settled that a Deemed Conveyance cannot affect the legal right if any in the property which the Petitioner could always assert in a Civil Suit. In support of his contention, Learned Counsel placed reliance upon a judgment of this Court in the case of Smt. Gracy Dmello & ors v/s. Andheri Amarendra Co-op. Housing Society Ltd and ors. 2016 SCC Online Bom. 10843`

22. I have heard learned counsel, perused a copy of the said Agreement and considered the case law cited and after a careful consideration of the same, have no hesitation in holding that the present Writ Petition deserves to be dismissed for the following reasons, viz.

A. Clause 4 of the said Agreement is clear and unambiguous. The said clause in terms provides that (i) the Agreement and (ii) the relations between the parties shall be governed by MOFA. Therefore, it is beyond the pale of doubt that the Parties had agreed that their respective rights and obligations pursuant to the redevelopment would be governed by the provisions of MOFA. This naturally means that the provisions of MOFA would apply in full. Additionally, not even an attempt was made by Learned Counsel for the Petitioner to demonstrate as to how once the parties having agreed that the provisions of MOFA would apply, application of the same could be circumscribed either in the manner suggested by the Petitioner or even otherwise in law.

B. In the present case, there is also no doubt that Venisons is a Promoter as defined under MOFA. Section 2(c) of MOFA defines Promoter as follows, viz.

"2. In this Act, unless the context otherwise requires; -

(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 terms includes both;”

There is no dispute that (i) Venisons (being a partnership firm) was the lessee of the said building (ii) Venisons, pursuant to permission granted, redeveloped the said land and building and (iii) Venisons received consideration from the tenants against which Venisons allotted flats on an ownership basis to the tenants. There is and can be no doubt therefore that Venisons would squarely fall within the definition of a Promoter as defined under MOFA. Given this fact it was incumbent upon Venisons to discharge all its obligations as a promoter under MOFA, this would inter-alia include Venisons transferring all its right, title and interest in the said land and building to Respondent No.3. Since Venisons did not however do so, Respondent No.3 was left with no option but to file the Application for Deemed Conveyance.

C. The fact that the said Agreement was not in the format prescribed by MOFA or that the same did not specifically mention sale price, is also immaterial since the parties had agreed categorically in Clause 4 that the provisions of MOFA would apply. It is not in dispute that Venisons did not redevelop the said building on its own cost but did so after taking requisite “construction costs” from the tenants. Respondent No.3 has demonstrated that the construction cost paid by the tenants was infact much higher than the market value of the said flat allotted on an ownership basis. Therefore, it is clear that the construction cost was nothing but consideration for sale of the said flat on an ownership basis. Therefore it is not open for the Petitioners (assuming the Petitioners are successors in interest of Venisons) to contend that only construction cost was paid by the tenants and that the tenants and/or Respondent No. 3 did not have the benefits of the rights under MOFA.

D. While Clause 6 undoubtedly reserves the rights in the said land in favour of Venisons (Landlords), the legality and effect of such a clause would have to be construed in the overall facts of the case. In the present case, as I have already held that there is no doubt that (i) the parties had agreed that the provisions of MOFA would apply; (ii) Venisons was the Promoter as defined under MOFA in respect of the redevelopment carried out and (iii) that the said flats were infact sold to the tenants on an ownership basis. Thus Venisons would therefore be required to discharge all its obligations as a Promoter under MOFA and consequently was required to take all the necessary steps to complete its title and convey the same to Respondent No.3 i.e. the Co-operative Society formed on the basis of which the redevelopment permission was granted. Should the Petitioner however seek to assert any right in respect of what is stated in Clause

6, then it would be open to the Petitioner to do so in an appropriate proceeding before a Civil Court.

23. With these observations, I accordingly dismissed the present Writ Petition with no order as to costs.