
(2023) 11 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No.8186 Of 2022, Interim Application No.10410 Of 2022

M/S. Faime Makers Pvt.Ltd

APPELLANT

Vs

District Deputy Registrar Co-Operative Societies (3), Mumbai

RESPONDENT

Date of Decision : 10-11-2023

Acts Referred:

Maharashtra Ownership Flats (Regulations Of The Promotion Of Construction, Sale, Management And Transfer Act, 1963 — Section 11

Citation : (2023) 11 BOM CK 0010

Hon'ble Judges : Sandeep V. Marne, J

Bench : Single Bench

Advocate : Ashish Kamat, Mayur Khandeparka, Aseem Naphade, Amar Khanna, Yugal Bhatia, Haris Koradia, Aditya Lele, V.S. Nimbalkar

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1. By this petition, Petitioner challenges order dated 5 October 2021 passed by the District Deputy Registrar Co-operative Societies (3), Mumbai and competent authority granting unilateral Deemed Conveyance of leasehold rights of land admeasuring 1321.36 square meters, societies' building and undivided rights in recreational ground admeasuring 1519.56 square meters in favour of the Respondent no.2 society.

2. Briefly stated, the facts of the case are that one Nanbhoy Byramjee Jeejeebhoy was the owner of piece and parcel of land admeasuring 6382.10 square meters and bearing CTS no.75 and 75/1 to 5,8,9,11 to 34 Survey no.22 Hissa no.1 (part) village Bandivali, Hill Raad, Jogeshwari (West), Mumbai (large property). On 24 July 1951 a Deed of Conveyance was executed between Nanabhoy Byramjee Jeejeebhoy and Byramjee Private Limited (BJPL) by which the larger property was sold to BJPL. A lessor and Respondent no.3 (Ramkishor Singh Kunjbihari Singh) was inducted as lessor in respect of land admeasuring 1 Acre and 20 Gunta i.e. about 6070.22 out of larger property. Lease is for period

of 99 years. Respondent no.3 granted development rights in favour of Respondent no.4 M/s. Prakash Builders. In accordance with the development rights granted in his favour, Respondent no.4 has constructed a building consisting of 27 flats and has sold flats in the building to various flat purchasers, who have formed Respondent no.2 society (Prakash Apartment Co-operative Housing Societies Limited) which came to be registered on 28.08.1991.

3. On 7 July 2010, Deed of Conveyance was executed between BJPL as vendor and Petitioner by which Petitioner has purchased the entire larger property for consideration of Rs. 2.50 crores. Under the conveyance, Petitioner's enjoyment of property is subject to the rights of the lessor. Respondent no.3 filed Suit no.64 of 2011 against BJPL and Petitioner for various reliefs. In that suit, Consent Terms were filed on 06.09.2012 under which it was agreed that the larger property admeasuring 6382 square meters would be divided into two portions viz.

(i) land admeasuring 2786 would belong to Petitioner and (ii) land admeasuring 3596 square meters would belong to Respondent No.3. It appears that the building of the society falls in land admeasuring 2786 square meters which belongs to Petitioner under the Consent Terms dated 06.09.2012.

4. On 30.12.2012, the Deed of Surrender was entered into between Petitioner and Respondent no.3, under which Petitioner surrendered land admeasuring 3596 square meters from the larger property in favour of Respondent no.3 and Respondent no.3 surrendered his leasehold rights in land admeasuring 2786 square meters from the larger property in favour of the Petitioner. This is how petitioner has become owner of land admeasuring 2786 square meters out of the larger property. One of the conditions of the Deed of Surrender is that the obligations of Respondent no.3 as promoter under provisions of the Maharashtra Ownership of Lands (Regularization of the Promotion Construction, Sale Management and Transfer Act, 1963) (MUFA) stood transferred to Petitioner.

5. Petitioner claims that out of the land admeasuring 2786 square meters coming to his ownership, land admeasuring 1277 square meters is declared as slum as per and the notification dated 15.10.1985, the land admeasuring 870 square meters is occupied by the building of Respondent no.2 society and the balance land admeasuring 639 square meters is non-slum open land. Petitioner has entered into development agreement with the association of slum dwellers on 08.10.2013 for carrying out development in respect of slum area admeasuring 1277 square meters.

6. On 25.02.2020, Respondent no.2 society called upon Petitioner and Respondent nos. 3 and 4 for grant of conveyance of land. Respondent no. 2 society filed Application dated 05.03.2020 before the District Deputy Registrar and Competent Authority seeking Deemed Conveyance of land admeasuring 1321.36 square meters and recreational ground admeasuring 198.20 square meters (totally admeasuring 2759.9 square meters) along with proportionate undivided share in all other properties and facilities and amenities. The

Application was opposed by Petitioner. Competent Authority passed order dated 22.02.2021 rejecting society's Application for Deemed Conveyance. It is society's contention that the Application was rejected as society had not sought Conveyance of Assignment leasehold rights and accordingly liberty was granted to file fresh application for seeking Deemed Conveyance of Assignment of leasehold rights. It is Petitioner's case that the application was rejected holding that there are legal complications and that unless competent Civil Court solves those complications, application for Deemed Conveyance could not be decided.

7. On 24.03.2021, Respondent no.2 society filed fresh application for Deemed Conveyance this time seeking certificate of entitlements of unilateral assignment of leasehold rights in land admeasuring 1321.36 square meters alongwith land admeasuring 198.20 square meters RG (totally admeasuring 2752.9 square meters) alongwith proportionate undivided share of in other common properties, facilities and amenities. The Application was opposed by Petitioner initially by filing an application dated 31.07.2021 seeking its rejection both on the ground of on maintainability as well as absence of functional Managing Committee to pass Resolution for making application for Deemed Conveyance. Separate written statement was filed by Petitioner on 18.08.2021. Respondent No.2 also opposed the Application by filing reply dated 23.08.2021. By order dated 5.10.2021, the Competent Authority has proceeded to grant Deemed Conveyance of leasehold rights in land admeasuring 1321.36 square meters, society's building thereon, RG admeasuring 198.20 square meters in favour of Respondent no. 2-society. Petitioner is aggrieved by the order dated 5 October 2021 passed by the Competent Authority and has filed the present petition.

8. Mr. Kamat, the learned senior advocate would appear on behalf of the Petitioner and submit that the second application filed by the society for grant of Deemed Conveyance dated 24.03.2021 was not maintainable. He would submit that first application was rejected observing that there are legal complications on account of transfer of the leasehold rights by the promoter in favour the Petitioner due to which, it was incumbent for Respondent no.2-society to seek appropriate relief from court of competent jurisdiction. He would further submit that the competent authority specifically recorded a finding that until resolution of legal complications by competent civil court, Respondent- society could not file application for Deemed Conveyance. He would submit that order dated 22.02.2021 passed by the competent authority attained finality as the same was not challenged by the society. That, the society did not approach Civil Court to resolve the legal complications arising out of the transfer of lease and absence of capacity of Petitioner as promoter and without filing proceedings before Civil Court, Respondent society filed a fresh Application before competent authority falsely claiming that a liberty was granted to the society to file the application to seek leasehold rights. That, no such liberty was granted by the Competent Authority. That, the liberty to file fresh application was only after seeking declaration from Civil Court.

9. Mr. Kamat would submit that the second application filed by the Respondent no.2 society was barred by principles of res-judicata. That the principle would apply to quasi-judicial authorities also. He would rely on the judgment of the Apex Court in Abdul Kuddus Vs. Union of India & Others (2019) 6 SCC 604 : 2019 SCC OnLine SC 2251 Mr. Kamat would further submit that entertainment of second application by the competent authority on same facts virtually amounts to review of earlier decision. That, the power of review has not been conferred on the competent authority.

10. So far as the merits of the decision of the competent authority is concerned, Mr. Kamat would contend that the society failed to file copies of commencement certificate and occupancy certificate alongwith its application for grant of conveyance. That filing of commencement certificate and occupancy certificate are pre-requisites for entertainment of Application under Section 11 of MOFA. Mr. Kamat would further submit that in any case, Respondent no.2-society is not entitled to the area of 1321.36 square meters or any undivided right in RG. That, the building stands on land admeasuring 870 square meters and conveyance of excess area could not have been granted in favour of Respondent no.2 society. He would pray for setting aside the order passed by the competent authority on 5.10.2021.

11. Per Contra, Mr. Lele, the learned counsel appearing for the Respondent no.2 would oppose the petition and support the order passed by the Competent Authority. He would submit that the second application filed by the society was perfectly maintainable in view of the liberty granted by the Competent Authority while rejecting the first application. That, the first Application was erroneously filed seeking ownership rights in respect of the land when in fact the society could only seek leasehold rights. This necessitated filing of second application in accordance with liberty granted by the competent authority. He would further submit that Petitioner did not raise any objection about maintainability of application before the Competent Authority. That, even the objection with regard to the failure to file commencement certificate and occupancy certificate was also not raised before the competent authority. He would submit that Petitioner specifically undertook the responsibility of being promoter under the Deed of Surrender dated 30 December 2012 and in his capacity as a promoter, he has the responsibility to convey land in favour of the society. That, the certificate Deemed Conveyance is based of architect's certificate produced by Respondent no.2 society and no contrary material was produced by the Petitioner to prove that the society is entitled to lesser area than the one reflected in the architect's certificate. He would pray for dismissal of the petition.

12. Rival contentions of the parties now fall for my consideration.

13. The first issue raised by the Petitioner is about maintainability of second application filed by Respondent no. 2 society for grant of Deemed Conveyance. The Society's first application was rejected by the Competent Authority vide order dated 22.02.2012. It would be apposite to reproduce the findings recorded

by the Competent Authority in his order dated 22.02.2021 for rejection of the first application.

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14. Thus, in order dated 22.02.2021, the competent authority held that though Respondent no.2 society had right to seek leasehold rights in the land, it

demanded conveyance of the land. That, the society could not seek conveyance of any other rights except leasehold rights. The Competent Authority further held that it had jurisdiction to decide entitlement of society to seek leasehold rights in the property. However, he felt that the original lessee Ramkishor Singh Kunjbihari was denuded of his leasehold rights and it was not possible for him to transfer leasehold rights in favour of society through the developer Prakash Builders. The Competent Authority held that by way of Deed of Surrender, Shri. Ramkishor Singh Kunjbihari has surrendered the leasehold rights in favour of the Petitioner. That, Petitioner is not a promoter under provisions of MOFA and the Competent Authority did not have jurisdiction to pass any order against the Petitioner. He felt that in absence of any order being issued to Petitioner, leasehold rights in the property cannot be conveyed to the society. That, the property extract bears name of the Petitioner alone and all the rights of Shri. Ramkishor Singh Kunjbihari as lessee stood terminated. The Competent Authority therefore felt that surrender of leasehold rights by Shri. Ramkishor Singh Kunjbihari in favour of the Petitioner created legal complications which necessitated society to seek appropriate reliefs from the Civil Court. It is for this reason that the competent authority felt that it was not possible for him to pass an order of unilateral Deemed Conveyance. However, after recording this finding, the competent authority still held that the society needs to demand assignment of only leasehold rights. He further held that the society should resolve the legal complications on account of conveyance of land in favour of Petitioner through Court and in absence of such resolution, it is not possible to convey leasehold rights in favour of the society. The society's application was accordingly rejected granting liberty to apply once again to seek conveyance of leasehold rights after complying with the aspects indicated in the order. This is how society's first application came to be rejected by the competent authority on 22.02.2021.

15. Mr. Kamat reads the order dated 22.02.2021 as an absolute rejection with a finding that the resolution of dispute could happen only in a Civil Court. Alternatively, his submission is that the liberty granted to apply for assignment of leasehold rights was only after procuring declaration from Civil Court. Mr. Lele on the other hand would contend that a clear and unequivocal liberty is granted by the competent authority to file a fresh application to seek conveyance of leasehold rights. Mr. Kamat does not appear to be entirely wrong in contending that the competent authority did record findings about legal complications arising out of the transfer of leasehold rights in favour of Petitioner. However, the competent authority's finding in the order dated 22.02.2021 that Petitioner is not a promoter appears to be contrary to clause no. 6 in the Deed of Surrender dated 30 December 2012 which reads thus:

6. It is hereby agreed between the parties that on and from the date of execution and registration of this Deed of Surrender cum Conveyance, the Lessees will cease to have any obligation as Promoters in respect of Prakash Apartments and that all their obligations as Promoters under the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale,

Management and Transfer) Act, 1963 will stand transferred to Owner and the Owner will be liable to perform the same.

16. However, I am not tasked upon to decide the correctness of order dated 22.02.2021. The limited issue that arises for my consideration is to decide as to whether Respondent no.2 society had the liberty to file a fresh application to seek conveyance of leasehold rights. Perusal of the order dated 22.02.2021 passed by the competent authority shows that the findings recorded therein are not very clear and specific. At few places, he holds that Court of competent jurisdiction can decide the legal complications. However, he also holds that the society ought to have applied for conveyance of leasehold rights. His finding about alleged legal complications also do not inspire confidence. The facts of the case are plain and simple. Respondent no.3 was granted lease in respect of the land admeasuring 6070.26 square meters by BJPL. Respondent no.3 granted development rights in favour of Respondent no.4, who has constructed the building of Respondent no.2 society. BJPL has subsequently sold and conveyed the entire larger portion of land admeasuring 6382.10 square meters to Petitioner. This is how Petitioner became the owner of entire larger property, but subject to the leasehold rights of Respondent no.3. Petitioner and Respondent no.3 thereafter entered into arrangement with each other, under which Respondent no.3 has retained and became owner of land admeasuring 3596 square meters whereas, Petitioner has retained and became owner in respect of the land admeasuring 2786 square meters. Admittedly, the society's building is situated on land admeasuring 2786 square meters owned by Petitioner. Thus, under the Deed of Surrender dated 30.12.2012, Petitioner is now the owner of land admeasuring 2786 square meters. Under clause 6 of the Deed of Surrender, Petitioner has taken overall obligations of promoter under provisions of MOFA from Respondent no.3. Thus, qua society now Petitioner is the promoter. He is also owner of land admeasuring 2786 square meters. To my mind, therefore, there are no legal complications in the matter where petitioner now wears two hats of owner as well as promoter. The Competent Authority could have decided the first application of Respondent no.2 society for grant of Deemed Conveyance of the land in favour of the society. However, unfortunately, the society has not challenged order dated 22.02.2021, which has attained finality. Instead it proceeded to file fresh application for grant of Deemed Conveyance of leasehold rights in the land on 24 March 2021. These findings are recorded not to criticize the order of Competent Authority dated 22.02.2021 but only to find out the nature of liberty granted by it for filing fresh application for deemed conveyance.

17. In the above background, the issue for determination is whether the second application can be said to be barred by res judicata. Since I have arrived at conclusion that there are actually no legal complications in the present case, a liberty granted by the competent authority to file fresh application for grant of Deemed Conveyance of leaseholds rights will have to be treated as an unconditional liberty. Once the said liberty is treated an unconditional, the objection for maintainability of the second application for Deemed Conveyance

becomes meaningless. It must also be observed that in its written statement, Petitioner never objected to maintainability of the application for Deemed Conveyance thought it did file a separate application seeking rejection of the second application. However, perusal of contents of the said application would indicate that the rejection was sought essentially on account of absence of any managing committee for passing a resolution for filing second application for Deemed Conveyance. So far as the rejection of first application vide order dated 22.02.2021 is concerned, Petitioner made following averments in para 5 its application.

5. It is further submitted that the Applicant Society had earlier too preferred an Application bearing No.53 of 2020, before this Hon'ble Authority for grant of a Certificate that the Applicant is entitled to have an unilateral Deemed Conveyance of Suit Property under Section 11 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer Act, 1963, which this Hon'ble Authority was pleased to rejected vide an Order dated 22nd February, 2021 for the reasons mentioned thereunder.

18. Thus, except stating that the society had earlier preferred application no.53 of 2020 for grant of certificate of Deemed Conveyance and that the same was rejected, the Petitioner did not raise any objection about maintainability of the second application.

19. Even perusal of the grounds raised in the present petition would indicate that the objection of maintainability of second application is not specifically raised. The Petitioner has raised vague grounds in para no. 4 as under:

4. The Petitioner does herewith humbly state and submit the grounds on which this writ petition is filed:

a. The Respondent No. 2 Society stands on 870 sq. mtrs., and as such, the Ld. Respondent No. 1 cannot grant Deed of Assignment for a larger area of 1321.36 sq. meters alongwith 198.20 sq. meters

b. The Maharashtra Ownership of Flats Act, 1963 is repealed and scrapped, and thus, the Order of deemed conveyance under the Maharashtra Ownership of Flats Act, 1963 is untenable and unsustainable

c. There is no Occupation Certificate of the Respondent No. 2 Society, and the top two floors do not have a Commencement Certificate, and Intimation of Disapproval, and as such, the Respondent No. 2 Society building is illegal and therefore the Ld. Respondent No. 1 could not have passed the impugned Order dated 05/10/2021 (Exhibit - 'A') in favour of the Respondent No. 2 Society

d. As is expressly recorded in the impugned Order dated 05/10/2021 (Exhibit - 'A'), "The name of this applicant is subject to the terms and conditions of the original lease letter dated 29.10.1952", and therefore, Clause-11 of the "Indenture dated 29/10/1952" Exhibit - 'C' herein) is relevant and binding which states, "On the expiry of the term hereby reserved or of any renewal thereof, to

yield up and deliver to the Lessor [presently the Petitioner herein], possession of the demised premises after removing at his own costs and expenses, all buildings and other structures erected thereon, upto their Plinth level restoring the remaining land to its original level to the satisfaction of the Lessor provided that in doing so, the Lessee shall not fill in any well or pond he may have constructed on the demised premises" , and as such, the impugned Order dated 05/10/2021 (Exhibit - 'A') is infructuous and cannot be implemented

e. The Petitioner being the Lessor-Landowner / holder of conveyance has the first right of refusal

f. Reasonable opportunity to argue the matter has not been given

g. The Order is not a speaking-Order

h. Provisions of Maharashtra Ownership Flats Act, are repealed and not applicable. In view thereof the order passed cannot be implemented

I. That the impugned Order:

I. is passed without any proper reasoning

ii. is erroneous on the face of it

iii. has occasioned grave miscarriage of justice

iv. suffers from infirmity

v. is based on presumption and surmises

vi. bad in law, contrary to law

vii. is harsh

viii. is unjust

ix. is unfair and is devoid of merits

xi. is not objective

xii. causes legal injury to the Petitioner

xiii. causes prejudice to the Petitioner

xiv. is against the principles of equity, rules of justice, good conscience and public policy

xv. is passed in a hasty manner

xvi. ought to be set aside with cost

xvii. is vague

xviii. is partial

xix. deserves to be set aside

J. That the Ld. Respondent No. 1:

- i. has erred
- ii. ought to have allowed for the prayers of the Petitioner
- iii. has passed an Order by non-application of mind
- iv. has lost sight of, not applied, and not appreciated:
 - 1. facts of the case
 - 2. (settled) positions of law
- v. has not considered vital issues
- vi. has not considered hardship
- vii. has either miscarried itself or failed to understand the matter

K. That the cause of action of the Petitioner:

- i. is strong and favourable
- ii. has balance of convenience in favour of the Petitioner

20. It is therefore difficult to uphold the objection of maintainability raised by Mr. Kamat. His reliance of judgment of the Apex Court in Abdul Kuddus (supra) regarding applicability of principles of res judicata to proceedings before quasi-judicial authorities is misplaced in view of specific liberty granted by the Competent Authority to Respondent no.2 society to file a fresh application for conveyance of leasehold rights. I therefore proceed to reject the objection of maintainability raised by Mr. Kamat.

21. So far as the objection of failure to file commencement certificate and occupancy certificate alongwith the application for certificate of Deemed Conveyance is concerned, this objection was admittedly not raised before the Competent Authority and the Petitioner is now precluded from raising the same directly before this court against objection is not specifically pleaded in the grounds raised in the present petition. Therefore, no cognizance of this objection which is sought to be raised across the bar during the course of argument, can be taken.

22. This leaves the last objection of Mr. Kamat about the area of land which could be conveyed. The Competent Authority has taken into consideration architect's certificate dated 28.01.2020 for the purpose of arriving at a conclusion that leasehold rights in land admeasuring 1321.36 square meters needs to be conveyed. Architect's certificate reads thus:

Date: 28/01/2020

TO WHOMSOEVER IT MAY CONCERN

This is to certify that Prakash Apartment C.H.S. Ltd., is standing on the land bearing C.T.S. No.75. The said building was constructed on the land bearing C.T.S. No. 75, Village Bandivali, Taluka Andheri and the total area of the plot of the land was 6382.10 sq. mtrs.

As per approved plan bearing No. CE/601/LOK/WN duly sanctioned by Municipal Corporation of Greater Mumbai.

PERFORMA-

A)

Area statement

Area

1.

Area of the plot

6382.10

2.

Deduction for

a) Set back area

389.62

b) Proposed Road

c) Any Reservation

Total (a+b+c)

389.62

3.

Net area of plot

5992.48

4.

Deduction for

a) Recreational Ground 15%

899.01

b) Internal Roads

212.94

Total (a+b)

1111.95

5.

Balance area of plot

4880.53

6.

Permissible F.S.I.

7.

4880.53

8.

3559.17

9.

Balance Area for Proposed Building

1321.36

23. Petitioner did not produce any other document or his own architect's certificate in support of his contention that land admeasuring 870 square meters could be conveyed in favour of the respondent no.2 society. Except vaguely contending in ground clause 4A that the building of the society stands on 870 square meters, no other material is produced to demonstrate as to why and how land admeasuring only 870 square meters needs to be conveyed in favour of the society. Even otherwise, Petitioner cannot insist that only the land covering the foot print of the building can be conveyed to the society. The architect has made calculations based on utilization of FSI which are not disputed by Petitioner, in any manner, by the competent authority or before this Court. Except raising the technical objection of maintainability and failure to file commencement certificate/ occupancy certificate, Petitioner has no other case on merits. Therefore, even the objection with regard to the area of the land of conveyed to the society deserves to be rejected.

24. After considering the overall conspectus of the case, I do not find that any palpable error is committed by the competent authority in conveying leasehold rights in favour of the society by way of order dated 05.10.2021. By now it is well settled law that certificate of unilateral Deemed Conveyance is not determinative of rights and entitlements of parties to the land in question. Reference in this regard can be made to judgments of this Court in Mazda Construction Company Vs. Sultanabad Darshan CHSL, 2013 (2) All MR 278 and Tirupati Shopping Centre Premises Co-operative Society Ltd. Vs. Shabayesha Construction Company Pvt. Ltd., WP (St) No.9105/2021 (decided on 22 April 2021) If Petitioner is aggrieved by the area of land conveyed in favour of society,

it can always file a civil suit to seek a declaration in that regard.

25. I therefore do not find to any reason to interfere in the order dated 5 October 2021 passed by the competent authority. Writ Petition, being devoid of merits, is dismissed with no order as to costs.

[SANDEEP V. MARNE, J.]

26. After the judgment is pronounced, the learned counsel appearing for the Petitioner seeks extension of time interim order granted by this Court. The request is opposed by the learned Counsel appearing for Respondent No.2. Considering that the interim relief is in operation since 18 November 2022, the interim protection is extended by a period of eight weeks from today.