

(2015) 02 NCDRC CK 0133

In the National Consumer Disputes Redressal Commission

Shewa Apartments Co -Operative Housing Society Ltd

APPELLANT

Vs

Ahuja Properties Private Ltd

RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

Citation : 2015 2 CPJ 255

Hon'ble Judges : V.K.JAIN , B.C.Gupta J.

Final Decision : Petition dismissed

Judgement

1. THE plot No.33 B measuring 2123.44 sq. mtrs at 3rd Road, Khar (West) Mumbai was owned by three persons namely, Khubchand Hemandas Setpal, Ramchandra Hemantdas Satpal and Gul Hemandas Setpal. There existed four structures/buildings and a temple on the aforesaid plot. The above referred three persons submitted a plan to Municipal Corporation of Greater Bombay, for redevelopment of the property by demolishing three out of the four existing structures and, constructing a new building thereon while retaining a temple structure and the fourth structure comprising the ground floor and the first floor. They also submitted an application to the Competent Authority under Urban Land (Ceiling and Regulation) Act, 1976 seeking the requisite permission. The competent authority vide its letter dated 25 -05 -1982 cleared the project. The plans for construction of a multi storey building known as Shewa Apartments consisting of three wings in place of three old structures was got approved. Vide an agreement dated 23 -12 -1984 Ramchandra Hemantdas Satpal and Gul Hemandas Setpal agreed to sell their 1/3 undivided share each in the aforesaid property to Shri Khubchand Hemandas Setpal, for a consideration of Rs.17,00,000/-, as a result whereof he came to hold and possess the aforesaid property absolutely.

2. SHRI Khubchand Hemandas Setpal (hereinafter referred to as the owner) entered into identical agreements with several persons for sale of apartments to be constructed in the aforesaid property. He informed the purchasers, in the said apartments, that the fourth structure comprising ground and first floor which at

that time was occupied by tenants shall continue to exist and for the said purpose the owner shall become and continue to remain the member of the society which was required to be formed under the provisions of Maharashtra Ownership of Flats (Regulation of the Permission of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as MOFA) and the tenants occupying the said structure shall continue to be his tenants alone. It was also stipulated in the said agreement that on demolishing the old structure in future the owner shall be entitled to construct a new building thereon and dispose of the same to the intended purchasers, on the terms mentioned therein. The purchasers were given inspection of the sanction plan as well as other documents including the letter/intimation received from the competent authority under Urban Land (Ceiling and Regulation) Act, 1976. The copies of the said documents were also handed over to them. The aforesaid agreements also required the owner to execute conveyance of the property with the building in the name of the society which was to be incorporated under the provisions of MOFA after all the flats had been sold and disposed of and the owner had received all the dues payable to him. Yet another term of the said agreements was that the purchasers will have no claim except in respect of particular flats agreed to be acquired by them and all open spaces, parking places, lobbies, stair cases, terrace, etc., will remain property of the owner until the property so transferred was conveyed to the society. It was also agreed that the terrace in the building shall always belong to the owner who shall be entitled to deal with and dispose of the same in such manner as he may deem fit and in the event of his constructing any flat on the terrace he shall be entitled to dispose it of, with or without terrace to such persons and on such terms as he may deem fit. The society was to admit and recognize the right of purchaser of such flats to the exclusive possession of the terrace if the flats to them were to be sold with terrace. However, the representatives of the society were permitted to enter the terrace for the purpose of attending to the maintenance and repairs of the water storage tank, if any, put up on the terrace. It was also stipulated in the said agreements that the owner shall have a right, until execution of conveyance in favour of the proposed society, to consume and utilise the full FSI available for construction till then and to make addition or raise additional stories as may be permitted by Bombay Municipal Corporation and other competent authorities. The owner could also dispose of such additional structures and stories in any manner he liked.

3. SUBSEQUENTLY , the owner entered into separate agreements with the tenants who were occupying the fourth old structure in the property. The agreements executed by the owner with them were almost identical except that they were not informed in the agreements that the fourth structure shall continue to be there and for the said purpose the owner shall become and continue to remain the member of the proposed society and on demolishing the same in future he will be entitled to construct a new building on the same and to dispose of the same to the intended purchasers. This presumably was felt

unnecessary since the tenants by entering into purchase agreements with the owner recognised his right to demolish the old structure, construct a new building thereon and dispose of the same. It was, however, specifically, disclosed to them that the Competent Authority under Urban Land (Ceiling and Regulation Act), 1976 had granted permission for development of the property vide letter dated 25 -05 -1982, a copy of which was annexed to the agreement as Annexure B. After entering into agreements with the tenants occupying the fourth structure, the owner entered a development agreement with Shri Ahuja Properties Pvt. Ltd. and the said old structure came to be demolished. The requisite approvals were also taken from the municipal corporation for constructing a new building in place of the old demolished structure. In the meanwhile, additional FSI became available on account of amendment of rules and TDR also become permissible, which the owner and the builder sought to utilize while constructing a new building. In the meanwhile, though the society known as Shewa Cooperative Housing Society had come to be formed, no conveyance deed in favour of the said society had been executed. The society objected to the proposed construction on the ground that the owner and the builder had not taken prior permission from them to the proposed construction. The owner and the builder, however, maintained that no such permission from the society was required. Consequently, the society approached the concerned District Forum, seeking the direction to the opposite parties to obtain completion certificate and execute conveyance deed in respect of the whole of the plot in its favour.

4. THE complaint was resisted by the opposite parties contending that under the agreement with the purchasers the owner had specifically reserved his right to demolish the fourth structure after getting the same vacated from the tenants and consequently they were entitled to construct a new building using the available FSI and/or TDR. It was stated in the reply that they were ready to execute the conveyance deed provided their right to redevelop the fourth structure was not compromised. They claimed that since the society was not recognising their aforesaid right, the requisite conveyance deed in its favour could not be executed.

5. THE District Forum vide its order dated 30 -06 -2011 directed the opposite parties to execute the transfer deed of the entire property in favour of the society and also pay Rs.15,000/- to the complainants towards the cost of litigation. Being aggrieved from the order of the District Forum, opposite parties Nos.1 & 2 approached the concerned State Commission by way of two separate appeals. Vide order dated 01 -11 -2012 the State Commission upheld the plea taken by the opposite parties and directed them to execute conveyance deed only to the extent of the land covered by the buildings managed and owned by the society. It was, however, made clear that the opposite parties Nos.1 & 2 would be entitled to develop only the retained portion of the plot along with available FSI and TDR in respect of that portion of the plot only and not on the whole plot of land. Being aggrieved from the order passed by the State

Commission, the society is before us by way of Revision Petition No.4540 of 2012. The owner and the builder have also filed separate revision petitions challenging the aforesaid order to the extent the State Commission had restricted their right to develop only the retained portion of the plot and had not permitted them to utilise the available FSI and TDR on the entire plot of land.

6. THE letter dated 25 -05 -1982 issued by the competent authority under Urban Land Ceiling and Regulations Act, 1976 which formed part of the purchase agreements and was specifically referred therein, to the extent it is relevant reads as under: "Now from your Architect's letter at Sr. No.(ii) above it seems that, you are desirous of developing the property by retaining only one structure as shown on the accompanying plan. The area calculations in that case would be as under: JUDGEMENT_64_LAWS(NCD)2_2015.htm (i.e. more than the plot area) It is seen from the details of area given above, that there is no surplus vacant land in the above said property. The property is, therefore, non vacant within the meaning of U.L. (C&R) Act, 76."

7. THE aforesaid letter dated 25 -05 -1982 was not challenged by any party before any forum and the correctness of the particulars stated therein has not been challenged. As per the aforesaid letter the plinth area of the structure, which the owner had retained while entering into agreement with the prospective buyers was 206.49 sq. mtr., the area appurtenant to the said structure was 391.12 sq. mtr. and additional appurtenant area of the aforesaid structure was 500 sq. mtr. There is no material on record which would show that the plinth area, appurtenant area or the additional appurtenant area, as recorded in the aforesaid letter was incorrect. Therefore, there is no escape from the conclusion that the total area of the fourth structure which the owner had retained was 1097.61 sq. mtr. This is also not in dispute that no part of the building consisting of the flats, the common areas and facilities or limited common areas and facilities pertaining to the said flats and as defined in Section 3(e), (f) and (n) respectively of the Maharashtra Apartment Owners Act, 1970 either exists or was proposed on any part of the aforesaid appurtenant area or additional appurtenant area in the plan which the owner had got approved from the municipal corporation and which was also made available to the purchasers. Thus, neither the apartments sold by the owner nor the common areas and the limited common areas and facilities appurtenant to the said apartments are situated on any part of the land appurtenant or the additional land appurtenant to the fourth structure which the owner had retained with himself. Legally and logically the apartment owners have right, title and interest only in their respective apartments, the common areas and facilities and limited common areas and facilities, appurtenant to the said apartments.

8. SECTION 7 of the MOFA, before it came to be amended by Maharashtra Amending Act 36 of 1986 inter alia stipulated that after the plans and specifications of the building as approved by the local authority were disclosed or furnished to the person who agreed to take one or more flats the promoter shall

not construct any additional structure without the previous consent of all the persons who had agreed to take the flats. The Bombay High Court, therefore, took the view that a promoter was not entitled to put up additional structures not shown in the original layout plan without the consent of the flat takers. The view taken by Bombay High Court necessitated amendment of the Section 7 of the Act by substituting the words "any other alternations in the structure of the building or construct any additional structures" by the words "any other alternations or additions in the structure of the building". Thus, after the amendment, though the promoter is prohibited from making any alternations or additions in the structure of the building without the previous consent of the flat owners, he does not need their permission to construct any additional structures. For removal of doubts, Section 7A came to be inserted by the aforesaid amendment Act thereby declaring that clause (ii) of Sub -Section (1) of Section 7 having been retrospectively substituted, it shall be deemed to be effective as if the said clause (ii), as was substituted, had been in force at all material times and the expression "or construct any additional structure" in clause (ii) of Sub -Section (1) of Section 7 as is existed before the commencement of the amendment Act and the expression "constructed and completed in accordance with the plans and specifications aforesaid" and "any unauthorised change in the construction" in Sub -Section (2) of Section 7 shall, notwithstanding anything contained in the Act or any agreement or any judgment, decree or order of any court shall be deemed never to apply or to have applied in respect of the construction of any other buildings or structures constructed or to be constructed under a scheme or project of development in the layout after obtaining the approval of the local authority in accordance with the building rules or building by laws or development control rules, made under any law for the time being in force.

9. IT would, thus, be seen that after amendment of Section 7 and enactment of Section 7A of MOFA there remained no prohibition on raising construction of an additional structure even if such additional structure was not reflected in the plans disclosed to the flat purchasers and the permission from the said flat purchasers was no more necessary. In fact, after enactment of Section 7A, the promoter has a right to construct any additional structure so long as such additional structure is sought to be constructed under a scheme or project of development in the layout and requisite approval from the concerned local authority is obtained, as per its rules and by laws. Therefore, though, in our view, the fourth old structure measuring 206.49 sq. mtr., the area appurtenant and the additional area appurtenant to the said structure cannot said to be a part of the building in which the flats were proposed to be constructed and were actually constructed, even if we take the entire property measuring 2123.44 sq. mtr. as one building, there is no legal impediment in constructing an additional structure in the aforesaid building without consent of the flat purchasers. Even if it is assumed for the sake of arguments that the agreements between the parties did envisage such a permission, it is no more necessary in view of the provisions of Section 7A of the Act, considering that the owner and builder have already

taken the approvals envisaged in the said Section.

10. IN *Jayantilal Investments Vs. Madhuvihar Coop. Housing Society and Ors.*, 2007 9 SCC 220, the Hon"ble Supreme Court after examining the above referred amendments to MOFA noted, that from a reading of Section 7 and Section 7A, it is clear that the question of taking prior consent of the flat takers does not arise after the amendment in respect of any construction of additional structures, though the right to make construction of such additional structures/buildings would come into existence only on the approval of the plan by the competent authority. The Hon"ble Supreme Court inter alia observed that by inserting Section 7A the legislature had made it clear that the consent of flat takers was never the criteria applicable to construction of additional buildings by the promoters.

11. SINCE neither the structure of the apartments sold to the complainants nor the common areas and facilities or the limited common areas or the facilities appurtenant to the said apartments are situated on any part of the fourth old structure measuring 206.49 sq. mtr., the appurtenant area of the said structure measuring 391.12 sq. mtr. or additional appurtenant area of the aforesaid structure measuring 500 sq. mtr., the building which the owner and builder are seeking to construct thereon cannot be said to be an extension of the existing building in which the apartments are situated and it would be a building independent of and unconnected with the building consisting of the apartments, common areas and facilities appurtenant to the apartments and the limited common areas and the facilities appurtenant to them.

12. THE learned counsel for the apartment owners has referred to the order dated 05 -07 -2011 passed by Bombay High Court in FA No.786 -989/2004 in *Madhuvihar CHS Ltd. Vs. Jayantilal Investment* and review petitions Nos. 32516/2010 and 13079/2010 in *Jayantilal* . However, I do not find any such legal proposition in the aforesaid decisions which would in any manner oblige the owner and builder to take consent of the flat owners before constructing an additional building on the land which has become available by demolition of the fourth old structure measuring 206.49 sq. mtr. as well as the appurtenant area and additional appurtenant area of the said fourth structure. A perusal of the decision of the High Court would show that on verification of the plans in terms of the direction given by the Hon"ble Supreme Court it was found that the plans submitted by the promoters from time to time envisaged construction of one building with seven wings which were interlinked to each other and later on the number of wings was changed firstly from seven to five and then from five to six before it was again changed but five wings interlinked to each other in the sanction plan of 2001 along with one proposed additional building. It was also noted by the High Court that not only that the permission obtained by the promoters contemplated one building with seven wings the number of tenaments constructed was also shown as 137, thereby representing to the flat takers that the amenities that would be made available were for 137 tenaments but by the

layout of 2002 not only the building was sought to be constructed on the area which was to be kept open but almost the same number of occupants were likely to be added in the layout thereby depriving the members of the society of the amenities that were provided. However, in the case before us no wing of the building consisting of the flats was proposed on the land in question nor was any facility for the flat owners proposed on the said land. Therefore, it cannot be said that the flat owners would be deprived of the amenities promised to them, in case additional structure is allowed to be constructed on the land in question.

13. IT was contended by the learned counsel for the flat purchasers that the owner did not disclose to the flat purchasers the development potentiality of the plot on which the apartments were sought to be constructed and, therefore, cannot be allowed to load the additional FSI or TDR on the plot without consent of the flat buyers. We, however, are unable to accept the aforesaid contention for two reasons. Firstly, the owner would have no occasion to disclose the additional FSI and/or the TDR to the flat purchasers in case the same was not available at the time he entered into sale agreement with the flat purchasers. Secondly, the aforesaid requirement would apply only where the additional FSI and/or TDR was sought to be loaded on that part of the land on which the apartments, common areas and facilities appurtenant to the apartments or the limited common areas and facilities if any appurtenant thereto were to be constructed. In any case, the owners specifically reserved to himself, in the agreement with the flat purchasers, right to raise construction on the fourth old structure which he had retained with himself. The fourth structure, in our view, would include not only that part of the land on which the structure existed but also the areas appurtenant and additional areas appurtenant to the said structure. In our view, considering that the letter of the competent authority dated 25 -05 -1982 was specifically disclosed to the flat purchasers and also formed part of the purchase agreement and the said letter refers not only to the plinth area of the structure which was sought to be retained but also to the appurtenant area and additional appurtenant area of the said structure, it was not necessary for the owner to specifically reserve right to raise construction on the appurtenant area and additional appurtenant area, in the agreement which he had executed with the flat purchasers. As rightly contended by the learned senior counsel for the owner, if in a given case there are four buildings structures existing on a plot and one of them is retained while entering into agreement with the purchasers of the flat sought to be constructed on the other three buildings structures, the retained building structure would comprise not only the super structure but also the area such as lawns, outhouses, etc., which formed part of the said structure. Therefore, reserving right to raise construction on the fourth old structure included the right to construct on the land appurtenant and additional land appurtenant to the said structure. The learned counsel for the flat purchasers has also referred to the decisions of the Bombay High Court in *Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Cooperative Housing Society Ltd.*, 2008 3 BCR 727; *Bajranglal Eriwal & Ors. Vs. Sagarmal Chunilal & Ors.*, 2008 6 BCR 887 and

the decision of this Commission in Nikhil Builders Vs. Swami Kumarbanvalikar, 2014 1 CPJ 103 (NC). However, we do not find any such legal proposition in any of these cases which would be of any help to the flat purchasers.

14. HOWEVER , in our opinion, the owner and builder cannot load either the additional FSI or the TDR available to them on any part of this plot other than the fourth old structure measuring 206.49 sq. mtr., the area appurtenant to the said structure measuring 391.12 sq. mtr. and additional area appurtenant to the said structure measuring 500 sq. mtr. We find no merit in the contention that they can use the said FSI and TDR on any part of the plot No.33B including that part on which the flats sold to the apartment owners are situated. No such right was retained by them at the time of execution of the agreements with the flat purchasers and no such right has come to vest in them under the provisions of MOFA even after the amendment of Section 7 and insertion of Section 7A in the said Act.

15. FOR the reasons stated hereinabove, we are in agreement with the view taken by the State Commission. Consequently, all the revision petitions are hereby dismissed. In the facts and circumstances of the case there shall be no order as to cost.