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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3912 OF 2012

- 1 Mazda Construction Company.
Having address at C/o 101,
Sultanabad Bhavan CHS Ltd.,
Behram Baug Road, Oshivara Road,
Jogeshwari (W), Mumbai-400102.
- 2 Maredia Enterprises.
Having address at 1404, Arcadia,
NCPA Marg, Nariman Point,
Mumbai-400021.
- 3 Sultanabad CHS Ltd. (Proposed).
Through its Chief Promoter
Mr.Hasanali Raje Jalal
an adult, Indian Inhabitant,
having address at 101,
Sultanabad Bhavan, Sultanabad,
Behram Baug Road, Jogeshwari (W),
Mumbai-400102.

..Petitioners

-versus-

- 1 Sultanabad Darshan CHS Ltd.
Having address at Plot No.2
CTS No.356/16 Sultanabad Layout,
Behram Baug Road, Jogeshwari (W),
Mumbai-400102.
- 2 Mr.Abbas Vali Asamadi
an Adult, Indian Inhabitant,
Chairman,
residing at Sultanabad Darshan
CHS Ltd., at Plot No.2 CTS No.356/16,
Sultanabad Layout, Behram Baug Road,
Jogeshwari (W), Mumbai-400102.
- 3 The Competent Authority

District Deputy Registrar,
Cooperative Societies,
Mumbai City (3), and also
Office of the Competent Authority
under Section 5A of the MOFA, 1963
MHADA Building, Ground Floor,
Room No.69, Bandra (E),
Mumbai-400051.

- 4 The Sub-Registrar of Assurances
of Andheri-1 to 4,
under the provisions of the
Registration Act, 1908,
having office at
Family Court, Ground Floor,
Bandra Kurla Complex,
Bandra (E), Mumbai-400051.
- 5 The State of Maharashtra,
Mantralaya, Mumbai-400032.
Through the Government Pleader,
Civil Appellate Side, High Court,
Mumbai.

..Respondents.

.....
Mr.Pravin Samdani, Senior Advocate a/w Mr.Samir Purohit i/by M/s
Markand Gandhi & Company, for the Petitioners.
Mr.Y.R.Mishra, for the Respondent Nos.1 and 2.
Ms.PS.Cardozo, AGP, for the Respondent Nos.4 and 5.
.....

CORAM : S.C.DHARMADHIKARI, J.
Date : 31st August, 2012.

Oral Judgment:

1 Heard.

2 Rule. The Respondents waive service. By consent, Rule is
made returnable forthwith.

3 By this Writ Petition under Articles 226 and 227 of the Constitution of India, the Petitioners are challenging the order dated 11.04.2012, copy of which is at Annexure-A to the Writ Petition, by which the District Deputy Registrar, Cooperative Societies, Mumbai City-3 & Competent Authority under Section 5A of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963 (for short "MOFA"), on an application bearing No.55/2011 has directed as under:-

"In exercise of the powers conferred on me under Section 5A of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, I, S.P.Ghorpade, District Deputy Registrar, Cooperative Societies, Mumbai City (3), Competent Authority under Section 5A of the Maharashtra Ownership Flats Act, 1963,

1. *certify under section 11(3) of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, that the Sultanabad Darshan Cooperative Housing Society Ltd., CTS No.356/16, Village : Oshiwara, Taluka : Andheri, Mumbai Suburban District, Jogeshwari (W), Mumbai 400102 are entitled and is a fit case to grant unilateral conveyance executed as deemed conveyance in their favour and to have it registered. Thus, it is entitled to have unilateral conveyance of land admeasuring 432.30 Square meters of land bearing CTS No.356/16 and proportionate area of gardening admeasuring 109.10 sq.mtrs. of sub-divided plot bearing CTS No.356/13 and proportionate area of access road admeasuring 150 sq.mtrs. of 30 feet wide of sub-divided plot bearing CTS 356/4 proposed road of a large piece of land admeasuring 14,682 sq.yrds. or 12,276 sq.mtrs. Village Oshiwara, Jogeshwari, Taluka Andheri, Mumbai Suburban District. The aggregate area to be conveyed to the applicant society is works out 691.40 sq.meters and the buildings constructed on the said land and is entitled to get the unilateral conveyance deed prepared and*

executed, as deemed conveyance and get it registered as provided under the Act.

2. I hereby authorize the applicant society to prepare a Conveyance Deed to be executed as unilateral conveyance as deemed conveyance of all the right, title and interest of the promoters Hassanali Raje Lalal, Shri Gulshan A Merchant, Kulsum A Raje and also M/s Mazda Construction Company through M/s Bhaktawar Construction Company Private Limited and the land owners Noshirwan Muluk Irani, Gulabai Muluk Irani, Kanubhai Ramanlal Shah, Shera Mokhan Irani and Sheela Ardhasar Irani and M/s Maredia Enterprises or their legal heirs, assignees, executors in respect of land admeasuring about 432.30 square meters bearing CTS No.356/16 at Oshiwara village, Andheri Taluka, Mumbai Suburban District, Jogeshwari (West), Mumbai 400102 and proportionate area of gardening admeasuring 109.10 sq.mtrs. of sub-divided plot bearing CTS No.356/13 and proportionate area of access road admeasuring 150 sq.mtrs. of 30 feet wide of sub-divided plot bearing CTS 356/4 proposed road of a large piece of land admeasuring 14,682 sq.yrds. or 12,276 sq.mtrs. village Oshiwara, Jogeshwari, Taluka Andheri, Mumbai Suburban District. The aggregate area to be conveyed to the applicant society is works out 691.40 sq. meters and the buildings constructed on the said plot of land in favour of it and also as provided under Section 11(5) of the Act, direct the sub registrar or the concerned appropriate Registration Officer appointed under the Registration Act, 1908 (16 of 1908) to register this certificate issued by me along with the Instrument of conveyance executed by me as per the power conferred on me and to be submitted to the Sub-Registrar unilaterally by the applicant as I have been exempted under the Act to appear before the registration Authority and after complying with the provisions of the law to register such conveyance deed as deemed conveyance.
3. The applicants are directed to submit the certified copy of Deemed Conveyance deed after the same is registered as required under 9(2) of the Rules.
4. The Sub Registrar shall take further action under the Bombay Stamp Act, 1958, The Registration Act, 1908

and Transfer of Property Act, 1882.

5. *This order is issued on the basis of documents and information submitted by the Applicant, reply filed by the opponents subject to the following conditions,
(i) The information/ documents furnished by the parties are correct and genuine.
(ii) That if the above documents produced by the parties are found hereinafter to be incorrect and not genuine, the respective parties will be liable to face the consequences in accordance with the law.*
6. *No order as to the cost is provided for.
Order under my seal and signature.”*

4 The Petitioner No.1 claims to be owner of a layout/ larger property admeasuring 12,387 square meters situate at Jogeshwari (West), Mumbai-400102. The Petitioner No.2 is a Developer and claims to be holding right, title and interest of the entire layout and is claiming to be carrying out the redevelopment work in the said layout by utilizing the development potential as permissible and sanctioned by the competent authorities of the Municipal Corporation. The Petitioner No.3 was, at the relevant time, Chief Promoter of the proposed Sultanabad Cooperative Housing Society Limited. It is claimed by the Petitioners that the layout was sub-divided into various plots under the scheme of sub-division approved by the Municipal Corporation. In the sub-division, internal access was shown to the sub-divided plots by internal common road and a portion of layout was earmarked for recreation garden being a common amenity for all the residents.

5 It is the case of the Petitioners that one of the sub-divided plot, namely, Plot No.2 corresponding to separate CTS No.356/16 admeasuring 432.20 sq.mtrs. is a plot which is part of 20 sub-divided

plots. On Plot No.2, one of the 16 buildings of the layout of ground plus three floors is constructed and 12 flats are allotted to the members of the Respondent No.1.

6 The Respondent No.2 claims to be Chairman of the Respondent No.1 Society which is a cooperative housing society registered under the Maharashtra Cooperative Societies Act, 1960. The Respondent No.3 is the Competent Authority which has been empowered under Section 5A of the MOFA.

7 After setting out as to how the ownership rights are claimed by the Petitioners in respect of the property which is a larger property bearing CTS Nos.356, 356/1 to 356/19 admeasuring 12,387 sq.mtrs., what is stated is that this property was agreed to be purchased by the proposed society through its Chief Promoter on 07.10.1974. The terms and conditions are referred to and it is stated that thereafter, the entire property was sub-divided into 20 plots bearing CTS Nos.356, 356/1 to 356/19 and each plot has different sizes and the remaining property consisted of open spaces, garden and internal access roads. It is stated that the Chief Promoter of the Society enrolled several flat purchasers as members and thereafter, agreed to allot the flats to them. It is stated that the Respondent No.1 Society is entitled to claim only sub-divided Plot No.3 corresponding to CTS No.356/16 admeasuring 432.30 sq.mtrs.

8 It is stated that there are 16 buildings which have formed their own separate societies and 9 societies of 9 different buildings filed a civil suit on the Original Side of this Court being Suit No.2613/2010 wherein the Respondent No.1 to this Writ Petition is impleaded as

Defendant No.9 and what the nine societies have claimed is a declaration against the Petitioners that they have no right to carry on construction on the plots bearing Survey Nos.1, 2(part), 8 and Survey No.2, Hissa No.1, Old CTS No.356, 367, 373, 365 and new CTS Nos.356, 356/1 to 19, admeasuring 12276 sq.mtrs. and that the Defendant Nos.1 and 2 who are present Petitioners be directed to execute a Deed of Conveyance in favour of the respective societies.

9 In this suit, an application was made for ad-interim injunction which application has been rejected. Once the Respondent No.1 is a party Defendant to this suit and there is serious dispute with regard to the entitlement of 9 societies qua the present Petitioners, but pertinently none of 9 societies have claimed anything more than the area of the respective buildings, then, what has been alleged is that as between the Petitioners and the Respondent No.1 there is a dispute and which is also subject matter of a earlier Writ Petition filed in this Court which Writ Petition was not entertained by this Court. Thus, the civil suit is pending, but the Competent Authority surprisingly entertained an application at the instance of the Respondent Nos.1 and 2 and what has been stated therein is that the Respondent Nos.1 and 2 are members of the cooperative housing society. They are claiming to be a cooperative housing society consisting of flat purchasers on Plot No.2, CTS No.356/16 situate at Sultanabad layout, Behram Baug Road, Jogeshwari (West), Mumbai-400102. After referring to the area of plot and garden and proportionate area of access roads, what has been alleged in this Application is that the agreements with the respective flat purchasers referred to a title certificate and which title certificate would indicate that the Respondent Nos.1 and 2, Applicants before the Competent Authority, can claim

conveyance in respect of a large piece of land admeasuring 14682 sq.yards or 12276 sq.mtrs. and sub-divided plots which have been extensively referred to hereinabove by me.

10 It is on such application that the Petitioners contested the claim and pointed out as to what is the entitlement of the present Respondent Nos.1 and 2 and the nature of the dispute including the Writ Petition which was filed and a civil suit.

11 However, according to the present Petitioners, the Competent Authority has ignored all this and in the observations and conclusions, erroneously referred to the area of larger property, the portion which has been earmarked as recreation garden and internal access. In these circumstances the conveyance which has been directed to be registered as a deemed conveyance is not in relation to what is the area occupied by the construction, but proportionate area of garden admeasuring 109.10 sq.mtrs. of sub-divided plot bearing CTS No.356/13 and proportionate area of access road admeasuring 150 sq.mtrs. of 30 feet width of sub-divided plot bearing CTS No.356/4 proposed road of a large piece of land, admeasuring 14682 sq.yards. or 12276 sq.mtrs. Thus, the aggregate area to be conveyed has been computed as 691.40 sq.mtrs. and the buildings constructed on the said land.

12 Mr.Samdani, learned Senior Counsel appearing for the Petitioners, has invited my attention to the Writ Petition and all annexures including the agreement with the flat purchasers, plans and has submitted that the provision enabling the flat purchasers to obtain a deemed conveyance should not be read in isolation, but must be read with what

precedes the said provision or section. He invites my attention to Section 3 of the MOFA and submits that same sets out the general liabilities of the Promoter. He then invites my attention to Section 4 and submits that what is provided by Section 4 is equally material and the agreement that is required to be registered, must give details and particulars as are set out in Section 4(1A). He submits that the provision then which is material for the purpose of the present Writ Petition is Section 5A in which what the Legislature provides is appointment of the Competent Authority and then the MOFA specifically states as to what would be obligations in terms of Sections 10 and 11 of the MOFA. Mr.Samdani has emphasized sub-section (1) of Section 11 and has submitted that the Promoter is required to take all necessary steps to complete his title and convey to the organization of persons, who take flats, which is registered either as a cooperative society or as a company, or to an association of flat takers or apartment owners, his right, title and interest in the land and building and execute all relevant documents therefor in accordance with the agreement executed under Section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power. Mr.Samdani submits that what the Maharashtra Act No.4 of 2008 enacted w.e.f. 25.02.2008 provides is that if the Promoter fails to execute the conveyance in favour of the cooperative society formed under Section 10 or any other association of apartment owners including the company as provided by sub-section (1), within the prescribed period, then, the members of such cooperative society or association, may make an application to the concerned Competent Authority accompanied by the true copies of the registered agreements for sale executed with the Promoter by each individual

member of the society or the company or the association, who have purchased the flats and all other relevant documents including the occupation certificate, if any, for issuing a certificate that such society or the Company or the Association is entitled to have an unilateral deemed conveyance executed in their favour and to have it registered.

13 The submission of Mr.Samdani is that there are no guidelines provided and therefore, what the Competent Authority has resorted to, is to grant an unilateral deemed conveyance not only in respect of the entitlement of the flat purchasers, but something beyond the individual agreements which have been executed with them. In some case the Promoters have been called upon to convey not only the right, title and interest in the land and building, but something more beyond the same. It is submitted by him that this provision does not enable the Competent Authority to ignore the agreements and all such documents as are contemplated by the preceding sections and particularly Sections 3 and 4. No competent authority can, therefore, determine on its own the entitlement of the parties who seek a deemed conveyance. In the instant case, what the Competent Authority has done is to hold that the deemed conveyance should be not only in relation to the area or portion of the building and land beneath it, but with regard to the common area and internal access and garden. That was clearly impermissible as what has been retained as a common amenity cannot be subject matter of the conveyance and in any event there is serious dispute between the parties with regard to the entitlement of the Respondent No.1. In such circumstances the adjudication by the competent civil court is the only remedy in the event the parties like the Respondent Nos.1 and 2 seek a conveyance in relation to such areas as are included in the order of the

Competent Authority. They could not have made an application for grant of a deemed conveyance and therefore, the Competent Authority equally was not empowered to grant any relief on such application. For all these reasons, it is submitted that the impugned order be set aside.

14 On the other hand, Mr.Mishra, learned counsel appearing for the Respondent Nos.1 and 2, firstly submitted that what the agreement in the case of the present Petitioners and the Respondent No.2 or their members would indicate is that the flat purchasers were informed that one Hasanali Raje Jalal was the Chief Promoter of the Sultanabad Cooperative Housing Society Limited (proposed) and they have agreed to purchase from Noshirwan Muluk Irani and others, partners of M/s Mazda Construction Company through M/s Bhaktawar Construction Company Private Limited, the property situate at village Oshiwara, Taluka Andheri and more particularly described in the first schedule to the agreement dated 20.03.1982. The entire purchase price has been paid in terms of the transaction between these parties and therefore, what was represented is that the proposed society is in a position to and entitled to develop the property and carry on the construction work of buildings in accordance with the sanctioned plans. There is reference made to the scheme under Section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 which allows the sale by way of transfer of the said property to the said society and the development of the said property on the terms and conditions contained therein. Mr.Mishra has emphasized the conditions imposed in the exemption order and has contended that what the Competent Authority under the Urban Land (Ceiling and Regulation) Act, 1976, has stated is that the cooperative society shall make full utilization of the land so exempted for the purpose of construction of 16 residential buildings

with more than 200 flats occupying a total plinth area of not less than 1777.25 sq.mtrs.. Thus, in tune with the sanction obtained under the Urban Land (Ceiling and Regulation) Act, 1976 and the plans including for sub-division of the property into several plots with garden and roads that the parties like the Petitioner No.3 approached the members of the Respondent No.1 Society. Therefore, it is futile to urge that what has to be conveyed is only the land beneath the building on Plot No.2 admeasuring 432.20 sq.mtrs. and from CTS No.356/16. In these circumstances the Competent Authority committed no error, according to Mr.Mishra, in granting the deemed conveyance. There was nothing erroneous in the order passed by the Competent Authority and the civil suit or any proceedings which may be stated to be pending, does not make any difference insofar as the entitlement of the Respondent Nos.1 and 2 is concerned. That litigation will not enable the Petitioners to avoid discharging their obligation as Promoters and defeating the rights of the Respondent Nos.1 and 2. Therefore, inviting my attention to the affidavit filed in reply to this Writ Petition, it is urged by Mr.Mishra that the Writ Petition be dismissed.

15 For properly appreciating the rival contentions, it would be advantageous to refer to the relevant provisions of the MOFA. It has been repeatedly held by the Honourable Supreme Court, as also, by this Court that this is an Act to regulate in the State of Maharashtra the promotion of the construction of, the sale and management, and the transfer of flats on ownership basis and what the Act enacts is popularly known as regulation of promotion of flats scheme. The definitions are pointer to the fact that the Act intends to cover what is popularly known as flat. Section 2(a-1) defines the term "flat". Thereafter, what other section provides is the

definition of the term “prescribed” vide Section 2(b). The term “promoter” is defined in Section 2(c). Subsequent definition is of the term “building”. The term “Registrar” which is defined in Section 2(d) to mean the Registrar as defined in the Maharashtra Cooperative Societies Act, 1960 or as the case may be, in the Companies Act, 1956. Section 2(e) refers to the term “to construct a block or building of flats or apartments” which includes conversion of a building or part thereof into flats or apartments and subsequently, what one finds is that the Act has made provisions so that it would be possible for promoters to construct the buildings, make provisions for flats and apartments and thereafter, put them up for sale. However, what has been provided by Section 3 are general liabilities of the Promoter and the Promoter who constructs or intends to construct such blocks or buildings or flats has to make disclosure in terms of the provision, namely, Section 3(2). It is a common ground that there were clauses which have been added to this provision by the Maharashtra Act 36 of 1986 whereas the agreement in this case is of prior year, namely, 1982. There are various particulars and it is further not disputed that the Promoter has to disclose the plans which have been sanctioned including the layout within which the buildings have to be constructed or are permitted to be erected, so also, common amenities and areas including the portions identified as recreation garden and accesses. Then comes Section 4 which reads as under:-

- “4. *Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered.*
- (1) *Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats all or some of which are to be taken or are taken on ownership basis, shall, before, he accepts any sum of money as advance payment or deposit, which shall not be more than 20*

per cent of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall be registered under the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act, 1908") and such agreement shall be in the prescribed form.

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

(a) particulars--

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

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

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

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

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

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

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

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

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

(x) percentage of undivided interests in the

limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(b) copies of documents--

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

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

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

(2) Any agreement for sale entered into under sub-section (1) shall be presented, by the promoter or by any other person competent to do so under section 32 of the Registration Act, at the proper registration office for registration, within the time allowed under sections 23 to 26 (both inclusive) of the said Act and execution thereof shall be admitted before the registering officer by the person executing the document or his representative, assign or agent as laid down in sections 34 and 35 of the said Act also within the time aforesaid:

Provided that, where any agreement for sale is entered into, or is purported to be entered into, under sub-section (1), at any time before the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment and Validating Provisions) Act, 1983, and such agreement was not presented for registration or was presented for registration but its execution was not admitted before the registration officer by the person concerned, before the commencement of the said Act, then such document may be presented at the proper registration office for registration, and its execution may be admitted, by any of the persons concerned referred to above in this sub-section, on or before the 31st December 1984, and the registering officer shall accept such document for

registration, and register it under the Registration Act, as if it were presented, and its execution was admitted, within the time laid down in the Registration Act:

Provided further that, on presenting a document for registration as aforesaid if the person executing such document or his representative, assign or agent does not appear before the registering officer and admit the execution of the document, the registering officer shall cause a summons to be issued under section 36 of the Registration Act requiring the executant to appear at the registration office, either in person or by duly authorised agent, at a time fixed in the summons. If the executant fails to appear in compliance with the summons, the execution of the document shall be deemed to be admitted by him and the registering officer may proceed to register the document accordingly. If the executant appears before the registering officer as required by the summons but denies execution of the document, the registering officer shall, after giving him a reasonable opportunity of being heard, if satisfied that the document has been executed by him, proceed to register the document accordingly.”

16 A bare perusal of Section 4 would indicate that the obligation of the promoter is to enter into an agreement and that agreement has to be registered and has to be in the prescribed form. The term “prescribed” means prescribed by rules made under the MOFA and therefore, the agreement prescribed under sub-section (1) of Section 4 shall contain inter alia the particulars as specified in clause (a) of sub-section (1A) and the documents as specified in clause (b) shall be attached to such agreement. Clause (b) of sub-section (1A) of Section 4 enumerates the copies of documents, namely, the certificate by an Attorney-at-law or Advocate under clause (a) of sub-section (2) of Section 3, the Property

Card or extract of Village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the Promoter to the land on which the flats are constructed or are to be constructed and the plans and specifications of the flat as approved by the concerned local authority. Sub-section (2) of Section 4, therefore, enacts the provision which enables the presentation of an agreement for sale entered into under sub-section (1) of Section 4 for registration and thereafter, comes Section 4A which clarifies what is to happen in the event the agreement is not registered.

17 The amendments to these sections including introduction of Section 5A is to enable the flat purchasers to proceed against the erring promoters and particularly those who fail to discharge their obligations. Therefore, the State had to step in as it was noticed that complaints made are that the promoters do not take steps to convey the property. The statement of objects and reasons to the Maharashtra Act No.4/2008 dated 25.02.2008 would indicate that the sundry abuses and malpractices, which were on the increase consequent upon the acute shortage of housing in several areas of the State, have to be curbed and the purpose of the Act and its object needs to be fulfilled in its entirety. The provisions of the Act were to be made more effective and to safeguard the interests of the purchaser of the flats, that the Legislature intervened and amended the Statute. The statement of objects and reasons reads as under:-

“The Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 has been enacted by the Government of Maharashtra in the year 1963 to regulate for a certain period in the State, the promotion of the construction of, the sale and management and the transfer of flats on ownership basis. The said Act has been enacted to effectively prevent the sundry abuses

and malpractices which had been on increase, consequent upon the acute shortage of housing in the several areas of the State.

2. It has come to the notice of the Government that the objective behind enactment of the said law is not fully achieved and its implementation has not been effective enough to curb certain malpractices and sundry abuses by the promoters or developers of the properties. Therefore, to make provisions of the said Act more effective and to safeguard interests of the purchaser of the flats, the Government of Maharashtra considers it expedient to carry out certain amendments to the existing provisions of the said Act. The important amendments proposed to be carried out are as follows:-

(a) It is proposed to provide for appointment of one or more Competent Authorities for different local areas who would, on failure on the part of the promoter,--

(i) to form a co-operative society of the persons who have purchased the flats from the promoter, on application received from such purchasers, direct the District Deputy Registrar, Deputy Registrar or, as the case may be, the Assistant Registrar of Co-operative Societies to register the co-operative society of such flat owners:

(ii) to execute a conveyance within the prescribed period as provided in Section 11, on receiving an application from the flat owner members of a co-operative society, issue a certificate to such society certifying that the said society was entitled to have a conveyance registered and that it is a fit case for execution of a unilateral conveyance as a 'deemed conveyance' in favour of the said society, by the Registration Officer under the Registration Act, 1908.

(b) To serve as a deterrent, a provision is also being made for disqualifying a promoter, convicted under the said Act (except under section 12A), for a period of five years so as to debar him from being granted any permission by the local authorities under the relevant laws for undertaking construction of flats.

(c) The proceedings before the Competent Authority are given the status of judicial proceedings for the purposes of sections 193 and 228 of the Indian Penal Code and every Competent Authority is to be deemed to be a Civil Court for the purpose of sections 345 and 347 of the Code of Criminal Procedure, 1973.

3. *The Bill seeks to achieve the above objectives.”*

18 It is with such intent that the amendments have been made and one such amendment is Section 5A and that is to set up a Competent Authority for the purpose of exercising the powers and performing the duties under Sections 5, 10 and 11 of the MOFA.

19 Therefore, to my mind it would not be possible to read Section 5A in isolation, but it should be seen in the backdrop of what the Legislature desired and intended to achieve. The Legislature intended that such of the powers and duties which have to be performed under Sections 5, 10 and 11, have not been performed and that causes inconvenience and hardship to the flat purchasers. Since they are not organized into a proper legal entity such as a cooperative housing society or company, the title to the property cannot be perfected. More often than not a situation arises, where the Society owns the building consisting of the flats and apartments but not the property. Therefore, the building belongs to the Society which is a body consisting of flat purchasers, but the land beneath it does not belong to it or is not owned by it. Such situation presents several obstacles, difficulties and hurdles in development of the property, utilization and exploitation of its potential to the fullest. In these circumstances and when the advantage is taken of the delay in execution of the Conveyance within the prescribed time and delivering of

documents, that it was intended to set up an authority which would convey the property by an unilateral deemed conveyance. Such conveyance by itself is thus capable of being registered. For that purpose, Sections 10 and 11 are material and they read thus:-

“10. Promoter to take steps for formation of co-operative society or company.

(1) As soon as a minimum number of persons required to form a Co-operative society or a company have taken flats, the promoter shall within the prescribed period submit an application to the Registrar for registration of the organisation of persons who take the flats as a co-operative society or, as the case may be, as a company; and the promoter shall join, in respect of the flats which have not been taken, in such application for membership of a co-operative society or as the case may be, of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act.

Provided that, if the promoter fail within the prescribed period to submit an application to the Registrar for registration of society in the manner provided in the Maharashtra Co-operative Societies Act, 1960, the Competent Authority may, upon receiving an application from the persons who have taken flats from the said promoter, direct the District Deputy Registrar, Deputy Registrar or, as the case may be, Assistant Registrar concerned, to register the society:

Provided further that, no such direction to register any society under the preceding proviso shall be given to the District Deputy Registrar, Deputy Registrar or, as the case may be, Assistant Registrar, by the Competent Authority without first verifying authenticity of the applicants' request and giving the concerned promoter a reasonable opportunity of being heard.

(2) If any property consisting of building or buildings is constructed or to be constructed [and the promoter submits such property to the provisions of the

Maharashtra Apartment Ownership Act, 1970, by executing and registering a Declaration as provided by that Act] then the promoter shall inform the Registrar as defined in the Maharashtra Co-operative Societies Act, 1960, accordingly; and in such cases, it shall not be lawful to form any co-operative society or company.

11. Promoter to convey title, etc., and execute documents, according to agreement.
 - (1) A promoter shall take all necessary steps to complete his title and convey to the organisation of persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association of flat takers or apartment owners, his right, title and interest in the land and building, and execute all relevant documents therefor in accordance with the agreement executed under section 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.
 - (2) It shall be the duty of the promoter to file with the Competent Authority, within the prescribed period, a copy of the conveyance executed by him under subsection (1).
 - (3) If the promoter fails to execute the conveyance in favour of the co-operative society formed under Section 10 or, as the case may be, the company or the association of apartment owners, as provided by subsection (1), within the prescribed period, the members of such co-operative society or, as the case may be, the company or the association of apartment owners may, make an application, in writing, to the concerned Competent Authority accompanied by the true copies of the registered agreements for sale, executed with the promoter by each individual member of the society or the company or the association, who have purchased the flats and all other relevant documents (including the occupation certificate, if any), for issuing a certificate that such society, or as the case

may be, company or association, is entitled to have an unilateral deemed conveyance, executed in their favour and to have it registered.

- (4) The Competent Authority, on receiving such application, within reasonable time and in any case not later than six months, after making such enquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard, on being satisfied that it is a fit case for issuing such certificate, shall issue a certificate to the Sub-Registrar or any other appropriate Registration Officer under the Registration Act, 1908, certifying that it is a fit case for enforcing unilateral execution of conveyance deed conveying the right, title and interest of the promoter in the land and building in favour of the applicant, as deemed conveyance.
- (5) On submission by such society or as the case may be, the company or the association of apartment owners, to the Sub-Registrar or the concerned appropriate Registration Officer appointed under the Registration Act, 1908, the certificate issued by the Competent Authority along with the unilateral instrument of conveyance, the Sub-Registrar or the concerned appropriate Registration Officer shall, notwithstanding anything contained in the Registration Act, 1908, issue summons to the promoter to show cause why such unilateral instrument should not be registered as 'deemed conveyance' and after giving the promoter and the applicants a reasonable opportunity of being heard, may, on being satisfied that it was a fit case for unilateral conveyance, register that instrument as 'deemed conveyance'."

20 To my mind, reading of Sections 10 and 11 together with Section 5A would make it amply clear that what is to be performed by the Competent Authority is a duty and obligation which the promoter is to

perform in law. That is to convey the title and execute the documents according to the agreement. If that is the duty which is to be performed by the promoter, but which he fails to perform, then, the Competent Authority steps in to fulfill it. That is a duty towards the flat purchasers and which duty cannot be avoided except at the cost and pains of legal proceedings including a criminal prosecution. In these circumstances and when sections 10 and 11 are read together and harmoniously with the preceding sections including those which contain the particulars of the agreement, then, it becomes absolutely clear that what has to be conveyed even by a deemed conveyance, which is an unilateral act and which enables the flat purchasers to acquire the Promoter's right, title and interest in the land and the building. Therefore, it cannot be said that an unilateral deemed conveyance conveys something more than what belongs to the Promoter. Section 11(1) provides for conveyance of Promoter's right, title and interest in the land and building as is clear from the words "his right, title and interest...." appearing therein. I am not in agreement with Mr.Samdani that there are no guidelines guiding and enabling the Competent Authority to grant a deemed conveyance and therefore, the powers are likely to be abused or exercised arbitrarily in every such case. There are inbuilt checks and safeguards inasmuch as what is to be issued is a certificate entitling a unilateral deemed conveyance. It is not a document which stands alone or is a distinct transaction. It is a grant or conveyance in terms of what the agreement between parties stipulates and provides for being conveyed to the flat purchasers. Therefore, the Applicant is permitted to apply to the Competent Authority u/s 11(3) and such application is to be accompanied by true copies of the registered agreements for sale executed by the Promoter with each individual member/ flat purchaser and other relevant

documents. It is to further that and to insist on the promoters fulfilling their obligations within the prescribed period, but noticing that their failure has resulted in hardship to flat purchasers, that the Legislature has stepped in. To my mind, this is not a power which can be exercised by the Competent Authority in ignorance of or by brushing aside the earlier provisions and contents of the agreement with the flat purchasers. Equally, the Competent Authority has to take into consideration the contents of other relevant documents.

21 The first submission of Mr.Samdani must, therefore, fail as the guidance is inbuilt in the scheme of the statutory provisions. However, there is much substance in the contentions of Mr.Samdani with regard to the Competent Authority over stepping its limits in this case. The Competent Authority ought to have seen the agreement with the members of the Respondent No.1. It ought to have taken into account the entitlement of the parties in terms of that agreement. If that agreement stipulates the conveyance of right, title and interest of the promoters in the land and building, which was not crystallized therein, but clauses thereof contemplate sub-division of the plots and refers to a layout which enables the construction of further buildings, then, that is a stipulation which binds both sides and which cannot, therefore, be overlooked in this case. Secondly, if there was any doubt or dispute as to what forms the subject matter of the deemed conveyance and which dispute is pending before a court of law, then, all the more further inquiry ought to have been made by the Competent Authority before issuing the certificate under Section 11(4) of the MOFA. The Competent Authority cannot permit the parties to claim something which is beyond their agreement with the Promoters or other relevant documents. If such is the purpose

sought to be achieved by insertion of Section 11(3) and (4), then, instead of removing the hardships of the flat purchasers, the amendments will give rise to further litigation and complications resulting therefrom. Therefore, what should guide the Competent Authority in each case is the entitlement in terms of the documents which are referred to in Sections 10 and 11 and equally in the preceding provisions including the particulars and details of the agreements with the flat purchasers.

22 In the instant case, there is a serious dispute as to whether the areas referred to as “garden” and “access” are forming part of the entitlement of the occupants and residents of the building on one plot or sub-plot. If it is styled and termed as common amenities, but the claims are contested, then, all the more the Competent Authority should not have included that portion in the area forming part of the deemed conveyance. The Competent Authority should have been aware that what the Respondent No.1-Applicants are entitled to have a certificate for enforcing unilateral execution of conveyance deed conveying the right, title and interest of the Promoter in the land and building in their favour. The word “unilateral” has some definite significance. Once a unilateral deemed conveyance is enforced by the Competent Authority, then, all the more when litigation is pending to which both are parties, the areas styled as garden and open access should not have been included in the order and the certificate issued by the Competent Authority. Their inclusion has thus vitiated the order of the Competent Authority. There is substance in the contentions and complaint of Mr.Samdani that the Competent Authority has, in this case, traveled far beyond the documents which were placed before it and once the interpretation and construction of which was in serious dispute. If the parties were not ad-idem or in any event the

entitlement could not have been determined and decided even in terms of the documents produced before the Competent Authority, then, the areas which are now included and which on the showing of the Competent Authority have been termed as proportionate could not have been included. Their inclusion demonstrates that there is a clear error of law apparent on the face of record and a perversity in the impugned order.

23 I have reproduced the order and certificate only with this intent because what it grants is an unilateral conveyance executed as deemed conveyance of the land admeasuring 432.30 square meters of CTS No.356/16 which is the area occupied by the building and land beneath the said building and in which the Respondent Nos.1 and 2 and their members are occupying the flats. However, the reference to the proportionate area of garden admeasuring 109.10 sq.mtrs. of sub-divided plot bearing CTS No.356/13 and proportionate area of access road admeasuring 150 sq.mtrs. of 30 feet wide of sub-divided plot bearing CTS No.356/4, itself would indicate that these plots are garden and roads. They are parts of the larger piece of land. However, they have not been indicated, identified and demarcated in proportion in any documents. The term "in proportion with" referred to in the order and certificate is vague. Therefore, this by itself will give rise to litigation between the Respondents inter-se. There would be disputes and differences, as to which portion will be occupied or enjoyed by which building and which residents or occupants. All this is not intended by the Legislature while amending the MOFA by Maharashtra Act No.4/2008. Similarly, proportionate area of access road itself would indicate that it is a road admeasuring 150 sq.mtrs., but proportionate area thereof would mean a enjoyment along with others so as to approach and access flats and

buildings on which the Respondent No.1 Society's construction exists. However, if such of these areas do not form a part of the particulars or are not disclosed in the plans or approvals, then, that by itself is a serious dispute. I have referred to all this in detail only because when there is a suit pending in a court of law with regard to the entitlement of the parties, then, all the more the Competent Authority ought not to undertake the exercise by which they overreach the jurisdiction, authority and powers of competent courts and tribunals.

24 Therefore, this Writ Petition deserves to partially succeed and what shall form a part of the certificate and the order of the Competent Authority is the land admeasuring 432.30 sq.mtrs. of CTS No.356/16. Mr.Samdani, on instructions, states that without prejudice to the rights and contentions of the parties, the Respondent Nos.1 and 2 would be entitled to use the internal access road for accessing their building and equally the garden identified on sub-divided plots of CTS No.356/13 along with all residents upon it being completely ready for usage. The above arrangement will be without prejudice to the rights and contentions of all parties and subject to final orders in the pending civil suit.

25 I have only noted the rival contentions with a view to appreciate the challenge to the impugned order and for scrutinizing whether the Competent Authority has exceeded its powers in terms of Section 5A r/w 11 of the MOFA. Beyond that any reference to the rival contentions or any observations in this order shall not preclude the parties from raising appropriate pleas or prevent the competent court from adjudicating the issues in the pending civil litigation. In none of the matters that are pending, the documents which would be produced or

evidence which would be led, will be appreciated only in the light of what has been observed in this order. Equally this order does not prevent or preclude the Respondent Nos.1 and 2 from filing any independent civil suit or other proceedings so as to assert their rights under the agreements which have been executed in their favour by the Petitioners. All contentions in such proceedings are also kept open.

26 The apprehension of Mr.Samdani, which he states, is not confined to the facts of this case alone, is that the powers conferred by this amendment in terms of sub-sections 3, 4 and 5 of Section 11 are likely to be misused or abused by both, the authorities, as also, by the parties. That apprehension can be taken care of if one carefully peruses these provisions and read them in their entirety. All that they indicate is that if an application is made in terms of sub-section (3) of Section 11 which prays to issue a certificate to the society, company or apartment, then, on issuance of the certificate, it is entitled to have an unilateral deemed conveyance executed in their favour and to have it registered. Therefore, the application that is contemplated by sub-section (3) itself is to seek a certificate to have an unilateral deemed conveyance executed in their favour and to have it registered. By sub-section (4) of Section 11, the powers of the Competent Authority have been enumerated and they are that on receipt of the application, within a reasonable time and in any case not later than six months, the Competent Authority after making such inquiry as deemed necessary and after verifying the authenticity of the documents submitted and after giving the promoter a reasonable opportunity of being heard and on being satisfied, issue a certificate to the Sub Registrar under the Registration Act, 1908. Thus, the Competent Authority is not obliged to issue a certificate in each case and as sought by

the Applicant/s. What sub-section (4) contemplates is verification of the authenticity of the documents submitted and a reasonable opportunity of being heard to the Promoter. Importantly satisfaction of the Competent Authority that it is a fit case for issuing such certificate is a mandatory requirement. Therefore, it is not as if an application being presented that issuance of certificate must follow.

27 On issuance of certificate to the Sub-Registrar certifying that it is a fit case for enforcing unilateral execution of conveyance deed conveying the right, title and interest of the promoter in the land and building in favour of the applicant, as deemed conveyance, that sub-section (5) comes into play. It is to enable the persons or parties possessing a certificate and armed with the same to approach the Sub Registrar or the concerned Registration Officer under the Registration Act, 1908. Now, the unilateral instrument of conveyance together with the certificate being presented to the Sub Registrar, he shall issue a summons to the promoter to show cause why this unilateral instrument should not be registered as "deemed conveyance" and after giving a reasonable opportunity of being heard to the promoter and the applicants and on being satisfied that it is a fit case for unilateral conveyance, the Registration Officer may register that instrument as "deemed conveyance". There are inbuilt safeguards, checks and balances and it is not as if that any time such an application is made, the Competent Authority and thereafter, the Sub Registrar will proceed and grant reliefs or the requests in terms of these sub-sections. At every stage, the Legislature has been careful to provide for appropriate inquiries and opportunities so that the certificates should not be issued for the asking and equally when the Registration Officer is approached with the

unilateral instrument of conveyance it would not be straightaway registered. In this regard, the term “unilateral” and its meaning in common parlance is extremely relevant. The word “Unilateral” means “One sided, performed by or affecting only one person, group or country”. If it is understood thus, then, parties like the Petitioners need not have any apprehension and particularly of losing and surrendering or taking away their legal rights. Equally, the word “deemed” means “regard or consider in a specified way”. In *Consolidated Coffee Ltd. v/s Coffee Board, Bangalore*, reported in **AIR 1980 SC 1468**, the Honourable Supreme Court explained the term “deemed” as under:-

“11. Secondly, the word “deemed” is used a great deal in modern legislation in different senses and it is not that a deeming provision is every time made for the purpose of creating a fiction. A deeming provision might be made to include what is obvious or what is uncertain or to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail, but in each case it would be a question as to with what object the legislature has made such a deeming provision. In *St. Aubyn v. Attorney General 1952 AC 15* at p.53 Lord Radcliffe observed thus:

“The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

After making these observations the learned Law Lord went on to hold that it was in the last of the three ways (indicated in the observations) that the deeming provision was made in S.58(2) of the Finance Act, 1940, which came for interpretation before the House of Lords. Similarly in *Words & Phrases, Permanent Edition, Vol.11A* at page 181 it is explained that the word

“deemed” is also used to mean “regarded as being”; it is equivalent to “shall be taken to be” (at page 185).”

28 Thus, when the Legislature is cautious and equally mindful of the fact that a Unilateral Instrument is to be registered as a deemed conveyance, then, all the more there is no scope for the apprehensions expressed by Mr.Samdani. The word “deemed” must, therefore, be understood accordingly and should be construed by reading it with the words preceding it.

29 In view of the above discussion, the Writ Petition is partially allowed. Rule made absolute to the extent indicated above. However, there will be no order as to costs.

(S.C. Dharmadhikari, J)

Bombay