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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.18 OF 2012

WITH

CIVIL APPLICATION NO.347 OF 2012

- 1 M/s.Harshal Developers Pvt.Ltd.,)
 A company registered under the)
 Companies Act, 1956, having its)
 registered office at : Janhavi, 40/22)
 Bhone Colony, Erandawana, Pune-4)
- 2 Mr.Rajesh haribhau Sachade)
 Age-52 years, Occupation :Business)
 R/o 'Rajshil', Survey No.91/1)
 Plot No.32, B/1, Paud Road, Kothrud)
 Pune-411 029.)....Appellants

V/s.

- 1 Mr.Manohar Gopal Bavdekar)
 Age-74 years, Occupation: Business)
 R/o. 'Ashray', 452, Gokhale Road,)
 Shivajinagar, Pune-411 016)
- 2 Mrs.Shaila Pradumna Rajwade)
 Age-Adult, Occupation: Housewife)
 R/o. 528, Narayan Peth, Behind Modi)
 Ganpati, Pune-411 030)....Respondents

Mr.Girish Godbole i/by S.R.Ronghe for the appellants.
 Mr.V.P.Vaze i/by City Legal for the respondent no.1.

CORAM : MRS.MRIDULA BHATKAR, J.
DATE : 26th NOVEMBER 2012.

JUDGMENT :-

1 Plaintiffs are shop purchasers. Defendant is property developers. Suit RCS No.1279 of 1992 was filed by the plaintiffs on the basis of an unregistered agreement for sale in the court of Civil Judge, Senior Division, seeking relief of specific performance and possession so also give direction to the respondent to perform all theWP10670 obligations under MOFA Act 1963 and direct the respondent to admit agreement of sale in the office of Registrar. Suit was decreed on 14.11.2006. Civil Appeal No.159 of 2009 filed by the respondent was dismissed on 15.11.2005.

2 The appellant is a defendant no.1 Promotor & developer who entered into an agreement of sale with respondents/plaintiffs on 31.8.1991 for sale of the shops in the building for total consideration of Rs.2,94,000/-. Out of which Rs.2,50,000/- was paid on the date of the execution. The agreement was entered into as per the provisions of the Maharashtra Ownership Flats Act 1963 (Hereinafter called as the said "Act"). The impugned agreement being unregistered, it was presented for the registration to the Joint Sub-Registrar of Assurances, Pune on 23.12.1991. The plaintiffs have also informed the appellants/defendants to come and admit the execution. However, the appellants did not turn up. Plaintiff thereafter issued a legal notice to admit the execution of the said agreement. However,

the appellants did not admit and did not respond. The defendant no.1 by way of defence contended that the money was accepted as a loan and by way of security for repayment of loan, the defendant has executed the impugned agreement in favour of the plaintiff so that agreement is not binding under MOFA. Suit was filed initially before the Civil Judge, Senior Division but after 4 years suit was transferred to the court of Civil Judge, Junior Division. The trial court framed issues about the execution of the valid agreement and specific performance of the same. All the issues were decided in favour of the plaintiff and suit was decreed. Appeal was preferred by the defendant no.1 and the Manager of the firm. First appeal court formulated the points in respect of the requirement of the conditions of the specific performance and about the execution of the sale deed and all the points were determined in favour of the respondent. Hence, this Second Appeal.

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3 At the time of hearing of the appeal at the stage of admission it was agreed by both the parties that the substantial questions of law may be framed and the appeal would be argued finally on the next date to enable parties to deliberate on the issues in detailed. The substantial questions of law on the submissions of the learned Counsel for the appellants are framed as under :-

(1) Whether a suit can lie under MOFA for specific performance on the basis of unregistered agreement for sale ?

(2) Whether to invoke the powers under the proviso -(2) of sub- section 2 of Section 4 of the MOFA Act 1963, the party demanding execution needs to give an application to the registering officer ?

The learned Counsel for the appellants challenged the validity of the sale deed dated 31.8.1991 and the maintainability of the suit.

4 The challenge was given mainly on the ground that as the impugned agreement is not registered as per the requirement of Section 4 of the MOFA, the suit cannot be entertained under the MOFA that the defendant should perform the statutory obligations under the MOFA. The submissions of the learned Counsel are entirely based on the ruling of the Bombay High Court in The Association of Commerce House Block Owners Ltd., Vs. Vishndas Samaldas reported in 1981 page-339. He submitted that an absolute enactment of section 4 if not obeyed, the consequence would follow that unregistered agreement of sale between the Promoter/developer

and the purchaser is altogether void and no rights are created between the parties. So such suit for specific performance under the MOFA is not maintainable. The learned Counsel for the appellants argued that in view of unregistered agreement of sale, the suit is not maintainable under the MOFA before the Civil Judge, Junior Division, therefore, prayers sought by the plaintiff for possession and to discharge the obligations under MOFA Act are not tenable. He argued that the suit was tried by Civil Judge Junior Division, who has no pecuniary jurisdiction to try and entertain the matter and moreover, no relief of conveyance is prayed so relief of possession can not be granted in favour of the plaintiff. The learned Counsel submitted that earlier no such objection in respect of the jurisdiction of the court of the Junior division in the written statement was taken. Subsequently, the respondent has filed application for amendment of the written statement challenging the pecuniary jurisdiction of the court of the Civil Judge, Junior Division. Under such circumstances, he submitted that the substantial question of law is to be determined in favour of the appellants.

5 Mr.Vaze in reply submitted that a suit for specific performance based on an unregistered agreement is tenable under the MOFA. He submitted that the appellants did not file written statement raising any plea of maintainability of the suit for specific

performance on unregistered agreement under MOFA. A say to Exh.5 was adopted as a written statement by the appellants. He submitted that agreement of sale dated 31.8.1991 at Exhibit-67 is proved by the plaintiffs. He read over the oral evidence of the plaintiff dated 13.1.2003. He pointed out that the plaintiff was not cross-examined even after two years after recording his evidence and finally on 24.8.2005 order of no cross-examination was passed. He pointed out that in the agreement dated 31.8.1991 Exhibit-67 paragraph-22 of the said agreement is regarding the obligation to admit the execution. He pointed out in the say of the defendant nos.1 & 2 to the injunction application at Exhibit-5, defendant no.1 has admitted that he has received amount of Rs.2,75,000/- from the plaintiff. However, it was contended that this amount was by way of loan and the agreement entered into is a security towards repayment of the loan amount. It was submitted that as it was a security for repayment of loan and interest, it is not necessary to be registered. It was further contended in the written statement that the agreement is fabricated. The learned Counsel argued that in that say the defendant no.1 has admitted that he has received a letter dated 23.12.1991 from the plaintiff to attend the office of Sub-Registrar, Haveli and admit the execution of the agreement dated 31.8.1991. The learned Counsel further submitted that the defendant neither stepped into the witness box nor cross-examined the plaintiff to deny

the case of the plaintiff and to prove his case. Under such circumstances, the courts below have rightly rejected the case of the defendants and granted the relief of specific performance in favour of the plaintiff.

6 The learned Counsel submitted that Section 4 is binding on the builder/promoter/developer to execute written agreement and not to accept more than 20% of the total consideration amount and then to register the agreement of sale. In the present case the agreement was prepared. Though it was not registered, it was really meant to be under Section 4. The defendant no.1 issued separate receipts of the payment made to him on the date of the execution of the agreement of sale dated 28.3.1991. He submitted that though payment of Rs.2,50,000/- was made out of total cost of Rs.2,94,000/- initially a separate receipt of Rs.50,000/- was issued on that date showing the receipt of less than 20% of the amount of the total cost which comes to Rs.58,000/-. He submitted that this agreement can be read in the evidence in the suit for specific performance. The objections of the appellant that if a suit for specific performance based on the contract is filed for declaration and possession then the suit is undervalued and barred for pecuniary jurisdiction ; are not correct. He replied that such objection by way of amendment of written statement under order 6 Rule 17 of the Code of Civil

Procedure was sought on 8.12.2010. However, the said application was rejected by the first appeal Court and also by this Court in the Writ Petition No.4291 of 2011 which was filed to challenge the said order.

7 The learned Counsel submitted that as per the ruling of the Division Bench in The Association of commerce House Block Owners Ltd., Vs. Vishndas Samaldas, earlier by virtue of section 4 it was not possible for the party to demand specific performance on the basis of unregistered agreement. However after the judgment of the Division Bench, section 4A was enacted and added in MOFA. He submitted that in the wording of section 4 the word is used as "Any other Law". It means that it does not include MOFA and it refers to laws other than MOFA. While enacting section 4A the Legislature did not use the same terminology but has started with non-obstante clause and used the term any law. Therefore, it includes the same law for the time being in force. He submitted that thus, section 4A takes care of not only the other laws but also all the provisions included under the MOFA. He argued that therefore, section 4A enables filing of suit for specific performance of contract based on unregistered agreement between the Promoter/developer and the flat purchaser under the MOFA and thus substantial question of law no.1 is to be answered positive and against the appellant. In support

of his submissions, he relied on following rulings :-

(1) Altaf Ismail Sheikh Vs. State of Maharashtra & Ors reported in 2005 ALL MR (Cri) 2403. (2) P.Virudhachalam & Ors Vs. The Management of Lotus Mills reported in AIR 1998 SUPREME COURT 554. (3) S.Kaladevi Vs. V.R.Somasundaram & Ors reported in 2010(3) ALL MR 477. 4) Union of India Vs. Ibrahim uddin & Anr reported in 2012(5) ALL MR 462. (5) Mt.Islam Fatima Vs. Syed Tamiz Ali, reported in 1924 Allahabad 938, (6) Kalavakurti Venkata Subbaiah Vs. Bala Gurappagari Guruvi Reddy reported in AIR 1999 SUPREME COURT 2958. (7) Gangaprasad & Ors. Vs. Mt.Banaspati reported in AIR 1937 Nagpur 132 ; (8) Totaram Krishna Patil Vs.Mt.Rahimat Bi and Ors reported in AIR 1937 Nagpur 227 ; (9) Abdul Kayum Vs. Damodhar Paikaji reported in AIR 1964 BOMBAY 46(V 51 C 7) and (10) Mansinh Vs. Jamnadas reported in AIR 1964 BOMBAY 49.

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8 For better understanding of the substantial questions of law the relevant provisions of the MOFA and the Registration Act are reproduced as follows :-

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(XVI of 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.....

(b) copies of documents.....

(I) the certificate by an Attorney-at-Law or Advocate under clause (a) of sub-section (2) of section

[(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, 1908 (16 of 1908) at the proper registration office for registration, within the time allowed under section 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

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.]

4A Effect of non-registration of agreement

required to be registered under section 4- Where any agreement for sale entered into under sub-section (1) of section 4, whether entered into before or after the commencement of the Maharashtra Ownership Flats (Regulation of the promotion and construction, sale, management and transfer) (Amendment and Validating Provisions) Act, 1983 (Mah. V of 1984.) remains unregistered for any reason, then notwithstanding anything contained in any law for the time being in force, or in any judgment, decree or order of any Court, it may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1963 (XLVII of 1963) or as evidence of part performance of a contract for the purposes of section 53A of the transfer of

Property Act 1882 (IV of 1982) or as evidence of any collateral transaction not required to be effected by registered instrument."

The execution of the unregistered agreement of sale dated 31.8.1991 is not disputed. The appellants did not file written statement but adopted his say given to application for interim injunction as written statement. The respondent/plaintiff was not cross-examined and appellant did not step into witness box and did not adduce any oral evidence. Thus the plaintiff has discharged his burden to prove his case. The case of the defendants that the impugned agreement was a security towards the repayment of the loan and the plaintiff has paid an amount of Rs.2,78,000/- to him towards loan and the agreement was executed towards the security of repayment of the loan was rightly rejected by the courts below. Thus on facts, the appellant has no case. However this being a Second Appeal the substantial questions of law are dealt herewith.

9 Section 4 of MOFA Act is a mandatory section. Within the purport of section 4 following three things are expected to be performed by the parties.

(a) There shall be written agreement in respect of sale or purchase of property ;

- (b) The promoter should not accept 20% of the amount of the flat before entering into an agreement ;
- (c) The said agreement should be registered.

10 If the agreement is not registered, it loses its value as agreement under Section 4 of the MOFA Act. If agreement is registered then it can be given effect under MOFA Act including imposing the liabilities/obligations mentioned under the Act. In the judgment of House of Commerce of Blocks Vs. Vishnadas & Samaldas & Ors. reported in 1981 BLR, it is held that if an agreement executed under Section 4 is not registered then the agreement is void and if agreement is void then no agreement exists between the parties and therefore, the flat owner cannot file any suit on the basis of such agreement. In the year 1981 when this matter was decided, there was no provision available to meet the situation if an agreement is unregistered. MOFA Act is enacted with an object to curtail the mal-practices of the builders and promoters and to protect the interest of the flat purchasers. However, in the absence of any such provision and section 4 being mandatory demanding registration of the document, no remedy was available to the flat owner if an agreement is not registered. There are number of instances of promoters not registering the agreement for sale. However on the background of the judgment of the Division Bench of

the Bombay High Court in The Association of Commerce House Block Owners Ltd., Vs. Vishndas Samaldas (*supra*) a flat purchaser was in fact remedyless. To meet this lacuna and to meet the injustice caused to genuine buyers section 4A of the MOFA was enacted in 1984. Section 4A acknowledged the privity of contract between the promoter and the flat purchaser created by unregistered agreement of sale and it stated that the said document to be accepted as an evidence in a suit for specific purpose or a suit of part performance under Section 53A of the Contract Act. Thus, under Section 4 of the MOFA said unregistered agreement of sale being a void document, cannot be recognized and suit cannot be filed for the liabilities and obligations under MOFA due to the mandatory requirement of the registration. However in view of section 4A of the Act the document did not become non-est or valueless. It does carry a character and value of the regular agreement of sale for immovable property. There is no specific requirement of the registration for agreement of sale of immovable property. Therefore, a suit for specific performance or performance of a contract can be instituted on the basis of an un-registered agreement of sale. Sub-section 2 of section 4 has two provisos : first proviso is in respect of an unregistered agreement which has taken place before the commencement of the MOFA Act and how that unregistered document can be registered. Proviso-2 lays down a procedure how

unregistered agreement of sale can be registered by presenting it before the office of Registrar by following the procedure under the proviso and so also under the Registration Act.

11 Section 49 of the Registration Act, 1908 and its proviso are to be read while interpreting section 4A of the MOFA . Section 49 of the Registration Act reads as under :-

“49 Effect of non-registration of documents required to be registered-

No document required by section 17 [or by any provision of the Transfer of Property Act, 1882,] to be registered shall-

- (a) affect any immovable property comprised therein, or
- (b) confer any power to adopt, or
- © be received as evidence of any transaction affecting such property or unless it has been registered ;

Provided that an unregistered document affecting immovable property and required by this Act, or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument.]

Proviso of Section 49 and section 4A are drafted on the similar lines. As per Section 49 of the Registration Act, unregistered agreement in respect of immovable property cannot be read in the evidence and no effect can be given on the basis of such unregistered agreement. In the year 1929 proviso was added in section 49 of the Registration Act, 1908. The proviso enabled a party to file a suit for specific performance under the Specific Relief Act based on unregistered agreement of immovable property demanding other party to come forward and execute and register the agreement. Thus the proviso removed the hurdle in respect of admissibility of such unregistered document of immovable property. Section 4A being the enabling section sings the same tune.

12 In order to determine the maintainability of the suit for specific performance based on unregistered agreement of sale under MOFA, the submissions made by the learned Counsel for the respondents on the point of interpretation of Sections 4 & 4A are required to be taken into account. Sections 4 & 4A have non obstant clauses. Section 4 opens with the terminology as follows:-

"notwithstanding anything contained in any other law."
(emphasis placed)

Thus despite of any other law inconsistent with the MOFA, the

mandate of section 4 operates. This necessarily refers to other Acts especially Registration Act. Section 4A was enacted in the year 1984 with the specific purpose to provide remedy in the case of any unregistered agreement of sale entered into under sub-section 1 of Section 4 which remained to be registered. It states "notwithstanding anything contained "in any law for the time being in force". Use of term in "any" law indicates that despite of inconsistent provision in any law, time being in force section 4A operates. Use of word 'any' includes the provisions of not only of the other laws but also the provision of the MOFA itself. For the purpose of interpretation, I rely on the following rulings :-

- (1) In the judgment of the Bombay High Court the case of Altaf Ismail Sheikh Vs. State of Maharashtra & Ors reported in 2005 ALL MR (Cri) 2403 the Division Bench has considered the application and purpose of non-obstante clause. It was held that non-obstante clause is a legislative devise which is usually employed to give overriding effect to certain provisions over some contrary provision, which may be found either in the same enactment or in some other enactment. (2) In P.Virudhachalam & Ors Vs. The Management of Lotus Mills reported in AIR 1998 SUPREME COURT 554. the Supreme Court has dealt with the term "any other law", In any part of the Act or any other law it is to be understood as exclusion of the law in which the said term is mentioned.

13 Thus the submissions of the learned Counsel for the respondents that Section 4A has over-riding effect over section 4 of the MOFA are correct and convincing. Thus a suit for specific performance based on an unregistered agreement of sale under MOFA is maintainable. However, the suit is filed only as per the provisions of section 4A of the MOFA. Such unregistered agreement of sale is not invalid but can be very much used in the evidence and specific performance on the basis of said document can be demanded within the purport of section 4A of the Act.

14 One more point of the competency of the Civil Court jurisdiction when its jurisdiction is challenged on pecuniary ground needs to be addressed. Civil Judge Jr.Division and Senior division have inherent jurisdiction to try and decide the civil dispute. So hierarchy created on the basis of pecuniary jurisdiction is technical. By order dated 19.7.2011 this court held that in view of sub-section 2 of section 21 of Code of Civil Procedure, the appellants could not have been permitted to raise the objection on the ground of pecuniary jurisdiction in appeal as the said objection was not raised during the pendency of the trial of the suit. The appellants did not challenge the said order further. Thus issue of pecuniary jurisdiction concluded by this court has attained finality. Therefore, at this stage,

the appellant is barred from raising the same issue of pecuniary jurisdiction. Thus the first substantial question of law is answered in affirmative.

15 2nd substantial question of law :-

While dealing with the 2nd substantial question of law the provisions of Registration Act of 1908 are required to be referred and compared with certain points. Proviso-2 of Sub-section 4 of MOFA lays down the procedure in respect of presentation of unregistered agreement of sale for registration. In the present case though the respondent presented the agreement of sale for registration a summons was not issued by the registering officer and therefore, document was not executed and remained to be registered. The learned Counsel for the appellants submits that under proviso-2 the person who presented the agreement for registration should make an application to the registering officer for issuance of summons or notice to the person who is required for the registration and on his failure to come and admit the same that agreement of sale remains unregistered. The learned Counsel submits that registering officer has powers under proviso-2 of section 2 of section-4 of MOFA but those powers cannot be used unless party moves application to the Registrar. Mere presentation is not sufficient to take out summons. In the present matter the plaintiffs have though submitted the

agreement for registration before the registering officer did not move the application for summons or notice under proviso-2 of sub-section 4 of section 2 of MOFA Act. He argued that if the provisions available in the Statute are not availed of by the party then the parties must blame themselves for their non action.

16 The learned Counsel Mr.Vaze for the respondent submitted that as per section 17 of the Registration Act, registration is compulsory in respect of documents in certain transactions. Section 4 of MOFA is enacted on the same lines of section 17 of the Registration Act. Proviso of section 4A is borrowed from proviso of section 49 of the Registration Act to enable the party to use an unregistered document for the purpose of suit as an evidence for specific performance or for collateral transaction. He submitted that when unregistered document is presented then Section 36 of the Registration Act is required to be followed by the registering officer. He further submitted that it is not necessary for the party to make separate application to the registering officer but registering officer has to issue a summons of his own.

17 On the point of procedure of the registration contemplated under proviso-2 of sub-section 2 of section 4 of the MOFA Act, the document has to be presented before the Registrar for registration

under Section 32 of the Registration Act. Thereafter if the other party appears then under Section 34 the Registrar has to take steps. The inquiry before the Registering officer is to be conducted under Section 34 of the Registration Act of 1908. Section 36 of the Act and proviso-2 of Section 4 of MOFA if read together may appear similar but in fact are distinguishable. Registration Act does not speak of what would be the result if on service the person fails to appear. What would be the legal position of an unregistered agreement which is presented for the registration. Registration is an act of making the entry in the office record to create a record. So making the entry or giving the number to a document of an individual or a body corporate on compliance of the formalities is registration. Proviso of sub-section 2 of section 4 of the MOFA Act lays down a procedure to meet a situation if an agreement remained unregistered. Under such circumstances, the agreement if at all is presented under Section 32 under the Registration Act and after notice to the other party who is required for the registration does not turn up for executing the agreement, then the inquiry under Section 34 cannot be conducted. Part-7 of the Registration Act of 1908 is of enforcing the appearance of executant and the witnesses. Section 36 of the Registration Act reads as under :-

"36. Procedure where appearance of executant or witness is desired- If any person presenting any

document for registration or claiming under any document, which is capable of being so presented, desires the appearance of any person whose presence or testimony is necessary for the registration of such document, the registering officer may, in his discretion, call upon such officer or Court as the [State Government] directs in this behalf to issue a summons requiring him to appear at the registration office, either in person or by duly authorized agent, as in the summons may be mentioned, and at a time named therein.

18 Under Section 36 the registering officer may in his discretion call upon such officer or Court thereafter on this behalf may issue summons to that person for appearance. However, no such discretion is left to the registration officer under proviso 2 of Section 4 of the Act. This is a special provision which is not only consistent with the Registration Act but with a force of mandate takes a provision further and lays down a solution to a situation if party fails to admit the execution.

By statutory provision power to issue summons vests with the registering officer. Question is whether that authority is required to suo-moto invoke its power or it is to be used only on the

application made by the party. The provisions of proviso-2 are to be analyzed. Section 36 of the Registration Act states that if a person presenting the document desires the appearance of any person, then registering officer may in his discretion take steps. However, proviso 2 simply says that if the agreement is presented and other party is not present, then the registering officer shall issue notice. Mere presentation of the instrument for registration may not be enough to issue summons by invoking powers in other circumstances but the proviso is enacted and worded in such a way that it is obligatory on the part of the registering officer to take steps. The presentation of that instrument for registration itself is to be construed that the party has asked the other person to execute the document. Therefore it is the duty of the registering officer to verify whether other party is present or not and if other party is not present then the presentation itself is sufficient for registering officer to proceed and take the step of sending summons/notice to the other party.

19 Proviso 2 of sub-section 2 of Section 4 of the MOFA states that if the executant fails to appear in compliance with the summons then execution of the document shall be deemed to be admitted by him and the registering officer may proceed to register the document accordingly. Thus proviso is a deeming provision but only for the purpose of admitting the execution. On failure of the

appearance of the other party such deeming terminology is not provided for the registration but only at execution. In view of deeming provision laid down in proviso of section 4 it is a duty of the registering officer to issue summons when the document is presented and other party remained absent. He should not wait for written application of the other party. Registrar cannot remain passive while performing his duty which is contemplated under proviso of section 4 of the MOFA. Thus 2nd substantial question of law is also decided in affirmative.

20 Submissions of the learned Counsel for the appellant that unless there is a prayer of conveyance, a prayer of possession is not tenable, cannot be accepted. On the basis of registered agreement of sale possession can be demanded for the conveyance of the co-operative society, however many times it is a matter of tripartite agreement. A land owner if is a 3rd person who subsequently comes in the picture at the time of conveyance, the possession is always handed over on the basis of registered agreement of sale. Therefore, in the suit for specific performance based on unregistered agreement of sale the prayers demanding registration of the document and possession are maintainable.

21 It is advisable for the Controller of Stamp & Registration

Authority to give directions to all the Registrars and Sub-Registrars in State of Maharashtra to maintain separate registers for the compliance under proviso 4 of sub-section 2 of section 4 of MOFA.

22 Hence, appeal is dismissed.

23 In view of dismissal of the Appeal, Civil Application is also disposed of.

(JUDGE)

24 Learned Counsel for the appellants prays that the order of this court be stayed for a period of four weeks. Learned Counsel for the respondent no.1 opposes the said prayer. He submits that the respondents have taken out execution proceedings in the year 2006 in RCS No.1279 of 1992 and they are waiting for the fruits of the decree since then. He submits that the respondent no.1 is now 80 years of old.

25 Considering the submissions made by both the parties, and in view of the findings given by this Court, I am not inclined to stay this order. Prayer of stay is rejected.

(JUDGE)

(JUDGE)



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HIGH COURT OF JUDICATURE AT BOMBAY