

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9856 OF 2003
WITH
CIVIL APPLICATION NO.1445 OF 2008

Vidya Nivas Co-op. Housing Society Ltd. ... Petitioner
Vs.
State of Maharashtra and others ... Respondents

Mr. Shailesh B. Dalal i/b. M/s. Dalal & Co. for Petitioner.
Mr. V. N. Solanki with Ms Sheela K. Mistry for Respondent No.4A.

CORAM : R. G. KETKAR, J.
Reserved on : 24TH JULY, 2015
Pronounced on: 27TH AUGUST, 2015

ORDER :

Heard Mr. Dalal, learned Counsel for petitioner and Mr. Solanki, learned Counsel for respondent No.4A at length.

2. By this Petition under Articles 226 and 227 of the Constitution of India, petitioner - Vidya Nivas Co-operative Housing Society Limited (for short 'Society') has challenged the judgment and order dated 12.11.2002 passed by the District Deputy Registrar, Co-operative Societies, 'D' Ward, Mumbai in Appeal No.8 of 2002 as also the judgment and order dated 04.09.2003 passed by the Divisional Joint Registrar, Co-operative Societies in Revision Application No.4 of 2003. By these orders, the authorities below allowed the application filed by the respondent No.4, since deceased, under Section 22(2) of the Maharashtra Co-operative Societies Act, 1960 (for short 'Act') and directed the Society to enroll him as a member in respect of the premises situate in basement of the Society. The relevant and material facts giving rise to filing of the present Petition, briefly stated, are as follows:

3. It is the case of the Society that one M/s. Sharma Estates and Builders Private Limited constructed a building some time in the year 1974-75 and sold the premises / flat in the said building. The builder also constructed a basement in the said building. The flat purchasers formed a Society and got it registered with the co-operation of the builder. The builder submitted 'Y' and 'Z' forms and other information along with the registration proposal in the year 1981. In that proposal, the builder disclosed that the basement - car parking was not sold. The Society was registered in the year 1982 and the builder had no right to sell the basement, which is a car parking and is a common property of the Society. Respondent No.4, since deceased, however, claimed that builder sold the basement to him in the year 1977 and attempted to illegally and unauthorisedly encroach upon the basement. Respondent No.4 claimed that he had purchased the basement on ownership basis in the building of the Society from the builder by executing agreement on 18.08.1977. Respondent No.4 applied on 12.02.2002 to the Society for admitting him as a member. Along with the said application, he submitted certain documents and also sent a cheque of Rs.250/- towards share money and Rs.100/- as entrance fee.

4. It is the case of the Society that as the document submitted by the respondent No.4 was not found in order and also he was not entitled to be a member of the Society in respect of the basement, the Society did not consider his application for membership and also did not admit him as a member of the Society.

5. On 25.06.2002, respondent No.4 filed application before the District Deputy Registrar under Section 22(2) of the Act for directing the Society to admit him as a member and issue necessary share certificate in respect of the basement premises. Society resisted the

application by filing reply. Respondent No.4 filed affidavit in rejoinder. By the impugned order dated 12.11.2002, District Deputy Registrar allowed the application by holding that as the Society did not inform its decision to the respondent No.4 within a period of 3 months from the date of the application, he was deemed to have been admitted as the member of the Society. Aggrieved by this decision, Society instituted Revision Application before the Divisional Joint Registrar. By the impugned order dated 04.09.2003, the Revision Application was rejected. It is against these orders, the Society has instituted the present Petition under Articles 226 and 227 of the Constitution of India.

6. In support of this Petition, Mr. Dalal strenuously contended that the authorities below mechanically passed the orders solely on the ground that the Society had not communicated its decision to the respondent No.4 within a period of 3 months of his application for membership and is, therefore, deemed to have been admitted as a member. He submitted that the authorities below failed to consider whether respondent No.4 was eligible to become member of the Society. The deeming fiction under Section 22 would come into play only if the respondent No.4 is entitled and eligible to become member of the Society. In the first place, respondent No.4 relied upon an unregistered agreement claiming ownership over the basement. Respondent No.4 could not have become owner of the basement on the basis of an unregistered agreement. Secondly, he submitted that even otherwise, owner of the basement is not eligible to become member of the Society. The authorities below held that on the basis of an unregistered agreement dated 18.08.1977, respondent No.4 is in possession, occupation and use of the basement and the Society has not denied his possession and / or occupation. Even if it is assumed that respondent No.4 is in occupation of basement, the said occupation is illegal and

unauthorized as the basement is the common property of the Society. The Builder has not sold the basement to the respondent No.4.

7. Mr. Dalal submitted that Section 2(16) of the Act defines the expression 'housing society' to mean a society, the object of which is to provide its members with open plots for housing, **dwelling houses or flats**; or if open plots, the **dwelling houses or flats** are already acquired, to provide its members common amenities and services. Section 2(19) (a) of the Act defines the expression 'member' to mean a person joining in an application for the registration of a co-operative society which is subsequently registered, or a person duly admitted to membership of a society after registration and includes a nominal, associate or sympathiser member and any depositor or financial service user of primary agricultural co-operative credit society. Section 22 lays down as to who may become member. Section 2(a-1) of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short 'MOFA') defines the expression 'flat' to mean a separate and self-contained set of premises used or intended to be used for residence, or office, or show-room or shop or godown or for carrying on any industry or business and includes a garage, the premises forming part of a building and includes an apartment. Section 2(c) defines expression 'promoter' to mean a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both.

8. Mr. Dalal submitted that Section 49 of the Indian Registration Act, 1908 lays down that no document required by Section 17 or any provision of the Transfer of Property Act, 1992 to be registered shall affect any immovable property comprised therein be received as evidence of any transaction affecting such property, unless it has been registered. As per Section 54 of the Transfer of Property Act, 1882, 'sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Such a transfer, in the case of tangible immovable property of the value of Rs.100/- and upwards can be made only by a registered instrument. Section 23 of the Indian Contract Act, 1872 lays down that the consideration or object of an agreement is lawful unless it is forbidden by law; or is of such nature, that if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

9. Relying upon these provisions, Mr. Dalal submitted that firstly, respondent No.4 has not purchased a flat as per Section 2(a-1) of MOFA. Secondly, he is not entitled and eligible to become member of the Society. In support of his submissions, he relied upon the decision of the Apex Court in the case of *Nahalchand Laloochand Pvt. Ltd. Vs. Panchali Co-operative Housing Society Limited*, **AIR 2010 SC 3607**.

10. On the other hand, Mr. Solanki supported the impugned orders. He submitted that in the proceedings arising under Section 23 of the Act what is required to be considered is prima facie whether the person, who is claiming to be a member, is the lawful occupier and has right, title and interest in the said property on the basis of which he is seeking membership of the Society. The jurisdiction of the Registrar under Section 23 does not extend to determine the validity and / or otherwise

the documents which are already executed in favour of the concerned person because that is the jurisdiction of the Civil Court and if any person raising any challenge to the said agreement is required to file appropriate civil suit. In support of this proposition, he relied upon the decision of this Court in the case of *Harish Commercial Premises Co-operative Society Limited Vs. Varsha Dinesh Joshi*, **2006(2) ALL MR 1**.

11. Mr. Solanki further submitted that under Section 22(2) of the Act once a person is refused admission as a member of the Society, the decision of the Society has to be communicated within 15 days of the date of the decision or within 3 months from the date of receipt of the application for admission, whichever is earlier. In the event, the Society not indicating its decision within 3 months of the receipt of the application, the applicant shall be deemed to have been admitted as a member of the society. In support of this proposition, he relied upon the decision of this Court in the case of *Prakash M. Naik Vs. Hanifa Jetha*, **2010 (3) Bom.C.R. 385**.

12. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, respondent No.4 filed application under Section 22(2) of the Act before the Deputy Registrar of Co-operative Societies. In paragraph 2, he claimed that he had purchased the basement premises in the building of the Society by an agreement dated 18.08.1977 from M/s. Sharma Estate and Builders Pvt. Ltd. He is in use and occupation of the said basement premises since the year 1977. In paragraph 4, respondent No.4 alleged that the builder with malafide and ulterior motive withheld and did not give his name as a purchaser of the premises of the Society. The Society was, therefore, not admitting him as its member. Reference to the suit being Suit No.1631 of 1979

instituted by the builder on the original Side of this Court and the order passed thereon was also made. In paragraph 6 of the application, respondent No.4 asserted that he had submitted application dated 12.02.2002 for membership along with a cheque of Rs.250/- for share certificate and Rs.100/- for entrance fee along with the relevant documents. In paragraph 7, it was asserted that the Society did not communicate any decision within 3 months from the date of receipt of the application, which was sent by the Registered A.D.

13. The Society opposed the application by filing reply inter alia contending that the builder did not sell the basement to the respondent No.4. This is evident from 'Y' and 'Z' forms and other information submitted by the builder along with the registration proposal. In paragraph 6, Society admitted that respondent No.4 had submitted application for membership on 12.02.2002. Respondent No.4 filed rejoinder inter alia contending that as there were disputes between him and the builder, the builder did not give any intimation about selling the basement to him. By order dated 12.11.2002, the Deputy Registrar allowed the application. The Deputy Registrar held that respondent No.4 claims to have purchased the basement from the builder in 1977. Respondent No.4 is using the basement and in fact respondent No.4 had mortgaged the premises with Central Bank of India. The premises stand in the name of the respondent No.4. Though the application was sent by the respondent No.4 to the Society for enrolling him as a member, the decision of the Society was not communicated within 3 months.

14. Aggrieved by that decision, Society preferred Revision Application. By order dated 04.09.2003, the Divisional Joint Registrar dismissed the Revision Application. In paragraph 4, it was observed that respondent No.4 is in possession of the basement from 1977. The

Society has not denied his possession or occupation.

15. In the case of **Harish Commercial Premises Co.op. Soc. Ltd.** (*supra*), a learned Single Judge of this Court observed in paragraph 12 as under:

“12. In any event I am of the opinion that in the proceedings arising under Section 23 of the Maharashtra Co-operative Society Act what is required to be considered is prima facie whether the respondents who are claiming to be the member are the lawful occupiers and have right, title and interest in the said property on the basis of which he is seeking membership of the society. The jurisdiction of the Registrar under Section 23 does not extend to determine the validity and/or otherwise the documents which are already executed in favour of the concerned person because that is the jurisdiction of the Civil Court and if any person raising any challenge to the said agreement is required to file appropriate civil suit. Prima facie in this case the respondents have got an agreement in their favour and also permission in their favour from the BMC for the purpose of constructing the said property. In that view of the matter I am of the opinion that the contention raised by the petitioner that the respondents are not entitled to be the member because they are unlawful and unauthorised occupier of the said construction cannot be accepted. In that view of the matter, petition fails. The order passed by the Divisional Joint Registrar dated 7.1.2002 is confirmed. However there shall be no order as to costs.”

16. In the case of **Prakash M. Naik** (*supra*), the learned Single Judge of this Court observed in paragraph 6 thus,

“6. Under the provision, as it stands today, once a person is refused admission as a member of a society, the decision of the society has to be communicated within fifteen days of the date of the decision or, as the case may be, within three months of the receipt of the Application whichever is earlier. In the event, that the society does not communicate its decision within three months of the receipt of the Application, the Applicant shall be deemed to have been admitted as a member of the society. ...”

17. Mr. Dalal relied upon the decision of the Apex Court in the case of **Nahalchand Laloochand Pvt. Ltd.** (*supra*). The Apex Court considered provisions of MOFA and held that 'common areas and

facilities' which include parking areas open and stilt parking space, are not flats and cannot be sold by promoter. The stilt area of building is not 'garage' within the meaning of Section 2(a-1) of MOFA and cannot be sold as a 'garage'. The moot is whether the authorities under the Act can go into this question. As held by this Court in the case of **Harish Commercial Premises Co.op. Soc. Ltd.** (*supra*), the jurisdiction of the Registrar under Section 23 does not extend to determine the validity and / or otherwise the documents which are already executed in favour of the applicant because that is the jurisdiction of the Civil Court. Hence, if the Society is raising any challenge to the agreement, it is required to institute Civil Suit before appropriate forum. In view thereof, I do not find that the authorities below committed any error in passing the impugned order. Reserving liberty to the Society to institute Suit before the appropriate Court, Petition fails and the same is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs.

18. In view of the dismissal of the Writ Petition, nothing survives in Civil Application No.1445 of 2008 and the same is disposed of accordingly.

(R. G. KETKAR, J.)

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