

M/s.Atur Sangtani and Associates ... Petitioner

The State of Maharashtra & Ors. ... Respondents

Mr.Shrikrishna R Ganbavale for Petitioner.
Mr.Vishal Vijayrao Kale for Respondent no.4.
Mr.S.D.Rayrikar, AGP for Respondent nos.1 to 3.

P.C.

1. The present Writ Petition is filed challenging an order dated 25/9/2014 passed in the Revision Application no. 187/2708 passed by the Minister in-charge, Department of Co-operation, Maharashtra State. The petitioner in the instant case is a firm of Builders and promoters of several properties. The Petitioner has launched a scheme for construction of ownership flats on Survey No.5, City Survey No. 11/1A, Koregaon Park, Pune - 411 001 (hereinafter referred to as "the scheme").

2. According to the petitioner after obtaining various sanctions and obtaining Completion Certificates, possession of the flats constructed in the said scheme were handed over to the respective flat purchasers. It is submitted that petitioner had subjected the said scheme to the provisions of The Maharashtra Apartment Ownership Act, 1970 (hereinafter referred to as "MAOA") by executing a Deed of declaration on 15th July 2005 which according to petitioners is duly registered in the Office of Sub-Registrar on 31st August 2005.

3. According to the petitioner, in spite of the above fact, Respondent no. 4 acting as Chief Promoter of the Atur Park Co-operative Housing Society (Proposed) had applied for a registration of the said society on 05th August, 2008. According to the petitioner the registration was allowed by Respondent no.3 without proper reasons. It is inter alia pointed out that right from the stage when the matter was before the Learned Assistant Registrar, orders have been passed without application of mind. Learned Counsel for the petitioner pointed out that in the first order that was passed by the

Assistant Registrar is annexed as Exhibit 'C', the petitioner has made reference to building Nos.16, 17, 18, 19 and 20 whereas the current respondent no. 4 was only concerned with building Nos.16, 17 and 19. According to the Learned Counsel reference to Building Nos.18 and 20 are extraneous to the subject matter / proceeding before the Assistant Registrar whose order dated 21st March 2006 has once again been confirmed by an order dated 1st February 2008 of the Divisional Joint Registrar of Co-operative Societies dismissing the Appeal No.27 of 2006 albeit incorrectly. The order of the Divisional Joint Registrar was challenged by the Petitioner in Revision application no. 187/2708. The Respondent no.1 confirmed the impugned order in the said revision being orders dated 21st March 2006 and 1st February 2008, without a properly reasoned order. Accordingly, the Learned Counsel for the petitioner states that the impugned order suffers from complete non-application of mind.

4. Learned Counsel for the Petitioner submitted that in accordance with provision of section 10(2) of the

Maharashtra Ownership Flats Act, 1963 (hereinafter referred to as “MOFA”) once an application has been filed viz. once a deed of declaration has been contemplated under section 11 of MAOA was filed, the Registrar was not entitled to consider any application under section 10(2) of the MOFA and section 11 of MAOA prohibits the consideration of any application for registration of a society. In this respect it will be useful to refer to section 10(2) of the MOFA and the same is reproduced below for ease of reference.

Sec 10(2): Registration of Co-operative Housing Society by Promoter within prescribed period : Special provision when Promoter fails to discharge statutory obligation : Amendment Act No.23 of 2008 dated 12.5.2008 and Amendment Act No.4 of 2008 dated 25.8.2008.

If, the Promoter fails within the prescribed period to submit an Application to Registrar of Co-operative Societies for Registration as per prescribed manner under the MCS Act, 1960, the Flat Purchaser can submit an Application to the

Competent Authority and can direct the District Deputy Registrar, Deputy Registrar or Asst. Registrar of the concerned area to register the Society. However, the verification and authenticity of the concerned Applicant Flat Holder is necessary and a Promoter is required to be given opportunity of being heard by the Competent Authorities. The prescribed period means within four months from the date on which minimum number of persons required to form such Organisation (Co-operative Society / Company).

The Competent Authority is required to scrutinise the documents in following manner. For verification of Application along with registered Agreement of Sale of Flats executed with each individual members of the Society/ Company / Association, the Agreement duly paid stamp duty, Occupation Certificate etc.

5. Learned Counsel for the petitioner states once

a declaration is executed as provided under the MAOA, it shall not be lawful to permit formation of any co-operative society since according to him the option vesting in the promoter has already been exercised. Accordingly, he submits that the Assistant Registrar could not and had no jurisdiction to adjudicate upon the validity or otherwise of the deed of declaration dated 31st August 2005. He further submitted that Society cannot be registered in respect of the building Nos.16, 17 and 19.

6. It is on this ground that Learned Counsel submitted that once a declaration was executed on 15th July 2005. It was lodged for registration on 30th August 2005 and was registered on 31st August 2005. There is no question of Registrar of the Co-operative Society's therefore permitting registration of a society in view of the provisions of section 10(2) of the MOFA.

7. On a query from the court, learned counsel for the Petitioner produced a copy of a standard agreement stated to be executed under MOFA with various flat

purchasers. In the instant case a copy of an agreement dated 20th June 2001 executed between petitioners and a purchaser in Building No.19 was produced. The Agreement prima facie does not appear to be in consonance with Form V which provides the standard form of a specimen agreement to be entered into.

8. Learned Counsel for petitioner made specific reference to clauses 9 and 11 of the agreement in an attempt to demonstrate that agreement clearly contemplated the right of the petitioners to confirm a condominium and no society could be registered in view of the fact that express provisions has been made for registration of a condominium and subjecting the entire property under provisions of the MAOA. Perusal of the clauses however in my view do not reveal any such compulsion. The clauses 9 and 11 deals with costs and expenses incidental to the purchase of the flat and restrictions against letting or subletting flats in question and also provide for costs of registration of the documents including the deed of assignment / conveyance. In fact specific reference has been made in

clause 11 to deeds of assignment and conveyance. There is no reference to any deed of declaration or a deed of apartment in case property was subjected to the provisions of the MAOA. Relying on the aforesaid, the learned counsel submitted that the order impugned in the present petition (page 135) dated 25th September, 2014 suffers from the same vice as the earlier orders passed by Respondent Nos.2 and 3 and accordingly he submitted that the impugned orders are liable to be set aside.

9. On behalf of the respondent No.4, learned counsel Mr.Kale submitted that in the petition incorrect facts have been mentioned. The real facts are otherwise. He submitted that there are approximately about 20 buildings out of which building Nos. 1 to 17, 19 and 20 have already been constructed. Building Nos.1 to 17, and 19 are apartments whereas building No.20 is a row house. Building No.18 is yet to be constructed. He submitted that as far as building Nos. 1 to 15 are concerned, they are already subjected to the Maharashtra Co-operative Society Act and a society

known as Atur Park Co-operative Housing Society Limited has been registered. He has relied upon a Certificate of registration dated 5th March 2003 in this respect.

10. He has therefore submitted that the said Society has been registered prior to the alleged deed of declaration. Even otherwise, he has submitted that having registered these 15 buildings as one society, the provision of Section 10(2) cannot be invoked by the petitioner. In the process of formation of society, no objection whatsoever was raised by the petitioners.

11. In the present case, the petitioner was trying to obstruct the registration of Society by claiming that a deed of declaration has already been registered. He further submitted that Building No 16, 17 & 19 with which respondent no 4 is now concerned were constructed prior to June 2001 and because they were constructed between 1996 and 2001 under Rule 9 of MOFA Rules 1964 the requirement was very clear. A promoter was required to convey the property within the statutory period of 4 months which has not been done.

He therefore submitted that there is no question of petitioner now obstructing the society or challenging the registration of the society. One more fundamental aspect on which Mr.Kale submitted was that the alleged deed of declaration has been executed on the strength of a Power of Attorney by the original owners namely Sir Shapoorji Burjorji Broacha Charity Trust.

12. The trustees of the aforesaid trust had executed a Power of Attorney dated 10th March 2000. A perusal of the said Power of Attorney submitted and particularly clause 15 will reveal that power of attorney was valid upto 31st August 2000 or till execution of the conveyance by the petitioner or their nominees **whichever was earlier** (emphasis supplied).

13. The learned counsel for the respondent therefore submitted that the Power of Attorney expired by efflux of time as of 31st August 2000 and since no conveyance of the property was executed by the petitioner or any of the petitioner's nominees before 31st August, 2000, there is no question of the present

petitioner acting under such out of date power of attorney and executing deed of declaration. In the circumstances he submitted that execution of deed of declaration itself is questionable and that deed of declaration is null and void.

14. The learned Counsel for the petitioners had also submitted that Respondent no 4 has filed suit bearing suit no 1606 of 2006 before the Civil Judge Junior Division, Pune challenging the execution and registration of the alleged deed of declaration which but is still pending. However, learned counsel for the Respondent no.4 submitted that even otherwise the declaration is invalid by reason of breach of express provision of section 13(2) of the MAOA which provides for various compliances. For all these reasons Mr.Kale submitted that petitioner ought not to be entertained.

15. Having considered the application made before the courts below and the impugned orders and after having heard learned counsel on both sides, this is not a case that calls for any interference. Quite apart

from the fact that the society has already been registered in respect of Buildings No. 1 to 15 as aforesaid as early as 5th March, 2003, there was no question of filing a declaration under the MAOA. The declaration appears to have been filed with motives which are not immediately evident but the entire exercise undertaken by the petitioners is clearly misconceived since the Petitioner had no authority to execute the Deed of Declaration. The Power of Attorney under which the Petitioner purported to act had expired. The execution of the deed was therefore non-est and the deed is void and of no legal effect. In the face of such a fundamental flaw, the declaration could never take effect. In any event the lack of power to execute the declaration was not the basis on which the impugned orders were passed. The impugned order was passed on the merits of the case. The petitioner derived their authority to execute the documents for registering a common body of flat purchasers only by virtue of the development rights and the power of attorney.

16. Under the agreement for sale executed

pursuant to the development rights the Petitioner did not provide for formation of a condominium. On the other hand the agreements are silent on the issue. The other buildings having formed a co-operative society, there was no reason for the Respondent no. 4 of Building nos. 16, 17 and 19 not to form a society. In fact they did so and correctly at that. The petitioner's attempts to form a condominium were effectively thwarted by the impugned orders which are neither arbitrary nor perverse. They do not call for any interference. Accordingly, I pass the following order:

- (i) The writ petition fails and is dismissed.
- (ii) There will be no order as to costs.

(A. K. MENON, J.)

CERTIFICATE

Certified to be true and correct copy of the original
signed Judgment / Order.