

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
ORDINARY ORIGINAL CIVIL JURISDICTION.**

WRIT PETITION NO. 962 OF 2011

Shining Star Co-operative Housing Society Ltd. ... Petitioner
V/s.

The Divisional Joint Registrar, Co-operative
Societies, Mumbai & Anr. ... Respondents

Mr. Sanjiv Sawant a/w Ms. Saloni Ghule for the Petitioner.
Mr. V. S. Kapse with Mr. P. G. Kathane for the respondent no.3.

**CORAM : K. K. TATED, J.
DATED : 07/12/2015.**

PC.:

. Heard learned Counsel for the parties.

2 By this petition under Article 226 of the Constitution of India, the petitioner is challenging the order dated 14.10.2010 passed by the Deputy Registrar, 'R' Division, Mumbai under Section 79(2) of the Maharashtra Co-operative Societies Act, 1960 (hereinafter will be referred as 'the said Act') directing the petitioner to grant no objection certificate (for short 'NOC') to the respondent No.3 for giving on rent basis his flats bearing nos. 52, 61, 62, 71 (part) in a co-operative society within 15 days from the said order and the order dated 02.11.2011 passed by the Divisional Joint Registrar Co-operative Societies, Mumbai in Revision Application No. 370 of 2010 and Appeal No. 246 of 2010 under Section 152 of the said Act by which the Appellate authority confirmed the order passed by the Deputy Registrar, 'R' Division, Mumbai.

3 The few facts of the matter are as under:

a) The respondent No.3 by application dated 21.01.2008 applied to the petitioner society for permission to allow him to let out the flat nos. 52, 61, 62 and half portion of flat no. 71 on leave and licence basis to the Bank and for certain other permissions. The petitioner society in its Annual General Body meeting dated 27.07.2008 declined to grant permission to the respondent No.3 for letting out his flat nos. 52, 61, 62 and part of 71 to the third party i.e. Bank. The majority of the members has resolved not to consider the request of respondent No.3 for subletting, leasing the flats to the bank. The said Resolution reads thus:

“ To decide the request of Mr. Chafekar for leasing his flat No. 52, 61,62 and part of 71 to Federal Bank Ltd: A letter of request signed by Mrs. Anjur Chafekar (who is, as per society's record owner of flat No. 74 and not the owner of flat No. 52, 61,62 & 71) was received by the society for its approval to lease the flat no. 52,61,62, and part of 71 to Federal Bank Ltd. As both Mr. Chafekar and Mrs. Anjur Chafekar were present in the meeting and with their approval the matter was taken for discussion in the AGM. Even after discussion for a long time no decision could be arrived in the meeting. At this point Mr. Pai Flat No. D-32 proposed for a Ballot voting by all members who were present in the meeting for a decision and Mr. Chafekar seconded the proposal. Mr. P. Nagarajan, the chair person of the meeting explained very clearly to Mr. Chafekar and the society members that the decision arrived would be binding on all, for which all members unanimously agreed. As it was decided in the meeting that the chair person should conduct the Ballot voting, Mr. P. Nagarajan took charge and conducted the voting in presence of all. After completion of voting in presence of all the counting of vote took place. The result was that 6 members voted in favour of Chafekar's request and 23 members voted against Chafekar's request. As agreed by all it was proposed by Mr. Pai D-32 of seconded by Mr. Sawant D-50 it was resolved not to consider the request of Mr. R.D. Chafekar

for leasing his flat No. 52,61,62 and part of 71 to Federal Bank and further resolved that no request from any member of the Society for change of user to be considered in future.”

b) Thereafter, the respondent No.3 made application dated 06.08.2010 to the Deputy Registrar, Co. Operative Societies seeking permission to grant NOC or instruct the society to grant NOC for subletting. In that application before the Deputy Registrar, the petitioner society filed their reply dated 21.08.2010 and 03.09.2010 and opposed the respondent No.3's application for grant of NOC on several grounds.

c) Considering the reply filed by the society and documents on record, the Deputy Registrar, R Division, Mumbai by order dated 14.10.2010 under Section 79 (2) of the said Act directed the petitioner society to grant NOC in favour of respondent No.3 for letting out suit flats to the Bank.

d) As the petitioner society failed to comply the order dated 14.10.2010, the Authority appointed Officer and granted no objection certificate in favour of respondent No.3.

e) Being aggrieved by the orders passed by the authority below, the petitioner preferred Revision Application No. 370 of 2010 and also Appeal bearing No. 246 of 2010 under Section 152 of the said Act. Both these proceedings were decided by the Divisional Joint Registrar, Co. Operative Societies, Mumbai, Division Mumbai by Order dated 02.02.2011 and rejected the Revision as well as Appeal. Hence, the present Writ Petition.

4 The learned Counsel Mr. S. A. Sawant appearing for the

petitioner submits that the order passed by the Dy. Registrar dated 14.09.2010 is against justice, equity and good conscience and same is liable to be set aside. He submits that the learned Dy. Registrar failed to consider that he has no jurisdiction and/or power to pass the direction and/or allow the Respondent no.3's application for NOC for letting out his flats to the Bank under Section 79(2) of the said Act. He submits that the Section 79 applies to enforce the performance of the society's obligations to file returns and statement etc. He submits that the Deputy Registrar failed to appreciate the fact that the respondent No.3 by his letter/application dated 06.08.2010 requested Deputy Registrar to issue directions and/or grant NOC which is not according to law. He further submits that the Deputy Registrar failed to consider the petitioner's reply dated 21.08.2010 and 03.09.2010 where they specifically raised the objection for allowing respondent No.3's application dated 06.08.2010. He submits that the Dy. Registrar erred in not considering the fact that in case of the co-operative society, the decision of Annual General Body of society is supreme and unless and until the decision is challenged and set aside by following due process of law, it cannot be interfered or set aside by the Registrar and that too after expiry of the limitation for the same. He submits that though the petitioner, placed on record before the Deputy Registrar that in General Body Meeting of the petitioner society, they decided not to allow the respondent No.3 to let out his premises for commercial activities passed the impugned order. Hence, the order passed by the Dy. Registrar dated 14.10.2010 is required to be set aside.

5 The learned Counsel for the petitioner submits that both the

authorities failed to appreciate the fact that petitioner filed Case No. 380 of 2008 in the Co-Operative Court No. IV at Mumbai against Respondent No.3 for following reliefs :

“a) this Hon'ble Court may be pleased to permanently restrain the opponent making any additions or alterations of a permanent nature and/or any change in use of the aforesaid flats, that is to say from residential use to commercial use, on any such terms and conditions as may deemed fit and proper by this Hon'ble Court.

b) Pending the hearing and final disposal of the present dispute, this Hon'ble Court may be pleased to grant interim and/or ad-interim reliefs in terms of prayer clause (a) mentioned herein above;

c) This Hon'ble Court may be pleased to grant cost of the present dispute;

d) This Hon'ble Court may be pleased to grant such further and relief as may be fit and proper by this Hon'ble Court.”

During the pendency of the said dispute before the Competent Court, the respondent No.3 with malafide intention filed the application dated 06.08.2010 before the Deputy Registrar for NOC for letting out the said premises to the Bank.

6 The learned Counsel for the petitioner further submits that even during the pendency of the present proceeding, the Respondent No.3 obtained permission from Mumbai Municipal Corporation for change of user from residential to commercial. That decision of the Municipal Corporation was challenged by the petitioner by preferring Writ Petition No. 1204 of 2013. The same was admitted by this Court on 07.08.2013 and is pending for hearing and final disposal on its own merits.

7 The learned Counsel for the petitioner submits that as per provisions of Model Bye-Laws of the Co-operative Housing Society Ltd, 2014 clause 75(e) change of user is not permissible without the consent of the society's committee which reads thus:

“75(e) No member of the Society shall use the flat deemed to have allotted to him under 75(a) above, for a purpose other than that mentioned in the letter of allotment, without the previous consent in writing of the committee.”

8 The learned Counsel for the petitioner submits that it is mandatory on the part of the member to take permission from the committee of the society before changing the user of property in society's premises. He submits that though these facts were pointed out to the Deputy Registrar, failed to consider the same.

9 The learned Counsel for the petitioner submits that even the Divisional Joint Registrar failed to consider the above mentioned facts at the time of dismissing the petitioner's Revision application as well as Appeal by common order dated 02.02.2011.

10 The learned Counsel for the petitioner submits that our High Court in the matter of ***Mohanlal Bhagwan Pandey V/s. Apurva Co-op. Hsg. Soc. Ltd, Bombay & Ors. reported in 2009(5) Mh. L. J. 330*** held that the Deputy Registrar cannot pass order under Section 79(1) of the said Act for the implementing the orders other than those mentioned in the said Section. He submits that Deputy Registrar can pass order only in respect of society's obligations to file returns and statement. He relies on paragraphs 5, 6 and 7 of the said Authority. He further submits that in similar way, our High Court in the matter of

Sudhir Co-operative Housing Society Ltd. V/s. State of Maharashtra & Ors, reported in 2010(1) All. M.R. 833 held that the Deputy Registrar have no jurisdiction to pass order directing the society to transfer plot of land which is beyond the scope of 79(1) of the said Act. He relies on paragraph 7 of the said Judgment.

11 The learned Counsel for the petitioner, on the basis of these submissions and law laid down by our High Court in the matter of Mohanlal Bhagwan Pandey (supra) and Sudhir Co-op. Housing Society Ltd.(Supra), the orders passed by the learned Deputy Registrar as well as Divisional Joint Registrar Co. Op. Societies Mumbai, Division Mumbai required to be set aside.

12 On the other hand, the learned Counsel Mr. V.S. Kapse appearing on behalf of respondent No.3 flats owner vehemently opposed the present Writ Petition. He submits that both the authorities below after considering the documents on record rightly held that respondent No.3 is entitled to NOC from the society for letting out the flats to the third party bank.

13 The learned Counsel for the Respondent No.3 submits that earlier the respondent No.3 was using the suit flats for commercial purpose only since 1975. He submits that at the time of formation of the society in the year 1980, he submitted sale deed as well as agreement arrived between respondent No.3 and the builder on 25.12.1975, by which the builder basically admitted that he sold those flats for using commercial purpose. He submits that in 2010, the

respondent No.3 decided to let out the suit premises to the Bank. Hence, he made application to the society for NOC, but same was not granted. Hence, he filed application/letter dated 06.08.2010 with the Deputy Registrar, Co-operative Societies, Mumbai. He submits that the said authority after considering the provisions of law and particularly the Section 79(2) allowed the Respondent No.3's application directing the society to grant NOC. The same was challenged by the petitioner unsuccessful before the Divisional Joint Registrar.

14 The learned Counsel for the respondent No.3 submits that for last several years respondent No.3 was using the suit premises for commercial purpose i.e. let out to the bank. He submits that even the Mumbai Municipal Corporation granted permission to the respondent no.3 to use the suit premises for commercial purpose. That permission/order passed by the Mumbai Municipal Corporation challenged by the petitioner by filing Writ Petition no. 1204 of 2013 before this Court. Though, this court admitted the said petition, declined to grant any interim relief.

15 The learned Counsel for the respondent No.3 submits that as per bye-laws which were applicable at relevant time, the respondent No.3 made appropriate application before the society. He submits that as per bye-laws 43(2), if any member want to let out on leave and licence basis or caretaker basis his flat or any part thereof, then he has to make appropriate application. The said bye-laws 43(2) reads thus:

“ 43(2) No member shall be permitted by the committee, to sub-let, give on leave or licence basis or care-taker basis his flat or any part thereof or part with its possession in any

manner unless;

- (i) *he has made an application in the prescribed form.*
- (ii) *he has furnished the application for nominal membership of the proposed sub-lettee, licensee, care-taker in the prescribed form;*
- (iii) *his application contains the undertaking that-*
 - (a) *he shall, by joining the society as a party to the proceedings initiate necessary legal proceedings against the sub-lettee, licensee, care-taker; on his failure to get vacant possession of the flat or part thereof on expiry of the period of sub-letting, giving on leave and licence or care-taker basis the flat or part thereof or parting with his possession in any other manner and meet the cost of the legal proceeding required to be incurred by the society.*
 - (b) *he shall pay the charges of the society every month during the period of sub-letting, licence etc;*
 - (c) *he shall pay non-occupancy charges to society. Non-occupancy charges shall be charged in accordance with the circular issued by the Government of Maharashtra and the Commissioner for Co-operation from time to time and shall not be levied if the flat is occupied by the "Family" of the members as defined under these bye-laws.*

Provided that while permitting the sub-letting, giving on leave & licence or care-taker basis the flat or part thereof or permitting parting with its possession in any other manner; the committee shall restrict the period thereof to 11 months or for more period as desired by the managing committee which may, on the request of the member be extended for similar period or part thereof from time to time.

- (d) *Non-occupancy charges shall not be levied to the flat purchaser who is intending to become a member and who submits the documentary evidence thereof."*

16 The learned Counsel for the respondent No.3 submits that the said application was not decided by the society as per the provisions of bye-laws. He submits that society has rejected their application

without giving any reasons which was mandatory on the part of the society. In support of his contention, he relied on bye-laws 65(a) and (g) which reads thus:

- “65(a) All the applications for (i) admission to membership of the society, including associate and nominal membership (ii) approval to the transfer of shares and interest in the capital/property of the society (iii) permission for sub-letting or giving flats or parts thereof on leave and licence or care taker basis (iv) permission for additions and alterations in flats (v) allotment of parking spaces and stilts (vi) permission for exchange of flats (vii) permission for holding additional flats (viii) permission for assigning, mortgaging or creating charge or interest in flats. (ix) permission for use of terrace and (x) for any other purpose provided under the bye-laws but not specifically mentioned above, shall be addressed to the Secretary of the Society. Every application received by the Secretary shall be acknowledged by him.”*
- (g) The Secretary of the society shall communicate the decisions of the committee or the General Body, as the case may be, to the applicants concerned within 15 days of the decisions of the committee or the General Body, as the case may be, with reasons, where the applications are rejected by the committee or the General Body, as the case may be, if the society does not communicate the decision to the applicant within three months from the date of receipt of application for membership including nominal or associate membership the applicant shall be deemed to have been admitted as a member as provided under Section 22(2) of the M.C.S. Act, 1960.”*

17 The learned Counsel for the respondent No.3 further submits that now as per amended provisions of Model bye-laws 2014 even for subletting the flats, permission is not required by the society; only they have to inform the society within 8 days. In support of his contention

he relies on clauses 43 and 44 of bye-laws 2014 which read thus:

- “43(a) A member shall intimate to the Society, of subletting his flat or given on leave and license basis or care taker basis or parting with its possession in any other manner, however the member shall submit a copy of leave and license agreement and copy of intimation report to the police station.*
- (b) No permission of the Society is required to sublet the flat/shop. However the intimation needs to be given to the Society 8 days before such subletting.*
- 44. No member of the society shall assign, mortgage or create any charge on his occupancy right in the flat without the previous permission in writing of the Society. Provided that such permission of the Society will not be required for assigning mortgaging or creating any charge on the occupancy right in the flat for the purpose of obtaining loan, either for purchase of the flat or for liquidating the liability incurred by him for the said purpose by way of loan or advance from the employer to the member or from the Life Insurance Corporation of India or from a Bank or the Society or any other agency approved by the Commissioner for Co-operation and Registrar, C.S.M.S. Pune.”*

18 The learned Counsel for the respondent No.3 submits that Deputy Registrar rightly passed the order under Section 79(2) of the said Act. Section 79(2) of the said Act, reads thus:

- “Section 79(2) Where any society is required to take any action [including filing of returns] under this Act, the rules or the bye-laws, or to comply with an order made under the [forgoing sub-sections], and such action is not taken-*
- (a) within the time provided in this Act, the rules or the bye-laws, or the order as the case may be, or*
- (b) where no time is provided, within such time, having regard to the nature and extent of the action to be taken, as the Registrar may specify by notice in writing, the Registrar may himself, or through a person authorised by him take such action, at the expense of the society; and such expense shall be recoverable from the society as if it were an arrear of land revenue.”*

19 The learned Counsel for the respondent No.3 submits that as per provisions of Section 79(2), the Registrar can direct the society to take appropriate action as required by law, if they failed to do so. He submits that in the present proceeding, it was binding on the petitioner's society to consider the respondent No.3's application for NOC to let out flats to the third person according to law. As petitioner failed and neglected to do so, the Registrar rightly passed order under Section 79(2) of the said Act. He submits that our High Court in the matter of ***Yuvraj Dattatray Patil V/s. Regional Joint Director (Sugar) & Ors. reported in 2011(4) Mh. L. J. 325*** held that under Section 79(2) where any society required to take any action according to Rules or Bye-laws and such an action is not taken, the Registrar himself or through a person authorised by him, may take such action at the expense of the society; and such expenses can be recovered from the society. Paragraph 7 of the said judgment reads thus:

“7.A minute perusal of Section 79 makes it clear that Sub-section (1) has no application to the facts of the present case. Under Sub-section (2), where any society is required to take any action under the said Act, the Rules or the Bye-laws, and such an action is not taken, then the Registrar himself, or through a person authorised by him, may take such action at the expense of the society; and such expense shall be recoverable from the society as if it were the arrears of land revenue. Under Sub-section (3), where action is taken under Sub-section (2), the Registrar may call upon the Officer of the society whom he considers to be responsible for non compliance of the provisions of the Act, the Rules or Bye-laws, and after giving an opportunity of hearing to the said officer, may require him to pay to the said Society the expenses paid or payable by it to the State Government as a result of their failure to take action. A conjoint reading of Sub-sections (2) and (3) of Section 79 makes it clear that before issuance of order under Sub-section (2), no hearing is contemplated to the

concerned society. However, the opportunity of hearing is contemplated under Sub-section (3) to the officer of the society subsequent to the action under Sub-section (2), who, according to the Registrar, is responsible for non compliance of the provisions of the Act, the Rules and Bye-laws.”

20 The learned Counsel for the respondent No.3 submits that the same view was confirmed by the Division Bench in the matter of ***Sadashivrao Mandlik Kagal Taluka Sahakari Sakhar Karkhana Ltd. V/s. Regional Joint Director (Sugar), Kolhapur & Ors. 2011(5) Mh. L. J. 68.***

21 The learned Counsel for the respondent No.3 submits that for last several years since 1975, he is using his flats for commercial purpose. Apart from that, for last several years plots are in possession of the Bank. He submits that even the Mumbai Municipal Corporation allowed respondent No.3's application for allowing him to use the residential premises for commercial activities. He submits that though the said order/decision challenged by the petitioner by filing Writ Petition 1204 of 2013 in this Court, the same was not stayed. He submits that considering the fact that Registrar has power under Section 79(2) of the said Act and for last several years respondent No.3 is using the suit premises for commercial purpose by letting out to the Bank, nothing survives in the present Writ Petition and same is required to be rejected.

22 I heard both the sides at length. The main contention raised by the petitioner in the present petition is that the Registrar have no authority to pass order under Section 79(2) of the said Act directing

the petitioner to issue NOC in favour of respondent No.3 allowing him to let out the suit premises to third party.

23 Bare reading of the Section 79(2) shows that where any society is required to do particular things and if they failed to do so, then the Registrar can issue directions/order under Section 79(2) of the said Act directing society to do particular things. The same view was taken by our High Court in the matter of Yuvraj Dattatray Patil (Supra).

24 Even bare reading of the orders passed by both the Authorities below dated 14.10.2010 and 02.02.2011, it is crystal clear that both the authorities after considering the evidence on record held that respondent No.3 is entitled to let out the suit premises to third party. Apart from that, now in view of amended provisions of Bye-laws for the year 2014 as per Bye-laws No. 43(b) the permission is not required from the society to let out the flat shops, however only intimation needs to be given to the society within 8 days.

25 The authorities relied by the petitioner in the matter of Mohanlal Bhagwan Pandey (supra) and Sudhir CHS (Supra) are not applicable in the facts and circumstances of the present case in hand. In those authorities the issue was under Section 79(1) of the said Act, whereas, in the case in hand issue is whether the Registrar can pass appropriate directions to the society under Section 79(2) of the said Act, if the society failed to comply its obligations/duties. In the matter in hand, as the petitioner society failed to entertain the respondent no.3's application for allowing him to let out his suit premises to the bank,

they filed application with the Registrar and Registrar has passed order under Section 79 (2) of the said Act.

26 Bare reading of the Section 79(2) of the said Act shows that Registrar has power to issue such type of directions. Apart from that, in the present proceeding, even this Court in Writ Petition no. 1204 of 2013 declined to grant any interim order in favour of petitioner restraining the respondent no.3 from using the suit premises for commercial purpose.

27 Considering these facts, I am of the opinion that petitioner failed to make out any case to interfere in the well reasoned order passed by the Authorities below dated 14.10.2010 and 02.11.2011.

28 Hence, following order.

- a) Rule is discharged.
- b) Writ petition stands dismissed.

(K.K.TATED, J.)