

**THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Writ Petition No. 4264 of 2016

M/s. Chetan Constructions,
Aurangabad & Another.

.. Petitioners.

Versus

The State of Maharashtra
And Others.

.. Respondents.

Shri. R.R. Mantri, Advocate, for petitioners.

Shri. S.R. Yadav, Assistant Government Pleader, for
respondent No.1.

Shri. R.F. Totla, Advocate, for respondent No.2.

Shri. U.P. Giri, Advocate for respondent No.4.

With

Writ Petition No. 1845 of 2014

M/s. Chetan Constructions,
Aurangabad & Others.

.. Petitioners.

Versus

Wadje Residency Flat Owners
Housing Cooperative Society Ltd.
Aurangabad
And Others.

.. Respondents.

Shri. Ruchir Wani, Advocate, holding for Shri. Anil S. Bajaj, Advocate, for petitioners.

Shri. V.P. Latange, Advocate, for respondent No.16.

Shri. S.R. Yadav, Assistant Government Pleader, for respondent No.19.

CORAM: T.V. NALAWADE, J.

DATE : 6 OCTOBER 2016

ORDER:

1) The first proceeding is filed to challenge the order made by the competent authority under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "the Act of 1963") by which a direction is given to register a cooperative housing society of the flat owners. The other proceeding is filed to challenge the order made by the competent authority to issue certificate in favour of the flat owners and their cooperative housing society of deemed conveyance under the provisions of section 11(4) of the Act of 1963. The first proceeding is filed by the owners and developers of the property and the second proceeding is filed by the developer and few flat owners of the developed premises. Both the sides are heard.

2) M/s Chetan Constructions has developed the property which is situated in Aurangabad city. There are 44 flats which include few shops. It is the case of the petitioners of the first proceeding that declaration was executed under section 2 of the Maharashtra Apartment Ownership Act, 1970 ("Apartment Act, 1970") and it was registered on 31-8-2001 by the developers and the flats were sold after such declaration. It is also contended that in each transaction a mention was made that association of the apartment owners was to be formed under the Apartment Act, 1970. It is contended that due to such declaration it was not open to the flat owners to go for registration of cooperative housing society under the provisions of the Act of 1963.

3) It is the contention of the petitioners that on 12-4-2015 a meeting of the unit holders of the building was held and they took the decision to form a housing society. Respondent No.1 of the petition is the Chief Promoter of the society. It is contended that majority of the unit holders approached the developer and they submitted that they wanted to register association of flat

owners under the Apartment Act, 1970 and they did not want to form a housing society. It is contended that due to the request made by the majority of the unit holders, the owner, developer executed a deed of conveyance in favour of the said association (condominium). It is contended that intimation of formation of said association and execution of conveyance document was then given to the competent authority constituted under Apartment Act 1970.

4) It is contended that in a proceeding which was numbered as 8/2015 and which was filed by the so called chief promoter of the housing society, the petitioners appeared and they opposed the proceeding by mentioning the aforesaid circumstances. It is contended that proper opportunity was not given to the owner, developer to have his say and even when there was aforesaid contention of the developer, the authority made the order of registration of cooperative housing society under the Act of 1963 and made another order of deemed conveyance in favour of the housing society.

5) The material which the petitioners want to use for challenging the aforesaid two orders is a declaration executed under the provisions of the Apartment Act, 1970 on 31-8-2001, the correction deed made in respect of declaration in the year 2006 and some copies of the sale transactions showing that it was informed to the purchasers that the property was to be submitted to the application of the Apartment Act, 1970. It can be said that only few complete copies of sale deeds are produced which include copy of sale deed executed in the year 2005 showing that it was informed to the purchaser that he will be bound by the declaration executed and registered under the Apartment Act, 1970. This provision is described as section 2-A of the said Act.

6) There are at least 18 sale deeds of the flats which were executed in favour of the persons who want registration of the association as cooperative housing society and which were executed prior to the date of execution of declaration i.e. 31-8-2001. They are dated 4-8-2000 (No.4459), 2-3-2001 (No.1088), 15-2-2000 (No.2730), 3-3-2000 (No.1290), 8-12-1999 (No.5407), 20-

2-2001 (No.897), 6-7-2001 (No.3395), 2-3-2001 (No.1087), 3-9-2000 (No.5074), 6-8-2001 (No.4059), 28-5-2001 (No.2610), 28-5-2001 (No.2611), 11-5-2001 (No.2363), 11-5-2001 (No.2364), 18-2-2000 (967), 1-11-2000 (No.5747), 24-7-2000 (No.4205); and, 13-10-2000 (No.5447).

7) Thus, most of the flats were sold prior to the declaration executed on 31-8-2001. It is already mentioned that complete copies of the sale deeds are not produced for perusal of this Court by the petitioners.

8) Learned counsel for the petitioners submitted that the provisions of the Act of 1963 were not made applicable to the area of the Municipal Corporation Aurangabad till the year 2009 and they were first time made applicable on 17-2-2009. Learned counsel submitted that in view of this circumstance, the provisions of the Act of 1963 cannot be used against the petitioners and the provisions of only the Apartment Act, 1970 can be used.

9) The record shows that the petitioners, owner, took the step for registration of the association of

apartment owners under the Apartment Act, 1970 only after filing of the proceeding by more than 60% of the flat owners for registration of cooperative housing society before the competent authority. The record shows that with the declaration which was registered in the year 2001, no copy of bye-laws was filed and it was first time filed on 26-8-2015. Similarly, the deed of conveyance in favour of the association of apartment owners which was shown to be registered during pendency of the proceeding filed by most of the owners of the flats, was executed subsequently, on 19-9-2015. The record shows that in the written say filed by the office bearers of this association of apartment owners, they informed to the competent authority that they would like to become members of cooperative housing society which was sought to be registered. Thus, most of the flat owners want the registration of the association as cooperative housing society. Only the owner wants registration as association of apartment owners under the Apartment Act, 1970. In this regard, there was one more circumstance. The owner had tried to make one shop owner as the main office bearer of the association of apartment owners when in the

declaration it was made clear that the purchaser of shop premises was not entitled to vote and he was not entitled even to express opinion in the meeting of the association. This conduct of the owner, vendor, shows that even when almost all the flat owners want cooperative housing society, the vendor, owner, wants its registration as association of apartment owners under the Apartment Act, 1970.

10) In view of the aforesaid submission made by the learned counsel for the petitioners and the material available, the provisions of the Act of 1963 and the Apartment Act, 1970 need to be considered and it needs to be ascertained as to whether the owner is entitled to see that the association is registered as association of apartment owners under the Apartment Act, 1970.

11) The scheme of the Act of 1963 shows that a duty has been cast upon the promoter under the Act of 1963 to take steps for registration of the association of flat owners. Thus, the registration ordinarily will be as cooperative housing society or Company. First time, the

Act of 1970 gave right to the apartment owners and also the vendor, to make declaration under section 2 of the Apartment Act, 1970 and see that the association is not registered as cooperative housing society or company. The provisions of the Act of 1963 show that initially this Act was made applicable only to some parts of this State. The Apartment Act, 1970 was introduced to give an opportunity to both the purchaser and the owner to get registered association of apartment owners under this Act. The provisions of the Apartment Act, 1970 and particularly section 2 of the Act shows that no duty as such was cast upon the owner, vendor to see that the property which he wanted to develop and sell, is submitted to the provisions of the Apartment Act, 1970. Thus if the Act of 1963 was not applicable, there was option given to the owner, vendor to make declaration under section 2 of the Apartment Act, 1970 and then see that the association of apartment owners is registered in view of the provisions of the Apartment Act, 1970. If no declaration was filed under section 2 of this Act by the owner, vendor, and the Act of 1963 was not made applicable then it was open to the apartment owners, to

go for the registration as association of apartment owners under the Apartment Act, 1970 in view of the provisions of section 2 and rule 8 of the rules framed under the Act of 1963. The provision of section 2 of the Apartment Act, 1970 reads as under :

"2. Application of Act : This Act applies only to property, the sole owner or all of the owners of which submit the same to the provisions of this Act by duly executing and registering a Declaration as hereinafter provided:

Provided that, no property shall be submitted to the provisions of this Act, unless it is used or proposed to be used for residence, office, practice of any profession or for carrying on any occupation, trade or business or for any other type of independent use:

Provided further that the sole owner or all the owners of the land may submit such land to the provisions of this Act with a condition that he or they shall grant a lease of such land to the apartment owners, terms and conditions of the lease being disclosed in the Declaration either by annexing a copy of the instrument of lease to be executed to the Declaration or otherwise."

12) The provisions of the Act of 1963 show that if this Act was made applicable, there was the option to the owner to see that association of the apartment owners, unit owners, is covered under the Apartment Act, 1970 and that can be seen in section 10(2) of the Act of 1963.

Thus, even after coming into force of the Act of 1963 it is open to the owner, vendor to submit the property to the application of the Apartment Act, 1970 by following the procedure given in that Act and avoid the registration of the association as cooperative housing society or Company. The provision of section 10(2) of the the Act of 1963 runs as under :

"10. Promoter to take steps for formation of co-operative society or company. (1)

(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 cooperative society or company."

13) If the provisions of the the Act of 1963 are applicable and property is not submitted to the application of the Act of 1970, it is the statutory duty of the promoter to take steps to register the association of flat owners in accordance with the provision of section 10(1) of the Act of 1963. This provision is as under :-

"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 cooperative 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 cooperative 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 fails 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."

14) For the area of Aurangabad Municipal Corporation, the provisions of the Act of 1963 were made applicable in the year 2009. As per the record, the declaration under section 2 of the Apartment Act, 1970

was filed by the owner, vendor on 31-8-2001. In view of the aforesaid provisions, the owner, vendor wants to see that cooperative housing society is not registered and the association of apartment owners is registered to make the provisions of the Apartment Act, 1970 applicable. Let us see whether in the present matter, in view of the facts of the case, the owner, vendor is entitled to make use of provision of section 10(2) of the the Act of 1963.

15) Relevant facts are already mentioned and they show that at least 18 flats, as per the record produced by the petitioners, were sold by the owner before execution of the declaration under section 2 of the Apartment Act, 1970. When declaration was executed, the Act of 1963 was not applicable to this area. As the declaration was made subsequent to the sale of most of the flats it needs to be ascertained as to whether due to declaration subsequently executed by the owner, the provision of section 10(2) of the Act of 1963 can be used against the flat owners who had purchased the flats prior to the execution of declaration. If the provision of section 10(2) of the Act of 1963 cannot be used against the flat owners,

they are entitled to use the provision of Section 10(1) of this Act.

16) The provision of section 17 of the Act of 1963 shows that the provisions of sections 10 and 11 of the Act are applicable to the flats which were already constructed before the Act came into force. This provision can be used even in respect of the flats which were constructed after the year 1963 and before year in which the Act was made applicable to the remaining area like in the year 2009. Thus, if there was no execution of declaration under section 2 of the Apartment Act, 1970, it became the duty of the owner, promoter to comply with the provisions of sections 10 and 11 of the Act of 1963 when this Act was made applicable, in the year 2009. In this regard section 16 of the Act of 1963 is also relevant and it runs as under.

“16. Act to be in addition to Transfer of Property Act and to over-ride contract to the contrary. The provisions of this Act, except where otherwise provided, shall be in addition to the provisions of the Transfer of Property Act, 1882 and shall take effect notwithstanding anything to the contrary contained in any contract.”

17) From the schemes of the two Acts and the conduct of the owner in the present matter it can be said that the owner finds himself in better position if the provisions of the Apartment Act, 1970 are made applicable and it appears that in that case he can retain some rights under contract. On the other hand, formation of the cooperative housing society is in the interest of the flat owners for many reasons. That subject need not be dealt with in detail in the present matter but the passing reference is necessary as it is the owner who has come upto this Court and most of the flat owners want the registration of the association as cooperative housing society. If the schemes of the two Acts are considered, it can be said that in both the cases if both the Acts are applicable it is the duty of the owner, promoter, to see that the association is registered either as cooperative housing society or a company or association of apartment owners. The registration of the association is in the interest of the flat owners as the maintenance of the flats, units, can be properly done and such association can help to re-develop the property. Thus, it can be said that both the Acts were made for the benefit of the flat, unit owners. So the

interpretation of the provisions needs to be done accordingly.

18) Section 2 of the Apartment Act, 1970, already quoted, shows that the declaration can be executed and registered both by the owner of property and the apartment owners. For both, procedure is given in rule 8 of the rules framed under the Act of 1963. In the present matter it is the owner who executed and registered the declaration first in time and so this situation needs to be considered for giving of the decision.

19) The scheme of the Act of 1963 shows that amendment in this Act was made when the Apartment Act, 1970 came in force. Amendment was made to cover the situation created by the Apartment Act, 1970. Thus, there are some provisions of the Act of 1963 which need to be used even when there is the declaration executed under section 2 of the Apartment Act, 1970.

20) In section 11 (1) of the Apartment Act, 1970 the contents of the declaration are mentioned and they are

with regard to the rights of the purchasers of apartments and so with regard to the description of the property, the entire building and of all the units including the spaces of common enjoyment. Provision of section 11(2) of the Apartment Act, 1970 reads as under :

"11. Contents of Declaration. (1)

(2) A true copy of each of the Declaration and bye-laws and all amendments to the Declaration or the bye-laws shall be filed in the office of the competent authority."

21) The record produced and the submissions made in this proceeding show that in the year 2001 when the declaration was executed, no bye-laws were submitted with the declaration for registration. Similarly copy of declaration and copy of bye-laws were not filed in the office of the competent authority.

22) Provision of section 13(1)((2), (4) and (5) of the Apartment Act, 1970 show that deed in respect of each apartment with plan of building etc, also need to be registered. Statement of the architect certifying correctness etc. of the lay out needs to be recorded. There

needs to be declaration in respect of common areas. In the present matter the declaration shows that at one place it is mentioned that the common areas are described but no such common areas are described in the declaration. Mentioning of common areas is important in view of the definition of common areas given in section 3(f) of the Apartment Act, 1970.

23) Section 12 of the Apartment Act, 1970 shows that in each deed of apartment, the date of execution of declaration, the date of registration of declaration etc. need to be mentioned. Similarly the date of filing of declaration in the office of the competent authority needs to be mentioned in the deed of apartments, conveyance. It is already observed that most of the sale deeds were executed prior to the execution of the declaration under section 2 of this Act and so there was no possibility of mentioning these particulars in the conveyance deeds of most of the flats. Provision of section 12(2) of the Apartment Act, 1970 reads as under.

"12. Contents of Deeds of Apartments: (1)

(2) A true copy of every Deed of Apartment shall be filed in the office of the competent authority."

Admittedly there was no compliance of this provision at least till the year 2015. The provision of section 16 of the Apartment Act, 1970 shows that copy of bye-laws needs to be annexed to the declaration and the bye-laws should provide for matters mentioned in section 16(2) of the Act. It is already observed that no such bye-laws were filed with the declaration executed in the year 2001.

24) The aforesaid provisions are made in the Apartment Act, 1970 to protect the interests of the purchasers of units. They were not complied with by the present petitioners, the owners. Section 2 of the Apartment Act, 1970 shows that the declaration should be "duly executed". The due execution can be inferred only if the aforesaid provisions are complied with. If such interpretation is not made of section 2 of the Act, it will be against the interests of the purchasers of the units. In view of these circumstances, this Court holds that the property was not submitted to the provisions of the

Apartment Act, 1970 though one declaration is shown to be executed.

25) No steps were taken by the owners to form association of apartment owners as provided by aforesaid two Acts. As per the record, more than 60% flat owners wanted the formation of co-operative housing society. They are from the purchasers who had purchased the flats prior to the execution of the declaration. As per the provisions it was necessary for the owners to take steps for registration of the association after sale of first five flats. Such steps were not taken. It is clear that the owner wanted to avoid the registration of any association. So, the flat owners are entitled to use the provision of section 10(1) of Act of 1963, get the association registered as co-operative housing society.

26) The owner also wanted to avoid execution of conveyance document in favour of such association which was necessary as provided in section 11 (1) of the Act of 1963. The provision runs as under :-

"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."

27) When the owner fails to comply with the provisions of section 11 (1) of the Act of 1963, the provision of sections 11 (2) to (5) of the Act, 1963 can be used by the purchasers of the units, flats. The provision runs as under.

"11. Promoter to convey title, etc. and execute documents, according to agreement.

(1)

(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 sub-section (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 sub-section (1), within the prescribed period, the members of such Co-operative 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 a 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."

28) The aforesaid provision involves verification of authenticity of documents. In view of nature of the provisions it needs to be presumed that the authority has got satisfied itself that more than 60% flat owners want registration of the cooperative housing society. The record is also to that effect. In view of these circumstances there was no other alternative before the competent authority than to direct registration of the co-operative housing society and issue certificate for enforcing unilateral execution of conveyance deed in favour of the society. Thus, on merits, it is not possible to interfere in the orders made by the competent authority.

29) Learned counsel for the petitioner placed reliance on a case reported as **2007 (1) Bom.C.R. 609** Bombay High Court (**Padmavati Construction Co. v. State of Maharashtra**). The facts of the reported case were different. In that matter, there was promise from the promoter to the purchaser to form co-operative housing society. In view of this circumstance, decision was in favour of the flat owners. This case can no way help the present petitioners.

30) For the respondents, flat owners, reliance was placed on the case reported as **2013(2) Mh.L.J. 463 (Rahul Enterprises vs. Abhineha Park Sahakari Gruha Rachana Samsntha Maryadit)**. In this case, this Court has held that when the builder does not inform to the Registrar, the competent authority about his right to submit the property to the application of the Apartment Act, 1970, he may lose the right given by the Apartment Act, 1970. In the present matter also though the record is produced to show that there was execution of declaration, this Court has come to the conclusion that it was not due execution under the Apartment Act, 1970. Further information about the said declaration was not submitted to the competent authority and necessary subsequent steps were also not taken by the owner. The steps were taken first time when most of the flat owners started proceeding for formation of co-operative housing society. So, the observations made in the case of Rahul cited supra need to be kept in mind for deciding the present matter.

31) The other side argued point of tenability of the present petition by submitting that revision ought to have

been filed. The learned counsel for the petitioners placed reliance on a case reported as **2011 (3) Bom.C.R. 465** (Full Bench) (**Shireen Sami Gadiali vs. Spenta Co-op. Housing Society Limited**). In this case this Court has laid down that there is no general rule that writ petition should not be entertained when alternate remedy like revision is available. It is laid down that whether the petition needs to be entertained or not needs to be decided on the facts and circumstances of that case. There cannot be dispute over this proposition. In the present matter it can be said that there is a dispute raised by the owner under the provisions of Apartment Act, 1970 that due to declaration executed by him only the association of apartment owners can be formed and co-operative housing society cannot be formed. The provision of section 10(1) of the Act of 1963 imposes liability on the promoter to go for registration of co-operative housing society or Company under the provisions of the Act of 1963 but when declaration is executed as required under the provisions of the Apartment Act, 1970, the competent authority cannot allow the registration of the association as co-operative housing society. When such point is involved it can be said

that the rights of the parties under contract also need to be ascertained. One authority created under the Maharashtra Cooperative Societies Act 1960 is expected to work as competent authority under the Act of 1963 and the Registrar of Cooperative Societies is expected to act as competent authority under the Apartment Act, 1970. Before giving of the decision by the competent authority under the Act of 1963, even the registration of the association of apartment owners was done by the owner by using some unit owners. In such circumstances, it can be said that the Apartment Act, 1970 is not a scheme complete in itself. So in such circumstances this Court holds that writ petition can be entertained. So, this Court holds that petition cannot be dismissed by holding that the decision of registration of cooperative housing society ought to have been challenged by filing appropriate proceeding like revision as provided under the Maharashtra Cooperative Societies Act, 1960. In respect of other order of deemed conveyance of the property it can be said that only after the registration of the association the conveyance is possible and so this Court holds that present petitions are tenable. In view of the

aforesaid discussion, this Court holds that no interference is possible in the orders made by the competent authority. In the result, both the petitions stand dismissed. Learned counsel for the petitioners requested for continuation of the interim relief. It is refused.

Sd/-
(T.V. NALAWADE, J.)

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