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

WRIT PETITION NO. 1953 OF 2007

Jeevan Niwas Co-operative Housing Society Ltd. & Anr. .. Petitioners
vs.
State of Maharashtra & Ors. .. Respondents

Mr. Ranjeet Thorat – Senior Advocate with Mr. Kalpesh Nansi, Ms Gayatri Sharma, Ms Khushboo Rupani and Ms Khan Farhana for Petitioners.
Mr. Milind More - Additional Government Pleader for Respondent Nos. 1 and 2.
Mr. R. V. Govilkar with Ms Ujwala Sawant for Respondent No. 4.

CORAM : M. S. SONAK, J.
Date of Reserving the Judgment : 02 March 2016
Date of Pronouncing the Judgment : 17 March 2016

JUDGMENT :-

1] The challenge in this petition is to the order dated 19 April 2007 issued by the Deputy Registrar of Co-operative Societies ordering an inquiry under Section 83 of the Maharashtra Co-operative Societies Act, 1960 (said Act) into the constitution, working and financial conditions of the petitioner society.

2] Mr. Thorat, the learned Senior Advocate appearing for the petitioners has made the following submissions in support of this petition :

(A) That in the present case, the respondent no. 2 has purported to exercise powers under Section 83 of the said Act and on the basis of application of Mr. Bhupendra Pamnani (respondent no. 4), about whose membership, there is a dispute. In any case, the complaint or the application by the respondent no. 4 does not constitute complaint or application by '*1/5th members of the society*' as contemplated by Section 83 of the said Act. Relying upon decision of this Court in the case of ***Ashok Saha & Ors. vs. State of Maharashtra & Ors***.[1], Mr. Thorat submitted that the inquiry is initiated by the Registrar on basis of complaint by member, it is necessary that such complaint must be supported by the requisite percentage of members. For these reasons, it is submitted that the impugned order is *ultra vires* provisions contained in Section 83 of the said Act;

(B) That the impugned order has been made at the behest of the respondent no. 4, who is involved in several disputes and litigations against the society. Accordingly, Mr. Thorat urged that the impugned order has been made in bad faith;

(C) That there has been no compliance with the provisions of natural justice and fair play before the impugned order came to be made. Further, the material on record establishes that the petitioners have, without prejudice to their rights and contentions, rectified the so-called defects pointed out by auditors in the course of audit or re-audit of the petitioner

1 2011 (4) Mh.L.J. 432

society's accounts. In such circumstances, Mr. Thorat has contended that there was no material on record for ordering inquiry under Section 83 of the said Act.

3] Mr. Milind More, the Additional Government Pleader for the respondent nos. 1 and 2 has submitted that the impugned order is not made on the basis of complaint by the respondent no. 4, but rather, the same is made on the basis of audit reports, in which, objections of serious nature have been reported. Mr. More submitted that the respondent no. 2, in terms of Section 83 of the said Act is vested with powers to order an inquiry even *suo motu* or on the basis of special report under 3rd proviso to sub section (5B) of Section 81. Mr. More submitted that merely because there is reference to some allegations made by the respondent no. 4 whilst determining the parameters of the inquiry, the same cannot be construed as exercise of powers at the behest of or upon the complaint of the respondent no. 4. Mr. More submitted that in this case, the respondent no. 2, upon independent application of mind to the materials on record, which include *inter alia* the auditors reports as well as complaints, has *suo motu* ordered inquiry in terms of Section 83 of the said Act.

4] Mr. More further submitted that at the stage of audit sufficient opportunity was granted to the petitioners. Further, even upon receipt of audit reports, the petitioners were granted liberty to make rectifications or to furnish explanations. The petitioners have in fact availed of such opportunities. However, since the explanations furnished by the petitioners were found to be *prima facie* unacceptable, the impugned order has been made by exercising powers under Section 83 of the said Act. Mr. More submitted that in the course of inquiry, all possible opportunity will be accorded to the petitioners and therefore, there is no occasion to complain about non compliance with principles of natural justice at this stage. Mr. More also submitted that after the inquiry is complete, the result thereof will be communicated to the petitioners in terms of the provisions contained in Section 83 (4) of the said Act. If, the report is adverse to the petitioners, there will be compliance with the principles of Section 87 of the said Act, before, any orders are made under Section 88 of the said Act. As against the orders made under Section 88 of the said Act, the petitioners, will have remedies, including the remedy of instituting an appeal under Section 152 of the said Act. For all these reasons, Mr. More submitted that this petition be dismissed.

5] Mr. Govilkar, the learned counsel for the respondent no. 4, also submitted that the respondent no. 4 may have only brought to the notice of the respondent nos. 1 and 2 certain gross irregularities committed by the petitioners. However, he submitted that the impugned orders cannot be said to have been made on the basis of complaint of the respondent no. 4, but rather, the impugned order is based upon *suo motu* exercise of powers by the respondent no. 2 upon examining audit report and other materials on record, which are more than sufficient to inquire into the situation, working and financial conditions of the society.

6] Rival contentions now fall for determination.

7] Section 83 of the said Act is contained in Chapter VIII of the said Act which deals with audit, inquiry, inspection and supervision. Section 81 provides for audit of the account of the society, at least, once in each financial year in the manner prescribed. Section 82 of the said Act provides that if the result of audit held under Section 81 of the said Act discloses any defects in the working of the society, the society shall within three months from the date of the audit report, explain to the Registrar the defects, or the irregularities, pointed out by the auditor and take steps to rectify the defects and remedy the irregularities and report to the Registrar the action taken by it thereon and also place the same before the next general body meeting. The Registrar is also empowered to issue directions to the society or its officers to take such action as may be specified in the order to remedy the defects within the time specified therein. The consequences of breach of said directions have also been set out in Section 82 of the said Act.

8] The section 83, with which, we are mainly concerned in this petition, reads thus :

"83. ***Inquiry by Registrar***

(1) The Registrar may suo motu, or on the application of the one-fifth members of the society or on the basis of Special Report under the third proviso to sub section (5B) of section 81, himself or by a person duly authorized by him in writing, in this behalf, shall hold an inquiry into the constitution, working and financial conditions of the society.

(2) Before holding any such inquiry on an application, the registrar may having regard to the nature of allegations and the inquiry involved, require the applicant to deposit with him such sum of money as he may determine, towards the cost of the inquiry. If the allegations made in the application are substantially proved at the inquiry, the deposit shall be refunded to the applicant, and the Registrar may under section 85, after following the procedure laid down in that section, direct from whom and to what extent the cost of the enquiry should be recovered. If it is proved that the allegations were false, vexatious or malicious, the Registrar may likewise direct that such cost shall be recovered from the applicant. Where the result of the inquiry shows that the allegations were not false, vexatious or malicious, but could not be proved, such cost may be borne by the State

Government.

(3) (a) All officers, members and past members of the society in respect of which an inquiry is held, and any other person who, in the opinion of the officer holding the enquiry is in possession of information, books and papers relating to the society, shall furnish such information as in their possession, and produce all books and papers relating to the society which are in their custody or power, and otherwise give to the officer holding an inquiry all assistance in connection with the inquiry which they can reasonably give.

(b) *If any such person refuses to produce to the Registrar or any person authorized by him under sub-section (1), any book or papers which it is his duty under clause (a) to produce or to answer any question which put to him by the Registrar or the person authorized by the Registrar in pursuance of sub-clause (a) the Registrar or the person authorized by the Registrar may certify the refusal and the Registrar after hearing any statement which may be offered in defence punish the defaulter with a penalty not exceeding five thousand rupees. Any sum imposed as penalty under this section shall on the application by the Registrar or the person authorized by him to a Magistrate having jurisdiction be recoverable by the Magistrate as if it were a fine imposed by himself.*

(c) *The Registrar or the officer authorized by him shall complete the inquiry and submit his report as far as possible within a period of six months and in any case not later than nine months.*

(4) The result of any inquiry under this section shall be communicated to the society whose affairs have been

investigated.

(5) It shall be competent for the Registrar or withdraw any inquiry from the officer to whom it is entrusted and to hold the inquiry himself or entrust it to any other person as he deems fit."

9] From the aforesaid, it is quite clear that inquiry can be ordered by the Registrar under Section 83 of the said Act in the following three circumstances:

(i) *suo motu; or*

(ii) on application of 1/5th members of the society ; or

(iii) on the basis of special report under the 3rd proviso to sub section (5B) of Section 81.

10] This Court, in the case of *Ashok Saha* (supra) has held that the powers under Section 83, if sought to be exercised on the basis of complaint of members, cannot be so exercised, unless the complaint is supported by 1/3rd members of the society. This is because, at the relevant time, Section 83(1) of the said Act made reference to 1/3rd of the members of the society. The same section, in its present form, makes reference to 1/5th members of the society. The purpose for making such a provision was obviously to insulate the society from inquiries under Section 83(1) of the said Act on the basis of complaints by some disgruntled members, lacking support of even 1/5th members of the society. The purpose was also not to obligate the Registrar to order such inquiry under Section 83(1) of the said Act, merely on basis of complaints of individual member, unsupported by even $1/5^{th}$ members of the society. The purpose of inquiry under Section 83(1) of the said Act is not to enable certain disgruntled members of the society, incapable of mustering the support of even $1/5^{th}$ members of the society to either settle their personal disputes with the society or to exert pressure upon the society, with a view to seeking resolution of their pesonal dispute with the society.

11] The *ratio decidendi* of the decision of in the case of *Ashok Saha* (supra) is that the Registrar is not bound to order inquiry under Section 83 (1) of the said Act, on the basis of complaint of a member or some members, who do not constitute requisite percentage of members as prescribed under Section 83(1) of the said Act. If however, the complaint or application is made by the requisite percentage of members of the society, the Registrar is obligated to order inquiry, subject of course, to fulfillment of other parameters prescribed under Section 83(1) of the said Act.

12] The decision in the case of *Ashok Saha* (supra) is however, not an authority for the proposition that the Registrar lacks jurisdiction to order an inquiry under Section 83 (1) of the said Act either *suo motu* or on the basis of special report under third proviso to sub-section (5B) of Section 81, merely because a complaint may have been made by some member or members, who do not constitute the requisite percentage as prescribed under Section 83(1) of the said Act. That would not be a correct manner reading the decision in case of *Ashok Saha* (supra). It must be noted upon the authority of decision of the House of Lords in case of ***Quinn vs. Leatham***[2] that a judgment is authority for the proposition, which it decides and not what can be deduced therefrom. Further, as has been held in the case of ***Mittal Engineering Works (P) Ltd. Vs. Collector of Central Excise, Meerut***[3]**,** a judgment is not a precedent on a proposition which it did not decide.

13] Therefore, mere circumstance that a complaint may have been made by some member or members not constituting the requisite percentage of members as prescribed under Section 83(1) of the said Act, does not oust the jurisdiction of the Registrar to order inquiry under Section 83(1) of the said Act either *suo motu* or on the basis of special report under the 3rd proviso to Section (5B) of Section 81. Of course, before exercising *suo motu* powers, there has to be material on record warranting exercise of such powers. Further, the Registrar has to genuinely apply his mind to such material, with a view to form an opinion as to whether inquiry under

2 1901 AC 495
3 1997(1) SCC 203

Section 83 (1) of the said Act is indeed warranted, in the facts and circumstances, so presented. If Registrar, virtually abdicates his powers and discretion to the dictates of some private complainant, then obviously, exercise of power by the Registrar, will be unsustainable.

14] Reverting to the facts and circumstances of the present case, the material on record indicates that the respondent no.2 has basically made the impugned order, on the basis of audit reports and the responses furnished by the petitioner society with regard to *prima-facie* objections raised in the audit reports. No doubt, the respondent no.2 has also looked into or adverted to the complaints made by respondent no.4. This is quite clear from the terms of inquiry referred to in the impugned order or in the corrigendum subsequently issued. However, that by itself, is not sufficient to conclude the respondent no.2 has abdicated his discretion to the dictates of respondent no.4, at the stage of making of impugned order. As noted earlier, the emphasis is basically upon the objections and the irregularities pointed out in the audit reports and the circumstance that the response of the petitioner society to the objections raised in audit reports was *prima-facie* unsatisfactory. In matters of judicial review of administrative action, adequacy of material is not usually gone into. So also the defences which the petitioner society might have on the merits, in the course of inquiry, are not to be gone into at this stage. Suffice to record that the impugned order cannot be said to have been made solely on the basis of complaint made by respondent no.4, but the same can be said to be the result of *suo motu* exercise of powers by the Registrar on the basis of material before him, in the form of audit reports, *prima-facie,* unsatisfactory response by the society coupled with certain irregularities referred to by the respondent no.4. Accordingly, it is not possible to accept the petitioner society's contention that the impugned order is *ultra vires* Section 83(1) of the said Act.

15] At the stage of making of order under Section 83(1) of the said Act, it is quite doubtful whether some full fledged opportunity for showing cause is required to be afforded to the society concerned. Be that as it may, in the facts and circumstances of the present case, at least the petitioner society, cannot legitimately make grievance with regard to any alleged non-compliance with principles of natural justice and fair play. This is because, the petitioner society was associated at the stage of audit. Even after the audit reports were submitted, the petitioner society was afforded opportunity to rectify defects and to furnish explanation. The petitioner society has in fact availed of such opportunity. The impugned order has been made upon record of *prima-facie* dissatisfaction with the responses submitted by the petitioner society. In these circumstances, even without going into the issue as to whether detailed compliance with principles of natural justice is contemplated at the stage of making of order under Section 83(1) of the said Act, suffice to record that there has been sufficient compliance in the facts and circumstances of the present case.

16] That apart, in the course of inquiry under Section 83 of the said Act, the petitioners, are bound to be granted full and effective opportunity. If the result of the inquiry is adverse to the petitioner society, obviously, the procedure as provided under Section 87 of the said Act will be complied with. If the matter, at all, reaches stage warranting action under Section 88 of the said Act, again, the petitioners or the members of the managing committee will be offered full opportunity consistent with principles of natural justice and fair play. As against any action under Section 88 of the said Act, there are statutory remedies, in the form of appeals provided under the said Act.

17] The observations in the impugned order are obviously prima facie and it will therefore be open to the petitioners to point out in the course of the inquiry that there are no irregularities in the constitution, working or financial conditions of the society. At this stage, considering the limited scope of judicial review in matters of this nature, it is not possible to hold that the impugned orders are *ex facie* without jurisdiction or that the same are vitiated by bad faith. This is also not the stage to advert to the adequacy or otherwise of the material on record or to adjudicate upon the defences on merits raised by the petitioner in the context of audit objections.

18] Upon cumulative consideration of the aforesaid aspects, this petition is dismissed. Interim order is vacated. There shall be no order as to costs.

(M. S. SONAK, J.)

19] At this stage, the learned counsel appearing for the petitioners prays for continuation of interim relief which was already in operation for a period of eight weeks. The request is reasonable. Accordingly, the interim relief already in operation is continued for a period of eight weeks from today.

(M. S. SONAK, J.)

Chandka