

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2034 OF 2016

Paul Parambi, Chief Promoter, Springs CHS Ltd. and another	... Petitioners
v/s	
The Bombay Dyeing and Manufacturing Co.Ltd. and another	... Respondents

Mr Prasad K. Dhakephalkar, Sr. Counsel with Mr Sanjay Jain and Mr Krishna Raja i/b M/s LJ Law for Petitioners.
Mr Aspi Chinoy, Sr. Counsel with Mr Ravi Kadam, Sr. Counsel with Ms Jinal Gogari i/b M/s Negandhi Shah and Himayatullah for Respondent No.1.

**CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA JJ.**

Reserved on : 26th October, 2016
Pronounced On : 16th December, 2016

JUDGMENT [PER B. P. COLABAWALLA J.] :-

1. Rule. Respondents waive service. By consent of parties, rule is made returnable forthwith and heard finally.

2. This Writ Petition is filed under Article 226 of the

Constitution of India seeking a writ of certiorari or any other appropriate writ, order or direction calling for the record and proceedings in respect of the Application dated 5th November, 2014 read with letter dated 17th July, 2016 filed by the Petitioners before the District Deputy Registrar, Co-operative Societies, Mumbai (I) [Respondent No.2 herein] and seeking a direction to quash and set aside the order dated 24th August, 2016 passed by the Respondent No.2 (Exh.'A' to the Petition).

3. By the impugned order, Respondent No.2 refused to consider the issue relating to registration of Petitioner No.2 which was allowed by the Assistant Registrar, Co-operative Societies, F/South Ward, Mumbai vide its order dated 31st December, 2014. According to the Petitioners, by the impugned order, Respondent No.2 refused to consider the issue relating to the registration of Petitioner No.2 under the provisions of *The Maharashtra Co-operative Societies Act, 1960* [for short, the “**MCS Act**”] on the ground that the new proposal for registration of the Petitioner No.2 – Society cannot be taken into consideration as Respondent No.1 had submitted the property to the provisions of the *The Maharashtra Apartment Ownership Act, 1970* [for short, the

“MAO Act”] by executing and registering a Deed of Declaration as required by the said Act and the cancellation of the said Declaration was pending adjudication in a suit filed in this Court.

4. The brief facts giving rise to the present controversy are as follows:-

- (a) Petitioner No.1 is an individual and is the Chief Promoter of Petitioner No.2 Society. Petitioner No.2 is a Co-operative Society who, according to the Petitioners, is registered under the provisions of the MCS Act. Respondent No.1 is a Company incorporated under the provisions of the Companies Act, 1956 and is a promoter within the meaning of the provisions of the *Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963* [for short, the **“MOFA, 1963”**]. Respondent No.2 is the District Deputy Registrar and who is the Competent Authority under section 5A of MOFA, 1963. Respondent No.2 has passed the impugned order dated 24th August, 2016.

- (b) Respondent No.1 is the owner of a land admeasuring approximately 1,84,658.43 sq.mtrs. and bearing C.S. Nos.120, 1/983 and 1/128 (part) and 223 of Dadar Naigaon Division, G.D. Ambekar Marg, Dadar (East), Mumbai 400 014 (hereinafter referred to as **“the larger property”**). During the period 2004-2005, on a portion of this larger property admeasuring approximately 1088.89 sq.mtrs., Respondent No.1 proposed construction of a residential building called “Springs I” (for short, the **“said building”**). For the purpose of this development, the Municipal Corporation of Greater Mumbai issued approval to the development plans by way of intimation of disapproval (IOD) dated 20th December, 2004 and thereafter issued a Commencement Certificate dated 8th August, 2005. Pursuant to this, Respondent No.1 launched its premium residential project and proposed construction of a residential building (Wing A) and a car parking building (Wing B) inter-connected with Wing A on a portion of the larger property bearing C.S. No.223

(part).

- (c) It is the case of the Petitioners that relying upon and believing the representations, assurances and promises made, several flat purchasers including Petitioner No.1 booked flats in the proposed building and made part payments towards the same from the year 2006 onwards. Accordingly, Respondent No.1 executed similarly structured Sale Agreements with several flat purchasers in respect of the flats in the building (Springs I) and provided them with the sanctioned layout plans in respect of the larger property.
- (d) According to the Petitioners, Respondent No.1 had assured the flat purchasers that possession of the flats would be handed over between October to December 2008. According to the Petitioners, by the year 2006, Respondent No.1 had sold more than 10 flats in the said building. It is thereafter averred that by the year 2009, Respondent No.1 had sold and disposed of about 80% of the flats to different flat purchasers by executing independent Sale Agreements. Despite this, Respondent

No.1 failed to take steps for formation of a co-operative society / organization of flat purchasers within a period of four months from the date of sale of the minimum number of flats as per section 10 of MOFA, 1963. It is the case of the Petitioners that Respondent No.1 always represented and assured the flat purchasers that a society would be formed and that the said building and the land would be conveyed to the said society / organization. We must mention here that this fact is disputed by Respondent No.1. Be that as it may, the Petitioners, relying upon an undertaking dated 11th June, 2010 given by Respondent No.1 to the Municipal Commissioner, which states that the proposed club house in building No.1 on plot bearing C.S. No.223 (part) and other appurtenant users shall vest in all the owners on account of cumulative holdings (the proposed society of the said buildings), argued that even before the statutory authorities it was represented and assured that a co-operative society would be formed of the said building.

- (e) It is not in dispute that the construction of the said

buildings (comprising of two wings as mentioned above) was finally completed in or around September 2011. Wing A was a residential tower consisting of ground plus 40 floors and part of the 41st floor and Wing B was a car parking block inter-connected with Wing A. The total construction consumed was about 27,377.65 sq.mtrs. on a portion of the larger property. In all there are approximately 143 flats. It is also not in dispute that part Occupation Certificate was granted on 9th September, 2011. After this, on 28th September 2011, Respondent No.1 executed a purported Deed of Declaration under the provisions of the MAO Act. It is the case of the Petitioners that this was done unilaterally and behind the back of the flat purchasers. It is further the case of the Petitioners that this purported Declaration was brought to the notice of the Petitioners for the first time only in or around January, 2014 when Respondent No.1 took a preliminary objection before the Assistant Registrar, Co-operative Societies, F/South Ward, Mumbai for registration of the Petitioner No.2 Society. Be that as it may, it now transpires that Respondent No.1 through its Advocate's

letter dated 4th October, 2011 intimated the Office of the Assistant Registrar of the execution and registration of the purported Declaration as contemplated under section 10(2) of the MOFA, 1963 and also forwarded a copy of the same to the Assistant Registrar. According to the Petitioners, apart from the fact that no inspection has been offered of this letter, this intimation [as contemplated under section 10(2)] has been addressed to the Office of the Assistant Registrar and not to the Registrar as defined in section 2(24) of the MCS Act. Under section 10(2) of MOFA, 1963 this intimation has to be given to the Registrar and which is to be strictly complied with, was the submission. It is therefore the case of the Petitioners that this intimation is no intimation in law at all.

- (f) Notwithstanding the aforesaid, it is the case of the Petitioners that in or about 2011 till the date of filing of the application for registration of the society (some time in the year 2014), Respondent No.1 continued to collect maintenance charges and outgoings from various flat purchasers in its own name. As Respondent No.1 failed

to take any steps for formation of a society, the flat purchasers initiated the process for proposal of registration of a society. Accordingly, on 6th January 2014, Petitioner No.1 as the chief Promoter of the then proposed society filed before the Assistant Registrar, Co-operative Societies, F/North Ward, Mumbai, the proposal for registration of Society.

- (g) At the hearing held on 20th January 2014, before the said Assistant Registrar, Co-operative Societies, F/North Ward, Mumbai, Respondent No.1 tendered a letter dated 13th January, 2014 enclosing therein the purported notice dated 4th October, 2011 to reveal that it had executed and registered a Declaration on 28th September, 2011 under the provisions of the MAO Act and that it had also formed a purported condominium called the “Springs Condominium Association of Apartment Owners”. It is the case of the Petitioners that be that as it may, despite registering this so called Declaration, Respondent No.1 started executing and registering Deeds of Apartment (as contemplated under the MAO Act) only from February, 2016 and till date, 11

Deeds of Apartment have been executed, the last being executed on 29th August, 2016.

- (h) As there were certain defects in the application filed before the Assistant Registrar, Co-operative Societies, F/North Ward, Mumbai, the same was withdrawn by Petitioner no.1 with liberty to file a fresh application before the Assistant Registrar within whose jurisdiction the building fell. Accordingly, on 5th November 2014, Petitioner No.1 filed a fresh application before the Assistant Registrar, Co-operative Societies, F/South Ward, Mumbai seeking registration of a society. In this Application, Respondent No.1 appeared and by its application dated 24th November 2014, raised a preliminary objection as to the maintainability of the proposal for registration mainly on the ground that it had already executed the purported Declaration as required under the provisions of the MAO Act and hence, by virtue of section 10(2) of MOFA, 1963, it was unlawful to form a society. After hearing the respective parties, the said Assistant Registrar, Co-operative Societies, F/South Ward, Mumbai, by his order dated

31st December, 2014 passed under section 9(1) of the MCS Act, allowed the registration and issued a Registration Certificate. That is how Petitioner No.2 was registered as a Co-operative Housing Society.

- (i) Being aggrieved by this order, Respondent No.1 preferred an appeal before the Divisional Joint Registrar. In the said appeal, the respective parties filed their pleadings and ultimately the Divisional Joint Registrar, by his order dated 16th November, 2015, allowed the said appeal and quashed and set aside the order dated 31st December, 2014 passed by the Assistant Registrar, Co-operative Societies, F/South Ward, Mumbai.
- (j) Being aggrieved by this order of the Divisional Joint Registrar, the Petitioners preferred a Revision Application dated 4th December, 2015 before the Ministry of Co-operation, Marketing and Textile, State of Maharashtra. This Revision Application was ultimately heard on 2nd March, 2016 and was reserved for orders. Thereafter, by order dated 4th April 2016,

the Hon'ble Minister quashed and set aside the order dated 16th November, 2015 passed by the divisional Joint Registrar, Co-operative Societies and remanded the matter back, to be heard by the District Deputy Registrar, Co-operative Societies (for Short, **“the DDR”**) being the Competent Authority under section 5A of MOFA, 1963 which exercised powers and performed duties inter alia under section 10 of MOFA, 1963.

- (k) Thereafter, on 10th May 2016, the DDR addressed a letter to Petitioner No.1 inter alia calling upon him to make an application under the provisions of MOFA 1963, as more particularly set out in the said letter. Correspondence thereafter ensued between the DDR, the Petitioners as well as Respondent No.1. Finally, the matter was heard by the DDR (Respondent No.2 herein) and the impugned judgment was passed by him on 24th August, 2016. In a nutshell, the DDR inter alia held that the new proposal for registration of the Society cannot be taken into consideration without the cancellation of the Deed of Declaration by the Hon'ble High Court in the

representative Suit that is pending before it. For the sake of completeness, we must mention that on 22nd September 2015, the flat purchasers of the said building filed Suit No.212 of 2016 in this Court against Respondent No.1 inter alia for enforcing their rights under the provisions of MOFA, 1963 and inter alia seeking cancellation of the purported Deed of Declaration. This Suit is still pending in this Court.

5. In this factual backdrop, Mr Dhakephalkar, the learned Senior Counsel appearing on behalf of the Petitioner, submitted that the impugned judgment and order dated 24th August, 2016 passed by Respondent No.2 is ex-facie illegal and wrong. He submitted that in the impugned order, Respondent No.2 refused to consider the issue relating to registration of Petitioner No.2 merely on the ground that the Deed of Declaration that was unilaterally executed by Respondent No.1 [under which the said building (Springs I) was submitted to the provisions of the MAO Act], was challenged in this Court in Suit No.212 of 2016. He submitted that by adopting this course of action, Respondent No.2 had abdicated his duty and in fact acted contrary to the order dated 4th April, 2016 passed by the Hon'ble Minister in the Revision Application filed by the Petitioners.

6. Mr Dhakephalkar thereafter submitted that in any event the impugned order was ex-facie illegal, as it was contrary to the provisions of the MOFA, 1963; the MAO Act; the MCS Act and the rules framed thereunder. In this regard, Mr Dhakephalkar placed reliance on Section 10 of the MOFA, 1963 and the several amendments thereto that were introduced from time to time. After drawing our attention to the said provisions, Mr Dhakephalkar contended that Section 10(2) of MOFA, 1963, and more particularly the embargo to form a co-operative society, should be read with and subject to Section 10(1). He submitted that Section 10(1) stipulates that 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 a prescribed period submit an application to the Registrar for registration of the organization of persons who take the flats as a co-operative society or, as the case may be, as a company. The prescribed period referred to in Section 10(1) is a period of four months, as more particularly set out in Rule 8 of the *Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Etc.) Rules, 1964* [for short, the **“said Rules”**]. Once this prescribed period of four months had expired,

the subsequent execution and registration by Respondent No.1 of the purported Declaration, submitting the property to the provisions of the MAO Act did not attract the embargo as set out in Section 10(2) and hence could not bar / preclude the flat purchasers from seeking registration of a Co-operative Housing Society. He, therefore, submitted that looking to the statutory provisions, it was clear that there was no bar on Respondent No.2 from registering a co-operative society as proposed by the flat purchasers of the said building (Springs I). This, he submitted, was notwithstanding the fact that the flat purchasers had filed a suit in this Court being Suit No.212 of 2016 *inter alia* seeking cancellation of the said purported Deed of Declaration. The pendency of the suit was not a fetter or a bar on Respondent No.2 from independently examining whether the flat purchasers were entitled to form a co-operative society, was the submission.

7. Mr Dhakephalkar then submitted that in any event, before the bar under Section 10(2) of MOFA, 1963 can come into operation, two conditions have to be fulfilled, namely, (i) the Promoter of any property consisting of a building or buildings submits such property to the provisions of the MAO Act by executing and registering a Declaration as provided by that Act

(MAO Act); and (ii) the promoter informs the Registrar [as defined in the MCS Act] accordingly. Only when both these conditions are fulfilled, the bar as contemplated under Section 10(2) would come into operation, was the submission. Mr Dhakephalkar submitted that in the facts of the present case, admittedly the notice dated 4th October, 2011, purporting to inform the authorities under the MCS Act that Respondent No.1 had executed and registered a Declaration submitting the property developed by it to the provisions of the MAO Act, was not addressed to the Registrar as defined in Section 2(24) of the MCS Act, but was in fact addressed to the Assistant Registrar. He submitted, therefore, that in law, this was no intimation at all and consequently the bar as contemplated under Section 10(2) of the MOFA, 1963, did not and/or could not come into operation. Mr Dhakephalkar therefore submitted that Respondent No.2 had completely gone wrong in not considering their application for registration of a co-operative society.

8. The alternative submission of Mr Dhakephalkar was that in any event, the Deed of Declaration has been executed and registered in breach of the provisions of the MAO Act, and therefore, there is no Declaration in the eyes of law. This being the case, Mr Dhakephalkar would submit that there was, therefore, no

bar from forming a co-operative society as set out in Section 10(2) of MOFA, 1963. To buttress this argument, Mr Dhakephalkar brought to our attention several provisions of the MAO Act. Mr Dhakephalkar placed reliance on Section 2 to contend that the MAO Act applies only to a property, the sole owner, or all of the owners of which, submit the said property to the provisions of the MAO Act by duly executing and registering a Declaration as provided therein. He thereafter placed reliance on Section 3 which is the definitions section and more particularly the definition of the words “apartment”, “building”, “competent authority” and “property”. He submitted that reading Section 2 of the MAO Act along with the definitions as well as the other provisions thereof, it was clear that once a substantial number of flats were sold by Respondent No.1 in the said building, the 1st Respondent was not the sole owner of the property, and therefore, could not have unilaterally executed and registered a Deed of Declaration as contemplated under the MAO Act. If this could not be done, and the same was in fact in breach of the provisions of the MAO Act, then, the embargo/bar from forming a co-operative society as contemplated under Section 10(2) of MOFA, 1963 did not come into play at all. Consequently, there was no impediment on Respondent No.2 from considering the application for registration of a co-operative society and thereafter

granting the same. Mr Dhakephalkar submitted that none of this has been considered by Respondent No.2 in the impugned order and the same has been simply glossed over by saying that since the flat purchasers had sought cancellation of the Deed of Declaration in the suit filed in this Court, and which suit is pending, registration could not be granted to the Petitioner No.2 society.

9. Mr Dhakephalkar submitted that the finding of Respondent No.2 that a condominium called **“Springs Condominium Association of Apartment Owners”** has been formed under Section 2 of the MAO Act is totally perverse in as much as Respondent No.2 has not even considered whether the purported Declaration [as contemplated under the provisions of the MAO Act] was validly executed and registered and whether the same was in consonance with the provisions of the MAO Act. He submitted that on the date when Respondent No.2 was hearing the application of the Petitioners for registration, even the provisions of Section 12 of the MAO Act were not complied with. This was an additional ground on which the purported Declaration could not be sustained, was the submission of Mr Dhakephalkar. Looking to all these facts, Mr Dhakephalkar submitted that the impugned order

could not be sustained and ought to be set aside by us in our writ jurisdiction under Article 226 of the Constitution of India.

10. In support of the aforesaid propositions, Mr Dhakephalkar relied upon the following decisions:-

- (i) Rahul Enterprises Vs. Abhineha Park Sahakari Gruha Rachana Samstha Maryadit.¹;**
- (ii) Padmavati Constructions Co. Vs. State of Maharashtra and Ors.²; and**
- (iii) Shakuntala Bharat Kachare & Ors. Vs Subhash Prataproa Chavan & Ors.³**

11. On the other hand, Mr Chinoy, learned Senior Counsel appearing on behalf of Respondent No.1, submitted that the Petitioners' interpretation / construction of the provisions of Section 10 of MOFA, 1963 are ex-facie contrary to the settled principles of interpretation. Mr Chinoy submitted that if we were to accept the interpretation of Mr Dhakephalkar on the provisions of Section 10, the same would amount to re-writing / adding words to the plain and unambiguous language of Section 10(2) and which

1 2013 (2) Mh. L.J. 463

2 2007 (1) Bom.C.R. 609

3 2011 (1) Bom. C.R. 842

would result in the said provision being substantially altered. He submitted that the Petitioners' suggested interpretation in-effect seeks to make the separate substantive provision made in Section 10(2) [enabling the Promoter to submit the property to the provisions of the MAO Act], subject to the terms of Section 10(1). He submitted that if that was the intention of the Legislature it would have simply provided for one more option in Section 10(1), i.e. in addition to the existing two options of (i) a co-operative society and (ii) a Company, and accordingly, subjected the conditions laid down in Section 10(2) to the stipulation made in Section 10(1) that the promoter was required submit the property to the provisions of the MAO Act within a period of four months. Mr Chinoy submitted that Section 10(2) is an independent provision under which no time period has been prescribed for submitting the property to the provisions of the MAO Act, so long as the same is done prior to an application for registration of a co-operative society or a company, as the case may be. He submitted that this is ex-facie clear from a plain reading of the provisions of Section 10. On a plain reading of Section 10 itself, the interpretation sought to be put on Section 10(2) by the Petitioners is wholly erroneous and misconceived, is the submission. Mr Chinoy submitted that such an interpretation, as sought to be put by the Petitioners, would restrict

and negate the plain and clear language of Section 10(2) by reading words in the said provisions that are conspicuous by their absence. This would be contrary to the basic canons of interpretation and construction of a statute, was the submission of Mr Chinoy. To substantiate this argument, Mr Chinoy brought to our attention Section 10 as originally enacted and thereafter the subsequent amendments that were made to said section. He submitted that the subsequent amendments to Section 10, one of which brought into force Section 10(2), is an independent provision and is not governed by the prescribed period of four months as contemplated under Section 10(1).

12. To counter the argument of Mr Dhakephalkar on the issue that the Deed of Declaration is executed and registered in breach of the provisions of the MAO Act, Mr Chinoy submitted that this argument/contention cannot be entertained by Respondent No.2. According to Mr Chinoy all that Respondent No.2 has to see is whether a Declaration has been executed and registered, submitting the property to the provisions of the MAO Act. Once this is brought to the attention of the authorities under the MCS Act, then the bar under Section 10(2) kicks in and thereafter it would not be lawful to form any co-operative society or a company as

contemplated under Section 10(1). He, therefore, submitted that Respondent No.2 correctly did not examine this issue in the impugned order, especially, since the issue of cancellation of the purported Deed of Declaration was pending in a suit filed in this Court.

13. As far as the decisions relied upon by Mr Dhakephalkar are concerned, Mr Chinoy submitted that all these decisions were distinguishable on facts and were wholly inapplicable in the factual matrix before us. In the case of **Rahul Enterprises**¹, Mr Chinoy submitted that in that case the flat purchasers had made an application for formation of the co-operative society which was registered on 10th July, 2009. Prior thereto, on 12th June, 2009 the promoter had executed a declaration under the MAO Act. The promoter, however, took no steps to oppose / impugn the registration of the co-operative society. Three years later, in 2012, an application for deemed conveyance was made by the co-operative society which was granted on 19th July, 2012. It was only thereafter that the promoter filed a Petition challenging the order of registration dated 10th July, 2009 *inter alia* contending that the promoter had already executed a Declaration under the

provisions of the MAO Act in June 2009. It is in these circumstances that this Court held that the promoter not having taken any steps to challenge the registration of the society for more than three years, could not do so after the order for deemed conveyance had been made in July 2012. The finding of this Court in the case of **Rahul Enterprises**¹ ought to be read and understood after appreciating the facts of that case, which are materially different from the one before us, was the submission. He, therefore, submitted that this Judgment is of no assistance to the Petitioners in the facts of the present case.

14. Similarly, in the case of **Padmavati Constructions Co.**², Mr Chinoy submitted that in that case the MOFA agreement had expressly and specifically provided that the promoter would register a co-operative society. Since, the Promoter failed to do so, the flat purchasers applied for registration of the society in January 2004. On 16th February, 2004 the Deputy Registrar dismissed the application for registration. Thereafter, the Promoter executed a Declaration under the MAO Act. Thereafter, in appeal and revision, the application for registration of the co-operative society was allowed and the Deputy Registrar was

directed to register the society. Before the Deputy Registrar and the Revisional Authority, the promoter in fact reiterated his obligation to form a co-operative society, but contended that he would do so after the entire project was completed. The promoter thereafter challenged the order of registration and relied on Section 10(2) of MOFA, 1963 and the Declaration executed by him. It is in these facts the Court held that as the MOFA agreements contained an express representation that a co-operative society of flat purchasers would be formed, the Promoter could not submit a Declaration under the provisions of the MAO Act. He submitted that in the present case, the agreements executed with the flat purchasers does not in any way represent to them that the promoter was to only register a co-operative society. This being a material difference, the judgment rendered in the case of **Padmavati Constructions Co.**² has no application to the facts of the present case.

15. Even the last judgment relied upon by Mr Dhakephalkar, in the case of **Shakuntala Bharat Kachare & Ors.**³, Mr Chinoy submitted that in that case the promoter had executed a Declaration under the MAO Act in September 1992. The flat

purchasers applied for registration of the society in October 1992. The Deputy Registrar rejected the application by an order in November 1993 on the ground that the property had already been submitted to the MAO Act. In revision, the Joint Registrar by an order passed in September 1994, remanded the matter to the Deputy Registrar for a *de novo* consideration of the application for registration filed by the flat purchasers. The Deputy Registrar on 20th December, 1994 registered the society. Being aggrieved thereby, the promoter filed a Writ Petition challenging the remand order. However, the Promoter did not challenge the subsequent order of December 1994 under which, registration of the society was ordered. It is, in these circumstances, that the Court held that the promoter's Writ Petition was infructuous in view of the subsequent event of the registration of the society. As far as the Writ Petition filed by the flat purchasers challenging the Declaration under the MAO Act, the Court held that in view of the registration of the co-operative society, the Declaration under the MAO Act could not survive in as much as (i) the developer had acquiesced in registration of the society by not challenging the registration and (ii) unless the Declaration was quashed, it would lead to an anomalous situation whereby the property would be subject to two local laws. Mr Chinoy submitted that in the facts of

the present case, the registration of the society was specifically challenged by the promoter and which was allowed by the Divisional Joint Registrar by his order dated 16th November, 2015. This order of the Divisional Joint Registrar was further subjected to a revision before the Hon'ble Minister, who by his order dated 4th April, 2016 set aside the order of the Divisional Joint Registrar. Whilst, remanding the matter back, it was directed that the Deputy District Registrar, Co-operative Societies, Mumbai would take a decision about registration of the society as it was the Competent Authority as per the provisions of the MOFA, 1963. He, therefore, submitted that the facts in the present case were materially different from that before this Court in the case of **Shakuntala Bharat Kachare & Ors.**³ The aforesaid decision, therefore, could not be of any assistance to the Petitioners, was the submission of Mr Chinoy.

16. For all the aforesaid reasons, Mr Chinoy submitted that no fault can be found with the order passed by Respondent No.2 and the same was legal and valid and ought not to be interfered with by us in our equitable, extraordinary and discretionary jurisdiction under Article 226 of the Constitution of India. Consequently, he

submitted that the Writ Petition is devoid of merit and ought to be dismissed.

17. We have heard the learned counsel for parties at length and have perused the papers and proceedings in the Writ Petition as well as the compilation of documents. We have also carefully perused the impugned order. Before we deal with the rival contentions, it would be necessary to note the objects and reasons of MOFA, 1963 as well as the MAO Act and several of its provisions. The objects and reasons of the MOFA, 1963 indicate that initially the Government of Maharashtra appointed a committee known as the Paymaster Committee to study and report various aspects of the business of construction and sale of flats on ownership basis. The Committee submitted its report to the Government of Maharashtra on 29th June, 1961. On the basis of the findings of this Committee, the Government introduced a Bill. The object behind the legislation was to see that there is integrity of purpose on the part of the promoter and that there is willingness and earnest co-operation of the flat purchaser and to solve the enormous problem of housing to some extent. It is in these circumstances, that MOFA, 1963 was promulgated. The preamble of this Act would show that it is enacted to regulate in the State of

Maharashtra, the promotion of construction, sale, management and transfer of flats taken on ownership basis.

18. Section 2 of this Act (MOFA, 1963) is the Definitions Section. The words **“Competent Authority”** have been defined in Section 2(a) to mean a Competent Authority appointed under Section 5A of the Act. The word **“Flat”** is defined in section 2(a-1) to mean a separate and self-contained set of premises used or intended to be used for residence, or office, 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. The word **“Apartment”** has also been defined in Section 2(f) and would have the same meaning assigned to it in the MAO Act. The word **“Registrar”** has been defined in Section 2(d) to mean the Registrar as defined in the Maharashtra Co-operative Societies Act, 1960 or as the case may be in the Companies Act, 1956. The word **“prescribed”** is also defined in section 2(b) to mean prescribed by the rules made under MOFA, 1963.

19. Thereafter, Section 3 deals with the general liabilities of the Promotor. Section 4 deals with the obligation of the promotor to

enter into an agreement before accepting advance payment or deposit. Section 5A talks about who is the Competent Authority under the Act and reads as under:-

"5A. Competent Authority

The State Government may, by notification in the *Official Gazette*, appoint an officer, not below the rank of the District Deputy Registrar of Co-operative Societies, to be the Competent Authority, for an area or areas to be specified in such notification and different officers may be appointed as Competent Authority for different local areas, for the purposes of exercising the powers and performing the duties under Sections 5, 10 and 11 of this Act."

20. As can be seen from the said Section, the State Government may appoint an Officer not below the rank of the District Deputy Registrar of Co-operative Societies, to be the Competent Authority, for an area or areas to be specified in such notification. Different officers may be appointed as the Competent Authority for different local areas for the purposes of exercising powers and performing the duties under Sections 5, 10 and 11 of the Act. As far as, Sections 6, 7, 8 and 9 are concerned, they are not really germane for the controversy before us. The real controversy before us is with reference Section 10 of MOFA, 1963. Section 10 as it was originally enacted read as under:-

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

21. Thereafter, the MAO Act was brought into force w.e.f 19th February, 1971. Because of this, Section 10 of MOFA, 1963 was amended in 1971 and read thus:-

"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 co-operative 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 co-operative 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.

(2) If any property consisting of building or buildings is constructed or to be constructed and the apartment takers propose to submit the apartments to the provisions of the Maharashtra Apartment Ownership Act, 1970, by executing Declaration and Deed of Apartments as required 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 co-operative

society or company and each apartment owner shall be entitled to the exclusive ownership and possession of his apartment as provided in the first mentioned Act."

22. As can be seen from the above reproduction, sub-section 2 was added to Section 10 and *inter alia* stipulated that if any property consisting of building or buildings, is constructed or to be constructed and the apartment takers propose to submit the apartments to the provisions of the Maharashtra Apartment Ownership Act, 1970 by executing a Declaration and Deed of Apartments as required 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 would not be lawful to form any co-operative society or company as contemplated under Section 10(1). It further provided that each apartment owner would be entitled to the exclusive ownership and possession of his apartment as provided in the first mentioned Act.

23. Thereafter, in 1974 sub-section (2) of Section 10 was further amended. Section 10 after this amendment in 1974 read thus:

"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 organization of persons who take the flats as a co-operative 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 Co-operative 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.

(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 (Mah. XV of 1971), 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 co-operative society or company."

24. From the amendment to sub-Section (2), the change that was made by the Legislature was that, now instead of the apartment takers proposing to submit the apartments to the provisions of the MAO Act (by executing a Declaration and Deed of Apartments), the Promoter could submit such property to the provisions of the MAO Act by executing and registering a Declaration as provided by that Act. The additional burden that was put on the Promoter was that he was to inform the Registrar about the same as defined in the MCS Act. Once both these conditions are fulfilled, it was not lawful to form any co-operative society or company as contemplated under Section 10(1).

25. Thereafter, in 2008 further amendments were done to Section 10 and two provisos were added after Section 10(1). Section 10, after its amendment in 2008 read thus:

"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 co-operative 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 Co-operative 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, 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.

(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 (Mah. XV of 1971) 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 co-operative society or company."

26. The first proviso to Section 10(1) and which was inserted by the Legislature in 2008 stipulates that if the Promoter failed within the prescribed period (which is a period of four months as prescribed by Rule 8 of the said Rules) to submit the application to the Registrar for registration of the society in the manner provided in the Maharashtra Co-operative Societies Act, 1960, then, the Competent Authority may, upon receiving an application from the person who has taken flats from the said promoter, direct the District Deputy Registrar, Deputy Registrar, or as the case may be, the Assistant Registrar concerned to register the society. The second proviso that was inserted stipulates that no such direction could be given by the Competent Authority without first verifying the authenticity of the applicant's request and giving the concerned promoter a reasonable opportunity of being heard. This is basically the Legislative history behind Section 10. The other sections of MOFA, 1963 are not really germane for the purpose of the disputes raised before us and hence we are not referring to the same.

27. Having noted the relevant provisions of MOFA, 1963, we now turn our attention to the provisions of the MAO Act. The object and reasons of the MAO Act would reveal that consequent upon the shortage of lands in urban areas, the majority of citizens of urban areas of the State could not think in terms of owning houses on individual basis. Though there was an overgrowing tendency to construct multi-storeyed flats, apartments and the like on ownership basis, persons purchasing flats, tenements or apartments did not have a marketable title thereto and could not obtain any loan by mortgaging such flats, tenements etc. Consequently, tenements constructed by Housing Boards for example could not be sold to the tenants who could not raise any loan on the security of such tenements. The result of this was that an enormous amount of capital was locked up which could otherwise be utilised for new constructions to meet the increasing demands for housing. It was therefore considered expedient that each apartment should, for all purposes, constitute a heritable and transferable immovable property, and that suitable legislation should provide for all matters connected therewith. The Legislature felt that such a measure would not only enable many a person to own his apartment, but it would at the same time enable

institutions like the Housing Boards, to utilize their locked up capital in the construction of new buildings. Keeping these objects in mind, the MAO Act was brought into force w.e.f. 19th February, 1971.

28. The preamble of the MAO Act clearly suggests that the Act was brought into force to provide for ownership of an individual apartment in a building and to make such apartment transferable property and provide for matters connected therewith. Section 2 of this Act talks about the application of the Act and 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."

29. As the section itself stipulates that MAO Act applies only to the 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 more particularly provided therein. In other words, if there is more than one owner of the property then all of them have to join in executing and registering a Declaration as contemplated under the said Act. Conversely, what becomes clear is that if there are more owners than one, a single owner cannot unilaterally submit the property to the provisions of the MAO Act.

30. Section 3 is the definitions section. For our purposes, it would be appropriate to set out the definition of the words “apartment”, “building”, “Competent Authority”, “declaration” and “property” respectively. They read as under:-

“3. Definitions

In this Act, unless the context otherwise requires, –

“(a) “apartment” means a part of the property intended for any type of independent use, including one or more rooms or enclosed spaces located on one or more floors or part or parts thereof in a building, intended 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 and with a direct exit to a public street, road or highway or to a common area leading to such street, road, or highway;

(e) “building” means a building containing five or more apartments, or two or more buildings, each containing two or more apartments, with a total of five or more apartments for all such buildings, and comprising a part of the property;

(i) “Competent authority”-

- (1) in relation to buildings constructed or to be constructed by the Housing and Area Development Authority established under section 3, or a Housing and Area Development Board established under section 18 of the Maharashtra Housing and Area Development Act, 1976, or by a company, means the Deputy Chief Engineer or the officer referred to in sub-section (2) of section 7 of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963; and**
- (2) in any other case, means the Registrar of Co-operative Societies as defined in the Maharashtra Co-operative Societies Act, 1960;**

(j) “Declaration” means the instrument by which the property is submitted to the provisions of this Act, as provided by section 2, and such Declaration as from time to time may be lawfully amended;

(r) “property” means the land, the building, all improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been, or are intended to be, submitted to the provisions of this Act.”

31. Section 3(a) defines **“apartment”** to mean a part of the property intended for any type of independent use, including one or more rooms or enclosed spaces located on one or more floors or part or parts thereof in a building, intended to be used for residence etc. **“Building”** has been defined in Section 3(e) to mean a building

containing five or more apartments, or two or more buildings, each containing two or more apartments, with a total of five or more apartments for all such buildings, and comprising a part of the property. **“Property”** has also been defined in Section 3(r) to mean the land, the building, all improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been, or are intended to be, submitted to the provisions of the MAO Act. Looking at these three definitions, we are clearly of the view that an apartment (and which is purchased by a flat purchaser) is a part of the property which can be subjected to the provisions of this Act by duly executing and registering a Declaration as more particularly set out therein.

32. Section 4 of the MAO Act deals with the status of apartments and Section 5 deals with the ownership thereof. Section 5 stipulates that each apartment owner shall be entitled to the exclusive ownership and possession of his apartment in accordance with the Declaration executed and registered as required by section 2 of this Act. It further stipulates that each apartment owner shall execute a Deed of Apartment in relation to

his apartment in the manner prescribed. Thereafter, Section 6 deals with common areas and facilities and *inter alia* stipulates that each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the Declaration. Section 7 deals with compliance with covenants, bye-laws and administrative provisions and Section 8 prohibits certain work by the apartment owners. Section 9 deals with encumbrances against apartments and removal thereof. Section 10 deals with common profits and expenses and Section 11 deals with the contents of the Declaration. Section 13 deals *inter alia* deals with registration of Declarations, Deeds of Apartments and copies of the floor plans. This registration has to be done as per the provisions of the Registration Act, 1908. Section 14 provides that all apartment owners may remove a property from the provisions of the MAO Act by an instrument that is duly executed. Another relevant section that we should make a note of is Section 24 which stipulates that all apartment owners, tenants of such owners, employees of owners and tenants, or any other person that may in any manner use the property or any part thereof submitted to the provisions of this Act shall be subject to this Act and to the Declaration and the bye-laws of the Association of Apartment Owners adopted pursuant to the provisions of this Act. It further stipulates that all agreements,

decisions and determinations lawfully made by the Association of Apartment Owners in accordance with the voting percentages established under this Act, Declaration or bye-laws, shall be deemed to be binding on all apartment owners.

33. Having noted and analyzed the provisions of these two Acts (namely MOFA, 1963 and the MAO Act), we shall now turn our attention to the contentions raised before us by the respective parties. The first contention raised by Mr Dhakephalkar was that Section 10(2) of MOFA, 1963, and more particularly the embargo to form a co-operative society, should be read with and subject to Section 10(1). He submitted that Section 10(1) stipulates that 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 a co-operative society or as the case may be, a company. The prescribed period as mentioned in Section 10(1) is a period of four months as more particularly set out in Rule 8 of the said Rules. He submitted that this period of four months that has been prescribed in Section 10(1) has to also apply to a promoter when he seeks to execute and register a Declaration by submitting the property to the provisions of MAO Act. If this was not done

within the prescribed period (four months), then the embargo as set out in Section 10(2) would not come into play and the flat purchasers would not be barred or precluded from seeking registration of a co-operative society.

34. As far as this contention is concerned, we are unable to agree with the submissions of Mr Dhakephalkar. In our opinion, and as rightly submitted by Mr Chinoy, such an interpretation / construction would be ex-facie contrary to the settled principles. If we are to accept the interpretation of Mr Dhakephalkar, the same would amount to rewriting / adding words to the unambiguous language of Section 10(2) and which would result in the said provision being substantially altered. If in fact the intention of the Legislature was to prescribe a definite period by which a promoter was to submit the property to the provisions of the MAO Act [before the embargo as set out in Section 10(2) came into play], it would have specifically done so. It could have simply provided for one more option in Section 10(1). We find considerable force in the argument of Mr Chinoy that Section 10(2) is an independent provision under which no time period has been prescribed for submitting the property to the MAO Act so long as the same is done prior to an application being filed for registration of a co-operative

society or a company, as the case may be. We are clearly of the view that if we were to accept the interpretation of the Petitioners, the same would restrict and negate the plain and clear language of Section 10(2) by reading words into the statute that are conspicuous by their absence. Thus, to our mind, this would be contrary to the basic canons of interpretation and construction of a Statute. We, therefore, are unable to agree with the submissions of Mr Dhakelpahlar that before the embargo as stipulated in Section 10(2) can kick in, the promoter has to submit the property to the provisions of the MAO Act within a period of four months after a minimum number of persons required to form a co-operative society or a company have taken the flats. This contention of Mr Dhakephalkar is, therefore, rejected.

35. Notwithstanding the aforesaid, the next contention of Mr Dhakephalkar was that there was no impediment in registering a co-operative society under Section 10(2) of the MOFA, 1963, because the Promoter (Respondent No.1 in the present case) had not complied with the conditions contained therein, namely, that the Promoter had not informed the Registrar as defined in the Maharashtra Co-operative Societies Act, 1960 about submitting the property to the provisions of the MAO Act. This being the position,

the bar under Section 10(2) would not apply, was the submission.

36. We find considerable force in this argument. Section 10(2) of MOFA, 1963 [and as reproduced by us earlier] clearly stipulates that if any property consisting of a building or buildings is constructed or to be constructed and the Promoter submits such property to the provisions of the MAO Act by executing and registering a Declaration as provided by that Act, then the Promoter shall inform the Registrar of the same as defined in the MCS Act accordingly. Only once both these conditions are fulfilled [namely execution and registration and thereafter initiation], it would be unlawful to form any co-operative society or a company. Section 2(24) of the MCS Act defines the word “Registrar”, as a person appointed to be the Registrar of co-operative societies under the MCS Act. Section 3 of the MCS Act talks about the Registrar and his subordinates and reads as under:-

“3. Registrar and his subordinates.- The State Government may appoint a person to be the Registrar of Co-operative Societies for the State; and may appoint one or more persons to assist such Registrar (with such designations, and in such local areas or throughout the State, as it may specify in that behalf, and may, by general or special order, confer on any such person or persons all or any of the powers of the Registrar under this Act. The person or persons so appointed to assist the Registrar and on whom any powers of the Registrar are conferred, shall work under the general guidance,

superintendence and control of the Registrar. They shall be subordinate to the Registrar, and subordination of such persons amongst themselves shall be such as may be determined by the State Government."

37. Section 3A deals with temporary vacancies and reads thus:-

3A. Temporary vacancies.- If the Registrar or a person appointed to assist such Registrar is disabled from performing his duties or for any reason vacates his office or leaves his jurisdiction or dies, then-

- (a) in the case of the Registrar, (Special,) the Additional or Joint Registrar, in the office of the Registrar, and
- (b) in the case of a person appointed to assist the Registrar, the senior-most officer holding the next higher post, in the respective office,

shall unless other provision has been made in that behalf, hold temporarily the office of the Registrar or, as the case may be, of the person appointed to assist the Registrar in addition to his own office and shall be held to be the Registrar or the person appointed to assist the Registrar under this Act, until the Registrar or the person appointed to assist the Registrar resumes his office, or until such time as the successor is duly appointed and take charge of his appointment."

38. On reading these two provisions [sections 3 and 3A], what becomes clear is that the Registrar is an authority that is superior to the Assistant Registrar. Section 10(2) of MOFA, 1963 clearly stipulates that once a Deed of Declaration has been executed and registered under the provisions of the MAO Act, intimation of the same has to be given to the Registrar as defined under the

provisions of the MCS Act. It is only once both these conditions are fulfilled [namely execution and registration and thereafter intimation], would it be unlawful to register a co-operative society. In the facts of the present case, it is an admitted fact that the intimation as contemplated under Section 10(2) [dated 4th October, 2011] was not given to the Registrar as defined under the MCS Act. This intimation can be found at page 903 (compilation Vol. V). This letter is admittedly addressed to the office of the Assistant Registrar and not to the Registrar as defined under the provisions of the MCS Act. This being the factual position, we find considerable force in the argument of Mr Dhakephalkar that this intimation addressed to the Assistant Registrar, who being an authority subordinate to the Registrar, is no intimation at all as contemplated under Section 10(2) of the MOFA, 1963. It is now well settled that when a statute provides that a particular act needs to be done in a particular manner, it has to be done in that manner and no other. If one needs to refer to any decision in support of the aforesaid proposition a reference to a decision of the Supreme Court in the case of **State of Kerala v. Kerala Rare Earth & Minerals Ltd.**⁴ would be apposite:-

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17. It is well settled that if the law requires a particular thing to be done in a particular manner, then, in order to be valid the act must be done in the prescribed manner alone. (See CIT v. Anjum M.H. Ghaswala [CIT v. Anjum M.H. Ghaswala, (2002) 1 SCC 633], Captain Sube Singh v. Lt. Governor of Delhi [Captain Sube Singh v. Lt. Governor of Delhi, (2004) 6 SCC 440] , State of U.P. v. Singhara Singh [State of U.P. v. Singhara Singh, AIR 1964 SC 358 : (1964) 1 Cri LJ 263 (2)] and Mohinder Singh Gill v. Chief Election Commr. [Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405]) Absence of the Central Government's approval to reservation and a notification as required by Section 17-A, therefore, renders the State Government's claim of reservation untenable till such time a valid reservation is made in accordance with law. It is trite that the State Government's general executive power cannot be invoked to make a reservation dehors Section 17-A

(emphasis supplied)

39. This is more so, when one considers the language of Section 10(2) which makes it unlawful to register a co-operative society, once a Deed of Declaration is executed and registered by the Promoter and intimation is given of the same to the Registrar as defined under the MCS Act. We are clearly of the view that looking to the language of Section 10(2) of the MOFA, 1963, the same has to be strictly complied with, especially taking into consideration that the flat purchasers lose their right to form a co-operative society. In the facts of the present case, admittedly, an intimation as contemplated under Section 10(2) was not given to the Registrar as defined under the provisions of the MCS Act, but was given to the

Assistant Registrar, who is an officer subordinate to the Registrar. If the Legislature intended that the embargo as set out in section 10(2) would apply only once the intimation was given to the Registrar, and who was the Superior Officer, then full effect has to be given to the said provision. This is not having been done, we are clearly of the view that there was no impediment / bar under Section 10(2) from considering the application of the flat purchasers for registering the Petitioner No.2 society. Consequently, we find that the order passed by Respondent No.2 cannot be sustained in law.

40. Even otherwise, considering the provisions of the MOFA, 1963 read with the provisions of the MAO Act, we find that the order of Respondent No.2 cannot be sustained. Section 10(1) of MOFA, 1963 *inter alia* provides that, once 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 co-operative society or, as the case may be, as a company. The first proviso to Section 10(1) stipulates that if the Promoter fails within the prescribed period to submit an application to the Registrar for registration of the society

as provided in Section 10(1), the Competent Authority (Section 5A of the MOFA, 1963) 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. Section 10(2) provides that 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 MAO Act, by executing and registering a Declaration as provided by that Act, then the Promoter shall inform the Registrar as defined in MCS Act accordingly, and in such case, it shall not be lawful to form any co-operative society / company. Looking at the clear, unambiguous language of Section 10(2), what becomes clear is that before it becomes unlawful to form any co-operative Society, two conditions have to be fulfilled namely, (i) the Promoter has to submit said property to the provisions of the MAO Act by executing and registering a Declaration as provided by that Act; and (ii) the Promoter informs the Registrar (as defined in MCS Act) about the same. Since, the first condition to be fulfilled under Section 10(2) is that the promoter should submit the property to the provisions of the MAO Act, by executing a registering a Declaration as provided by that Act, one would also have to refer to the provisions of the

MAO Act. Section 2 of the MAO Act clearly stipulates that it applies only to a property, the sole owner, or all of the owners of which submit the same to the provisions of the MAO Act by duly executing and registering a Declaration. In other words, if the property that is submitted to the provisions of the MAO Act belongs to more than one owner, all would have to join in executing the Deed of Declaration, failing which the applicability of the Act itself would not arise. The word **“apartment”** has also been defined in Section 3(a) to mean a part of the property intended for any type of independent use, including one or more rooms or enclosed spaces located on one or more floors or part or parts thereof in a building, intended to be used for the reasons set out in the said definition. The word **“building”** is defined in Section 3(e) to mean a building containing of five or more apartments, or two or more buildings, each containing two or more apartments, with a total of five or more apartments for all such buildings, and comprising a part of the property. In turn **“property”** has been defined in Section 3(r) to mean the land, the building, all improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been, or are intended to be,

submitted to the provisions of the MAO Act.

41. In the facts of the present case as set out earlier, the purported Deed of Declaration was registered by Respondent No.1 only on 28th September, 2011. However, much prior thereto, by the year 2009, Respondent No.1 had admittedly sold and disposed of about 80 % of the flats by executing individual sale agreements with the flat purchasers. In fact by the end of the year 2006 itself, Respondent No.1 had sold more than 10 flats in the said building. This being the factual position, looking at the provisions of Section 2 as well as the definitions as set out in Section 3 of the words **“apartment”**, **“building”** and **“property”**, we do not think that Respondent No.1 could have unilaterally executed a Deed of Declaration on 28th September, 2011 under the provisions of the MAO Act. This is for the simple reason that Section 2 clearly provides that the MAO Act applies only to a property, the sole owner or all of the owners of which submit the same to the provisions of the MAO Act. Looking to the definitions of the words **“apartment”**, **“building”** and **“property”**, as on 28th September, 2011 (the date on which the Deed of Declaration was executed) Respondent No.1 could not be said to be the sole owner of the property as it had already disposed of 80% of the flats in the

building constructed by it. This being the position, this unilateral execution and registration of the Deed of Declaration (dated 28th September, 2011) was ex-facie contrary to the provisions of the MAO Act and could not be considered as a Declaration at all for the purposes of Section 10(2) of MOFA, 1963. We have reached this conclusion because the language of Section 10(2) clearly stipulates that if the promoter submits a property to the provisions of the MAO Act, the same is to be done by executing and registering a Declaration as provided by that Act. This clearly postulates that if the Declaration is not as per the provisions of the MAO Act, the bar under Section 10(2) [making it unlawful to form a co-operative society or a company] would not be attracted.

42. The Maharashtra Apartment Ownership Act, 1970 is an Act to provide for the ownership of an individual apartment in a building and to make such apartment heritable and transferable property. The MAO Act applies only if the pre-conditions for its application set out in Section 2 thereof are fulfilled. The word “declaration”, which finds repeated reference in Section 2 is defined in Section 3(j) to mean the instrument by which the property is submitted to the provisions of MAO Act, as provided by section 2, which words and figures were substituted for the words “as

hereinafter provided” by Maharashtra Act 53 of 1974. The definition does not end here and says further, and such Declaration as from time to time may be lawfully amended. Once the Declaration is an instrument, then, for it to have complete legal effect, it has to be in conformity with Section 11 and by Section 13, its registration is compulsory. Therefore, when the legislature employs the words “*as provided by that Act*” in Sub-section (2) of Section 10 of MOFA, it means that the provisions of the MAO Act are duly complied with. Therefore, as provided by that Act means in conformity and in accordance with the provisions of the MAO Act. Unless there is material before the Registrar, which would establish and prove that the promoter submitted the property to the provisions of MAO Act by executing and registering a declaration as provided by that Act, then alone it shall not be lawful to form any co-operative society of persons, who have taken the flats. The legislature has employed and used these words with a specific intent and purpose.

43. The MAO Act provides for ownership of an individual apartment in a building and to make such apartment heritable and transferable property and that Act has been enacted in 1970. On the date of that enactment, the MOFA, 1963 was already in

existence and in force. MOFA, 1963 seeks to regulate, in the State of Maharashtra, promotion of the construction, sale, management and transfer of flats on ownership basis. When the competent legislature realised that consequent on the acute shortage of houses in several areas of the State of Maharashtra, there were abuses, malpractices and difficulties relating to above matters and those are increasing, that it decided to step in and make the law. Once this is the purpose which is sought to be achieved and the MAO Act contemplating, by Section 14, removal from provisions of that Act, then, all the more we cannot place an interpretation on Sub-section (2) of Section 10 of MOFA, 1963 which would either clash with the MAO Act or render it nugatory. Equally, we cannot place such an interpretation on the provisions of the MAO Act (the later Act), which would nullify the effect of MOFA, 1963 namely, the earlier Act. That Act is specifically referred to in the Schedule to the MAO Act and Section 27 thereof.

44. Once we are of the opinion that the provisions of both enactments having more or less a common underlying theme, namely, to give legal recognition and status to an apartment as a property, make it heritable and transferable and equally its construction, sale, management and transfer needs to be regulated

so as to enable the flat takers/purchasers to utilise and enjoy it fully, then an interpretation which will allow both to operate in their respective fields, must be placed on their provisions. No interpretation which creates disharmony or conflict between two such enactments can be placed for that would be destructive of the legislative regime. If the aim, object and purpose of both legislations is understood, then, there is no hesitation in rejecting the contentions of Mr. Chinoy that in the facts and circumstances of the present case, it was not lawful to register a co-operative society. We are of the opinion that Sub-section (2) of Section 10 would operate provided the promoter has submitted the property to the provisions of the MAO Act in terms thereof and that the information of the same is given to the Registrar. It is only in such cases that it shall not be lawful to form any co-operative society or a company. Mr. Chinoy's arguments overlook the fact that there could be different and distinct legal entities that would be formed and in terms of Sub-section (1) of Section 10. It could be a co-operative society or a company. It is formed by persons who have taken flats. It is the promoter's obligation and duty to submit an application for registration of the organisation of persons who take the flats as a co-operative society, or as the case may be, a company. The promoter is obliged to join in the application for

membership of a co-operative society or in case of a company even in respect of flats, which have not been taken or which remained unsold. However, the legislature has taken care not to deprive the promoter of his right to dispose of the remaining flats in accordance with the provisions of MOFA, 1963. Therefore, a balancing act has been performed. Just as there is a regulation of the promotion of construction, sale, management and transfer of the ownership flats, equally, the right that is created in the promoter to dispose of the flats, which have not been taken by persons joining to form an organisation, remains unaffected and untouched. The principle of statutory interpretation, which harmonises and enables both statutes to co-exist without any conflict or collusion ought to be placed, therefore, on the statutory provisions in question.

45. In Principles of Statutory Interpretation by Justice G. P. Singh, 14th Edition, the learned author, emphasises and points out the essence of the rule of harmonious construction. That is that none of the provisions should be reduced to “useless lumber” or “dead letter”. That is not harmonious construction. These principles have also been applied in resolving the conflict between two different Acts as well. We have applied that very principle. We do not think that while holding as above, we have nullified the effect

and impact of either of the statutes. There is no basis for the complaint that if the interpretation as suggested and placed by us is upheld, then, it will not be possible to submit the property to the MAO Act. We do not think that language of Sub-section (2) of Section 10 gives any room for such complaint at all.

46. We, therefore, find that Respondent No.2 had completely misdirected itself in rejecting the application for registration of the Petitioner on the ground that this purported Deed of Declaration was challenged in a suit that is pending in this Court. It was the duty of Respondent No.2 to give full effect to Section 10(2) of the MOFA, 1963 and to examine whether the Declaration executed and registered under the MAO Act was in consonance with the MAO Act before it came to the conclusion that there was a bar from considering the application of the Petitioners for forming a co-operative society. This exercise, we find has not been undertaken by Respondent No.2 at all and he has completely abdicated his duty in this regard.

47. We also find from the facts of the present case that the unilateral Declaration has been executed behind the back of the flat purchasers. When they purchased their flats, the respective flat

purchasers were never informed that the property they were purchasing was going to be submitted to the provisions of the MAO Act. In fact, clause 24 of one of the agreements executed with the flat purchasers reads as follows:-

“24. The Purchaser/s along with the other purchasers of premises in the said Residential Building shall join in forming and registering the Society or association of flat owners or Limited Company to be known by such name as the Promoter may decide and for this purpose also from time to time sign and execute the application for registration and/or membership and other papers and documents necessary for the formation and registration of the Society or Limited Company or an association of flat owners and for becoming a member, including the bye-laws of the proposed Society and duly fill in, sign and return to the Promoter within 15 days of the same being forwarded by the Promoter to Flat Purchasers, so as to enable the Promoter to register the organization of the Flat Purchasers under Section 10 of the said Act, within the time limit prescribed by Rule 8 of the Maharashtra Ownership Flats (Regulation of the Promotion of the Construction, Sale, Management and Transfer) Rules, 1964. No objection shall be taken by the Purchaser/s if any changes or modifications are made in the draft bye-laws, or the Memorandum and/or Articles of Association or Declaration, as may be required by the Registrar of Co-operative Societies or the Registrar appointed under the Apartment Ownership Act or the Registrar of Companies, as the case may be, or any other Competent Authority.”

48. In fact on reading this clause, it is clear that Respondent No.1 never categorically informed the flat purchasers that the property was being subjected to the provisions of the MAO Act. The indication would be otherwise. Further more, as mentioned earlier,

the 1st Respondent had itself given an undertaking to the Municipal Commissioner on 11th June, 2010 (page 971 and 972 of the compilation Vol. V) that the ownership of the structure and other appurtenant user shall vest in all the owners and that the 1st Respondent is planning to form a proposed society of the said building which it proposes to construct. Further more, as late as 20th October, 2011, a receipt has been issued to one of the flat purchasers which indicates that part of the money that Respondent No.1 has received from said flat purchaser is towards formation of the society. The said receipt reads as under:-

“R E C E I P T

*Received with thanks from Mr. Nitin Radheshyam Agarwal & Mrs Nikita Nitin Agarwal a sum of Rs.26,95,504.00 (Rs. Twenty Six Lakh Ninety Five Thousand Five Hundred Four Only) vide cheque/ DD No. 293214603 dated 20-Oct-2011 drawn on Wire Transfer Amount received towards flat cost addl. adm. chsg. legal chgs, install, of water, electricity, Gas connection, **Formation of Soc.** Dev. Chgs. Club Facility and Service Tax for 4 BHK facing West-2104 in the building proposed to be called “Springs”.*

49. We, therefore, find that this unilateral execution and registration of the Deed of Declaration by Respondent No.1 submitting the property to the provisions of the MAO Act cannot be an impediment in Respondent No.2 considering the application of

the Petitioners for formation of a co-operative society.

50. Before parting, we must mention that we are in agreement with Mr Chinoy that the decisions relied upon by Mr Dhakephalkar will not apply in the facts situation before us. Those decisions have been correctly distinguished by Mr Chinoy and which we have set out earlier in this judgment.

51. In view of the foregoing discussions, we set aside the impugned order dated 24th August, 2016 passed by Respondent No.2 and restore the application for registration of the Petitioners on the file of Respondent No.2, to be considered denovo in the light of what we have held in this judgment and notwithstanding the pendency of suit No.212 of 2016 in this Court. Respondent No.2 shall decide the matter afresh uninfluenced by his earlier observations in the impugned order and which is set aside by us. Rule is made absolute in the aforesaid terms. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B.P.COLABAWALLA J.) (S.C.DHARMADHIKARI J)

52. After this judgement was pronounced, Mr Chinoy,

learned Sr. Counsel appearing for the contesting Respondent would pray that this Court should defer the proceedings before the Respondent No.2 till 16th January, 2017 to enable the contesting Respondent to consider their position, including challenging this judgement in a higher Court.

53. This request is opposed by Mr Jain appearing for the Petitioners. He would submit that given the number of flat takers and their anxious wait for formation of the organisation so as to enable them to administer and manage the property by themselves and not giving it to the promoters, this request should not be granted.

54. Having heard the counsel on this point, we are of the opinion that in the event Respondent No.2 commences the proceedings pursuant to our order and directions, he shall do so, but not pass final orders till 17th January, 2017.

(B. P. COLABAWALLA J.)

(S. C. DHARMADHIKARI J)