

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2968 OF 2004

Madhukar Sadashiv Bhalerao ...Petitioner
vs.
Sudharkar P. Upasani and Ors. ..Respondents

**WITH
SECOND APPEAL NO.223 OF 1999**

Madhukar Sadashiv Bhalerao ...Appellant
vs.
Pune Municipal Corporation and Anr. ...Respondents

Mr. Shriram Kulkarni, for the Petitioner in WP.No.2968 of 2004
Mr. Nitin Deshpande, for the Appellant in S.A.No.223 of 1999
Mr. Ashutosh Kulkarni a/w. Mr. Akshay Kulkarni, for Respondent
Nos. 1 and 2 in WP.No.2968 of 2004.
Mr. Ravi Kadam, AGP for Respondent-State in WP.No.2968 of 2004
Mr. Abhijit Kulkarni, for Respondent No. 1 in S.A.No. 223 of 1999
Mr. M.K. Irani, for Respondent No. 2 in S.A.No. 223 of 1999.

CORAM : M. S. SONAK, J.

RESERVED ON : 12th April, 2019

PRONOUNCED ON : 23rd April, 2019

JUDGMENT

- . Heard the learned counsel for the parties.
2. The challenge in the Writ Petition is basically to the judgment and orders dated 4th November, 1999 and 29th January, 2003 made

by the Cooperative Court and the Cooperative Appeal Court in Dispute No. 461 of 1997 instituted by the Petitioner (Madhukar). The dispute arose in the context of Respondent No. 2 (Society) allotting in favour of Respondent No. 1 (Upasani) the additional area admeasuring 613.41 sq.h. which according to the Petitioner-Madhukar, was a common amenity (pathway) as per the layout plan. Since, the allotment was by way of resolutions dated 11th April, 1987 and 14th October, 1986, Madhukar challenged such resolutions before the Cooperative Court and also sought for an injunction to restrain Upasani from carrying any construction or raising any compound or closing this pathway in any manner whatsoever.

3. The society and Upasani filed their responses to the Dispute No. 461 of 1997 raised by Madhukar before the Cooperative Court. Based upon the pleadings, issues were framed by the Cooperative Court, the main issue being whether the impugned resolutions were illegal, null and void. Madhukar examined himself as witness in the proceeding and produced oral as well as documentary evidence in support of his claim. The society and Upasani failed to lead any evidence in the matter. However, they were permitted to

and they filed their written arguments in opposition to the claim of Madhukar. The Cooperative Court by judgment and order dated 29th October, 1999 dismissed the Dispute No. 461 of 1997 instituted by Madhukar. Madhukar's Appeal No. 278 of 1999 was also dismissed by the Cooperative Appeal Court vide judgment and order dated 29th January, 2003. Hence, the present Petition by Madhukar.

4. During the pendency of proceeding before the Cooperative Court and Cooperative Appeal Court, it appears that there was restraint on Upasani undertaking the construction of compound wall on the suit property, which Madhukar had alleged was a common amenity i.e. pathway between the plot allotted to him and the plot allotted to Upasani. However, at some stage this interim order was vacated and Upasani pointed out to this Court that the construction of the compound wall was carried out. Therefore, this Court by its order dated 21st April, 2004 whilst issuing rule in the present Petition, made it clear that the construction of compound wall by Upasani would be subject to the outcome of Writ Petition No. 2968 of 2004 and Upasani was directed to file undertaking in the Court that if the Writ Petition is allowed, Upasani shall remove

the construction made on the disputed plot subject to right in Appeal and shall not claim any equity in the matter. The record indicates that such undertaking dated 5th May, 2004 was filed by Upasani.

5. Madhukar also instituted RCS No. 516 of 1991 *inter alia* against Pune Municipal Corporation (PMC) questioning the issue raised by PMC to Upasani *inter alia* for construction of the compound wall in the disputed plot. By judgment and decree dated 15th June, 1995, the Civil Suit came to be dismissed. The Appeal against the same was also dismissed by the First Appellate Court vide judgment and decree dated 9th February, 1999. Accordingly, Madhukar instituted Second Appeal No. 223 of 1999 which was ordered to be taken up along with Writ Petition No. 2968 of 2004. This was because the trial Court and the First Appellate Court dismissed Madhukar's suit/Appeal mainly on the ground that Madhukar's challenge to the society's resolutions for allotment of the disputed plot in favour of Upasani, had failed. Therefore, it was deemed appropriate that if Madhukar's challenge to such allotment in Writ Petition No. 2968 of 2004 were to succeed, then, same would have impact upon the decision of the trial Court and First

Appellate Court in the matter. Accordingly, Writ Petition No. 2968 of 2004 and Second Appeal No. 223 of 1999 were taken up for consideration together.

6. Mr. Shriram Kulkarni, learned counsel for the Petitioner in Writ Petition No. 2968 of 2004 and Mr. Nitin Deshpande, learned counsel for Appellant in S.A.No. 223 of 1999 submitted that there was overwhelming evidence on record which was not even challenged by Upasani or society that the disputed plot was a common amenity in the form of pathway between the two plots, in terms of the layout approved by the local authorities. They submit that neither the general body nor the managing committee of the society were vested with any powers to convert such common amenities into private amenity of Upasani. They point out that by the impugned resolution, society had allotted a common amenity which was meant for the benefit of all the members of the society to Upasani for his exclusive use. They point out that the society was merely a trustee in respect of such common amenity and therefore, would never have permitted conversion of such common amenity to some exclusive privilege for Upsani. They point out that neither the society nor Upasni had lead any evidence before the

Cooperative Court. They point out that evidence lead by Madhukar was therefore virtually not challenged. They submit that in such circumstances, the dispute raised by Madhukar was required to be allowed.

7. Mr. Shriram Kulkarni, learned counsel for Madhukar pointed out that there was a serious flaw in the reasoning of the Cooperative Court in relying upon hyper technicalities. He pointed out that Cooperative Court has dismissed Madhukar's dispute upon noticing that the society had made similar allotment in favour of two other members, since the said allotment was not questioned by Madhukar, Madhukar deserves no relief. Mr. Kulkarni, submits that this reasoning is completely flawed and on such basis, relief could not have been declined to the Madhukar. Mr. Kulkarni points out that Cooperative Court has relied upon the construction permission issued by PMC to Upasani and on such basis declined relief to Uasani. On the other hand, Mr. Kulkarni pointed out that the Civil Court relied upon the resolutions of the society and therefore declined relief to Madhukar who had challenged the permission granted by PMC as ultra vires the provisions of Municipalities Act.

8. Mr. Kulkarni, points out that Cooperative Court also misconstrued the fact that the society, in pursuance to the impugned resolutions had merely issued a circular which was signed by Madhukar in token of receipt. Mr. Kulkarni submits that the Cooperative Court and the Cooperative Appeal Court has virtually taken signature of Madhukar as acceptance of the resolutions made by the society or managing committee of the society. Mr. Kulkarni submits that such inference is clearly perverse and in any case of ultra vires resolutions of the society or its managing committee cannot be enforced even if the same have been accepted by any members of the society. Mr. Kulkarni points out that when the issue relates to legality or illegality of the resolutions or the power of the general body or the managing committee to issue resolutions, such resolutions cannot be validated regarding merely upon numbers. Mr. Kulkarni submits that moot issue in this matter was that disputed plot was nothing but a common amenity and such common amenity could not have been converted by the society into a private property of Upasani. He therefore submits that impugned orders warrant interference.

9. Mr. Nitin Deshpande, learned counsel for Appellant submits

that consequent upon setting aside all the resolutions alleging common amenity space to Upasani, the Second Appeal is liable to be allowed and even the permission issue by PMC, which in any case are ultra vires of the Municipal Act; are liable to be set aside.

10 Mr. Ashutosh Kulkarni, learned counsel appearing for Upasani in Writ Petition No.2968 of 2004 submitted that the impugned orders made by the Cooperative Court and Cooperative Appeal Court warrant no interference whatsoever. He pointed out that the general body had resolved in principle the allotment in favour of Upasani and other similarly placed members of the society and the managing committee consistent with the resolution of the general body, had merely made allotment. He points out that this is a private society and therefore the so called open space or common amenities were not public common amenities or public place rather they were owned by the society. He therefore, submits that society was justified in dealing with this space, as it deems fit. He pointed out that there was no challenge to the resolution of the general body and in the absence of challenge to the resolution of the general body, the two Courts were quite justified in rejecting the dispute raised by Madhukar.

11. Mr. Ashutosh Kulkarni, learned counsel submits that the general body of the society is the supreme body when it comes to the management and administration of the society is concerned. He submits that once the general body has taken a decision for allotment, the same is immune from challenge by any member of the society. In any case, he points out that resolution of the general body was never challenged and only the resolution of managing committee was challenged. He points out that since the managing committee is bound by the resolution of the general body which for want of challenge, had attained finality, there could be no infirmity in the resolution of the managing committee. He relies on ***Girish Mulchand Mehta and Anr. vs. Mahesh S. Mehta, 2010(2) Mh.L.J., 657*** and ***Mohammed Moinuddin and Ors. vs. Commissioner for Cooperation and Ors., (2014) 8 Supreme Court Cases 661*** in support of his contentions.

12. Mr. Ashutosh Kulkarni also pointed out that the judge of the Cooperative Court actually inspected the site and urged that there was no serious obstruction caused to Madhukar, on account of any construction in the disputed plot. Mr. Kulkarni submits that this is additional reason as to why the claim of Madhukar deserves to be

dismissed. Mr. Kulkarni, pointed out that construction was undertaken in accordance with the permission granted by the PMC and therefore, there was nothing illegal about the construction. He points out that even though no evidence was lead by the society, the claim of Madhukar deserved to be dismissed on the basis of documents produced by Madhukar and since this has been rightly done, the present Petition may be dismissed.

13. Mr. Abhijit Kulkarni, learned counsel for Respondent-PMC submitted that the suit instituted by Madhukar against the PMC was clearly not maintainable, for want of notice under section 149 of Maharashtra Regional Town Planning Act, 1966. He submits that the suit was rightly dismissed by the trial Court and such dismissal was rightly upheld by the Appeal Court. He therefore submits that even without going into the issue as to whether the resolutions of the society were justified or not, the suit had to be dismissed for want of notice. He therefore submits that the Second Appeal also deserves to be dismissed.

14. Mr. M.K. Irani, learned counsel for the Respondent No. 2 – Society submitted that there is change in the composition of the

managing committee of the society. He submits that the society has reconsidered the matter and finds that the disputed plot was indeed a common amenity which could not have been allotted to any member as his private property. He submits that the society has in fact taken up the matter with the local authorities and in pursuance of the same the local authorities have issued notices in connection with the illegalities concerning construction on the common amenities.

15. The rival contentions now fall for determination.

16. At the outset, it is necessary to note that the most vital issue which arises in this matter is whether the disputed plot which came to be allotted by the society to Upasani, was indeed a “common amenity” i.e. pathway or open space between two plots in terms of the layout originally approved by the authorities, on the basis of which the development has proceeded was at least required to proceed. If the material on record indicates that the disputed plot was indeed a common amenity, then the next question which arises for determination is whether the society was then entitled to allot the disputed plot in favour of Upasani so as to

convert this common amenity into a private property of Upasani. These are the main issues which arise for determination in this matter.

17. The material on record, overwhelmingly indicates that the disputed plot was a part of the common amenities in the original layout. There are clear averments made in the dispute Petition filed by Madhukar before the Cooperative Court. There is no serious denial regards this aspect. As if this was not sufficient, from the documents produced on record by Madhukar which went unchallenged, this production stands established. Neither the society nor Upsani challenged the documents in the evidence before the Cooperative Court. Even these documents unmistakably establish that the disputed plot is nothing but a portion of the common amenities in the original layout. Though this common amenity is described as pathway between plots of Upasani and Madhukar, in fact this common amenity is nothing but a mandatory open space required to be maintained in terms of approved layout.

18. In terms of the planning regulation, spaces between two plots

or open arises are required to be maintained as a part of the planning permission or the layout subject to which the development came to be permitted. Therefore, whether this common amenity is described as pathway or described as open space, is really not very relevant. What is relevant is that this space whether called as pathway between two plots or styled as open space between two plots, is a common amenity meant for the benefit of the society in terms of the approved layout.

19. True, the society may be the owner of such property which comprises the common amenity or pathway or the open space. However, this does not entitle the society to deal with this property in any manner as it chooses. The society, is basically a trustee in respect of such common amenities or common property and the society cannot convert this common amenity by way of impugned allotment to some private property of any of its members, whether it be Madhukar or Upasani. The common amenities have to remain common and cannot be converted by even the overwhelming majority of the members of the society into a private property of any member or members.

20. In this case, surprisingly, the Society as well as Upasani filed

a common written statement. This was possibly on the basis that Upasani was one of the office bearers of the Society. Though, there is no issue raised as regards participation of Upasani at the stage when the resolutions were passed for allotment of common amenity in favour of Upasani, generally when office bearers of the society have particular interest in the subject matter, which is personal to them, they should refrain from participating in the deliberations. This is on the basis that where there is a conflict between interests and duty, the elected representatives should refrain from participating in the decision making process. However, the impugned resolutions, need not be set aside on this ground, since, it appears, that this ground was never raised before the Cooperative Court or Cooperative Appeal Court.

21. However, the fact remains that the common written statement was filed and even in the common written statement, there is repeated reference to '*pathways*'. Only at one stage, it is stated that the pathway in-question was not '*common pathway*', but it was a pathway adjacent to the plot of Upasani, who alone, could use it. Surprisingly, neither Upasani nor any other office bearers of the society stepped in the witness box before the

Cooperative Court to make good the averments in the written statement. That apart, it is not even the case of Upasani that pathway was a part of the plot which was allotted to him by the society initially. From the material on record, it is more than apparent that the pathway which the society purported to allot to Upasani was a common amenity between two plots. Such common amenity, which was meant for the benefit of all the plot holders in the lay out and consequently, all the members of the society could not have been sold, transferred or allotted by the society to any one or more members of the society to exclusion of all others. Resolutions to this effect are clearly incompetent even assuming that the same were supported by majority of the members.

22. The two Courts have denied reliefs to the petitioner on grounds which are unsustainable. The first ground is that there were similar allotment in favour of two other members in relation to common amenities in the lay out by the society. The two Courts have reasoned that even the said two beneficiaries would be affected by grant of any relief and since, they were not parties, the relief has to be denied to the petitioner.

23. According to me, except for the statement in the written statement filed by Upasani and the society, there was no material produced on record in support of such statement. As noted earlier, neither Upasani nor any other office bearers of the society examined themselves in these proceedings. In any case, the two Courts could have restricted the reliefs to the petitioner *qua* only, Upasani. In fact, the petitioner had claimed relief only against Upasani and not against any other parties. However, this was not a good ground to deny the relief to the petitioner *qua* Upasani. In such matters, the society can never plead any equality of illegalities. The society cannot be heard to say that it had committed illegality in two other cases, therefore, illegality in the present case should be immune from judicial scrutiny.

24. The second reason stated by the two Courts is that the petitioner had not challenged the resolutions of General Body. Now if the resolutions of the General Body are perused, it is clear that the General Body has only delegated powers to the Managing Committee to take appropriate decision on the issue of request made by Upasani for allotment of common amenity, i.e., common pathway. Ultimately, it is the Managing Committee of which, it

appears, Upasani was himself a member, passed the impugned resolutions actually making the allotment. In such circumstances, the petitioner, could not have been non-suited on the ground of failure to challenge the resolutions of the General Body. Such common amenities are for benefit of the entire body of allottees and the same cannot be permitted to be converted into private property of individual allottees. Since these aspects have not been considered by the two Court in their proper perspective, the impugned judgments and orders warrant interference.

25. The Cooperative Court has also observed that the petitioner had accepted one of the resolutions, which is evident from his endorsement thereon. This is clearly an error apparent on the face of record. In pursuance of the resolutions, a circular was issued by the Managing Committee and it is on this circular that signature of the petitioner is found. The petitioner has stated that such signature does not indicate acceptance, but only receipt of the circular. This appears to be the correct position particularly in a situation where neither Upasani nor any other representatives of the society bothered to examine themselves before the Cooperative Court. In any case, the illegality by way of conversion of open

spaces or common pathways into private properties cannot be defeated by invoking the principles of estoppel. Accordingly, even this reasoning of the Cooperative Court cannot stand.

26. In *Girish Mehta (supra)*, the Division Bench of this Court has held that General Body of the society is supreme and once it had taken conscious decision to develop the suit building, some disgruntled members cannot raise any opposition to the same. This decision was in the context of redevelopment of building/suit property. The decision for redevelopment was itself a legal decision which was taken by adoption of democratic principle of majority. It is in this context that the Division Bench of this Court has held that individual members cannot challenge such decision which was itself legal, merely because they may have not supported such decision which was passed by the vote of majority of members. This decision turns on its own facts and can be of no assistance to either Upasani or the society.

27. In the present case, the very decision of allotment of common amenities like pathways, meant for benefit of all members or all plot allottees to Upasani for his exclusive and private use, was not

a legal decision. Such a decision cannot gain immunity, assuming that the same was supported by majority of the members of the General Body. There is also no clear material on record that the General Body had in fact approved such a decision. The record at the highest indicates that the General Body had left the issue for decision to the Managing Committee. The Managing Committee has ultimately resolved allotment in favour of Upasani, even though, Upasani was himself a member of the Managing Committee. The decision in *Girish Mehta (supra)* is therefore, of no assistance to the respondents in this case.

28. In *Mohammed Moinuddin (supra)*, the issue involved related to legitimate use of the property of the Cooperative Society. It is in these circumstances that the Hon'ble Supreme Court observed that the property which was purchased by the society and which vested in the society must be dealt with by the society, by adopting cooperative principles. The Supreme Court held that it is not for the individual members of the society to claim in what manner the land should be dealt with for the purpose of distribution amongst its members. The Supreme Court held that the members who contributed their funds to the society, have no exclusive right to

claim any share in the property on the ground that they made the investments for the purchase of the land.

29. Again, the distinguishing feature in *Mohammed Moinuddin (supra)* and was that the matter related to legitimate use of the property of the society. This was not a case where the society intended to use its property for purposes prohibited by law. As between the range of legitimate activities to which the society's property can be put to use, the Hon'ble Supreme Court held that the decision as to which precise activity, the land must be used, has to be left to the decision of the society itself arrived at on the basis of cooperative principles.

30. However, in the present case, the society, even on the basis of support from the majority could not have resolved to allot common amenities to individual members. The society, may be the owner of the common amenities, but it holds any common amenities in trust on behalf of the members of the society. The common amenities cannot be converted into private properties, relying upon the support of the majority of the members. In this case, there is no evidence that the impugned resolutions by which common

amenities were allotted in favour of Upasani had the support of majority of the members. However, even assuming that such resolutions had the support of the majority of the members of the General Body of the society that by itself, will not render legal, any act which, at the very inception was not legal. Therefore, the decision in *Mohammad Moinuddin (supra)* is also of no assistance to the respondents in the present matter.

31. In ***Harijan Lay Out Sudhar Samiti and ors vs. The State of Maharashtra and ors. - 1997 (99) BLR 434*** , the Division Bench of this Court held that it is a settled law that once a space is earmarked/reserved in the plan, the conversion is not permissible. This was in the context of admitted conversion of a place reserved for public parks in the lay out which was sought to be converted to private use.

32. In ***Bangalore Medical Trust vs. B. S. Muddappa and ors. - AIR 1991 SC 1902***, though, in the context of public authorities purporting to permit a private nursing home upon an open space reserved for a public park in a lay out, the Hon'ble Supreme Court observed that a private public nursing home, which is essentially

commercial venture cannot be substituted for a public park. No town planner would prepare a blue print without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town planning or development. Acts of different States require even private house-owners to leave open space in front and back for lawn and fresh air. Absence of open space and public park, in present day when urbanisation is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health hazard. To say, therefore, that by conversion of a site reserved for low lying park into a private nursing home social welfare was being promoted was oblivious of true character of the two and their utility.

33. The observations in *Bangalore Medical Trust (supra)* in the context of regulations which require even private house owner to leave open space in front and back for lawn and fresh air are significant. In the present case, when the lay out was approved, deliberately, pathways or open spaces were maintained between the plots. This serves vital public purpose or serves a vital purpose *qua* entire lay out is concerned. If, the society or rather, the Managing Committee members of the society decided to

appropriate such common amenities, common pathways or common open spaces for individual and private use of the members or the plot allottees then, health hazards are bound to ensue. The society, cannot be permitted to act in such a manner even assuming that such acts are beaked by majority.

34. In **S. Nagaraj (Dead) by Lrs. And ors. B.R. Vasudeva Murthy and ors. - (2010) 3 SCC 353**, the Hon'ble Supreme Court has stressed upon the compliance with the conditions set out in the lay out plan particularly with regard to appurtenant plan allotted for civil amenities and common use.

35. In **DLF Limited vs. Manohan Lowe and ors. - (2014) 12 SCC 231**, the Supreme Court, in the context of the provisions of Haryana Development and Regulation of Urban Areas Act, 1975 and the Haryana Apartment Ownership Act, 1983, has held that each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration and such percentage shall be computed by taking as a basis the value of the apartments in relation to the value of the property. The common areas and facilities shall also remain

undivided and apartment owner or any other person can use common areas and facilities in accordance with the purpose for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners. The apartment owners and common areas and facilities in the percentage expressed in the declaration, withing in the meaning of sections 3(f) (i) to (vi) and (viii) and it is also open to the coloniser to provide, at its own cost, the community and commercial facilities referred to in clause (7) of section 3(f) read with section 3 (3) (f)(iv) of the Development Act by including them in the declaration. The coloniser cannot also, under certain circumstances, confer any undivided interest to an exclusive set of apartment owners to the detriment of similar apartment owners, who have apartments in other phases or a larger colony or city.

36. In *DLF Ltd (supra)*, a contention was raised that since silver Oaks Apartments was a gated colony, therefore, the development which have taken place inside the boundary walls of that colony are to be treated as parts of internal development works and, therefore, these are parts of common areas. This contention was rejected when it came to the construction of two nursery schools,

three shops and one community center which cannot be treated as '*common areas and facilities*' However, this argument was accepted when it came to common passages, staircases, lifts which were regarded as common areas and facilities. In the present case, pathways between plots in the lay out, are clearly common amenities and the society, was not at all justified in converting this common amenities into private amenities by way of allotment of such pathways in favour of Upasani.

37. For all the aforesaid reasons, the impugned orders made by the Cooperative Court and the Cooperative Appeal Court are required to be set aside and the same are hereby set aside. Upasani is liable to be directed to remove the construction put up by him on the disputed plot, consistent with the undertaking given by him on 5th May 2004, no doubt, without prejudice to his rights of appeal.

38. Insofar as Second Appeal No. 223 of 1999 is concerned, in view of the aforesaid order made in Writ Petition No. 2968 of 2004, there is no necessity to interfere with the judgments and order made by the Cooperative Court and the Cooperative Appeal Court.

The judgments and orders, really, do not touch the merits of the matter but dismissal of the suit was mainly on the ground that the appellant Madhukar Bhalerao had failed in his challenge to the resolutions of the society and further, there was no valid notice to the PMC before institution of the suit. Now that the resolutions of the society have been set aside, the first ground does not survive. The second ground, however, might survive but the same, will not preclude the appellant for instituting a fresh suit after furnish of the statutory notice if and when occasion therefor arises. As long as the impugned resolutions stand set aside and as long as direction for restoration of the pathway is maintained, there would possibly arise no action for the appellant Madhukar to pursue the relief for setting aside the permissions granted by PMC to Upasani to undertake construction of compound wall etc. in the disputed plot. It is only if the resolutions and consequent allotment in favour of Upasani is restored that cause of action might accrue to the appellant Madhukar to question the permissions granted by PMC. Besides, it is necessary to note that though the appellant Madhukar had questioned the grant of permission by PMC, the appellant Madhukar had failed to implead Upasani as a defendant in the suit. Any relief in the suit would have naturally affected

Upasani. This is another reason as to why there is no case made out to entertain the appellant's Second Appeal at this stage.

39. The Second Appeal is therefore, dismissed with liberty to the appellant Madhukar to institute a fresh suit, if he so desires, after issuance of statutory notice to PMC and impleading Upasani as defendant. It is made clear that this liberty is not to be construed as precluding the defendants in the suit, if instituted from raising all permissible objections, including *inter alia* objections on the ground of limitation etc. The Second Appeal is accordingly, dismissed with liberty as aforesaid.

40. Accordingly, Writ Petition No. 2968 of 2004 and Second Appeal No. 223 of 1999 are disposed of with the following order:

(a) The impugned judgments and orders dated 4th November 1999 and 29th January 2003 are quashed and set aside;

(b) The impugned resolutions dated 11th April 1987 and 14th October, 1986 are declared illegal and are set aside. Consequently, the allotment of the disputed plot, which is

common amenity in favour of Upasani (respondent No.1) is hereby set aside;

(c) Upasani (respondent No.1) is hereby directed to demolish the construction put up by him in the disputed plot allotted to him on the strength of the aforesaid impugned resolutions within a period of three months from today, consistent with the undertaking dated 5th May 2004 furnished by him to this Court, subject, no doubt, to his right of appeal;

(d) Rule is made absolute in the aforesaid terms. There shall be no order as to costs;

(e) Second Appeal No. 223 of 1999 is dismissed with liberty to the appellant Madhukar to institute a fresh suit, if he so desires after issuance of statutory notice to PMC and impleading Upasani as the defendant. It is made clear that this liberty is not to be construed as precluding the defendants to such a suit, if instituted, from raising of permissible objections, including *inter alia* objections on the

ground of limitation etc.. The Second Appeal No. 223 of 1999 is accordingly, dismissed with liberty in the aforesaid terms;

(f) There shall be no order as to costs in the Second Appeal as well as in the Writ Petition.

(g) Civil Application, if any, do not survive and is disposed of accordingly.

(M. S. SONAK, J.)