

7 September 2023

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11899 OF 2022

Mistry Park CHS Ltd., 77
Bhulabhai Desai Road, Mumbai-
400 026.a

...PETITIONER

: V/s. :

1. Dr. Bharat Prem Shivdasani
2. Dr. Haresh Prem Shivdasani
R/at. Flat No.9/26, Shyam
Niwas, 77, Bhulabhai Desai
Road, Mumbai-400 026.
3. Deputy Registrar, Co-
operative Societies, D-Ward,
Mumbai.
4. The Divisional Joint Registrar
of Co-operative Societies,
Malhotra House, GPO, Mumbai.

...RESPONDENTS

Mr. G.S. Gobbole, Senior Advocate i/by. Mr. S.P. Kanuga a/w. Ms. Sapna Math, for Petitioner.

Mr. Mustafa Doctor, Senior Advocate a/w. Mr. Lalan Gupta a/w. Mr. Rohit Iyengar i/by. Mr. Shardul Amarchand Mangaldas co. for Respondents No.1 and 2.

Mr. P.P. Pujari, AGP for State-Respondents No.3 and 4.

7 September 2023

CORAM : SANDEEP V. MARNE, J.**Reserved on : 28 August 2023.****Pronounced on : 7 September 2023****JUDGMENT:**

1. Petitioner, a Co-operative Housing Society is aggrieved by order dated 18 October 2021 passed by the Deputy Registrar of Co-operative Societies directing refund of amounts recovered from Respondents No.1 and 2 in respect of Shop No.1 towards non-occupancy charges or to adjust the same from future maintenance bills. The order is passed in exercise of powers under Section 79(2) (b) of the Maharashtra Co-operative Societies Act, 1960 (**Act of 1960**). The Managing Committee of the Society is threatened with action under Section 154B-27(2) upon failure to implement the directives. Aggrieved by the decision of the Deputy Registrar, Petitioner-Society filed Revision before the Joint Registrar of Co-operative Societies, which is rejected by order dated 22 March 2022 upholding Deputy Registrar's decision. Petitioner-Society is accordingly challenging the decisions of the Deputy Registrar and the Divisional Joint Registrar in the present petition.

2. It is Petitioner-Society's case that on 8 March 1966, lessors of the plot executed a lease in favour of the Society and one of the conditions for lease in Clause-2(f) was not to use the building for any purpose other than as private residences and further not to use

motor garages for any purpose other than for garaging the motor cars. The Developer-Mistry Construction Company constructed two buildings consisting of residential flats on upper floor and garages on the ground floor. One, Dr. Prem Kalyandas Shivdasani purchased garage 'A' from the Developer. He does not own any residential flat in the building. The occupiers of the building have formed Co-operative Society and have adopted by-laws which are registered with the Registrar on 18 December 1965. By-law No.6 limits admission of membership to the number of tenements or plots available for allotment. It is Petitioner-Society's case that only flat owner or plot owner can become member of the Society. Under Clause-7(a), there is a provision for admission of nominal member who does not enjoy any right of membership or receive any advantage or benefit of dividend. Dr. Prem Kalyandas Shivdasani was admitted as a nominal member of the Society.

3. Dr. Prem Kalyandas Shivdasani was using the garage for running his clinic which according to the Society is not permissible in law. He expired in the year 1992 leaving behind his wife Nirmala and two sons, Dr. Bharat and Dr. Haresh. Smt. Nirmala Prem Shivdasani held a nomination from her husband and was brought on record as a nominal member. Smt. Nirmala Shivdasani expired on 9 September 2018. On her death, Respondents No.1 and 2 made an application on 10 October 2019 stating that the mother had nominated them to hold 60% (Dr. Bharat) and 40% (Dr. Haresh) shares in the garage. They requested the Society to add themselves as

nominal members by submitting applications in prescribed format. On 28 November 2020, Respondents No.1 submitted an application for issuance of Share Certificate/Sinking Fund Certificate.

4. It appears that the Petitioner-Society has been levying non-occupancy charges from the occupiers of Garage/Shop No.1 on the ground of use of the same for purposes other than for garaging of cars. It appears that the Society adopted a Resolution in its meeting on 12 March 2021 to levy non-occupancy charges only to the extent of 10% of service charges and made the said decision applicable from the date of the meeting. Respondents No.1 and 2 filed application dated 15 March 2021 under Section 154B of the Act of 1960 before the Deputy Registrar praying for refund of non-occupancy charges with interest as well as sought restraint order against the Society from levying non-occupancy charges in future. The application was resisted by the Petitioner-Society by filing reply contending that beyond directing the Society to levy non-occupancy charges to the extent of 10% service charges, the Deputy Registrar did not have jurisdiction to direct refund of levy already made. Plea of limitation was also raised. The application was also opposed on merits.

5. The Deputy Registrar passed order dated 18 October 2021 allowing the application of Respondent Nos. 1 and 2 and in exercise of powers under Section 79(2)(b) of the Act of 1960, directed the Society to refund the amount recovered towards non-occupancy charges or to adjust the same in future maintenance bills.

It is further directed that, failure to comply with the order within 30 days would entail action under Section 154B-27(2) against the Managing Committee.

6. The Petitioner-Society preferred Revision Application No.699/2021 before the Divisional Joint Registrar challenging the order of the Deputy Registrar. The Divisional Joint Registrar heard Revision Application No.699/2021 together with Appeal No.353/2012 filed by the Society opposing grant of regular membership to Respondents No.1 and 2 and decided both by common order dated 22 March 2022 and proceeded to dismiss Revision Application No.699/2021 as well as Appeal No.353/2021. Aggrieved by the decision of the Divisional Joint Registrar, the Petitioner-Society has filed the present petition.

7. Appearing for Petitioner-Society, Mr. Godbole the learned senior advocate would submit that the order passed by the Deputy Registrar is wholly without jurisdiction. That Respondents No.1 and 2 filed their application before the Registrar ostensibly under Section 154B-27 of the Act of 1960. That under Section 154B-27, the Registrar does not have any jurisdiction to direct refund of levy already made. He would further submit that though the Deputy Registrar has referred to the provisions of Section 154B-27(1) in the opening portion of his order, in the operative portion, he has also referred to the provisions of Section 79(2)(b). Section 79 deals with Society's obligation to file returns and statements and

Registrar's power to enforce performance of obligations. That Section 79 has nothing to do with levy of non-occupancy charges or power of the Registrar to order refund.

8. Mr. Godbole would submit that, at the highest, Respondents No.1 and 2 could have exercised remedy of filing a Dispute under Section 91 of the Act before a Co-operative Court as levy of non-occupancy charge is admittedly a dispute touching the business of the Society. That Section 92 of the Act prescribes limitation for raising a dispute under Section 91. That even if it is assumed that the Deputy Registrar had jurisdiction to adjudicate prayer of Respondents No.1 and 2 to direct refund, the prayer was clearly barred by limitation. He would further submit that the society had already taken a corrective action by levying non-occupancy charges within the permissible limit as per order issued by the State Government under Section 79A of the Act and therefore the order of the Registrar in directing refund in respect of a past levy is wholly without jurisdiction. He would pray for setting aside the orders, both of the Deputy Registrar and Divisional Joint Registrar.

9. *Per-contra*, Mr. Doctor the learned senior advocate appearing for Respondent Nos. 1 and 2 would oppose the petition. He would submit that the Society had been illegally and arbitrarily levying non-occupancy charges in violation of express orders passed by the State Government under Section 79A of the Act. He would further submit that the Society has illegally recovered non-occupancy

charges at the rate of Rs.5,000/- per month during 1 January 1996 to 30 September 2010, at Rs.8,000/- per month during 1 October 2010 to 31 March 2014 and at the rate of Rs.10,000/- per month from 1 April 2014 onwards. That the Registrar has necessary jurisdiction to enforce orders issued by the State Government and also to declare any action of the Society, contrary to such orders, as illegal. That the State Government had issued order under Section 79A of the Act on 14 March 1955, under which non-occupancy charges could not be more than one time service charge which was Rs.1220/- during the relevant time. He would then invite my attention to the order dated 1 August 2001 issued by the State Government under Section 79A of the Act, under which a Society cannot charge non-occupancy charges in excess of 10% of the service charge. That the Society grossly violated the said orders of the State Government and continued levying non-occupancy charges in excess of the limit prescribed in the order.

10. Mr. Doctor would submit that since the levy is *ex-facie* illegal, no period of limitation would apply for seeking its refund. He would submit that it is well settled law that no period of limitation applies for seeking refund of illegal levy. In this connection, he would rely upon the judgment of Division Bench of this Court in **Wipro Products Limited V/s. Union of India**, 1980 SCC Online 484. He would further submit that the order passed by the Deputy Registrar is perfectly within limitation as the Registrar

has jurisdiction under Section 79(2)(b) to enforce orders issued by the State Government. He would pray for dismissal of the petition.

11. Rival contentions of the parties now fall for my consideration.

12. Petitioners have raised two objections of jurisdiction and limitation while challenging the impugned decisions of the Deputy Registrar and Divisional Joint Registrar. I accordingly proceed to deal with both the objections. So far as objection of jurisdiction is concerned, perusal of the order passed by the Deputy Registrar would indicate reference to the two provisions of the Act of 1960. The heading of the order states that it is passed under provisions of Section 154B-27(1). In the operative portion of the order, the Deputy Registrar has stated that the order is passed in exercise of jurisdiction under Section 79(2)(b). Again, in the operative portion, after issuing directions for refund of non-occupancy charges in exercise of powers under Section 79(2)(b), the Deputy Registrar has threatened the Managing Committee of the Society of action under Section 154B-27(2).

13. It would therefore be necessary to refer to the relevant provisions of Section 154B-27 which reads thus :

154B-27. Obligation of society to take action and Registrar's powers to enforce:

(1) If any society is required to take action for performance of its obligations, responsibilities and duties as provided in this

Act, rules and bye-laws or to execute the orders issued by the State Government or by the Registrar, from time to time, and such actions are not taken or such orders are not executed, the Registrar *suo motu* or on the application may issue directions to take such action or actions or execute such orders.

(2) Where any society is required to take any action or to execute the orders as provided in the foregoing sub-section and such action is not taken or orders are not executed,-

(i) within the time provided in this Act, rules or the bye-laws or in the order as the case may be;

(ii) where no time is provided, within such time having regard to the nature and extent of the action to be taken as the Registrar may specify by notice in writing, the Registrar may himself or through a person authorized by him take such action or execute such order at the expense of the society and such expenses shall be recoverable from the responsible officer of the society as if it were arrears of land revenue

Provided that, before issuing an order or direction and fixing the responsibility of payment of expenses an opportunity of being heard shall be given to the officer of society to whom the Registrar considers to be responsible for not taking such action or not executing such orders.

13. Under sub-section (1) of Section 154B-27, the Registrar is conferred with power to issue directions for ensuring performance of obligations, responsibilities and duties by a Society provided under the Act, Rules and Bye-laws, as well as for executing the orders issued by the State Government. Thus, under sub-section (1) of Section 154B-27, the Registrar will have jurisdiction to issue a direction to the Society to comply with any order of the State Government under

the provisions of the Act. State Government can give directions in public interest under Section 79A of the Act, which reads thus :

79A. Government's power to give directions in the public Interest, etc.

(1) If the State Government, on receipt of a report from the Registrar or otherwise, is satisfied that in the public interest or for the purposes of securing proper implementation of co-operative production and other development programmes approved or undertaken by Government, or to secure the proper management of the business of the society generally, or for preventing the affairs of the society being conducted in a manner detrimental to the interests of the members or of the depositors or the creditors thereof, it is necessary to issue directions to any class of societies generally or to any society or societies in particular the State Government may issue directions to them from time to time, and all societies or the societies concerned, as the case may be, shall be bound to comply with such directions.

(2) The State Government may modify or cancel any directions issued under sub- section (1), and in modifying or cancelling such directions may impose such conditions as it may deem fit.

(3) Where the Registrar is satisfied that any person was responsible for complying with any directions or modified directions issued to a society under sub-sections (1) and (2) and he has failed without any good reason or justification, to comply with the directions, the Registrar may by order-

(a) if the person is a member of the committee of the society, [declare him to be disqualified to be or to continue to be a member of the committee of any society,] for a period of six years from the date of the order;

(b) if the person is an employee of the society, direct the committee to remove such person from employment of the society forthwith, and if any member or member of the committee, without any good reason or justification, fail to

comply with this order, declare them disqualified as provided in clause (a) above:

Provided that, before making any order under this sub-section, the Registrar shall give a reasonable opportunity of being heard to the person or persons concerned and consult the federal society is affiliated.

Provided further that, such federal society shall communicate its opinion to the Registrar within a period of forty-five days from the date of receipt of communication, failing which it shall be presumed that such federal society has no objection to take action under this section and the Registrar shall be at liberty to proceed further to take action accordingly.]

Any order made by the Registrar under this section shall be final.

14. It is a common ground that the State Government has issued orders dated 14 March 1995 and 1 August 2001 in exercise of its powers under Section 79A of the Act. There is no challenge by either side to the orders so passed by the State Government under Section 79A of the Act and infact the Society has come up with a case that it has complied with the said directions by passing a Resolution on 12 March 2021 by levying of non-occupancy charges in accordance with the order dated 1 August 2001. Thus, if the Society was not to comply with the order issued under Section 79A of the Act, the Registrar has jurisdiction under sub-section (1) of section 154B-27 to direct Society to comply with the order. If after issuance of such direction, if Society failed to comply with such a directive, the Registrar is empowered with further power to take action against the Society under sub-section (2) of Section 154B-27.

15. In the present case, there was no occasion for the Registrar to issue any directive under sub-section (1) of Section 154B-27 since the Society had already complied with State Government's orders issued under Section 79A.

16. Since the Deputy Registrar has exercised power under Section 79(2)(b), it would be necessary to refer to the said provision, which reads as under :

79. Society's obligation to file returns and statements and Registrar's power to enforce performance of such obligations:

(1) The Registrar may direct any society or class of societies to take action to comp with the provisions of this Act, rules made thereunder, by-laws of the society or any order passed by the Registrar under this Act; and the officer or officers of the society shall be bound to comply with order within the period specified therein.

(1-1A) The registrar may direct any society or class of societies, to keep proper books of accounts in such form, including electronic or any other form, as may be prescribed with respect to all sums of money received and expended by the society, and the matters in respect of which the receipt and expenditure take place all sales and purchases of goods by the society, and the assets and liabilities of the society, and to furnish such statements and returns and to produce such records as he may require from time to time; and the officer or officers of the society shall be bound to comply with his order within the period specified therein.

(1A) Every society shall file returns within six months of the close of every financial year to which such accounts relate, to the Registrar or to the person authorised by him. The returns shall contain the following matters, namely :-

- (a) annual report of its activities;
- (b) its audited statement of accounts;

- (c) plans for disposal of surplus funds as approved by the general body of the society;
- (d) list of amendments to the bye-laws of the society, if any;
- (e) declaration regarding date of holding of its general body meeting and conduct of elections when due;
- (f) any other information required by the Registrar in pursuance of any of the provisions of this Act.

(1B) Every society shall also file a return regarding the name of the auditor or auditing firm from a panel approved by a State Government in this behalf, appointed in the general body meeting together with his written consent, within a period of one month from the date of annual general body meeting.

(2) Where any society is required to take any action [including filing of returns] under this Act, the rules or the bye-laws, or to comply with an order made under the foregoing sub-sections), and such action is not taken-

- (a) within the time provided in this Act, the rules or the bye laws, or the bye-laws, or the order as the case may be, or
- (b) where no time is so provided, within such time, having regard to the nature and extent of the action to be taken, as the Registrar may specify by notice in writing,

the Registrar may himself, or through a person authorised by him, take such action, at the expense of the society; and such expense shall be recoverable from the society as if it were an arrear of land revenue.

(3) Where the Registrar takes action under sub-section (2), the Registrar may call upon the officer or officers of the society whom he considers to be responsible for not complying with the provisions of this Act, the rules or the bye-laws, or the order made under sub-sections (1) and (1-1A)] and after giving such officer or officers an opportunity of being heard, may require him or them to pay to the society the expenses paid or payable by it to the State Government as a result of their failure to take action and to pay to the assets of the society such sum not exceeding one hundred rupees as the Registrar may think fit for each day until the Registrar's directions are carried out.

(4) The Registrar or the authorised person on his behalf shall scrutinise the returns and information so received and take further necessary action, if required.

17. Section 79 of the Act of 1960 essentially deals with Society's obligation to file returns and statements and Registrar's power to enforce performance of such obligations. Sub-section (2) of Section 79 confers power on the Registrar to take action for non-compliance with the provisions of the Act, Rules or Bye-laws. Mr. Godbole has contended that this power under sub-section (2) of Section 79 is confined to issuance of directives only with regard to filing of returns and statements. The submission does not appear to be entirely correct as sub-section (2) uses the words 'including filing of returns' which would mean that the power conferred on the Registrar under Section 79 (2) does not appear to be restricted to filing of returns only. However, this discussion becomes academic in view of the position that the order issued by the State Government has been complied with in the present case by adopting Resolution dated 12 March 2021 by the Society.

18. Thus, under the provisions of sub-section (1) of Section 154B-27, as well as under Section 79(2)(b), Registrar can at best take action against the Society to ensure compliance with the orders passed by the State Government under Section 79A. In the present case, however the Registrar has gone ahead and directed refund of non-occupancy charges levied in respect of the past period. This

power of the Registrar to direct refund of levy is not traceable to either Section 154B-27 or Section 79(2)(b) of the Act of 1960.

19. In this context, it would be necessary to refer to the provisions of Section 91 of the Act of 1960 which reads thus :

91. Disputes

(1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the committee or its officers, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated or by a creditor of the society, to the co-operative Court if both the parties thereto are one or other of the following:--

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society or the official Assignee of a deregistered society.

(b) a member, past member of a person claiming through a member, past member of a deceased member of society, or a society which is a member of the society for a person who claims to be a member of the society;

(c) a person other than a member of the society, with whom the society, has any transactions in respect of which any restrictions or regulations have been imposed made or prescribed under sections 43, 44 or 45, and any person claiming through such person;

(d) a surety of a member, past member or deceased member, or surety of person other than a member with whom the society has any transactions in respect of which restrictions have been prescribed under section 45, whether such surety or person is or is not a member of the society;

(e) any other society, or the Liquidator of such a society '[or deregistered society or the official Assignee of such a de-registered society.

Thus, failure of the Society to refund excess levy to a member would fall within the definition of Dispute under Section 91 of the Act as it undoubtedly touches business of the Society. Thus under Section 91 of the Act, a member would have a remedy to recover excess levy made by the Society.

20. In my view, therefore the direction issued by the Deputy Registrar for refund of excess non-occupancy charges recovered from Respondents No.1 and 2 in respect of past period is wholly without jurisdiction.

21. Coming to the second aspect of limitation, provisions of Section 92 of the Act would be relevant which reads thus :

92. Limitation

(1) Notwithstanding anything in the Limitation Act, 1963, but subject to the specific provisions made in this Act, the period of limitation in the case of a dispute referred to the Co-operative Court under the last preceding section shall-

(a) when the dispute relates to the recovery of any sum, including interest thereon, due to a society by a member thereof be computed from the date on which such member dies or ceases to be a member of the society;

(b) when the dispute is between a society or its committee, and any past committee, any past or present officer, or past or present agent, or past or present servant or the nominee, heir or legal

representative of a deceased officer, deceased agent or deceased servant of the society, or a member, or past member, or the nominee, heir or legal representative of a deceased member and when the dispute relates to any act or omission on the part of either party to the dispute, be six years from the date on which the act or omission with reference to which the dispute arose, took place;

(c) when the dispute is in respect of any matter touching the constitution, management or business of a society which has been ordered to be wound up under section 102, or in respect of which a nominated committee for an administrator] or committee or authorised person has been appointed under sections 77A, 78 or 78A, be six years from the date of the order issued under section 77A, 78 or 78A or, under section 102, as the case may be];

(d) when the dispute is in respect of an election of a committee or officers] of the society, be [two months] from the date of the declaration of the result of the election.

(2) The period of limitation in the case of any other dispute except those mentioned in the foregoing sub-section which are required to be referred to the Co-operative Court under the last preceding section shall be regulated by the provisions of the Limitation Act, 1963), as if the dispute were a suit and the Co-operative Court a Civil Court.

(3) Notwithstanding anything contained in sub sections (1) and (2), the Co-operative Court may admit a dispute after the expiry of the limitation period if the Applicant satisfied the Co-operative Court that he had sufficient cause for not referring the dispute within such period and the dispute so admitted shall be a dispute which shall not be barred on the ground that the period of limitation had expired.

Thus, under Section 92, period of limitation of six years is prescribed in respect of a dispute between the Society and its member. In that view of the matter, whether Respondent Nos.1 and 2 would be entitled to recover the entire levy made from 1 January 1996 in view

of prescription of period of limitation under Section 92 becomes questionable. Mr. Doctor has placed reliance on the judgment of this Court in ***Wipro Products Ltd.*** (supra) wherein it has held in para-9 as under :

9. The submission of Shri Govilkar that the claim of the petitioners is barred by Rule 11 of the Central Excise Rules is also without any merit. The levy of Central Excise by inclusion of post-manufacturing expenses is totally without jurisdiction and outside the provisions of Section 4 of the Act and would not attract the bar of limitation prescribed by Rule 11. The ambit and scope of Rule 11 has been repeatedly considered by this Court and it has been held that Rule 11 has no application where recovery of duty is illegal and without jurisdiction. It would be suffice to make a reference to a decision of the Division Bench of this Court in *Special Civil Application No. 2118 of 1976* decided on March 5, 1980 in the case of *Associated Bearing Company Limited v. Union of India, 1980 ELT 415*. The submission of Shri Govilkar that the claim beyond three years prior to the date of filing the petition is barred by principles of Limitation Act is also without any substance. It has been repeatedly held by this Court that the claim for refund is not governed by the Rules of limitation if the recovery is illegal and without jurisdiction.

22. However, Mr. Godbole has sought to distinguish the judgment in ***Wipro Products Ltd*** on the ground that the levy in that case related to sovereign power of the Government to levy and recover taxes and that the principles would therefore not apply to a dispute of recovery of money between a private society and a member. In my view, since I have held that the Deputy Registrar did not have jurisdiction to direct refund of non-occupancy charges, it will be for Respondent Nos. 1 and 2 to institute appropriate remedy in respect of their claim for refund. If and when such proceedings are

initiated, it is for that Forum to decide as to how much of claim of Respondent Nos. 1 and 2 would fall within limitation. No opinion is expressed in that regard and all contentions are kept open.

23. Resultantly, I find the orders passed by the Deputy Registrar and Divisional Joint Registrar to be indefensible. The orders are accordingly set aside. Respondent Nos. 1 and 2 shall however be at liberty to adopt appropriate proceedings before the appropriate forum to seek refund of excess levy of non-occupancy charges. If and when such proceedings are filed, the same would be decided by the appropriate forum, without being influenced by any of the observations made in the present order.

24. With the above directions, the Writ Petition succeeds and is allowed. Rule is made absolute.

**NEETA
SHAILESH
SAWANT**

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SANDEEP V. MARNE, J.