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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.11902 OF 2022

Jayprakash Sahakari Griha Rachana Sanstha Mrt.
A Society registered under MCS Act
Survey No.165 (A), Jayprakash Nagar,
Malwadi, Hadapsar, Pune – 411 028.
Through its Secretary
Mr.Sachin Madhavrao Tupe

.. Petitioner

Versus

1. The State of Maharashtra
(Dept. of Co-operation, Marketing
and Textiles) having office at
Mantralaya, Mumbai-400 032
Through its Principal Secretary
 2. The Deputy Registrar
Co-operative Societies, Pune City (4)
Having its office at Sahakar Vaibhav,
1st Floor, Plot No.E/3, Marketing Federation,
Market Yard, Gultekdi, Pune – 411 037.
 3. The Inquiry Officer
Shri Vijaysinh D. Malwadkar
Having its office at Sahakar Vaibhav,
1st Floor, Plot No.E/3, Marketing Federation,
Market Yard, Gultekdi, Pune – 411 037.
 4. Shri Sanjay Bhagwan Tupe
R/at: Plot No.122/1, S. No.165(A),
Jayprakash Nagar, Malwadi,
Hadapsar, Pune – 411 028.
- .. Respondents

**WITH
INTERIM APPLICATION NO.18399 OF 2023
IN
WRIT PETITION NO.11902 OF 2022**

1. Shri. Vikaram Shankar Haripure,
Age: 70 Yrs. Occu: Dental Surgeon

2. Shri. Arun Marotrao Memane,
Age: 72 Yrs. Occu: Retired Officer
3. Shri. Aaba Rama Dange,
Age: 90 Yrs. Occu: Retired teacher
4. Shri. Ramchandra Wamanrao Chavan
(Since deceased through his legal heirs)
 - 4a. Shri. Ganesh Ramchandra Chavan,
Age: 48 Yrs. Occu: Shopkeeper
 - 4b. Shri. Mahesh Ramchandra Chavan,
Age: 46 Yrs. Occu: Service
5. Shri. Janardhan Baburao Pawar,
(Since deceased through his legal heirs)
 - 5a. Shri. Ganesh Janardhan Pawar,
Age: 47 Yrs. Occu: Doctor
 - 5b. Shri. Amol Janardhan Pawar,
Age: 44 Yrs. Occu: Business
6. Bhagwan Keshav Tupe,
(Since deceased through his legal heirs)
 - 6a. Shri. Sanjay Bhagwan Tupe,
Age: 55 Yrs. Occu: Business
7. Dinkar Chimanrao Patil,
(Since deceased through his legal heirs)
 - 7a. Shri. Dilip Dinkar Patil,
Age: 70 Yrs. Occu: Retired
8. Eknath Bahiru Jadhav,
(Since deceased through his legal heirs)
 - 8a. Nita Dnyaneshwar Bhosale,
Age: 47 Yrs. Occu: Household
9. Kisanrao Pandharinath Paigude,
(Since deceased through his legal heirs)

- 9a. Shri. Suhas Kisanrao Paigude,
Age: 61 Yrs. Occu: Doctor
- 9b. Shri. Sudhakar Kisanrao Paigude
Age: 59 Yrs. Occu: Business
10. Vilas Rajaram Shinde and Suhas Rajaram Shinde,
(Since deceased through his legal heirs)
- 10a. Shri. Vivek Vilas Shinde,
Age: 47 Yrs. Occu: Business
- 10b. Shrimati. Sulbha Suhas Shinde,
Age: 68 Yrs. Occu: Household
11. Ramchandra Pandurang Memane,
(Since deceased through his legal heirs)
- 11a. Sau. Sulochana Aabasaheb Dange,
Age: 80 Yrs. Occu: Household
- All residents of 121/3, Jayprakash
Housing Society, Malwadi, Hadapsar,
Pune 411028. ..Applicants

In the matter between

Jayprakash Sahakari Griha
Rachana Sanstha Mrt.
Through its Secretary
Mr. Sachin Madhavrao Tupe

..Petitioner

Versus

1. State of Maharashtra
(Department of Co-operation Marketing and Textiles)
Having office at: Mantralaya, Mumbai 32
2. The Deputy Registrar,
Co-operative Societies, Pune City (4),
Having its office: Sahakar Vaibhav,
1st Floor, Plot No. E/3, Marketing Federation,
Market Yard, Gultekdi, Pune -37.

3. The Inquiry Officer,
Shri Vijaysinh D Malwadkar,
Having its office: Sahakar Vaibhav,
1" Floor, Plot No. E/3, Marketing Federation,
Market Yard, Gultekdi, Pune -37
4. Shri Sanjay Bhagwan Tupe,
R/at: Plot No. 122/1. S. No. 165 (A),
Jayprakash Nagar, Malwadi,
Hadapsar, Pune-28

..Respondents

Mr.V.H. Narvekar a/w Mr.Aadesh M. Patil for the petitioner.

Mr.Kalpesh U. Patil a/w Mr.Vivek B. Rane for the applicant/Intervener in
IA/18399/2023.

Ms.Kavita N.Solunke, AGP for respondent nos.1 & 2.

Mr.A.R.Kapadnis for respondent no.4.

**CORAM : A.S. CHANDURKAR &
JITENDRA JAIN, JJ.**

Date on which the Arguments were concluded : 15th March 2024

Date on which the Judgment is pronounced : 22nd March 2024

Judgment (Per Jitendra Jain, J.) :-

. **Rule.** Ms.Solunke, learned AGP for the respondent nos.1 &
2 and Mr.Kapadnis, learned counsel for respondent no.4 waives service
of notice. By consent of the parties, the writ petition is heard finally.

2. By this petition under Article 226 of the Constitution of
India, the petitioner seeks quashing of enquiry report dated 22nd April
2022 issued by respondent no.3-Enquiry Officer.

3. **Brief facts are as under :-**

- (i) The petitioner is a Co-operative Housing Society consisting of 117 members registered under the Maharashtra Co-operative Societies Act, 1960 (for short 'MCS Act'). In 1964, respondent no.1-State allotted land to the petitioner on payment of premium. In 1976, an order was passed for resumption of the said plot on the ground that the petitioner has committed breaches of the various conditions of allotment. The said action of resumption was the subject matter of appeal before the Appellate Authority and an understanding was reached between the petitioner and respondent no.1-State whereby 20 plots were allowed to be retained by the Society and balance 20 plots were to be resumed by respondent no.1-State. On this understanding, the appeal proceedings were disposed of in the year 1981.
- (ii) Thereafter, the petitioner constructed buildings on these plots and the petitioner has been sub-classified as tenant co-partnership co-operative housing society. In 2018, the petitioner adopted model bye-laws approved by respondent no.2-Deputy Registrar, Co-operative Societies. During 2021-22, the authorities of Pune Municipal Corporation visited site of the petitioner and observed illegal construction on the said site. During the period from

February 2022 to April 2022, respondent no.2 initiated enquiry on various irregularities and illegalities committed by the petitioner and on 22nd April 2022, a report was submitted by respondent no.3-Enquiry Officer to respondent no.2-Deputy Registrar to take appropriate action in accordance with law.

4. It is on this backdrop, the petitioner is before us challenging the said enquiry report.

Submission of the petitioner:-

5. The petitioner submits that against the impugned enquiry report, there is no alternative remedy provided under the MCS Act and therefore, they have approached this Court under Article 226 of the Constitution of India. To support this submission, the petitioner relied upon the decision of the Nagpur Bench of this Court in the case of ***Gopal Kashinath Pawar Vs. State of Maharashtra***¹. The petitioner further submitted that the impugned enquiry report is prepared without there being any authority under the MCS Act to do so and more particularly on the basis of the complaints made by respondent no.4 who is not a member of the society and therefore, the enquiry report is without jurisdiction. The petitioner for this submission relied upon the decision of the learned Single Judge of this Court in case of ***Vithalnagar Co-***

1 Writ Petition No.3442 of 2015 decided on 15th December 2017

*operative Housing Society, Mumbai Vs. Divisional Joint Registrar, CSMD & Ors.*² and the decision of the Co-ordinate Bench of this Court in the petitioner's own case being *Writ Petition No.7442 of 2022* decided on 4th July 2022. The Co-ordinate Bench in Writ Petition No.7442 of 2022 has given a finding that respondent no.4 was not a member of the Society. It is the contention of the petitioner that based on his compliant, no proceedings ought to have been taken by respondent no.3 in conducting enquiry. The petitioner further referring to WhatsApp chat submitted that enquiry is conducted not by respondent no.3 but by some other officer who is not authorised. The petitioner, therefore, prayed that the impugned enquiry report dated 22nd April 2022 be quashed and set aside.

Submission of the respondents:-

6. Per contra, respondent no.4 raised preliminary objection on alternative remedy and further submitted that on account of death of his father, who was a member of the petitioner-Society, on 19th January 2018, he has locus to file a complaint to initiate an enquiry. Respondent no.4 further submitted that the petitioner deliberately did not make him a member and therefore, had to approach this Court in Writ Petition No.8736 of 2023 and on the direction of this Court, he was made a

2 2015 (2) Mh.L.J. 452

member on 28th September 2023. Respondent no.4 further submitted that the petitioner did not challenge various notices issued by the Enquiry Officer and therefore is now precluded from challenging the enquiry report. Respondent no.4 further submitted that the enquiry report only states that on account of various irregularities and illegalities, action should be taken as per the law and therefore, the present petition is pre-mature inasmuch as the report under challenge is only a pre-enquiry report.

7. The respondent nos.1 and 2-State and the interveners being various members of the petitioner-Society adopted the arguments of respondent no.4 and sought for dismissal of the writ petition.

Analysis & Conclusions:-

8. We have heard the learned counsel for the petitioner and the respondents and with their assistance have perused the documents annexed to the petition and affidavit-in-replies filed by the respondents.

9. Insofar as the preliminary point on the alternative remedy is concerned, the enquiry report, as held by the learned Single Judge of this Court in the case of *Gopal Kashinath Pawar (supra)*, cannot be challenged under Section 154 of the MCS Act since it is neither a decision nor an order. Therefore, insofar as the objection of the

respondents with respect to the availability of alternative remedy is concerned, the same is rejected in the light of the decision of this Court in *Gopal Kashinath Pawar (supra)*.

10. The petitioner did not challenge various communications dated 1st September 2021, 15th November 2021, 24th November 2021, 10th February 2022 whereby it was informed to the petitioner that based on the complaints of various authorities including that of respondent no.4, an enquiry was sought to be made with respect to the alleged irregularities pointed out in these complaints. The petitioner participated in the enquiry proceedings and thereafter, the enquiry report was prepared on 22nd April 2022 after hearing the petitioner and considering the documents filed by the petitioner. At no point of time, the petitioner challenged the said communications but the petitioner participated in the said proceedings. Enquiry report is the culmination of the enquiry proceedings which the petitioner participated in. Therefore, the petitioner cannot now contend that the enquiry report was illegal or without jurisdiction.

11. The petitioner filed Writ Petition No.7442 of 2022 wherein a show cause notice for appointment of Administrator based on the aforesaid enquiry report dated 22nd April 2022 was the subject matter of challenge. On a perusal of the prayers set out in said Writ Petition

No.7442 of 2022 (record of which was called for) order dated 4th July 2022 passed therein, it appears that the enquiry report dated 22nd April 2022 was not challenged by the petitioner although the same was open for it to challenge since the show cause notice proposing appointment of Administrator was based on said enquiry report dated 22nd April 2022. Therefore, the petitioner having not challenged the said report, although action taken on the basis of the report which was challenged, is now precluded on the principle of constructive *res judicata*. Assuming that the petitioner had challenged the report dated 22nd April 2022 in Writ Petition No.7442 of 2022 and this Court having not adjudicated upon the same, the same would amount to rejection of the said contention and therefore, even on this ground, the challenge mounted to enquiry report dated 22nd April 2022 in the present proceedings before us cannot be accepted. Therefore, the challenge to the impugned enquiry report appears to be by way of an afterthought.

12. Insofar as the objection of the petitioner with respect to enquiry being initiated at the behest of respondent no.4 who is not a member of the Society is concerned, we are of the view that the petitioner is not justified in raising this objection. Admittedly, there is no dispute that respondent no.4 is the son of the deceased Shri Bhagwan Tupe who died on 19th January 2018. Being the son of the said deceased

member, respondent no.4 has an interest in the membership of the society by virtue of Section 30 of the MCS Act and the petitioner-society is bound to recognise him as a member upon his fathers death, unless there is a dispute amongst the legal heirs which is not the case of the petitioner. The petitioner is bound to transfer the membership on the death of a member to his/her legal heirs as per Section 30 of the MCS Act. The petitioner by refusing the membership to a legal heir cannot contend that such a legal heir cannot make a complaint for initiation of enquiry by the Registrar since same would amount to taking benefit of its own wrong. The respondent no.4 and other members who were denied the membership had to approach this Court in Writ Petition No.8736 of 2023 decided on 19th July 2023 in which this Court directed the Deputy Registrar of the Co-operative Society to resolve the membership issue. Pursuant thereto on 10th August 2023, an order was passed by the Deputy Registrar directing the petitioner to make respondent no.4 a member of the petitioner-society and it is only thereafter, that the share certificate is transferred in the name of respondent no.4. It is relevant that respondent no.4 is not a total stranger to the Society but has a vital interest in the Society. Therefore, the petitioner cannot contend that respondent no.4 is not a member and that based on his complaint an enquiry cannot be initiated. The

petitioner's reliance on order in Writ Petition No.7442 of 2022 to contend that this Court has given a finding that respondent no.4 is not a member is *de hors* the context in which said finding was given. The said finding was given with respect to voters list and since respondent no.4 name was not entered in share certificate, this Court observed he is not a member. Even otherwise, as observed by us above respondent no.4 is now a member of the petitioner.

13. The petitioner is not justified in relying upon the decision of the Single Judge of this Court in case of ***Vithalnagar Co-operative Housing Society (supra)***. The said decision based on its own facts and facts before us are not the same. Even otherwise, this Court in a recent decision of ***Janhit Nagari Sahakari Path Santha Maryadit Vs. State of Maharashtra***³ has considered this decision and observed that a blanket proposition, that an enquiry cannot be initiated at the behest of a complaint lodged by a non-member was rejected. In our view, by applying the ratio of the decision of this Court in case of ***Janhit Nagari Sahakari Path Santha Maryadit (supra)*** to the facts of the present case, the petitioner's contention that the enquiry report at the behest of respondent no.4 is illegal cannot be accepted.

14. The relevant paragraphs of the ***Janhit Nagari Sahakari Path***

Santha Maryadit (supra) read thus : -

10. Thus, under section 83 of the MCS Act, inquiry can be held into the constitution working or financial conditions of a Society under three eventualities viz. (i) suo moto by Registrar, (ii) on application of 1/5th members of the Society and (iii) on the basis of special report under 3rd proviso of section 81 (5B). It must be noted here that the word 'may' is used for holding of suo moto inquiry by Registrar whereas the word 'shall' is used for holding inquiry at the instance of application by 1/5th members of the Society or on the basis of special report. Thus, statutory scheme is such that if 1/5th members of the Society make an application, holding of inquiry is mandatory. On the contrary, use of the word 'may' for exercise of power of the Registrar to hold suo moto inquiry indicates that upon receipt of an information, the Registrar may or may not order inquiry. ***[For the purpose of holding inquiry suo moto, the Registrar can always receive information from various sources. One such source could be in the form of a complaint made by persons who is not a member. Thus, there cannot be an absolute proposition that a non-member can never file a complaint with the Registrar or that the Registrar cannot look into such complaint for suo moto ordering an inquiry.]*** The only difference between Registrar's suo moto power to hold inquiry and inquiry on application of 1/5th members is that the Registrar may or may not exercise suo moto upon receipt of complaint from a non-member, but he is bound to hold inquiry on receipt of requisition from 1/5th members of the Society. Thus if a non-member makes an application to the Registrar, the Registrar is not bound to hold an inquiry unlike the situation where 1/5th of the members file an application for holding inquiry. I am unable to agree with the submission of Mr. Panchpor that under no circumstances, the Registrar can entertain an application by non-member or ex-employee for ordering an inquiry under section 83 of the MCS Act. In a given circumstance, a complaint by non-member can become a source of information for the Registrar for exercise of suo moto power. Thus everything would depend of facts of each case, the nature of information divulged in a complaint, familiarity of complainant with affairs of society and application of mind by the Registrar to such information.

11. Reliance is placed by Mr. Panchpor on the Judgment of Single Bench of this Court in *Vithalnagar Co-operative Housing Society (supra)*. In that case, the application was filed by a non-member demanding institution of inquiry under section 83. This court held in paragraph No. 3, 4 and 6 as under :-

3. The decision on merits with regard to the members right, based upon an application ACC, by the third person, needs to be decided first in the present facts and circumstances of the case. Considering the scope and purpose of section 83, it is necessary that one third and/or one fifth members of the society to file a complaint/application for an inquiry against

the society. The authority, in the absence of any such application, may, suo motu, pass orders for such inquiry, but in a situation like this where an application was filed by respondent No. 2, who admittedly was not a member on the date of the application i.e. 10-1-2010 his application was considered by the impugned order. The issue with regard to his membership is still pending in other proceedings.

4. We are concerned with the date when the application was filed where admittedly respondent No. 2 was not even a member of the society against whom, the respondents ordered to initiate Inquiry under section 83 which follows section 88 of the Act. If case is made out with supporting material, an invocation of suo motu power by the authority is difficult to interfere with, but when the application was filed by the third person, as done in the present case, who admittedly was not a member of the society at the relevant time, in my view, need to be tested in the background of litigation between respondent No. 2 and the society. A person who was not a member at the relevant time and even prior to that just cannot lodge a complaint and/or pray to initiate inquiry against the society members and/or society as he had no personal knowledge of the events and circumstances to initiate such Inquiry which certainly affects the rights of the managing committee members of the relevant time and definitely the name and fame of the society.

6. The order, therefore, passed by the Divisional Joint Registrar, in the above background, to initiate suo motu Inquiry by observing that the material placed on record even by a member of public can be taken note of to initiate such inquiry against such private society, in my view, is unacceptable. The power of suo motu cannot be read and referred to mean the basic provisions which required that the one fifth/one third members to file such application to Initiate such Inquiry just cannot be overlooked but need to be dissected for all the purposes. If the Registrar and/or concerned authority wants to initiate Inquiry suo motu against the society based upon the material with them, there cannot be issue on this power. But If there is a case of complaint by a member then it should be as per the mandate of the section so referred above ie one fifth/one third members should lodge the complaint. And if it is based upon the third person's complaint, the situation is different. This, in my view, just cannot be overlooked. Therefore, in a given case, if such an application is filed by a person claiming to be the member to initiate Inquiry under section 83 against the society, the Registrar and/or authority need to test the same differently. This cannot be treated like a public Interest litigation.

12. *Mr. Panchpor would also rely upon Judgment of this Court in Ashok Saha (supra) in which it is held in paragraph No. 7 as under :-*

7. In my view, not only the Registrar but there are officers who are responsible and have various obligations under the Act who are bound to look into the affairs of the society from time to time. Therefore, the Registrar can take note of Information so received and may of his own proceed to hold the enquiry. In the present case, it is based upon the complaint. Therefore it is necessary that such application or complaint should be supported by one-third of the members of the society. The aspect that some members or one member is against the particular action of the society/managing committee, that itself should not be the reason to invoke the provisions of section 83 of the M.C.S. Act. But if an application is filed by the requisite members of the society, the Registrar is under obligation to take action as contemplated.

13. *Thus both in Vithalnagar Co-operative Housing Society and Ashok Saha this Court has taken a view that though Registrar can take note of information disclosed in complaint by a non-member, such complaint stands on a completely different pedestal and cannot be compared with requisition by 1/5th members.*

(emphasis supplied)

15. It is important to note that under Section 83 of the MCS Act, power is given to the Registrar for holding an inquiry regarding the constitution, working and financial conditions of a society. This is a regulatory and supervisory power to ensure that the Society is functioning in accordance with law. In our view, such a provision has to be construed widely looking at the objects of the Act and the regulatory and supervisory provisions enshrined in Section 83 of the MCS Act. The said section *per se* does not mandate that no other person shall complain and on the basis of which the Registrar cannot exercise his powers under Section 83. In our view, if the information is received from a third person

then, the Registrar has to apply his mind to the said information and thereafter if satisfied, would decide whether to initiate the enquiry. The phrase “suo-motu” has to be understood in that sense. The Registrar acts essentially on his own accord and satisfaction albeit the information being a motivator. If any other interpretation is given to suo-motu under Sub-section (1) of Section 83 of the MCS Act then, it would become meaningless and therefore, the only purposeful interpretation would be to mean that on receipt of information from third person, the Registrar if satisfied, would take suo-motu action.

16. We may draw support for above from the decision of the Supreme Court in case of *K Pandurangan Vs. SSR Velusamy*⁴ wherein the Supreme Court observed in connection with the provisions of the Code of Criminal Procedure with regard to suo-motu power to revision as under :-

“6. So far as the first question as to the maintainability of the revision at the instance of the complainant is concerned, we think the said argument has only to be noted to be rejected. Under the provisions of the Code of Criminal Procedure, 1973, the court has suo motu power of revision, if that be so, the question of the same being invoked at the instance of an outsider would not make any difference because ultimately it is the power of revision which is already vested with the High Court statutorily that is being exercised by the High Court. Therefore, whether the same is done by itself or at the instance of a third party will not affect such power of the High Court. In this regard, we may note the following judgment of this Court in the case of Nadir Khan v. State (Delhi Admn).”

(emphasis supplied)

4 (2003) 8 SCC 625

17. In our view, therefore, the contention of the petitioner that the impugned enquiry report is at the behest of respondent no.4 who is not a member and therefore the report prepared by respondent nos.2 & 3 is illegal is required to be rejected.

18. The initiation of enquiry is not only based on complaint of respondent no.4 but also other statutory authorities as evident from communications dated 1st September 2021, 15th November 2021, 24th November 2021 and 10th February 2022. Section 83(1) empowers the Registrar to initiate inquiry suo-motu or on application of requisite members. Therefore, “suo-motu” has to be read in contradistinction to “members”. A Registrar may receive information from various sources including a person who is a legal heir of deceased member which compels him to take action.

19. The other contention raised by the petitioner is that the enquiry is not conducted by respondent nos.2 & 3 but is conducted by some other person concerned. This contention is outrightly to be rejected. When a statute provides for conducting an enquiry by a particular authority, it does not mean that very authority has to do the physical work of collecting the data, tabulating it, etc. It is the persons

working under the said authority as a team who do this work of collecting the data etc. The authorised authority has to analyze this data collated by its team and come to a conclusion on the basis thereof. A WhatsApp message referred to in the petition is the message between the petitioner and a team member of respondent no.3. However, the report is prepared by respondent no.3. Section 83(1) read with 83(3)(c) of the MCS Act provides that the Registrar or the officer authorised by him shall complete the inquiry and submit his report. Therefore, in our view, the contention of the petitioner to challenge the impugned report on this ground also fails.

20. Even otherwise, the impugned enquiry report dated 22nd April 2022 concludes by saying that on inspection various serious irregularities have been noticed by respondent no.3 and therefore, appropriate action should be taken in accordance with law for various violation. Therefore, the respondents are justified in contending that this is a pre-enquiry report on the basis of which the action would be taken and therefore, at this stage, it is pre-mature for the petitioner to challenge the enquiry report. At this stage, the challenge to the said report would be to scuttle future course of action on the basis of the enquiry report which would amount to putting a cart before the horse. Therefore, even on this count, the petition fails.

21. In view of the above, the petition is dismissed. Rule is discharged.

22. In view of dismissal of the writ petition, the interim Application does not survive and the same is disposed of. No order as to costs.

23. We make it clear that we have not opined on the contents of the enquiry report since the same was not the subject matter of the challenge before us.

JITENDRA JAIN, J.

A.S. CHANDURKAR, J.

24. At this stage, on a prayer made by the counsel for the petitioner, we direct that no coercive steps be taken by the respondents for a period of four weeks from today.

JITENDRA JAIN, J.

A.S. CHANDURKAR, J.