

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3938 OF 2024

The Vivina Co-operative Housing
Society Ltd.

....*Petitioner*

: *Versus* :

The State of Maharashtra & Ors.

....*Respondents*

Mr. Vijay D. Patil, Senior Advocate *i/by. Mr. Yogesh Patil, for the Petitioner.*

Ms. Pooja Joshi Deshpande, AGP *for Respondent Nos.1 to 3-State.*

Mr. Nilkant Bhadrashete *with Mr. Harsh S. Malhotra, for Respondent Nos.4 to 12.*

CORAM : SANDEEP V. MARNE, J.

Dated : 24 February 2025.

ORAL ORDER :

1) The petition challenges the order dated 12 October 2023 passed by the Divisional Joint Registrar dismissing Revision Application No. 676/2012 filed by the Petitioner-Society and confirming the order dated 14 September 2022 passed by the Deputy Registrar. The Deputy Registrar has held that the 12 shop purchasers are on par with the regular members of the Society and that the Society shall not discriminate between the two set of members. The Deputy Registrar has accordingly directed inclusion of names of the 12

shop purchasers in Registers-I and J. In respect of the four additional shop purchasers, who are yet to be issued share certificates by the Petitioner-Society, the Deputy Registrar has granted liberty to them to file proceedings under Section 23(2) of the Maharashtra Co-operative Societies Act, 1960 (**M.C.S. Act**) for grant of membership of the Petitioner-Society.

2) I have heard Mr. Patil, the learned senior advocate appearing for the Petitioner-Society, Mr. Bhadrashete, the learned counsel appearing for Respondent Nos.4 to 12 and Ms. Prabhune, the learned AGP appearing for Respondent Nos.1 to 3.

3) Petitioner-Society had entered into development agreement with the developer-Bindu Building Corporation in 1984 for redevelopment of its building. Suit No.1729/2000 was filed before this Court in respect of disputes between the Society and developer. There was apparently unutilized FSI of 3000 sq.ft (*carpet*) in respect of the plot. The Society agreed for the developer constructing shops in the premises of the Society by utilizing the said unutilized FSI. Accordingly, consent terms were filed with the Developer-Bindu Building Corporation in Suit No.1729/2000 pending, under which the Society permitted the developer to construct 16 shops by consuming the balance FSI of 3000 sq.ft in the premises of the Society's building. Under Clauses-14 and 15 of the Consent Terms, it was agreed as follows :

"14. The Defendant No.2 hereby agree that they shall not claim any right, title or interest in respect of the said shops which will be constructed by the Plaintiffs and the Plaintiffs alone shall be entitled to sell the occupancy rights of the shops in open market

and receive consideration from the prospective purchasers of the said shops; however, ownership of the land and newly constructed building would remain with the Society.

15. The Defendant No.3 agree to make the prospective purchasers of the said shops as the nominal members in accordance with the provisions of the Bye-laws of the Society. However, the proposed purchasers shall pay a sum of Rs.25,000/- being Transfer fees and Rs.25,000/- as contribution towards Common Amenities Fund for the Society.

4) It appears that a separate Development Agreement dated 23 September 2003 was also executed between the Developer and the Society, in which again, the Developer was granted rights to construct additional shops in the premises of the Society's building. It appears that after construction of such shops, the Developer entered into individual agreements under Section 4 of Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA) with the shop purchasers and sold individual shops to such purchasers. Para-11 of the shop purchase agreement contained a covenant for admission of the shop purchasers as nominal member of the Society and it reads thus :

11. The Vendors hereby disclose to the Purchaser that under Clause 15 of the said Consent Terms dated 23rd September, 2003 the said Society has agreed that the Purchaser shall be taken as nominal member of the said Society and such Purchaser shall pay to the said Society Rs.25,000/- as Transfer Fee and Rs.25,000/- towards the share in common Amenities of the said Society. The Purchaser/s agrees/agree to pay the said total amount of Rs.50,000/- to the said Society immediately on execution of the Deed.

5) This is how the Society was supposed to admit the shop purchasers as mere nominal members. They desire their

admission as regular members of the Society so as to take part in decision making process relating to the affairs of the Society. With this complaint, the 12 shop purchasers filed application dated 17 August 2022 before the Deputy Registrar seeking a declaration that all 16 shop owners are full/regular members of the Society and sought direction for entering their names in Register-I and Register-J. The application was resisted by the Petitioner-Society by filing reply. The Deputy Registrar has allowed the said application vide order dated 14 September 2022 referring to various bye-laws of the Society and observing that the Society has accepted transfer fees from the shop purchasers and was recovering the monthly maintenance from them. The Deputy Registrar has further observed that the Society has already issued share certificates to the 12 shop purchasers, without specifying thereon that they are admitted as nominal members. It is further held that the shop purchasers were not parties to the consent terms and hence the same are not binding on them.

6) According to Mr. Patil, the application made on behalf of the said 16 shop purchasers on 17 August 2022 cannot be treated as the one filed under the provisions of Sections 22 or 23 of the M.C.S. Act and that the Registrar has committed jurisdictional error in entertaining the said application and issuing a directive to the said Society for inclusion of names of 12 out of 16 shop purchasers in Register-I and Register-J.

7) If the provisions of Sections 22 or 23 of the M.C.S. Act are perused, the same refers to admission of a person as member

of the Society. So far as 12 out of 16 shop purchasers are concerned, the Society is not averse to their admission as nominal members. The Deputy Registrar appears to have proceeded on an assumption that the said 12 shop purchasers are admitted as nominal members. However, Mr. Patil would invite my attention to ground clause-(F) pleaded in the petition and submit that Respondent Nos.4 to 15 are not admitted even to the nominal membership of the Petitioner-Society. He would submit that the then Secretary had erroneously issued Share Certificate in common to the 12 shop purchasers, which itself was illegal. In my view, it is not necessary to delve deeper into this aspect in view of the fact that reliance of Mr. Patil on the Consent Terms as well as, Covenant No.11 of shop purchase agreements clearly make the shop purchasers entitled at least to nominal membership. Even Mr. Patil has clarified that the Society is willing to admit the 12 shop purchasers as nominal members. Therefore, there is no dispute *qua* those 12 shop purchasers with regard to admission to the membership of the Society. The only debate is about the nature of membership. In that view of the matter, the proceedings were not required to be instituted under the provisions of Section 23 of the M.C.S. Act in strict sense. The limited grievance of the said 12 shop purchasers was that the Society gave a discriminatory treatment to them as compared to the other regular members by not permitting them to participate in management of the affairs of the Society. In my view, therefore there is no jurisdictional error committed by the Deputy Registrar in issuing directives to the Society to convert the membership of the 12 said shop owners from nominal members to regular members by inclusion of their

names in Register-I and Register-J. So far as rest of the 4 shop purchasers are concerned, the Deputy Registrar correctly appreciated the fact that they were yet to be admitted as nominal members of the Society and accordingly relegated them to a remedy under Section 22(2) of the M.C.S. Act. I am therefore not inclined to accept the objection of jurisdictional error on the part of the Deputy Registrar sought to be raised by Mr. Patil.

8) Having quelled the technical objection of jurisdiction, I now proceed to determine the main issue involved in the present petition as to whether the 16 shop owners can be granted mere nominal membership or regular membership of the Society.

9) It is Mr. Patil's contention that what is purchased by the said 16 shop owners is only occupancy rights in respect of their respective shops and that the Society continues to remain the owner in respect of the land as well as the structure. In respect of every 'tenant co-partnership housing society' the land and the building is always owned by the Society and what is held by a member is essentially occupancy right. So even in respect of regular members of Petitioner-Society, what they own is essentially the occupancy rights. In that sense, there is no difference in the nature of ownership between the existing regular members of the Society and the shop purchasers. Therefore, mere purchase of occupancy rights by the shop purchasers cannot be a reason for denying them regular membership of the Society.

10) The matter can be viewed from another angle as well. The provision of M.C.S. Act were found to be unsuitable for formation, registration and management of affairs of the housing societies and the Legislature thought it expedient to make special provisions relating to housing societies. Accordingly by Maharashtra Act 23 of 2019, Chapter XIII-B came to be inserted in the M.C.S. Act under the heading 'Co-operative Housing Societies'. The amendment came into effect from 9 March 2019. After the amendment of M.C.S. Act, the whole concept of nominal membership *qua* co-operative housing society has been obliterated. After insertion of Chapter XIII-B, no cooperative housing society can admit any person as a mere nominal member. Under the provisions of Section 154B-1(18) of the M.C.S. Act, the term 'Member' means and includes only an associate member, joint member or provisional member. Section 154B-1(18) provides thus :

(18) "Member" means a person joining in an application for the registration of a housing society which is subsequently registered, or a person duly admitted to Membership of a society after its registration and includes associate or joint or provisional Member,

(a) "Associate Member" means husband, wife, father, mother, brother, sister, son, daughter, son-in-law, daughter-in-law, nephew, niece a person duly admitted to Membership of a housing society on a written recommendation of a Member to exercise his rights and duties with his written prior consent and whose name does not stand in the share certificate.

(b) "Joint Member" means a person joining in an application for the registration of a housing society jointly, which is subsequently registered or a person who is duly admitted to Membership after its registration and who holds share, right, title and interest in the flat jointly but whose name does not stand first in the share certificate;

(c) "Provisional Member" means a person who is duly admitted as a Member of a society temporarily after death of a Member on the basis of nomination till the admission of legal heir or heirs as the Member of the society in place of deceased Member;

11) Thus, the intention of the Legislature post insertion of Chapter XIII-B in the Act is that every person who has a right in respect of a unit constructed in the building of the Society must be permitted to take part in the management of the affairs of the Society. Here the mischief rule would apply as the amendment is aimed at preventing the mischief of keeping a unit purchaser out of management of Society under the pretext of nominal membership. In the present case, the impugned order has been passed by the Deputy Registrar on 14 September 2022, well after insertion of Chapter XIII-B in the M.C.S. Act.

12) Faced with the above situation, Mr. Patil would rely upon the provisions of Section 154B-31 and submit that insertion of Chapter XIII-B does not affect the Bye-laws of the Society which were adopted prior to Amendment Act of 2019, unless they are expressly repealed, modified or amended. As a matter of facts the bye-laws need to be amended so as to bring the same on par with the amended provisions of the Act. Also, if there is a conflict between the provisions of the Act and the bye-laws, the provisions of the Act would prevail. In my view, once the provision for admission of a nominal member under Chapter XIII-B has been completely removed *qua* a co-operative housing society, it would be inconceivable that the Society can be permitted to rely upon its old Bye-laws and continue admitting persons as nominal

members contrary to the provisions of the Amended Act. Therefore Section 154B-31 cannot be used for the purpose of enabling the co-operative housing society to continue to admit a unit purchaser as a mere nominal member after deletion of provision of nominal membership in relation to a co-operative housing society. Even if the contention of Mr. Patil is to be momentarily accepted, the Bye-law No. 3(24) entitles a purchaser of unit in Society's building to become its member. The shop purchasers have purchased the shops through registered agreements, and they are not mere licensees, caretaker or occupant for being admitted to nominal membership of the Society. The Deputy Registrar has considered the Bye-laws of the Society in the impugned order.

13) What has been done by the impugned order is to merely ensure the shop purchasers are also permitted to take part in the management of the affairs of the housing society. It is otherwise inconceivable that the Society permitted the Developer to construct 16 shops in the premises of the building but would insist that the purchasers of the said 16 shops cannot take part in the management of affairs of the Society. Tomorrow, if the Society decides to levy unreasonable amount of maintenance in respect of a shops, the shop purchasers would not be in a position to oppose such decision by taking part in the General Body Meeting. Mr. Patil would suggest that in such a situation, a nominal member would have a right to challenge the decision of the Society by filing a dispute under the provisions of Section 91 of the M.C.S.

Act. I am afraid this is not the scheme or objective of the M.C.S. Act to drive a shop purchaser to the Co-operative Court challenging every decision of the Society in which he is not permitted to take part. The whole objective of formation and registration of a Co-operative housing society is to ensure that all the decisions relating to the management of affairs of the Society and its building is collectively taken by all the unit purchasers. In fact, under the Model Bye-laws, the membership of the Society cannot exceed the total number of units constructed in the Society's building which again ensures that every unit purchaser is guaranteed membership of the Society. If the impugned orders are set aside, the same would result in a situation where the affairs of the Society would then be managed by only residential members by excluding shop owners located within the premises of the Society's building. This is not the objective behind formation and registration of a co-operative housing society. In my view, therefore the impugned order passed by the Deputy Registrar ensures that all the 16 shop purchasers are also taken on board while taking any collective decisions relating to management of affairs of the Society and its building.

14) I therefore do not find any valid reason to exercise extraordinary jurisdiction of this Court under Article 227 of the Constitution of India to interfere in the impugned decisions of the Deputy Registrar and Divisional Joint Registrar, which appear, to my mind, to be unexceptionable. The Writ Petition being, devoid of merits, is accordingly **rejected**.

15) After the order is pronounced, Mr. Patil would pray for maintenance of status-quo for a period of 4 weeks in order to enable the Petitioner-Society to challenge the order before the Supreme Court. However, the request is opposed by Mr. Bhadrashete. It is observed that the petition is pending since November 2023 and there is no interim order passed in favour of the Petitioner-Society. In that view of the matter, request for maintenance of status-quo is rejected.

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[SANDEEP V. MARNE, J.]