

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.17735 OF 2024

Gaurav Aster Co-op Housing Society
Ltd.

...Petitioner

V/s.

Divisional Joint Registrar and Ors.

...Respondents

Mr. Hiren Mehta with *Mr. Amit Kumar Singh for the Petitioner.*

Ms. A.A. Nadkarni, *AGP for Respondent-State.*

Mr. Aseem Naphade with *Kiran Chouhan and Mr. Vijay Laxmi Tiwari, Mr. Makarand Raut for Respondent Nos.3 to 46*

CORAM : SANDEEP V. MARNE, J.

Dated : 4 March 2025.

P.C. :

1) Petition challenges order dated 9 August 2024 passed by the Divisional Joint Registrar, Co-operative Societies, Konkan Division, Navi Mumbai dismissing the revision petitions preferred by the Petitioner-Society and confirming the orders passed by the Deputy Registrar on 17 August 2023 directing the Petitioner-Society to admit Respondent Nos.3 to 43 as Society's members.

2) Petitioner-Society has refused to grant membership in favour of Respondent Nos.3 to 43 on the ground that the flats

occupied by them are not constructed in accordance with the sanctioned plans and are accordingly unauthorised. It is contended that the construction permission was only in respect of Ground+10 floors and the developer has illegally added floor Nos. 11 to 16 for 'A' and 'C' wings and floor Nos.11 to 17 for 'B' wing without any construction permission. It is therefore, contended by the Society that Respondent Nos.3 to 43 cannot be admitted as members of Petitioner-Society in view of provisions of Section 154B-5 of the Maharashtra Co-operative Societies Act, 1960 (**MCS Act**) which limits the membership to the number of flats available in the Society. It is submitted that flats available for allotment as per Section 154B-5 of the MCS Act would obviously mean legally constructed flats in accordance with the sanctioned development permission.

3) The issue as to whether membership to a society can be denied on account of allegation of unauthorised construction of premises is no more *res-integra* and is covered by judgment of this Court in ***Harish Commercial Premises Co-op-sco. Ltd. V/s.Varsha Dinesh Joshi and Ors.***¹ in which this Court held in paragraph Nos.10 and 11 as under:-

10. It has been contended that a person who is an encroacher and a person who carries out unauthorised construction in the premises of the society is not entitled to and/or eligible to be made as member of the petitioner society and thus the rejection of the membership of the respondents by the petitioner society was legal and justified and that the Divisional Joint Registrar in exercise of revisional power was not correct in setting aside the order of the Deputy Registrar

¹ (2006) 5 Bom CR 853

who has passed an order upholding the rejection of the membership of the respondents under section 23 of the Maharashtra Co-operative Societies Act, 1960. Learned Counsel for the petitioner has further contended that the agreement on which the reliance has been placed is not a valid agreement because Bitesh S. Sagar has no authority or power to enter into the said agreement as he was merely a chief promoter of the proposed co-operative housing society and could not have entered into the said agreement. It has been contended that the respondents have constructed the structure without authority and without the permission from the Corporation and therefore the structure is illegal and are thus subject to demolition under section 351 of the BMC Act and therefore the respondents are not entitled to be the members of the petitioner society. On the other hand the learned Counsel for the respondent has produced before me the permission granted by the Corporation and even the sanction plan given by the Corporation giving them the authority and sanction for construction on the said open plot of land. The rights in the land was conferred on the respondents by entering into specific agreement between the builder Bitesh Sagar with the respondents herein. The agreement is on record. There is no dispute as to the agreement which has been entered into already as far back as in 1981. The petitioner society has not taken any steps by filing civil proceedings or civil suit challenging the said agreement and seeking cancellation thereof. Thus at this stage to hold that the respondents are not entitled to the membership because there is no valid agreement entered into by them is not possible. Apart from the aforesaid fact I am of the opinion that the contention of the learned Counsel for the petitioner totally lacks merits. It is because firstly the builder has entered into conveyance in 1978 being the chief promoter of the proposed society, the present members were not in the scene in 1978. Thus after the conveyance is obtained the builder has sold the commercial premises to various persons who have subsequently become the members of the petitioner society. Thus the members of the petitioner society are holding the said agreement from Bashitesh Sagar in his capacity as builder and thus they have become entitled to become a member of the petitioner society. It is not possible to accept the contention of the learned Counsel for the petitioner that while it comes to creating the rights in commercial premises in favour of the member of the petitioner society Bitesh Sagar had an authority and power to enter in to such an agreement but when it comes to the execution of the right in the building for the proposed Co-operative housing society

and thereafter sold to various persons commercial premises in the said building. It is these purchasers of the commercial premises who have subsequently formed the society and have become the members thereof. Similarly the said premises are sold to the respondent by the very same builder and has been given a power to construct the structure thereon. In so far as the respondents are concerned there is another important factor which has to be taken into consideration. Originally the respondents were having a structure on the road but for the purpose of construction of the building and for the purpose of road widening the said structures of the respondents have been demolished and as and by way of an alternate accommodation an arrangement has been arrived at between the promoters of the then proposed society and Corporation under which expressly it has been agreed that the respondent will be accommodated in the premises of the petitioner society by the builder and on that basis permissions are issued by the Corporation and sanction plan permitting the respondents to carry on construction on the small portion of the open premises of the building so as to rehabilitate them has been granted. The permission and sanction plan which are produced before me by the respondents leaves no manner of doubt that the construction of the respondents are legal, valid and that the respondents have infact acquired the right in the said premises by entering into usual agreement with the builder as far back as 1981. The respondents are in possession of the said premises right from 1983 when the structure has been constructed by them pursuant to the rights created in their favour. The respondents having given up their original accommodation on the basis of aforesaid alternate accommodation arrived at, it is not possible to accept the contention of the petitioner that they should not be made member of the petitioner society. Membership of the society is an open membership and if a person is in lawful possession of a premises of the society then the membership cannot be refused to such a person. By not adding the respondent as a member of the society would amount to denying the benefits of the membership under the Act conferred on each and every person who is the occupier of the premises of the building. In any event I do not find any compelling reason that the respondents should not be made the members of the petitioner society. The rights of the respondents prima facie cannot be held illegal under the said agreement nor a structure can be considered as unauthorized when there is a permission from the Corporation.

11. In any event I am of the opinion that in the proceedings arising under section 23 of the Maharashtra Co-operative Society Act what is required to be considered is prima facie whether the respondents who are claiming to be the member are the lawful occupiers and have right, title and interest in the said property on the basis of which he is seeking membership of the society. The jurisdiction of the Registrar under section 23 does not extend to determine the validity and/or otherwise the documents which are already executed in favour of the concerned person because that is the jurisdiction of the Civil Court and if any person raising any challenge to the said agreement is required to file appropriate civil suit. Prima facie in this case the respondents have got an agreement in their favour and also permission in their favour from the BMC for the purpose of constructing the said property. In that view of the matter I am of the opinion that the contention raised by the petitioner that the respondents are not entitled to be the member because they are unlawful and unauthorised occupier of the said construction cannot be accepted. In that view of the matter, petition fails. The order passed by the Divisional Joint Registrar dated 7.1.2002 is confirmed. However there shall be no order as to costs.

4) Same view is reiterated in judgment of this Court in ***Kamla Spaces Premises Co-op. Society Ltd. through Secretary V/s. Divisional Joint Registrar, Co-op. Societies, Mumbai Division²***, in which it is held in paragraph 14 as under:-

14. In the present case, there appears to be factual dispute about the legality of construction of some of the units in the building. While Society contends that all the units constructed on upper ground floor are illegal, it is the contention of some of the Society members that the units constructed on the fourth floor will have to be treated as illegal. Be that as it may. The Division Bench of this Court is already seized of bunch of petitions in which, the issue of regularisation of entire building is under consideration. Therefore, as of now, it cannot be stated that all the four units, in respect of which membership is sought by the Respondents-Unit purchasers, are admittedly illegal or constructed in violation of the development permission. If all the units in the building are regularised by

2 Writ Petition (Lodg.) No.2679 of 2024, decided on 27 March 2024.

the Planning Authority, the issue that Mr. Dave seeks to agitate before me may not even survive. On the other hand, if the Planning Authority refuses to regularise any of the four units involved in the present petitions, even if Society grants membership to the Respondent-unit purchasers, the same can always be rescinded in the event the concerned units are declared illegal by the Planning Authority. This takes care of apprehension expressed by the Society with regard to construction of the four units in contravention of the development permission.

5) Thus, the law appears to be fairly well settled. Merely because the flat /unit is unauthorized, same cannot be a ground for denial of membership to the purchaser thereof. If the Planning authority demolishes the flat/ units, which is constructed in violation of the sanctioned permission, it is open for the Society to delete the name of such person from its membership register. However, membership of the Society need not be deferred till the flat in question gets regularised by the planning authority. This appears to be the consistent view taken by this Court. In that view of the matter, no serious error can be traced in the orders passed by the Deputy Registrar and the Divisional Joint Registrar.

6) Writ Petition is accordingly dismissed.

[SANDEEP V. MARNE, J.]