

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.660 OF 2010

...

Anil Jadwani & ors. ...Petitioners

v/s.

The State of Maharashtra
and ors.

...Respondent

...

Mr.A.Y.Sakhare, Sr.Advocate with Mr.Gunjalkar
and Mr.U.A.Sakhare i/b M/s.Y.K.S.Legal for
the petitioners.

Ms.Geeta Shastri, AGP for State.

Mr.D.D.Madon, Sr.Advocate with Mr.Chirag Modi
and Mr.Mayuresh Borkar i/b D.S.K. Legal for
Respondent No.4.

...

CORAM: D.K.Deshmukh &
N.D.Deshpande, JJ

DATED: 6th October, 2010

P.C.:

1. Rule. Returnable forthwith. Heard
finally by consent of parties.

2. The question that falls for
consideration is what is the minimum number

of members required for signing the application for registration of a Co-operative Housing Society.

3. The facts which are relevant for deciding this petition are, the Respondent No.4 has constructed a multi-storeyed building, which according to the Petitioners consisting of 110 flats, whereas according to the Respondent No.4 it consists of 124 flats. According to the Petitioners by 1-1-2007, 73 flats were sold by the Respondent No.4 to various persons including the Petitioners and as the Builder was not taking any steps to get the Co-operative Society of the Flats purchasers registered, 58 flats purchasers joined together and made an application for registration of the Co-operative Housing Society before the Deputy Registrar, Co-operative Societies. The Deputy Registrar,

by his order dated 22-3-2007 directed registration of Co-operative Housing Society and sub-classified it as "Tenant Co-partnership Housing Society".

4. The Respondent No.4 made an application under Section 21-A of the Co-operative Societies Act for de-registration of the Society before the Divisional Joint Registrar. The Divisional Joint Registrar by his order dated 10-2-2009 set aside the order passed by the Asst.Registrar registering the society and remitted the matter back for fresh inquiry. The Divisional Joint Registrar held that according to law at least 60% of the flat purchasers must sign the application for registration of the Co-operative Housing Society. The application submitted by the Petitioners is not signed by 60% of the flat

purchasers and therefore, the registration is not valid. That order was challenged before the State Government by the Petitioners in Revision. That Revision was dismissed by the State Government by order dated 22-7-2009. The Petitioners are therefore before this court challenging these two orders, one passed by the Divisional Joint Registrar and other by the State Government.

5. We have heard the learned Counsel for both sides. There is some dispute between the parties as to the number of total flats. However, we do not propose to go into that dispute. We propose to assume that there are total number of 124 flats according to the sanctioned building plan. There is, however, no dispute that on 1-3-2007, 73 of those flats were sold. There is also a dispute as to the number of persons who have signed the

application. According to the Petitioners, 58 flat purchasers have signed the application. According to the Respondent No.4, however, there is dispute about signatures of 15 persons. For the purpose of deciding this petition we propose to assume that, as there is a dispute about 15 signatures, only 43 flats purchasers have signed the application. Both the authorities below have held that minimum number of members who are required to sign the application for registration of a housing society as per the provisions of the Co-operative Societies Act is 60% of the total number of flats which are to be constructed in the building. For that purpose, the Respondents are relying on the Circular issued by the State Government dated 24th July, 1992. Before us reliance was also placed on a circular dated 1-1-1993 issued by the Registrar of Co-operative Societies.

6. Before us it is an admitted position that the provisions of Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act (hereinafter referred to as "MOFA") are applicable to the project of the Respondent No.4. It is also an admitted position before us that sub-section 1 of Section 10 of the MOFA casts duty on the builder/Respondent No. 4 to apply for registration of a Co-operative Society of the persons to whom he has sold the flats in the building, as soon as minimum number of persons require to form a Co-operative Society have taken the flats. The case of the Petitioners is that in terms of the provisions of the Maharashtra Co-operative Societies Act as soon as 10 flats from the building were sold by the Respondent No.4, he was under a duty because

of the provisions of MOFA to apply for registration of the Co-operative Society within a period of four months from the date on which the minimum number of persons require to form such Society had taken the flats. According to the Petitioners, as the Respondent No.4, did not perform his statutory duty, they made an application with the Deputy Registrar for registration of their Housing Society. That application was signed by more than 10 persons and therefore, the Deputy Registrar was justified in registering their society. Whereas, according to the Respondents a duty arises in so far as the Respondent No.4 is concerned, to apply for registration of a Co-operative Housing Society after 60% of the 124 flats are sold by the Respondent No.4. In other words, according to the Respondents at least 60% of the flats to be constructed in the building

should be sold by the builder before a duty is cast on the builder to apply for registration. For that purpose, as observed above, reliance is placed in the impugned order, on the circular issued by the State Government dated 24th July, 1992 and during the course of argument before us on the Circular issued by the Registrar, Co-operative Societies dated 1-1-1993.

7. So far as conditions of registration of a Co-operative Society are concerned, it is sub-section 1 of Section 6 of the Co-operative Societies Act which is relevant. It reads as under:

6(i) No society, other than a federal society, shall be registered under this Act, unless it consists of at least ten persons (or such higher number of persons as the Registrar may, having regard to the objects and economic viability of a society and development of the co-operative

movement, determine from time to time for a class of societies (each of such persons being a member of a different family), who are qualified to be members under this Act, and who reside in the area of operation of the society.

(Provided that, a lift irrigation society consisting of less than ten but of five or more such persons may be registered under this Act)

(Provided further that, the condition regarding residence of the members in the area of operation of the society shall not apply for registration of the society, being the co-operative credit structure entity.)

8. The Maharashtra Co-operative Societies Act was enacted in the year 1961. At that time for making an application for registration of a society including a Co-operative Housing Society, which is not a federal society only 10 persons were required. There was no power conferred on any authority to prescribe higher number of persons. That provision was incorporated in the Act by Maharashtra Act 20 of 1986. In

other words, till 12-5-1986 when Maharashtra Act 20 of 1986 came into force, only 10 persons were required to sign an application for registration of a Co-operative Housing Society. By Section 5 of Maharashtra Act 20 of 1986, power was conferred on the Registrar to specify such higher number of persons than 10, as the Registrar may, having regard to object and economic viability of the society and development of the co-operative movement, decide for a class of a society. The Respondents rely on a Government Circular dated 24th July, 1992 to claim that higher number of persons than 10 is specified for signing an application for registration of a Co-operative Housing Society. Perusal of the Circular dated 24th July, 1992 shows that it merely modifies the Government Circular dated 2nd May, 1980. The Government Circular dated 24th July, 1992 lays down that by Government

Circular dated 2nd May, 1980 it was provided that 90% of the promoters should sign the application for registration of Co-operative Housing Society. Now, that condition is relaxed and now only 60% of the promoters can sign an application for registration of a Co-operative Housing Society. It is relying on this Circular it is contended that 60% of the flat purchasers must sign an application for registration of a Co-operative Housing Society. Therefore, it becomes necessary to see the Circular dated 2nd May, 1980. Perusal of the Circular shows that it does not refer to any provision in the Act under which it has been issued. It is paragraph 3 of this Circular which is relevant for our purpose. It reads as under:

3. The procedure of registration of Cooperative Housing Societies prescribed under this Circular clearly and distinctively specifies the various stages of the procedure and the requirements of the

various documents, as will be seen from the accompaniments (Annexures "I" to "X" and forms 'X' 'Y' 'Z') to this Circular. The procedure should be invariably followed by the registering authorities while registering Cooperative Housing Societies in the State.

9. Thus, this Circular lays down the procedure for registration of a Co-operative Housing Society. Annexure "VIII" of which heading is "Instructions for filling in the Form "A" and statement 'A', 'B' and 'C' (Application for Registration of a Co-operative Housing Society)." Paragraph 1 & 4 of that Annexure reads as under:

1. The application for registration should be in Quadruplicate.

2.....

3.....

4. Minimum 90% promoters should sign against their names in all the 4 copies of the Statement "A".

According to Respondents, this Circular is issued by the State Government under Section 4 of the Co-operative Societies Act. Section 4 reads as under:

4. A society, which has as its object the promotion of the economic interests or general welfare of its members, or of the public, in accordance with co-operatife principles, or a society established with the object of facilitating the operations of any such society, may be registered under this Act:

Provided that, no society shall be registered if it is likely to be economically unsound, or the registration of which may have an adverse effect on development (of the co-operative movement, or the registration of which may be contrary to the policy directives which the State Government may, from time to time, issue)

10. It is submitted on behalf of the Respondents that Section 4 contemplates the State Government issuing policy directive in relation to registration of a Co-operative Society and that 1980 Circular is a policy

directive issued by the State Government.

11. In our opinion, this submission is incapable of being accepted. As noted above, this Circular was issued in the year 1980, when the provision of Section 6 required only 10 persons to sign the application for registration, and there was no power given by Section 6 to any authority to specify any higher number of persons. Thus, if 1980's Circular is taken to be a policy directive issued under Section 4, then it will be contrary to the provisions of Section 6, which requires only 10 persons to sign the application for membership. If 1980's Circular is taken to contain policy directive of the State Government, then it will result in amending the provision of Section 6 and it is impossible that by policy directive the State Government can amend the provisions

of the Statute. In 1986, by Section 6 of the Maharashtra Act 20 of 1986, power to specify higher number of persons was conferred on the Registrar. Therefore, even if it is assumed that under Section 4 while issuing policy directive the State Government could issue a policy directive in relation to number of persons required to sign the application for registration of a society, then the State Government ceased to have that power, once by Maharashtra Act 20 of 1986 that power was conferred on the Registrar, and therefore, when the State Government issued the Circular dated 24th July, 1992, there was no provision made in the Co-operative Societies Act to which that Circular could be referred. One more aspect, in our opinion, which is relevant is that the order of the State Government dated 10th March, 1995 issued under Section 7 of the Co-operative Societies Act

shows that even according to the State Government, by its Circulars of 1980 and 1992 it did not prescribe higher number of persons than 10 for signing an application for membership. Section 7 of the Co-operative Societies Act confers power on the State Government to exempt any society or class of societies from any of the requirement of the Act as to registration, subject to such conditions as Section 7 itself may impose. In exercise of its power under Section 7, the State Government has issued an order dated 10th March, 1995 , which provided that requirement of sub-section 1 of Section 6 of the Act, that there should be minimum number of 10 persons for signing an application for registration of a Co-operative Housing Society will not apply in relation to Co-operative Society whose plinth area of the flat is less than 700 sq.ft. and the society

exhaust the entire FSI. If by the Circulars of 1980 & 1992 the State Government had prescribed the higher number of persons than 10, then in the above referred order of 10th March, 1995 the State Government would not have referred to the requirement in sub-section 1 of Section 6 of minimum 10 persons signing the application for membership. In our opinion, therefore, the authorities were not justified on relying on the 1980 & 1992's Circulars of the State Government to hold that more than 10 persons are required to sign the application for registration of a Co-operative Housing Society.

12. Though, the authorities in their order have not relied on the Circulars issued by the Registrar dated 1-1-1993, before us reliance was placed on that Circular. Perusal of the Circular issued by the Registrar dated

1-1-1993 shows that the purpose of that Circular is to give to the sub-ordinate officers a check list in relation to registration of a Co-operative Housing Society. The purpose of that Circular does not appear to be to specify the higher number of persons to apply for registration of a Co-operative Housing Society. Perusal of that Circular shows that the Circular gives separate check list for different kind of societies. The First Class of societies of which check lists were given are the tenant ownership housing societies. Then the check lists are given of tenant co-partnership housing societies, which are sponsored by the Builders. There clause 28 incorporated the requirement of 60% promoters signing the application. The Third Class of society of which check list is provided is a co-operative society of open plots. All these

societies, where land and buildings are on lease hold or ownership basis, but the societies are proposed by persons other than builders. Perusal of the check lists shows that the requirement of 60% promoters signing an application is included. But it is clear that this requirement is included because of the Government Circulars of 1980 and 1992 and is not included because of any order passed or determination made by the Registrar in exercise of the powers conferred on him by Section 6, after that Section was amended by Maharashtra Act 20 of 1986. Perusal of provisions of sub-section 1 of Section 6 shows that the determination of higher number of persons is to be made by the Registrar by taking into consideration various things and aspects. It is apparent that the Circular dated 1-1-1993 cannot be termed as determination made by the Registrar in

exercise of the power under sub-section 1 of Section 6 of the Act. It is thus clear that neither the Government Circulars 1980 and 1992 result in prescribing higher number of persons than 10 for signing an application for registration of a co-operative Housing Society nor the Circular of the Registrar dated 1-1-1993 achieved that. Therefore, as on the date on which the society was registered in the present case, the requirement of law was that at least 10 persons who have taken the flats should sign the application for registration of a society and therefore, as admittedly, that many persons had signed the application in the present case, there was no justification for the Divisional Joint Registrar to de-register the society.

13. It is further to be seen that in the

present case, though the society was registered by the Deputy Registrar and an application for de-registration was made before the Divisional Joint Registrar under Section 21A of the Co-operative Societies Act, perusal of provisions of Section 21A shows that the society can be de-registered when the society is registered on a misrepresentation made by the Applicants or where the work of the society is completed or exhausted or the purposes for which the society has been registered are not served. In the present case, from the record it does not appear that any misrepresentation was made by the persons who had applied for registration of a co-operative society and therefore, for that reason also it could not have been held that the society is liable to be de-registered merely because at least 60% of the flat purchasers had not signed the

application for registration of a society.

14. In our opinion, therefore, though we maintain the order passed by the Divisional Joint Registrar and the State Government remanding proceedings back to the Registrar for re-examination of the proposal, we set aside the finding recorded by those authorises that application for registration of co-operative society is required to be signed by 60% of the flat purchasers. In our opinion, as the position stand today, an application signed by 10 flat purchasers can also be considered for registration of the Society by the Registrar.

15. Now, as a consequence of this order, the Deputy Registrar, Co-operative Societies will have to examine the proposal submitted by the Petitioners in accordance with law and in the light of the observations made above.

However, that exercise shall be completed by the Deputy Registrar, as expeditiously as possible, in any case within a period of eight weeks from today.

16. Petition disposed. Rule made absolute accordingly.

(D.K.Deshmukh, J.)

(N.D.Deshpande, J.)