

Navi Mumbai Merchants Chamber Vs Sri Arjun Krishnarao Deshmukh And Ors

Court: Bombay High Court

Date of Decision: Feb. 12, 2025

Acts Referred: Maharashtra Cooperative Societies Act, 1960 " Section 6

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Manager and Transfer) Act, 1963 " Section 2(c), 3, 10, 10(1), 10(2)

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Manager and Transfer) Rules, 1964 " Rule 4

Hon'ble Judges: Amit Borkar, J

Bench: Single Bench

Advocate: Girish S. Godbole, Sunil Tilokchandani, Himalaya Choudhari, Manilal Kher Ambalal & Co., Virendra Tulzapurkar, Mandar Soman, Prashant D. Patil, Hanmant G. Wakshe, V.S. Nimbalkar, Nitin V. Gangal, Ranjiv Carvhallo, Akshay Udeshi, N.N. Gawade, M/s. Sanjay Udeshi & Co

Final Decision: Dismissed

Judgement

Amit Borkar, J

1. The petitioner takes exception to an order dated 20th August 2019 passed by the Minister for Cooperation, Mantralaya, Mumbai, granting

registration under Section 10 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Manager and Transfer) Act,

1963 ("MOFA Act" for short) in respect of plot bearing No.4, Sector 19, Vashi, Navi Mumbai in favour of respondent No.1.

2. Facts and circumstances giving rise to the filing of the present writ petition are as follows: Respondent No.6-CIDCO executed registered lease

deeds in favour of the petitioner in respect of plot No.14, Sector 19, Vashi, Navi Mumbai on 5th March 2001 and 20th February 2004. Thereafter, by

resolution dated 21st August 2004, the petitioner resolved to confer the right to transfer commercial shops in favour of its members. On 24th August

2004, the petitioner executed a development agreement in favour of respondent No.3-developer for a consideration of Rs.52 lakh and 178 shops/units

free of cost. The development agreement expressly permitted the developer to sell 59 units in the open market. Subsequently, Navi Mumbai Municipal

Corporation, on 24th December 2004, granted building permission to construct a multi-storied building over the said plot, and on 2nd July 2007, issued

the occupation certificate for the building. On 12th April 2008, the general body of the petitioner decided to allot shops/units in favour of third parties.

3. On the failure of respondent No.3 to form a society, respondent No.1, having secured the minimum number of persons required to constitute a co-

operative society who had taken flats, filed an application with the Registrar for registration of the society under Section 10 of the MOFA Act. The

Registrar, by order dated 7th March 2004, rejected the proposal of respondent No.1. In response, respondent No.1 filed an appeal, which was allowed

on 12th September 2014, directing the grant of registration in its favour. Consequently, on 17th September 2014, respondent No.1-society was duly

registered.

4. The petitioner filed Writ Petition No.9921 of 2019 before this Court, and on 27th November 2014, this Court directed that the petitioner be afforded

an opportunity for hearing regarding the registration of respondent No.1-society. In pursuance of that direction, the Appellate Authority allowed the

petitioner's application for intervention and similarly admitted the application of CIDCO for intervention. However, the Appellate Authority, by

order dated 31st March 2016, set aside the order of registration. In response thereto, respondent No.1 filed Writ Petition No.4914 of 2018 in this

Court, and on 31st May 2016, this Court set aside the order dated 31st March 2016 and directed the Appellate Authority to decide the appeal on or

before 17th January 2019.

5. The Appellate Authority, having granted an opportunity of hearing to respondent No.1, the petitioner, respondent No.3, and CIDCO, allowed the

appeal filed by respondent No.1. In doing so, it set aside the earlier order of refusal to grant registration and confirmed the order dated 16th September

2014 granting registration in favour of respondent No.1. Consequently, the petitioner has resorted to the present writ petition.

6. Mr. Godbole, learned Senior Advocate for the petitioner, submitted that, as per the occupation certificate, the building comprises 237 units of

which 235 are offices, one is a medical store, and one is an art gallery whereas the proposal filed by respondent No.1 accounts for only 59 units.

He further contended that the regulatory framework, as embodied in the relevant Government Circular, mandates that a minimum of 60% of unit

holders must be represented for the valid registration of the society. In this context, treating 176 units owned by the petitioner as constituting a single

member is legally untenable and amounts to an erroneous interpretation of the requisite criteria. Moreover, he submitted that the petitioner executed a

development agreement in favour of respondent No.3 for a consideration of Rs.75 lakh and the allotment of 178 units in the building. Additionally, the

petitioner had issued allotment letters in favour of 154 members, with the remaining 24 units not allotted to third parties, thereby giving rise to a

scenario where the rights of 174 unit holders ought to be accorded precedence in the registration process. Accordingly, it is prayed that the impugned

order of registration be quashed and set aside for failing to comply with the statutory requirement of adequate and equitable representation of the unit

holders.

7. Mr. Tulzapurkar, learned Senior Advocate on behalf of Respondents Nos.1 and 2, submitted that the CIDCO had allotted the plot in question in

favour of the petitioner by a registered lease deed dated 20th February 2004, covering an area of 4046.62 square meters. He further argued that,

pursuant to the development agreement dated 24th August 2004, respondent No.3 was duly authorized to develop the property for a consideration

involving the sale of 59 units in the open market and the allotment of 178 units in favour of the petitioner-company. It was submitted that, out of the

total 235 units in the building, 178 units are vested in the petitioner-company, which, for the purpose of registration, must be treated as a single

member. This interpretation, it was argued, satisfies the requirement of having at least 60% of the unit holders represented, as prescribed in the

Government circular. Furthermore, on a meticulous perusal of the allotment letters, it is evident that the rights conferred upon such allottees are merely

those of licensees, thereby precluding them from claiming any proprietary rights under the provisions of the MOFA Act. In light of the failure of

respondent No.3, the developer, to form a society within the prescribed period, respondent No.1 was well within its rights to file the proposal for

registration of the society. Consequently, the learned counsel submitted that the impugned order passed by the Minister is in strict accordance with law

and the established statutory framework governing the registration of societies under the MOFA Act.

8. Mr. Gangal, learned Advocate for Respondent No.6-CIDCO, submitted that respondent No.6 had lawfully terminated the lease agreement with the

petitioner and that any challenge to this termination is currently pending before the appropriate adjudicatory forum. He further contended that the

conditions for the termination of the lease are predicated on the breach of specific contractual conditions by the petitioner. In his submission, Mr.

Gangal emphasized that the termination constitutes a bona fide exercise of the respondent's rights under the lease agreement, and that any

substantive issues regarding the termination should be resolved by the forum with proper jurisdiction over contractual disputes. Accordingly, he urged

that the pending dispute concerning the lease termination be adjudicated separately, so as to preserve the integrity of the present proceedings and

ensure that the principles of natural justice are upheld in their entirety.

9. Rival contentions fall for consideration. The various arguments advanced by the parties, which touch upon both the substantive and procedural

aspects of the registration process under the MOFA Act, are now amenable to detailed judicial scrutiny.

10. For the purpose of considering the submissions made on behalf of the parties, it is necessary to have regard to certain relevant provisions of the

MOFA Act. Section 2(c) of the Act defines "promoter" to mean a person who constructs or causes to be constructed a block or building of flats

or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons.

This definition is pivotal as it delineates the scope of responsibilities and obligations incumbent upon the promoter.

Section 4 further mandates that,

prior to accepting any advance "restricted to not more than 20% of the sale price" the promoter must execute a written agreement for the sale of

flats, which is then required to be registered. This requirement is designed to protect the interests of the flat purchasers and to ensure transparency in

the transaction.

11. Section 10 of the Act prescribes the manner in which the promoter is to facilitate the formation of a co-operative society or a company. The

provision reads as follows:

"10. (i) As soon as a minimum number of persons required to form a Co-operative society or a company have taken flats, the promoter shall within the

prescribed period submit an application to the Registrar for registration of the organization of persons who take the flats as a Co-operative society, as the case

may be, as a company; and the promoter shall join, in respect of the flats which have not been taken, in such application for membership of a co-operative society

or as the case may be, of a company. Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the

provisions of this Act,

(2) If any property consisting of building or buildings is constructed or to be constructed and the promoter submits such property to the provisions of the

Maharashtra Apartment Ownership Act, 1970, by executing and registering Declaration as provided by that Act, then the promoter shall inform the Registrar as

defined in the Maharashtra Co-operative Societies Act, 1960, accordingly; and in such cases, it shall not be lawful to form any co-operative society or

company.

12. This statutory framework is crafted to ensure that the rights and interests of flat purchasers are secured at the earliest possible stage. The

provisions collectively emphasize prompt action by the promoter in applying for registration once the minimum threshold of unit holders is met, thereby

precluding any arbitrary delay or manipulation that might otherwise prejudice the purchasers' interests.

13. The provisions of Section 10 thus indicate that the promoter is under an obligation, immediately upon the requisite minimum number of persons

taking flats, to submit an application to the Registrar for the registration of the organization of persons as a co-operative society or, as the case may

be, a company. In addition, the promoter is mandated to include in the membership of the co-operative society those flats which have not been taken,

while retaining the right to dispose of the remaining flats in accordance with the statutory provisions. Moreover, Rule 8 of the Maharashtra Ownership

Flats (Regulation of the Promotion of Construction, Sale, Manager and Transfer) Rules, 1964, provides a specific period of four months within which

an application for the registration of the co-operative society or company of flat purchasers must be submitted. This regulatory provision serves as an

adjunct to the statutory requirements, ensuring that the registration process is not only timely but also reflective of the actual distribution of ownership

interests. In sum, both the Act and the Rules are designed to effectuate an orderly and equitable transition of rights from the promoter to the flat

purchasers, thereby safeguarding the statutory objective of promoting transparency and accountability in the sale and transfer of flats.

14. The statutory framework of Section 10 of the MOFA Act crystallizes the inalienable right of flat purchasers to form a cooperative society or

company, a right contingent on the existence of a binding contractual nexus between the promoter and the purchaser. The phrase "taken flats" under

Section 10(1) must be interpreted through the prism of purposive construction, to hold that the term encompasses persons who have entered into

enforceable agreements conferring substantive rights akin to ownership, even if the conveyance remains pending. Such agreements, typically in the

form of agreements to sell, create a jus ad rem (Latin for "right to a thing") in favor of purchasers, distinct from a mere license to occupy.

15. Explaining what a jus ad rem is, Salmond states: "The commonest and most important kind of jus in personam is that which has been termed by

the Civilians and Canonists as jus ad rem. I have a jus ad rem, when I have a right that some other right shall be transferred to me or otherwise vested

in me. Jus ad rem is a right to a right. A debt, a contract to assign property and a promise of marriage are examples of this. It is clear that such a right

to a right must be in all cases in personam.

16. The Supreme Court clarified in *Gajraj Jain v. State of Bihar* (AIR 2004 SC 3392) that there is a significant difference between a charge and a

mortgage. In the case of a charge under Section 100 of the Transfer of Property Act, there is no transfer of an interest in the property; a charge is not

a jus in rem but is rather a jus ad rem. It creates a right of payment out of the property charged with the debt or out of the proceeds of realisation of

such property. The Court underscored that the classification of the right as a jus ad rem underscores its inherently personal and conditional nature.

This classification limits the creditor's remedy to an action against the defaulting debtor, rather than establishing an immediate proprietary right

enforceable against third parties. The distinction between a jus ad rem and a jus in rem is not merely theoretical but bears significant practical

implications in the enforcement of security interests and the protection of creditors' rights.

17. The concept of "jus ad rem" in the context of agreements to sell under the Maharashtra Ownership Flats Act (MOFA), 1963, refers to a buyer's

right to a specific property arising from a contractual obligation, which can be enforced against the developer and, in certain cases, third parties. This

right is intermediate, lying between a personal right (jus in personam) and a full proprietary right (jus in rem).

18. "Jus ad rem" is a legal right that entitles a person to demand the transfer of ownership of a specific property, typically arising from a contract.

It is not full ownership but a vested right to obtain ownership upon fulfilling contractual conditions. Under MOFA, an agreement to sell creates

obligations for developers to convey ownership to buyers after construction. The buyer's right under this agreement is interpreted as jus ad rem,

enforceable against the developer and, in some cases, successors.

19. In the context of the Maharashtra Ownership Flats Act (MOFA Act), and particularly under Section 4, which lays down the conditions for

entering into and registering an agreement to sell, a "jus ad rem" right refers to the quasi-property interest that a purchaser acquires once the

promoter has complied with the statutory requirements before accepting an advance payment. This interest, although not a full title, is attached "to

the thing" (i.e. the flat) and is enforceable against the promoter (and, in some respects, against subsequent dealings affecting the property). While an

agreement to sell is a contractual obligation between the promoter and the purchaser, the requirement of registration transforms the buyer's

interest. As soon as the promoter complies with the statutory mandate by executing and registering the agreement, the purchaser's interest in the

flat "attaches" to the property. This attachment is what is described as a "jus ad rem" right "it is not the full title but is an interest "in

respect of the thing." The statutory requirement of registration is not a mere formality. Rather, it is a tool to convert what might otherwise be a

personal contractual right into an equitable interest that "runs with the property." This is the essence of a "jus ad rem" right "it is attached

to the property, giving it a "real" character.

20. Once the agreement is registered as prescribed, the purchaser's interest cannot be displaced by any subsequent act of the promoter (such as

an attempt to reassign or sell the property to another party). The purchaser is, in effect, entitled to insist on the performance of the contract (i.e.,

construction and eventual transfer of title) in accordance with the terms laid down in the registered agreement.

21. It needs to be clarified that while the "jus ad rem" right is intermediate, it is confined to the terms and conditions specified in the agreement. It

does not automatically grant the purchaser any additional rights beyond what has been expressly or implicitly provided in the agreement executed

under section 4 of the Act. This right is not merely contractual but is elevated to a statutory entitlement under MOFA, creating a legally enforceable

charge over the property.

22. The transferee's rights under such agreements are further safeguarded by Section 4 of MOFA, which mandates the promoter to disclose

project details and timelines, thereby embedding statutory sanctity into the contractual relationship. Thus, the phrase "taken flats" under Section 10(1)

is not necessarily contingent on the execution of a sale deed but on the conferral of irrevocable jus ad rem through a legally enforceable instrument.

23. On perusal of the letters of allotment submitted by the petitioner, it is evident that the documents neither transfer nor purport to transfer any

proprietary interest in the units to the allottees. Instead, the language of the allotments restricts the allottees to a mere license to occupy, devoid of the

hallmarks of an agreement to sell, such as stipulations for payment schedules, timelines for execution of conveyance, or clauses binding the promoter

to transfer title. An allotment letter lacking specific performance obligations or compliance with Section 4 of MOFA cannot be equated with an

agreement to sell. Consequently, the occupiers of 154 units, not being parties to agreements satisfying the statutory criteria under MOFA, cannot be

deemed to have "taken flats" under Section 10(1).

24. In the facts of the present case, the question that arises for consideration is regarding the juridical status of the petitioner-company under the

Maharashtra Ownership Flats Act, 1963 (MOFA). It is undisputed that the petitioner, through a development agreement dated 24th August 2004,

authorized respondent No. 3 to develop the property in exchange for a monetary consideration of Rs. 75 lakh and entitlement to 176 units. Under

Section 2(c) of the MOFA Act, the definition of a "promoter" explicitly includes any person who "causes to be constructed" a building of flats,

irrespective of whether such construction is executed directly or through an agent. Consequently, the petitioner, having facilitated the construction

through a contractual delegation of authority, unequivocally falls within the statutory ambit of a promoter under MOFA. This classification is further

fortified by the legislative intent of MOFA, which seeks to impose fiduciary obligations on entities controlling the development and disposition of flats,

ensuring accountability to flat purchasers.

25. The petitioner, as the statutory promoter under Section 2(c), retains the residual right to dispose of unsold units, subject to compliance with

Sections 3 (disclosure obligations) and 11 (restrictions on further sales after formation of society) of MOFA. However, for the purpose of registering a

cooperative society under Section 10(1), the petitioner must be counted as one constituent member, irrespective of its proprietary stake. This

interpretation aligns with the legislative mandate of Section 10, which envisages the promoter's inclusion in the society to ensure continuity in

management and compliance with post-registration obligations.

26. Notably, Section 6 of the Maharashtra Cooperative Societies Act, 1960, mandates a minimum of ten persons to form a society, a threshold that is

non-derogable by administrative circulars or executive fiat. Administrative instructions cannot dilute statutory prescriptions under the Cooperative

Societies Act. In the present case, the 59 unit-occupiers (having valid agreements to sell) and the petitioner (as promoter) collectively satisfy the

minimum membership requirement under Section 6. The petitioner's inclusion as a member does not, however, vitiate its obligations under MOFA

to execute conveyance deeds in favor of the society post-registration, as mandated by Section 10(2).

27. In conclusion the petitioner's status as a promoter under MOFA remains unaltered, and the 154 unit-occupiers, lacking enforceable

agreements to sell, cannot claim membership in the proposed society. However, the 59 allottees with valid agreements, coupled with the petitioner as

the 60th member, fulfill the statutory quorum for registration under Section 10(1) of MOFA read with Section 6 of the Maharashtra Cooperative

Societies Act, 1960.

28. In light of the foregoing observations and detailed analysis of the statutory provisions, the submissions advanced by the parties, it is evident that the

impugned order passed by respondent No.5, confirming registration in favour of respondent No.1, is both legally sound and in strict conformity with the

provisions of the MOFA Act and the applicable Rules. The Court finds that the decision of respondent No.5 adequately addresses the substantive and

procedural aspects of the registration process, and the petitioner has failed to adduce any material or persuasive argument to demonstrate any breach

of statutory mandate or any procedural irregularity that would warrant judicial intervention.

29. Therefore, in my considered opinion, the order passed by respondent No.5 confirming registration in favour of respondent No.1 need not be

interfered with. The writ petition is, accordingly, dismissed. No costs.

30. At this stage, learned Advocate for the petitioner prays for extension of the order of status quo. However, considering the fact that the respondent

No.5 has confirmed the order of grant of registration, the request for continuation of status quo is rejected.