

(2015) 08 AHC CK 0073

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 39150 of 2015

Grand Omaxe Apartment Owners Association

APPELLANT

Vs

New Okhla Industrial Development Authority and Others

RESPONDENT

Date of Decision : 05-08-2015

Acts Referred:

Societies Registration Act, 1860 — Section 1, 1, 12, 12(1), 14

Citation : (2015) 9 ADJ 174 : (2015) 113 ALR 79 : (2015) 6 AWC 5613

Hon'ble Judges : Krishna Murari, J; Amar Singh Chauhan, J

Bench : Division Bench

Final Decision : Disposed off

Judgement

1. Heard learned counsel for the petitioner and Shri Shivam Yadav for the respondent-Development Authority.

2. M/s. Omaxe Buildhome Pvt. Ltd. are the promoters of the multi-storied building called Grand Omaxe, which consists of several flats/apartments.

3. Petitioner claiming to be a registered association by the name of Grand Omaxe Apartments Owners Association formed by the apartment owners of the said building, has approached this Court challenging the letter dated 11.08.2014 issued by respondent No. 2, Deputy Registrar, Meerut Division, Meerut and the order dated 05.06.2015 passed by Chief Executive Officer of respondent No. 1, Development Authority.

4. An application for registration was presented before the Deputy Registrar through Shri P.V.S. Prasad claiming to have been elected as Secretary of the Association along with bye-laws and other relevant papers. In the said application, Major General Umong Sethi was shown to be elected as President, Rajesh Gupta as Vice President, Manish Gupta as Treasurer and Animesh Mishra, Mrs. Shilpa Panpalia, Ashish Kumar Sharma, Dipesh Jain, Rahul Rathore and Mrs. Anju Puniya as Executive Members. Another set of application was filed through Shri Srikant Tyagi alleging him to have been as elected President of the

Association, Smt. Achla Singh as Vice President, Sanjay Goyal as Secretary, Smt. Kanak Murty as Joint Secretary, Manish Agrawal as Treasurer and Muktesh Shukla, Varun Kumar, R.P. Singh, Smt. Neelam Gandhi as members of the committee.

5. Deputy Registrar though registered the society by the name of Grand Omaxe Association of Apartment Owners and issued a registration certificate dated 08.08.2014, but vide impugned letter dated 11.08.2014 informed the Chief Executive Officer of the respondent Development Authority that on account of there being a dispute between the apartment owners with respect to the elected office bearers and members of the association and two rival groups were claiming to have been elected, the bye-laws, have not been registered and the matter is being referred to him to decide the dispute with respect to elected office bearers of the association. Vide order dated 05.06.2015, Chief Executive Officer of the NOIDA Authority, though granted recognition to the Grand Omaxe Association of Apartment Owners under the U.P. Apartment Act, 2010, but referred the matter for adjudication of the dispute on election under Section 25 of the Societies Registration Act, 1860 (hereinafter referred to as "Act of 1860") to the Prescribed authority.

6. Learned counsel for the petitioner contends that once the registration certificate was issued, it was incumbent upon the Deputy Registrar to have registered the bye-laws and the list of the elected office bearers submitted along with application and it could not have refused to register the bye-laws and the list of elected members. It is further submitted that respondent No. 1 also committed a patent illegality in referring the dispute under Section 25 of the Act of 1860 to the Prescribed Authority.

7. Two rival groups of the apartment owners starting claiming to have been elected as Board of Management entitled for registration of the Association. The Deputy Registrar instead of resolving the dispute between two rival groups exercising powers conferred by proviso to Section 3(1) of Societies Registration Act, 1860 as applicable to the State of U.P. issued a registration certificate without registering the Bye-Laws. In our opinion, mere issuance of certificate of registration does not raise a presumption that society is duly registered. It is the rules and regulation and the memorandum, which could be certified under Section 19 of the Act, constitute a prima facie proof of registration. In this connection, it may be relevant to extract Section 1 to 3 of Societies Registration Act as applicable to State of U.P.

"1. Societies formed by memorandum of association and registration.- Any seven or more persons associated for any literary, scientific, or charitable purpose, or for any such purpose as is described in Section 20 of this Act, may, by subscribing their names to a memorandum of association, and filing the same with the Registrar form themselves into a society under this Act.

2. Memorandum of association.- The memorandum of association shall contain

the following things (that is to say)-

the name of the society;

the objects of the society;

the names, addresses, and occupations of the governors, council, directors, committee, or other governing body to whom, by the rules of the society, the management of its affairs is entrusted.

A copy of the rules and regulations of the society, certified to be a correct copy by not less than three of the members of the governing body, shall be filed with the memorandum of association.

3. Registration and fees.- (1) Upon such memorandum and certified copy being filed along with particulars of the address of the Society's office which shall be its registered address, by the Secretary of the Society on behalf of the persons subscribing to the memorandum, the Registrar shall certify under his hand that the society is registered under this Act. There shall be paid to the Registrar for every such registration a fee of five hundred rupees or such smaller fee as the State Government may notify in respect of any class of societies.

Provided that the Registrar may, in his discretion, issue public notice or issue notice to such persons as he thinks fit inviting objections; if any, against the proposed registration and consider all objections that may be received by him before registering the society.

(2)"

8. Thus, Section 1 of the Act requires that memorandum of Association shall be signed by seven or more persons by subscribing their names and filing the same with the Registrar for the purpose of forming themselves into a society. Section 2 provides that rules and regulations of the society shall be certified to be correct copy by not less than three members of the governing body while Section 3 lays down upon such memorandum and certified copy being filed, the Registrar shall certify that society is registered. It is, therefore, abundantly clear that no society can be registered unless provisions of Sections 1 and 2 of the Act have been complied with and memorandum and Rules and Regulations of the society are registered and would be available for inspection by a person, or a copy of extract of such documents could be issued by the Registrar on payment of prescribed fee as provided under Section 19 of the Act. Unless the memorandum and Rules & Regulations or Bye-Laws are registered by the Registrar, the same would not be available for inspection nor certified copies thereof could be issued. The view taken by us finds support from the decision of Privy Council in the case of *Sunder Singh-Mallah Singh Sanatan Dharam High School Trust* AIR 1938 73 (Privy Council), wherein it has been observed as under.

"The learned Subordinate Judge held that the Committee was not duly registered, but his decision is vitiated by his failure to give effect to Section 19.

He placed the burden of proving the seven signatures to the original memorandum on the plaintiffs, and held that, in the absence of such proof, he could not hold that the Association was duly registered. The High Court reversed this finding, and held that the defendants had failed to disprove the presumption arising on the certificate of the Registrar dated December 7, 1919, Their Lordships are of opinion that the presumption arises, not on the certificate of registration granted by the Registrar under Section 3, but on the copies of the Rules and Regulations and Memorandum, certified under Section 19, which constitutes them prima facie evidence of the matter therein contained."

9. In view of above, mere issuance of a registration certificate by the Deputy Registrar to the petitioners without registering the bye-laws, which admittedly was not done on account of dispute raised by rival claimants, cannot lead to the conclusion that petitioner-association is registered under the provisions of the Act. The registration certificate is of no avail to the petitioners and it cannot be said to be a society duly registered under the provisions of the Act of 1860.

10. The dispute with respect to claim for registration set up by two rival claimants could have been resolved by the Deputy Registrar exercising powers conferred by proviso to Section 3(1) of the Act as applicable in State of U.P. or a reference would be made to State Government under Section 3-B, which entitles a State Government to take a decision if any question arises whether any society is entitled to get itself registered in accordance with Section 3 or get its certificate or registration renewed in accordance with Section 3-A.

11. In the case in hand, the association was formed under the provisions of the U.P. Apartment Act, 2010 and the U.P. Apartment Rules 2011.

12. The U.P. Apartment (Promotion of Construction, Ownership & Maintenance) Act, 2010 (in short the U.P. Apartment Act, 2010) was enacted by the State Legislature to provide for the ownership of an individual apartment in a building, of an undivided interest in the common areas and facilities appurtenant to such apartment; to make such apartment and interest heritable and transferable, and for matters connected therewith or incidental thereto.

13. The U.P. Apartment Act, 2010 provides for an association of apartment owners and bye-laws for the registration of the affairs of such association, for administration of the affairs in relation to the apartments and the property appertaining thereto and for the management of common areas and facilities. Sub-section (2) of Section 14 enjoins joint responsibility of the promoter and apartment owners to form an association. The responsibility of getting the association registered has been given to the promoter to get the association registered, when such number of apartments have been handed over to the owners, which is necessary to form an association or 33% of the apartments, whichever is more by way of sale, transfer or possession provided the building has been completed along with all infrastructure services and completion certificate obtained from the local authorities. Sub-section (3) of Section 14

places an obligation upon a prospective apartment owner to become member of the association within four weeks of receipt of the written intimation about the formation of such association. On formation of the association of the apartment owners under sub-section (2), sub-section (5) provides that the management of the affairs of the apartment regarding their common areas and facilities shall be deemed to be transferred from the promoter to the Association which shall thereupon maintain them; provided that till all the apartments are sold or transferred, the promoter shall proportionately share the maintenance cost of common areas and facilities. The model bye-laws made by the State Government and notified in the gazette under sub-section (6) of Section 14, which provide for (a) the manner in which the Association of Apartment Owners is to be formed; (b) the election, from among apartment owners, of a Board of Management by the members of the Association of Apartment Owners; (c) the number of apartment owners constituting the Board, the composition of the Board and that one-third of members of the Board shall retire annually etc. include in (j) election of a President of the Association of Apartment Owners from amongst the apartment owners, who shall preside over the meeting of the Board and of the Association of Apartment Owners and of Secretary under (i) to be the ex-officio member of the Board to be keeper of the minute books, provided in sub-section (7) and other provisions of bye-laws under sub-section (8) provide for a uniform and standard bye-laws, which have been notified as model bye-laws under sub-section (6) of Section 14 vide Notification No. 3977/8-1-11-115 D.A./02-TC-1 dated 16.11.2011. The amendment to the bye-laws can be made by the association as per Bye-Law No. 58 in a duly constituted meeting for such purpose and no amendment is to take effect unless approved by the owners representing at least 2/3rd of the total number of units in the building with the prior approval of the competent authority.

14. The U.P. Apartment Act, 2010 and the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Rules, 2011 (The Rules of 2011) notified on 16.11.2011 provide for a complete code for regulating the rights, duties and liabilities of the promoters and apartment owners. The formation of an association, resolution of disputes, offences and penalties with the ultimate control vested in the State Government under Section 27 of the Act. The Act has been given overriding effect under Section 31 notwithstanding anything inconsistent therewith contained in any other law for the time being enforced. Section 29 provides for removal of doubts that the provisions of the Transfer of Property Act, 1882 shall in so far as they are not inconsistent with the provisions of the Act apply to the transfer of any apartment, together with its undivided interest in the common areas and facilities appertaining thereto made by the owner of such apartment, whether such transfer is made by sale, lease, mortgage, exchange, gift or otherwise as they apply to the transfer of any immovable property. Section 28 exempts the application of Section 25 and 26 of the Act relating to offences and offences of companies, if the promoter is local authority, or any other statutory body constituted for the development of land or

housing or a company or a body wholly owned or controlled by the Government created for the development of land or housing or promotion of industry and in such case no suit, prosecution or legal proceedings shall lie against government or any officer or other employee of the government in respect of anything which is in good faith done or intended to be done by or under the Act, with further power under Section 32 to exempt if the government is of the opinion that the operation of any provisions of the Act cause any undue hardship, by a general or special order, any class of person or areas from the provisions of the Act.

15. The U.P. Apartment Act, 2010 and the Rules of 2011 have taken care of every detail for providing ownership of an individual apartment, undivided interest in the common areas and facilities, the delineation of common areas and facilities to be provided in the declaration, formation of association and the rights, duties and liabilities of the promoter and apartment owners. Rule 3 of the U.P. Apartment Rules, 2011 provides for formation of declaration under sub-section (1) of Section 12. The declaration shall be submitted by the promoter under sub-section (1) of Section 12 in Form-A appended to the Rules within a period of 12 months from the date of approval of the plans. Where the building has been constructed or is under construction prior to the commencement of these Rules declaration shall be submitted within 90 days.

16. The "competent authority" under Rule 2(c) of the Rules of 2011 means Vice Chairman of the Development Authority in whose development area the building is situated or Collector of the district, where no such development authority exists. Though we find that no specific power has been given to the competent authority to decide any dispute between the apartment owners and promoters or the apartment owners inter se, the provisions of the Act namely the prior permission of the competent authority under sub-section (4) of Section 25 in case of any complaint for any offences for the Court to take cognizance, the obligation of the competent authority under sub-section (1) of Section 27 to carry out such directions as may be issued to it from time to time; the lodgment of the declaration with the competent authority under Section 12(1) and any amendment and the resolution of disputes on such amendment under rule 4(4) of the U.P. Apartment Rules, 2011, clearly enjoins that if a dispute or disputes is not resolved between the disputants in the meeting of the association of apartment owners of which promoter is necessary member under sub-section (2) of Section 14, the dispute has to be first raised before the competent authority and thereafter to be raised before the State Government under sub-section (3) of Section 27 of the Act, which has control and is accountable for the efficient implementation of the Act and the powers of removal of doubts and removal of difficulties under Section 29 and 33 of the Act.

17. The Act has thought it proper to provide for a compulsory formation of an association of apartment owners, by way of a society for administering affairs in relation to the apartment and properties appertaining thereto and for the management of common areas and facilities.

18. The Act and the Rules do not provide for the authority with whom the association of apartment owners will be registered. The model bye-laws notified by the State Government on 16.11.2011, however, provide in the definition clause that the Registrar means the Registrar under the provisions of the Societies Registration Act. On the formation of the association of which obligation has been entrusted on the promoter under sub-section (2) of Section 14, the association shall make its bye-laws at its first meeting, which is also obligatory for every society under the Societies Registration Act. The Model bye-laws made in sub-section (6) of Section 14 provide that every association of apartment owners shall make its bye-laws at its first meeting for the administration of the affairs in relation to apartment and properties appertaining thereto. By its own name, the Model Bye-laws means that these bye-laws has to be adopted by every association of apartment owners, which can be amended under Bye-Law 58 of the Model bye-laws by the association in a duly constituted meeting for such purpose and that no amendment shall take effect unless approved by owners representing at least 2/3 of the total number of units in the building with the prior approval of the competent authority, which has been defined under Rule 2(c) of the U.P. Apartment Rules, 2011. By such approval being granted to a valid resolution for amendment of bye-laws by the owners representing at least 2/3rd of the total number of units in the building in the special meeting constituted for such purpose the amendment shall be carried out by the Registrar of Societies. It goes without saying that such amendment has to be in consonance with the U.P. Apartment Act, 2010 and the U.P. Apartment Rules, 2011.

19. Though the apartment owner has been defined to mean; "a person or persons owning an apartment or promoter or his nominee in case of unsold apartment", since there is no restriction on the occupation of the apartment by members of any joint family, which has been defined under Section 2(q) and by the family members of the apartment owner as well as lawful tenant or lawful occupant, who may be authorized by the society/firm/company or any validly recognized association of persons, such lawful occupation will also be included within the meaning of the apartment owner both for the purposes of enjoying rights and obligations and corresponding general liabilities of the promoter, but also for the purposes of becoming members of the association of apartment owners. In case of any dispute on the validity of his membership, it has to be first resolved by the members of the association in an annual meeting or special meeting of the association and in case of any further dispute by the Competent Authority under Rule 2(c) of the U.P. Apartment Rules, 2011 and thereafter before the State Government before it is raised before any Court of law.

20. After the enforcement of the U.P. Apartment Act, 2010 no builder, promoter can resist/or delay the formation of association of apartment owners under Section 14 of the Act. If the promoter does not get the association registered, the apartment owners can get such association registered after a notice giving reasonable period to the promoter, say a month, and to adopting model bye-

laws, if they have not adopted earlier. In such case the Registrar of Societies shall not refuse the registration of the association of the apartment owners. The promoter, however, has to be made a member as he is jointly responsible with the apartment owners to form an association. Even if he does not get the association registered and does not join or his authorised agents and subscribe to be a member of the association, he will be deemed to be member of the association for the purposes of enforcement of the Act as the promoter being the member of the association has duties and liabilities under the Act to be enforced.

21. It is not clear from the pleadings, which of the two associations claiming rights for being registered, was formed with the association of promoters or when the promoters of the building resisted the formation of association, the owners formed their association themselves. It is also not clear from the pleadings that which of the two association adopted the model bye-laws in their alleged meeting, which they were compulsorily required to do under the provisions of Statute.

22. In any view of the matter, there is a dispute between the two factions and both are claiming registration under Societies Registration Act. The dispute became further complicated with some of the apartments owners approaching this Court by filing Writ Petition No. 8749 of 2015 claiming the association of which they are member to be recognised under the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 by the Noida authorities. The Court finding that there was a dispute between two rival factions in respect of the recognition, disposed of the writ petition vide order dated 12.02.2015 by making following order.

"There is an issue as to whether the association of apartment owners of which the petitioners are members, is to be recognised under the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 by the Noida authorities or it is the association represented by respondent No. 9, who claims to be Secretary is to be so recognised.

Petitioners are permanent owners of the multi-storied building called Grand Omaxe and the Development Authority has to give recognition to the association of the apartment owners. The purpose of the said Act is to give recognition to one of the associations, who are fighting amongst themselves for such recognition. The petitioners only pray that the association may be recognised by the Noida Authority after affording opportunity to the contesting association.

Under the provisions of U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010, the power of recognition of such association is with the Development Authority and, therefore, the interests of justice would be served by providing that the respondent No. 3 may examine the dispute between the parties and do the needful in the matter of recognition of the Association of apartment owners, preferably within 8 weeks from the date of certified copy of this order filed before him. The respondent No. 3 shall afford opportunity of

hearing to the parties concerned and pass a reasoned orders.

With the aforesaid observation, the writ petition is disposed off."

23. In compliance of the said order, the Chief Executive Officer, NOIDA authority vide impugned order dated 05.06.2015 referred the matter to be adjudicated by prescribed authority under Section 25 of the Societies Registration Act., since there was a dispute in respect of the elected members of the association. The Deputy Registrar without registering the bye-laws of the society, issued a registration certificate in favour of Grand Omaxe Apartment Owners, though there were two rival groups claiming registration. Similarly, the Chief Executive Officer of the NOIDA authority, instead of entering into the dispute, referred it under Section 25 of the Act, which provides reference of the dispute regarding election of office bearers before a Prescribed Authority. The said provision comes into operation where there is some dispute with regard to elections of office bearers of an already registered society.

24. In the case in hand, as already held above, the registration certificate issued by the Deputy Registrar without registering the bye-laws is of no consequence and, thus, there is no registered society. In such view of the matter, the order passed by the Chief Executive Officer, NOIDA authority is also illegal and not liable to be sustained.

25. Having come to the conclusion that the registration certificate issued in favour of the petitioner is illegal and of no consequence and the order dated 05.06.2015 passed by Chief Executive Officer, NOIDA authority referring the dispute under Section 25 of the Act to Prescribed Authority is not liable to be sustained, the issue for consideration is an appropriate direction in the matter so as to resolve the dispute between the parties.

26. A Division Bench of this Court vide judgment and order dated 14.11.2013 passed on Writ Petition No. 33826 of 2012 and other connected petitions, after analysing the provisions of Act of 2010 and the Rules framed thereunder, has held that Vice Chairman of the Development Authority, in whose notified area, the building is situate, is the competent authority to decide any dispute. As already observed above, in the present case, there is a dispute between the apartment owners with regard to formation of Association itself.

27. In view of the above facts and discussions, while quashing the registration certificate and the order dated 05.06.2015 passed by Chief Executive Officer, NOIDA authority and in order to resolve the dispute between the parties, we dispose of the writ petition by making following directions.

1. The Chief Executive Officer, NOIDA or any officer authorised by him not below the rank of Joint Secretary, NOIDA authority shall call for a meeting of the apartment owners and the promoters on a date, time and place to be fixed by him for the purposes of forming an association of the apartment owners.

2. The election/constitution of the Board of Management as provided under the

Act and Rules shall be held in the said meeting by the apartment owners under the supervision of the competent authority or the officer nominated by him in this behalf.

3. The association so formed in the said meeting after adopting the model bye-laws shall make an application before the concerned Joint Registrar for registration and the society so formed, with the elected office bearers, shall be registered along with bye-laws adopted.

4. After the association is registered, the Chief Executive Officer shall proceed to consider granting recognition to said association.

5. It shall be open to the association, so formed registered and recognised, to amend the bye-laws as provided under Bye-law No. 58 of the model bye-laws in a duly constituted meeting in such manner as provided under the Rules and model bye-laws.

28. In the facts and circumstances of the case, there shall be no order as to costs.