

(2025) 08 BOM CK 0208
In the Bombay High Court
Case No : Writ Petition No. 9179 Of 2022

Sachin Malpani And Ors

APPELLANT

Vs

Nilam Patil And Ors

RESPONDENT

Date of Decision : 04-08-2025

Acts Referred:

Maharashtra Apartment Ownership Act, 1970 — Section 2(s), 3(f), 3(g), 3(h), 6, 6(1), 10, 16A, 16B
Maharashtra Co Operative Societies Act, 1960 — Section 3

Citation : (2025) 08 BOM CK 0208

Hon'ble Judges : Milind N. Jadhav, J

Bench : Single Bench

Advocate : Atul Damle, Vaibhav Kulkarni, Prathamesh Deshpande, Disha Rathod, Yash Agarwal, Khushnumah Banerjee, Vidhii Partners, P.J. Gavhane

Final Decision : Dismissed

Judgement

Milind N. Jadhav, J

1. Present Writ Petition takes exception to order dated 13.05.2022 passed by the Co-operative Court, Pune by which Appeal No.01 of 2021 filed by Petitioners under Section 16B of the Maharashtra Apartment Ownership Act, 1970 (for short "the Apartment Act") was dismissed.

2. Brief facts germane for adjudication of the present Petition are as follows:-

2.1. The subject property from which dispute in the present Petition emanates is 'Treasure Park' which is a registered condominium of 11 buildings namely building 'A' to building 'K' comprising of 356 apartments registered under the Apartment Act. A Deed of Declaration dated 29.07.2011 was executed and registered subjecting the property to the provisions of the Apartment Act and also a Supplementary Deed of Declaration dated 31.05.2017 was executed and registered for additional construction. Deed of Apartment has been executed in consonance with the Deed of Declaration with each apartment owner.

2.2. According to Petitioners, in the condominium as per the resolutions passed by the General Body, maintenance charges were charged equally to all apartment owners irrespective of the area of their flat or their undivided share and only the contribution towards the sinking fund varied as per the undivided share or area of the flat.

2.3. On 11.11.2020, Respondent No.1 to 5 who are also apartment owners in the said condominium filed complaint with the Respondent No.10 - Deputy Registrar of Co-operative Societies alleging that the maintenance charges levied by the condominium are in violation of Section 10 of the Apartment Act. Thereafter Respondent No.10 issued notice to the Chairman and Secretary of the condominium who filed their reply dated 28.12.2020.

2.4. On 08.07.2021, Respondent No.10 - Deputy Registrar of Co-operative Societies passed order dated 08.07.2021 directing the Treasure Park condominium to levy maintenance charges proportionate to the undivided share of the apartment owners in terms of Section 10 of the Apartment Act.

2.5. Petitioners who are members of the Treasure Park condominium were intimated about the said order dated 08.07.2021 by the Central Committee of the condominium by displaying the said order on the notice board of the condominium on 14.07.2021. Petitioners therefore approached the Co-operative Court, Pune to challenge the order dated 08.07.2021 by filing Appeal No.01 of 2021 which was rejected by order dated 13.05.2022 which is impugned in the present Petition.

2.6. Hence the present Petition.

3. Mr. Damle, learned Senior Advocate for Petitioners would at the outset submit that Section 16A of the Apartment Act empowers the 'Registrar' to adjudicate upon the issue pertaining to violations under the Apartment Act. He would submit that 'Registrar' is defined under Section 2(s) of the Apartment Act as a person appointed as a Registrar under the under the Maharashtra Co-operative Societies Act, 1970 (for short 'MCS Act'). However he would submit that in the present matter, the order dated 08.07.2021 is passed by Respondent No.10 who is the Deputy Registrar of Co-operative Societies and not the 'Registrar' as envisaged under the Apartment Act which is the applicable statute in the present case. He would submit that the order dated 08.07.2021 passed by Respondent No.10 - Deputy Registrar of of Co-operative Societies is sans jurisdiction and amounts to nullity.

3.1. He has drawn my attention to order dated 19.06.2024 passed by this Court wherein this Court has recorded the statement made by the learned AGP that there is no specific delegation of the power under Section 16A of the Apartment Act in favour of the Deputy Registrar. He would submit that reliance of the learned AGP on the general delegation of powers by the Registrar as provided under Section 3 of the MCS Act and the said delegation of powers cannot be implied or read into as being the same and applicable to the case of Apartment

Act as it has to be in express terms. In support of this submission he has referred to and relied upon the decision of the Supreme Court in the case of Marathwada University Vs. Seshrao Balwant Rao Chavan (1989) 3 SCC 132 wherein the Supreme Court has explained the maxim *delegatus non potest delegare*. He would submit that the said proposition has been reiterated by the Supreme Court in the case of Sahni Silk Mills (P) Ltd. Vs. Employees' State Insurance Corporation (1994) 5 SCC 346. He would submit that in view of the above precedents, the decision passed by the Respondent No.10 - Deputy Registrar of Co-operative Societies amounts to nullity.

3.2. That apart he would submit that the order passed by the Respondent No.10 - Deputy Registrar of Co-operative Societies directly affects the rights of Petitioners who are members of the condominium being owners of 3BHK and 4BHK apartments and therefore the Respondent No.10 - Deputy Registrar of Co-operative Societies before passing any order ought to have given audience to them as it decided the issue of practice of the condominium to levy common maintenance charges across all flats.

3.3. On merits of the matter he would submit that as per the audit reports, common maintenance collected by the condominium is used for maintenance of common areas and amenities like swimming pool, club house, gym, park, security, etc. which are used in common by all apartment holders irrespective of their undivided share or area of their apartment. He would submit that the order dated 08.07.2021 passed by the Respondent No.10 - Deputy Registrar of Co-operative Societies is bad in law and is in contravention to the law laid down by this Court in the case of Venus Co-operative Housing Society Vs. Dr. JY Detwani 2002 SCC OnLine Bom 1457 wherein this Court held that common amenities are enjoyed by all members of the society irrespective of the area of flat they hold and therefore large flat holders cannot be forced to pay more maintenance towards the common facilities.

3.4. He would submit that the impugned order passed by the Co-operative Court proceeds on an erroneous presumption that larger flats are occupied by more number of people which is unconnected with the common maintenance amount. He would submit that functioning of the condominium is governed by the General Body Resolutions by majority and have never been challenged by Respondent Nos.1 to 5 till the filing of the complaint in November 2020.

3.5. He would submit that the Resolutions passed by the General Body are in conformity with Section 10 of the Apartment Act as the sinking fund and the property tax are already being paid by the apartment owners as per their proportionate area. He has drawn my attention to the provisions of Section 10 of the Apartment Act and would submit that the provisions of Section 10 of the Apartment Act use the words "according to the percentage of the undivided interest in the common areas of facilities" and the Deed of Declaration of the condominium does not give more or higher interest to large apartment holders in common areas or facilities. He would submit that as per the Apartment Act,

person having higher area has a proportionate higher interest in the land and not common areas or facilities.

3.6. In view of his above submissions, he would urge the Court to allow the Writ Petition and thereby quash and set aside the two concurrent orders viz. order dated 08.07.2021 passed by Respondent No.10 - Deputy Registrar of Co-operative Societies and order dated 13.05.2022 passed by the Co-operative Court in Appeal filed by Petitioners.

4. PER CONTRA, Ms. Banerjee, learned Advocate for Respondent Nos.1 to 5 – original complainants would on the issue of jurisdiction of the Respondent No.10 to pass order dated 08.07.2021 draw my attention to the two Notifications dated 11.09.2012 and 24.11.2021 issued by the State Government through its Corporation, Marketing and Textile Department in exercise of power conferred under Section 3 of the MCS Act whereby the State Government appointed such persons / officers to assist the Registrar and conferred on the said officers all powers of the Registrar, except those as specified in the said notification. She has drawn my attention to Sr. No.6 in the Schedule of the Notification dated 24.11.2021 which confers powers rather all powers of the Registrar under the MCS Act except for certain Sections and Rules specified therein on the District Deputy Registrar of Pune City. She would submit that in the light of the powers conferred upon the Deputy Registrar by the said Notification dated 24.11.2021, it cannot be contended by Petitioners that the order dated 08.07.2021 passed by Respondent No.10 – District Deputy Registrar of Co-operative Societies is without jurisdiction.

4.1. She has next drawn my attention to clause 7 of the Deed of Declaration dated 29.07.2011 which states that each apartment owner/s shall have undivided share in the general and / or restricted common areas and facilities as enumerated therein in accordance with the Apartment Act. Next she would submit that clause 9(xviii) of the Deed of Declaration provides for share of apartment owners for sharing income and common expenses based on the size of their apartment. She would submit that a conjoint reading of the aforesaid clauses alongwith Sections 6 and 10 of the Apartment Act would make it clear that that all apartment owners of the condominium possess undivided interest in common areas and facilities. She would submit that the Deed of Declaration of the condominium also affords higher voting rights to apartment owner possessing larger apartments and therefore such persons must contribute to the common area maintenance charges proportionately.

4.2. She would submit that in furtherance to the decision of the Respondent No.10 – Deputy Registrar of Co-operative Societies and the Co-operative Court, an annual general meeting of the condominium was held on 31.07.2022 for discussion about the maintenance collection and pursuant thereto from August 2022 the condominium is issuing maintenance bills on the basis of the percentage share of each apartment owner in respect of the common area and facilities. However the Petitioners did not challenge the minutes of the said

meeting and also did not pay the common area maintenance charges.

4.3. In view of her above submissions, she would submit that the order dated 08.07.2021 passed by the Respondent No.10 – Deputy Registrar of Co-operative Societies which is upheld by the Co-operative Court by order dated 13.05.2022, both being cogent and well reasoned orders be upheld and confirmed and the Writ Petition be dismissed.

5. I have heard Mr. Damle, learned Senior Advocate for Petitioners, Ms. Banerjee, learned Advocate for Respondent Nos.1 to 5 and Ms. Gavhane, learned AGP for State and with their able assistance perused the record and pleadings of the case. Submissions made by the learned Advocates have received due consideration of the Court.

6. In the present case, rights of the parties clearly stand governed by the Deed of Declaration dated 29.07.2011. The Society is registered as condominium of 11 buildings comprising 356 apartments under the Apartment Act. Apartments are of 3BHK, 4BHK and 2BHK areas, some with garden also. Copy of the registered Deed of Declaration dated 29.07.2011 is appended at Exhibit 'E' – page No.150 of the Petition. There is a Supplementary Deed of Declaration dated 31.05.2017 which applies in respect of the additional construction. It is in consonance with this Deed of Declaration that Agreement with individual apartment holders have been entered into and executed with each of the apartment owners and therefore they are bound by the clauses contained in the Apartment Act with the Deed of Declaration. Clause 7 of the Deed of Declaration dated 29.07.2011 reads thus:-

"7. All the units are capable of independent use and occupation on account of them having their own exit to the common areas and facilities and leading to the main exist of the property. The units will be owned by one or more persons, each having a particular and exclusive property thereto, each Apartment constituting a heritable and transferable immovable property within the meaning of common law for the time being in force in the state, and also undivided share in the general and/or restricted common areas and facilitates of the building as enumerated herein below necessary for their adequate use and enjoyment and hereinafter referred to as the General and/or restricted common areas and facilities, all the same in accordance with the Maharashtra Apartment Ownership Act, 1970."

7. Thereafter the next relevant clause for determination of the present lis between the parties is clause 8(XVIII) which reads thus:-

"XVIII. The share of the individual owner/s of Apartment in the said project for the purpose of sharing income and common expenses in the Limited and Common areas and facilities for Apartment units in the said project shall be calculated based upon the proportion of their Maintaince Corpus Fund (MCF) contribution to the total MCF collected from all Apartment owner/s by the promoter, as shown in the following table:

Type

No of Units

MCF/ Unit

Total MCF

Each Unit's proportioned Contribution in MCF

2BHK

172

125,000

21,500,000

0.2528%

2BHK+Garden

12

150,000

1,800,000

0.3033%

3BHK

132

150,000

19,800,000

0.3033%

3BHK+Garden

12

175,000

2,100,000

0.3539%

4BHK

22

175,000

3,850,000

0.3539%

4BHK+Garden

2

200,000

400,000

0.4044%

49,450,000

The above mentioned way of sharing income and expenses is a logical guideline provided by the Promoter to the Association of individual owner/s of Apartments of the said project. The Association is free to decide any other method/mode for the same purpose that they think fit in future."

8. The statutory provisions which apply to the present case are Section 6 and Section 10 of the Apartment Act which read thus:-

"6. Common areas and facilities.

(1) Each apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the Declaration. Such percentage shall be computed by taking as a basis the value of the apartment in relation to the value of the property; and such percentage shall reflect the limited common areas and facilities.

(2) The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the Declaration shall have a permanent character, and shall not be altered without the consent [of majority] "These words were substituted for the words "of all" by Mah. 41 of 2018, dated 07-07-2018, s. 3, (w.e.f. 7-7-2018)" of the apartment owners expressed in an amended Declaration duly executed and registered as provided in this Act. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains, and shall be deemed to conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or other instrument.

(3) The common areas and facilities shall remain undivided and no apartment owner or any other person shall bring any action for partition or division of any part thereof, unless the property has been removed from the provisions of this Act as provided in sections 14 and 22. Any covenant to the contrary shall be null and void.

(4) Each apartment owner may use the common areas and facilities in accordance with the purpose for which they are intended without hindering or encroaching upon the lawful rights of the other apartment owners.

(5) The necessary work of maintenance, repair and replacement of the common areas and facilities and the making of any additions or improvements thereto

shall be carried out only as provided herein and in the bye-laws.

(6) The Association of Apartment Owners shall have the irrevocable right, to be exercised by the Manager or Board of Managers, to have access to each apartment from time to time during reasonable hours as may be necessary for the maintenance, repairs and replacement of any of the common areas and facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another apartment or apartments.”

10. Common profits and expenses.— The common profits of the property shall be distributed among, and the common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities.”

9. From a conjoint reading of the aforesaid covenant in the Deed of Declaration and the statutory provisions, it is prima facie seen that the Deed of Declaration provides income and common expenses based on the side of their respective purchased apartment. Section 6(1) of the Apartment Act prima facie provides for a basis and computation of interest in the common areas and facilities of each apartment owner and it categorically states that each apartment owner shall be entitled to an interest in the common area and facilities for the percentage expressed in the Declaration (emphasis supplied). Thus it also states that such percentage shall be computed by taking as a basis of the value of the apartment in relation to the value of the total property. Section 6 of the Apartment Act further categorically provides that the percentage of undivided interest of each apartment owner in the common area and facilities as expressed in the Declaration (which is the Deed of Declaration herein) shall have a permanent character and the percentage of common undivided interest in the common area and facilities shall not be separated from the apartment to which it appertains.

10. Thereafter Section 10 prima facie when read provides for common profits of the properties to be distributed amongst and the common expenses to be charged to the apartment owners according to the percentage of the undivided interest in the common area and facilities.

11. Thus combined reading of the aforesaid provisions and the covenant in the Deed of Declaration which forms the basis of the MAO Agreement each apartment owner, makes it clear that the undivided interest in the common area and facilities is an interest which runs with the apartment and upon transfer, the undivided interest, sale and transfer together with the apartment irrespective of a specific covenant to that effect in the Conveyance Deed.

12. In that view of the matter, the ascertainment of percentage of interest in the common area granted to each apartment owner is according to the Deed of Declaration which is required to be calculated in proportion to the value of the apartment in relation to the value of the entire property as provided in the Apartment Act. The Deed of Declaration is found in consonance with the

provisions of the Apartment Act which also affords voting rights to each apartment owner on the proportionate area of each unit to the total area of all units. Thus member holding higher proportionate value and size (area) of the apartment must contribute to the common area maintenance charges proportionately.

13. It is seen that in the Annual General Meeting of the condominium held on 31.07.2022 pursuant to the order passed by the learned Co-operative Court, the condominium has issued maintenance bills on the basis of the percentage share of each apartment owner with respect to the common area and facilities thereby giving effect to the impugned order. The Deed of Declaration being a registered instrument needs to be followed in view of the statutory provisions of the Apartment Act applicable to the condominium apartment purchasers. What is stated in the Deed of Declaration if not agreeable to the Members of the condominium can only be altered and modified by way of another registered instrument.

14. It is seen that Deed of Declaration dated 29.07.2011 specifically shows the right, title interest of individual owners of the apartment in the said condominium for the purpose of voting in therein of the association which is based on the proportionate area of each unit to the total area of all the units. It discloses that the number of flat and its total area and the total area in the flat. It is seen that initially the apartment owner's had paid the lumpsum advance maintenance amount to the Developer for a few years and therefore this issue of unequal maintenance never cropped up. In the present case the dispute is not about equal maintenance but applicability of the provisions of Section 10 of the Apartment Act in the facts and circumstances of the present case.

15. It is seen from the record that occupants of smaller flats had therefore approached the Deputy Registrar to levy charge of maintenance as per Section 10 of the Apartment Act. Thus Deputy Registrar considered the said issues which were also equally considered by the Appellate Court while deciding the lis between the parties. The Definition of common areas under Section 3(f), common expenses under Section 3(g) and common profits under Section 3(h) of the Apartment Act applied to the present case. It is seen that just because the association of Members in the condominium have in the past passed a resolution for equal maintenance, it does not mean that they / or the members are estopped from the following due process of law. The condominium under the Apartment Act is empowered to act in the interest of all apartment owners for maintenance of the common areas and facilities in view of Section 10 of the Apartment Act.

16. The argument of the Petitioners that the Petitioners holding larger apartment do not get any additional benefit or priority of preference in the undivided share or do not any additional benefit cannot be countenanced in view of the aforesaid observations and findings and is stated to be rejected. Thus in view of the applicability of the provisions of Section 10 of the Apartment Act which clearly

mentions that the common profits of the property shall be distributed among and the common expenses shall be charged to the apartment owners according to percentage of the undivided interest in the common areas and facilities squarely applies to the case of the Petitioners before me.

17. The reasons returned by the learned Appellate Court in its judgment and order dated 13.05.2022 while answering point Nos.1 and 2 in paragraph Nos.32 to 62 of the said decision while upholding the judgment and order passed by the Deputy Registrar, Co-operative Society, Pune are cogent and well reasoned findings which deserve to be accepted in accordance with the applicable statutory provisions and the statutory Deed of Declaration dated 29.07.2011 in the present case. The Petitioners have already benefited in the past due to the inequality and non-application of the statutory provisions under the Apartment Act. They cannot obstruct implementation of the provisions of the Apartment Act which squarely and admittedly applies to their case. If Petitioners' case is to be accepted then the registered Deed of Declaration would be a nullity in law. There is a clear distinction between the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale Management and Transfer) Act, 1963 and the Maharashtra Apartment Ownership Act, 1970 and rights of members under the aforesaid two statutes as applicable for levy of maintenance charges.

18. In view of the above observations and findings, twin judgment and order dated 08.07.2021 passed by the Deputy Registrar, Co-operative Society, Pune and 13.05.2022 passed by the learned Appellate Court are upheld and confirmed. Resultantly Petition fails.

19. Writ Petition is dismissed.