

# Mukesh Makandas Mehta vs The State Of Maharashtra (Th. The ... on 7 May, 2024)

**Author: Sandeep V. Marne**

**Bench: Sandeep V. Marne**

2024:BHC-OS:7555

Neeta Sawant

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LODG.) NO. 11586 OF 2024

Mukesh Makandas Mehta,  
Member of M/s. Prestige Properties

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: Versus :

1. The State of Maharashtra,  
(through the Co-operation,  
Marketing and Textile Department)
2. District Deputy Registrar of Co-op.  
Societies, Mumbai City-III, MHADA
3. Deputy Registrar of Co-operative  
Societies, K. East Ward, Mumbai Divsn.
4. Silver Utopia Premises Co-op.  
Soc. Ltd.
5. Sourabh Jain
6. National Realty Pvt. Ltd.
7. Mahendra Likhite
8. Rishabh Infrastructure Pvt. Ltd.
9. Kheruka Properties Pvt. Ltd.
10. Landmark Premises Pvt. Ltd.

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..Respond

Neeta Sawant  
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WPL-11586

Mr. Vishwajeet Sawant, Senior Advocate with Mr. Ansoshak Daver, Mr. Chinmaya Acharya and Mr. Viraj Jadhav i/by. Mr. Kevin Pereira, for the Petitioner.

Mr. Nishigandh Patil, AGP for State-Respondent Nos.1 to 3.  
Mr. Ashish Kamat, Senior Advocate with Mr. Jai Chhabria, Ms. Spenta Havewala, Mr. Murtuza Federal, Mr. Mihir Mekul and Mr. Sudarshan Satalkar i/by. Federal & Co., for Respondent Nos.4, 5,6, 7, 9 and 10.

CORAM : SANDEEP V. MARNE, J.

Reserved on : 25 April 2024.

Pronounced on : 7 May 2024.

JUDGMENT :

1) Petitioner has fled this petition challenging the Order dated 20 March 2024 passed by the District Deputy Registrar, Co-operative Societies, Mumbai City-III and Competent Authority allowing the application for registration of 'Silver Utopia Premises Co-operative Society Ltd.' and directing Deputy Registrar to register the said Co-operative Housing Society.

2) Briefly stated, facts of the case are that Plot bearing Survey No.48 and Survey No.47, 477/1 and 477/2 of Revenue Village Chakala, Andheri (East), Mumbai was originally owned by Goldfeld Mercantile Company, which held development rights in respect of another parcel of land bearing 7 May 2024 Neeta Sawant WPL-11586-2024-FC Survey No.47, Hissa No.2(P) and 3, City Survey No. 478, 478/1, Chakala, Andheri (East). Both properties together admeasured 8341.30 sq.mts. A joint venture agreement was executed on 8 May 2006 between Goldfeld Mercantile, Iqbal S. Nathani, Kamlesh Shah and Petitioner for carrying on business as Association of Persons (AOP) in the name and style as 'M/s. Prestige Properties'. On 31 May 2008, Goldfeld Mercantile and Iqbal Nathani retired from AOP thereby leaving Petitioner and Kamlesh Shah to carry on business of M/s. Prestige Properties. The AOP submitted plans to Municipal Corporation for construction of I.T. Park, which was eventually named as 'Silver Utopia'. The AOP later applied for change of use of development from IT Park to commercial use. On 4 October 2012, the MCGM issued part Occupancy Certificate in respect of the building. Petitioner claims that Mr. Kamlesh Shah unilaterally and unauthorisedly

sold Unit Nos.101A, 101B, 201A, 501A, 501B, 601A, 601B, 801A and 801B to the following entities:

| Sr. No. | Unit No. | Date       | Purchaser/Respondent No.       |
|---------|----------|------------|--------------------------------|
| 1       | 101A     | 20.10.2011 | Landmark Premises Pvt. Ltd.    |
| 2       | 101B     | 20.10.2011 | Landmark Premises Pvt. Ltd.    |
| 3       | 201A     | 13.12.2011 | Mahendra Likhete               |
| 4       | 501A     | 30.12.2014 | National Realty Pvt. Ltd.      |
| 5       | 501B     | 15.03.2014 | National Realty Pvt. Ltd.      |
| 6       | 601A     | 22.12.2015 | Rishabh Infrastructure Pvt. Lt |
| 7       | 601B     | 05.05.2014 | Kheruka Properties LLP         |
| 8       | 801A     | 22.12.2015 | Rishabh Infrastructure Pvt. Lt |
| 9       | 801B     | 07.03.2015 | Tulip Properties Pvt. Ltd.     |

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3) It appears that certain changes occurred in AOP and after retirement

of Kamlesh Shah, Petitioner is apparently claiming rights in respect of the development concerned.

4) In the above background, an application was made for registration of proposed Society under the name 'Silver Utopia Premises Co-operative Society Ltd.' and the Deputy Registrar of Co-operative Societies, K-(East) Ward, Mumbai Division passed Order dated 24 January 2020 and issued Registration Certificate in respect of Respondent No.4-Society. Petitioner challenged the Order dated 24 January 2020 before the Divisional Joint Registrar by filing Appeal under Section 152 of Maharashtra Co-operative Societies Act, 1960 (M.C.S. Act). Upon rejection of Appeal, the challenge was further carried before the Hon'ble Minister for Co-operation, who rejected the Revision by Order dated 26 February 2021.

5) Petitioner therefore filed Writ Petition No. 131 of 2023 in this Court challenging the Order passed by the learned Minister dated 26 February 2021. This Court disposed of the Writ Petition by Order dated 16 February 2024 after noticing that decision for registration of Society under Section 10(1) of the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (MOFA) was required to be decided by the Competent Authority and not by the Deputy Registrar. This Court therefore set aside orders passed by the Deputy Registrar and Divisional Joint Registrar as well as the one passed by 7 May 2024 Neeta Sawant WPL-11586-2024-FC learned Minister and directed the Competent Authority to decide application for registration of the Society afresh.

6) Petitioner fled reply before the Competent Authority opposing the application for registration of the Society and Chief Promoter of the Society fled rejoinder to Petitioner's reply. After hearing the parties, the Competent Authority passed Order dated 20 March 2024 allowing the application fled by the Promoters for registration of Respondent No.4- Society and has directed the Deputy Registrar to register Co-operative Housing Society proposed by the Promoters. The Petitioner has fled the present petition challenging the Competent Authority's Order dated 20 March 2024.

7) Mr. Sawant, the learned senior advocate appearing for the Petitioner would essentially raise two objections to the impugned order of the Competent Authority. Firstly, he would submit that Co-operative Society cannot be registered unless it consists of atleast 10 persons under the provisions of Section 6 of the M.C.S. Act. He would submit that in the present case, even if all the purchasers of commercial units purchased are to be individually considered, less than 10 persons made application for registration of the Society in violation of the provisions of Section 6 of the M.C.S. Act.

8) Mr. Sawant would further submit that since the building ' Silver Utopia' entirely consists of only commercial premises, it is classified as 7 May 2024 Neeta Sawant WPL-11586-2024-FC 'other housing society' under Rule 10 of the Maharashtra Co-operative Societies Rules, 1961 (MCS Rules). Inviting my attention to the Registration Certificate dated 22 March 2024, Mr. Sawant would submit that Respondent No.4 is registered as a ' housing society' and its sub- classification is 'other housing society'. He would then rely upon the provisions of Section 154B-2 of the MCS Act in support of the contention that the said provision permitting formation of society by five persons does not apply to 'other housing society' as its application is consciously restricted to 'tenant co-partnership housing society' and 'tenant ownership housing society'. That since there is conscious legislative omission to include 'other housing society' within the ambit of Section 154B-2, Section 6 of the MCS Act providing for requirement of minimum 10 persons for formation and registration of the society would apply to ' other housing society'. Mr. Sawant would submit that this is a case of casus omissus where a situation is omitted from and not provided for by the Statute and therefore governed by the general provisions of the Act, which in the present case is Section 6 of the M.C.S. Act.

9) The second contention of Mr. Sawant is that the building ' Silver Utopia' consists of total 19 commercial units, out of which 9 have been sold to 6 persons/entities. That Landmark Premises, National Realty Pvt. Ltd. and Rishabh Infrastructure Pvt. Ltd. have purchased two units each in the building and therefore the said entities are required to be considered as 'one person' within the meaning of Section 6 or in the alternative under Section 154B-2 irrespective of number of units purchased by them. He 7 May 2024 Neeta Sawant WPL-11586-2024-FC would submit that even if Section 154B-2 is held to be applicable in the present case, Clauses-1 and 2 thereof specifically provide that such person must be member of different family. He would therefore submit that correct interpretation of Clauses-1 and 2 of Section 154B-2 is that same unit/entity purchasing multiple units will be considered as one person for registration of Society even under Section 154B-2. That therefore Landmark Premises Pvt. Ltd, National Realty Pvt. Ltd. and Rishabh Infrastructure Pvt. Ltd. are required to be treated as ' one person' each in respect of units purchased by them. Mr. Sawant would therefore submit that seen from either of the angles, the Promoters did not comply all the mandatory requirements of Section 6 or Section 154B-2 for formation or registration of the

society.

10) Mr. Sawant would further submit that though this objection was specifically raised before the Competent Authority, the same has neither been considered nor been decided in the impugned order, which shows total non-application of mind. That reference of the Competent Authority to the Circular of Commissioner of Co-operation dated 23 March 2016 or G.R. dated 9 March 2019, is totally irrelevant to the present case as the said Circular or G.R. do not have any bearing on an application by persons who are purchasers of offices and commercial garages in a building where all units are offices and commercial garages. He would submit that since the applicant before the Competent Authority did not fulfill the requirement for 7 May 2024 Neeta Sawant WPL-11586-2024-FC formation/registration of the Society, the impugned order is liable to be set aside.

11) Mr. Kamat the learned senior advocate would appear on behalf of Respondent No.4-Society to oppose the petition and support the order passed by the Competent Authority. He would submit that Chapter XIII-B has been incorporated in M.C.S. Act to cater to specific requirements of housing societies and that therefore such amendment introduced for the benefit of housing societies is required to be purposively interpreted. That Section 6 of the M.C.S. Act is specifically excluded from being applied in relation to housing societies. That the definition of 'housing societies' under Section 154B-1(17) is distinct and separate from the definition under Section 2(16) of the M.C.S. Act. That therefore in view of specific exclusion of Sections 6 and 8 of the M.C.S. Act, in relation to housing societies [as defined under Section 154B-1(17)] the registration of 'a Housing Society' must be done in accordance with the provisions of Section 154B-2 of the M.C.S. Act and that Section 6 would have no application.

12) Mr. Kamat would further submit that even offices and commercial premises are covered by definition of the term 'flat' under Section 154B- 1(13) of M.C.S. Act and that the Act recognises formation of Co-operative Housing Society in respect of a building which comprises only of offices or commercial garages.

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13) Mr. Kamat would further submit that the word 'person' referred to

under Section 154B-2 of the M.C.S. Act is a natural person and not an artificial person or an incorporated entity such as a company. That explanation to Section 154B-2 makes this position clear, which does not include a company within the expression 'Member of a family'. He would therefore submit that companies, who have purchased multiple commercial units, will be considered as separate person within the meaning of Section 154B-2 of the M.C.S. Act.

14) Mr. Kamat would further submit that in the present case, Promoters have sold 9 units out of 15 units in the building. That Section 154B-2 prescribes a disjunctive eligibility criterion, where the requirement is either 5 persons or atleast 51% fat purchasers, whichever is higher. That therefore 51% of 9 commercial units would be less than 5 and that therefore the minimum required criteria under Section 154B-2 has been fulfilled in the present case. Without prejudice, even if multiple units purchased by the same persons are to be ignored and each of them are to be treated as one person, still there are five purchasers who are eligible for formation and registration of Co-operative Housing Society.

15) Relying on provisions of Section 154B-3, Mr. Kamat would submit that 'tenant co-partnership housing society' and 'premises society' are treated at par with each other for the purpose of opening bank account and reservation of name. That therefore the artificial distinction sought to be made by Petitioner in two classes of Society is totally baseless. Mr. Kamat 7 May 2024 Neeta Sawant WPL-11586-2024-FC would further submit that the Petitioner has thoroughly failed to fulfill his obligations to form a Society despite covenant in the MOFA Agreement mandating him to do so. In this connection, Mr. Kamath would rely upon various clauses in the agreements executed with unit purchasers. He would submit that formation and registration of Society is deliberately opposed by Petitioner with a view to grab extra FSI and carry out additional construction. Mr. Kamath would pray for dismissal of the petition.

16) I have heard Mr. Patil, the learned AGP appearing for Respondent Nos. 2 to 3 who would support the order passed by the Competent Authority.

17) Rival contentions of the parties now fall for my consideration.

18) The short issue that arises for consideration is whether there is minimum number of persons available for registration of Respondent No.4-Society. Petitioner claims that minimum number of persons required for registration of any Society, particularly Respondent No. 4 society, is 10. It is also Petitioner's case that same entity purchasing multiple units cannot be considered as separate person for meeting the requirement of minimum number of persons for formation and registration of Society.

19) To resolve the controversy that is sought to be raised at the behest of the Petitioner, it would be necessary to make a quick reference to the provisions of M.C.S. Act. The expression 'housing society' was initially 7 May 2024 Neeta Sawant WPL-11586-2024-FC defined under Section 2(16) of the M.C.S. Act, and which is still retained in the Act, is as under:

2(16) "housing society" means a society, the object of which is to provide its members with open plots for housing, dwelling houses or fats; or if open plots, the dwelling houses or fats are already acquired, to provide its members common amenities and services.

20) Section 6 of the M.C.S. Act provides for registration of Society and provides no society, other than the Federal society, shall be registered unless it consists of at least ten persons, each of such persons being a member of different family, who are qualified to be the members under the Act and who reside in the area of operation of the society. For the purposes of the present petition, only sub-section (1) of Section (6) is relevant which reads thus:

#### 6. Conditions of registration.

(1) 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:

Provided also that, the Registrar may specify the norms and conditions for registration of societies or class of societies.

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21) Thus, for registration of a society, the minimum number of eligible

persons required are 10, with a further caveat that each such person must be a member of different family. Section 8 provides for mode of making an application for

registration of society and Section 9 provides for grant of registration to a society.

22) Chapter XIII-B came to be inserted in M.C.S. Act by 2019 Amendment, by which special provisions to govern Co-operative Housing Societies came to be incorporated in the Act. Section 154B provides for application and non-application of various provisions of the Act to the housing societies. Section 154B(1) provides that sections enumerated therein shall apply mutandis mutatis to housing societies. Conversely, Section 154B(2) provides that Sections enumerated therein shall not apply to the housing societies. Section 154B provides thus:

154B. Application and non-application of provisions of this Act to the housing societies.

(1) The following provisions of this Act shall apply mutatis mutandis to the housing societies, namely :--

Section 1, clauses (5), (6), (7), (8), (10), (10-ai), (10-a ii), (10-a iii), (13), (14), (16), (17), (18), (20-A), (21), (24), (26), (27), (28), (29), (29A) and (31) of section 2, sections 3, 3A, 4, 5, 7, 9, 10, 12, 13, 14, 15, 17, 18, 19, 20, 20A, 21, 21A, 22, sub-sections (1), (2) and (3) of section 23, sections 25, 25A, 31, 33, 34, 35, 36, 37, 38, 40, 41, 42, except proviso of sub-section (1) of section 43, section 45 and sub-sections (1)(b), (2) and (3) of section 47, section 50, clauses (a) (c), (d) and (e) of section 62, sections 64, 65, 66, 67, 68, 69, 70, 71, 71A, 72, 73, sub-sections (2) to (7) of section 73-ID, sections 73C, 73CB, 73CC, 73F, 73-I, 75, 76, 77, 77A, 78A, sub-sections, (1), (1-1A), (1A), (1B), (2), (3) and (4) of 7 May 2024 Neeta Sawant WPL-11586-2024-FC section 79, sections 79A, 79AA, 80, 81 to 89A, 91 to 100, 102 to 110, 145 to 148A, 149 to 154, 154A and 155 to 168.

(2) The following provisions of this Act shall not apply to the housing societies, namely :--

Clauses (1)(a) and (b), (2)(a), (b) and (c), (4), (9), (10-a ii-1), (10A), (11), (11-A), (12), (14-A), (15), (16-A), (19) (a), (b) and (c), (19A), (22), (23) and (25) of section 2, sections 6, 8, 11, 16, 18A, 18B, 18C, 23(4), 24, 24A, 26, 27, 28, 29, 30, 32, 32A, 39, 44, 44A, 46, 47(1)(a), 47(4), 48, 48A, 49, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62(b), 63, 69B, 72A, 73(1A)(b), 73A, 73AAA, 73B, 73CA, 73D, sub-section (1) of section 73-ID, sections 74, 78, 90, 101, 110A and sections 111 to 144-1A.

23) Thus, under sub-section 2 of Section 154B, Section 6 and 8 have been excluded from their application to 'housing societies'. This would essentially mean that the requirement of minimum number of 10 persons for registration of any other 'Society' under Section 6, does not apply to a 'Housing Society'. Similarly, the procedure of making application for registration of society under Section 8 is inapplicable for registration of a housing society. Since a vacuum is created on account of non-application of Sections 6 and 8 of the M.C.S. Act, registration of Housing Society is now governed by the provisions of Section 154B-2 and 154B-3, which provide thus:



154B-2. Registration of co-operative societies (1) No tenant co-partnership housing society shall be registered under this Act, unless it consists of at least five persons (each of such persons being a Member of different family) or at least fifty-

one per cent. (of total number of flats as per sanctioned plan) flat purchasers or intending Members and who are qualified to become Members and who are qualified to become Member 7 May 2024 Neeta Sawant WPL-11586-2024-FC under this Act, whichever is higher, joins the registration proposal of housing society to be registered.

(2) No tenant ownership housing society shall be registered under this Act, unless it consists of at least five persons (each of such persons being a Member of different family) or at least fifty- one per cent. (of total number of plots as per proposed or sanctioned layout) plot purchasers and who are qualified to become Member under this Act, whichever is higher, joins the registration proposal of housing society to be registered. (3) No Association of society shall be registered unless it has at least five housing societies as its Members.

(4) No Co-operative Housing Association shall be registered unless it has at least two housing societies or other legal bodies as its Members.

(5) Nothing in this section shall be deemed to affect the registration of any society made before the commencement of the Maharashtra Co-operative Societies (Amendment) Act, 2019. (6) The word 'limited' or 'unlimited' shall be the last word in the name of every society with limited or unlimited liability, as the case may be, which is registered or deemed to be registered under this Act.

Explanation- For the purpose of this section, the expression "Member of a family" means a wife, husband, father, mother, dependent son unmarried dependent daughter.

154B-3. Application for reservation of name and permission for opening bank account.

(1) For the purpose of granting permission to open an account in the bank and reservation of name of the proposed tenant co-partnership housing society or premises society, an application shall be made to the Registrar in the prescribed format and shall be accompanied with the copies of commencement certificate, or the building completion certificate given by the Architect and the copy 7 May 2024 Neeta Sawant WPL-11586-2024-FC of resolution of promoters electing chief promoter and authorizing him to make such application and on receipt of such application, the Registrar shall dispose of it within a period of thirty days from the date of its receipt.

(2) For the purpose of granting permission to open an account in the bank and reservation of name of the proposed tenant ownership housing society an application shall be made to the Registrar in the prescribed format and shall be accompanied with the copy of tentative lay-out plan certified by Architect or sanctioned lay-out plan and copy of resolution of promoters electing chief promoter and authorizing him to make such application and on receipt of such application, the Registrar shall decide it within a period of thirty days from the date of its receipt.

(3) For the purpose of registration of a housing society, an application shall be made to the Registrar in the prescribed format and shall be accompanied with documents as prescribed alongwith such fees as may be prescribed :

Provided that, the application shall be signed by the minimum number of plot or fat purchasers or owners or intending Members as provided under foregoing section :

Provided further that, for the registration of a Association of society or co-operative housing association, such application shall be signed by minimum number of authorized ofce bearers of diferent societies or legal bodies, as the case may be, as provided under foregoing section.

24) Thus, for registration of 'tenant co-partnership housing society' and 'tenant ownership housing society', the minimum number of persons required is 5, each of such persons being a member of diferent family or atleast 51% purchasers of total number of fats as per sanctioned plan, 7 May 2024 Neeta Sawant WPL-11586-2024-FC whichever is higher. The application for registration of 'housing society' is now to be made under Section 154B-3 and not under Section 8.

25) Section 154B-1(17) defines 'housing society', to mean as under:

(17) 'housing society' means a society, the object of which is to provide its Members with open plots for housing, dwelling houses or fats; or if open plots, the dwelling houses or fats are already acquired, to provide its Members common amenities and services and to demolish existing buildings and reconstruct or to construct additional tenements or premises by using potential of the land;

(a) "tenant ownership housing society" means a society the object of which is to allot the plots to its Members to construct the dwelling unit or fats thereon or to allot the dwelling units already constructed and where land is held either on lease-hold or free hold basis by the society and houses are owned or to be owned by the Members;

(b) "tenant co-partnership housing society" means a society the object of which is to allot the fats already constructed or to be constructed to its Members and where both land and building or buildings are held either on free-hold or lease-hold basis by the society; and

(c) "other housing societies" means the house mortgage co-operative societies, house construction co- operative housing societies and premises co-operative societies where all the units are ofces or commercial galas.

26) Thus, under Section 154B-1 (17), there can be three classes of housing societies viz. (i) tenant ownership housing society, (ii) tenant co-

partnership housing society and (iii) other housing societies. The 7 May 2024 Neeta Sawant WPL-11586-2024-FC classification of 'other housing societies' applies inter alia to 'premises co-operative societies' where all the units are ofces or commercial galas.

27) Clause-13 of Section 154B-1 defines 'fat' to mean as under:

(13) "Flat" means block, chamber, dwelling unit, apartment, ofce, showroom, shop, godown, premises, suit, tenement, unit or by any other name, means a separate and self-contained part of any immovable property, including one or more rooms or enclosed spaces, located on one or more foors or any part thereof, in building or on a plot of land, used or intended to be used for any residential or commercial use such as residence, ofce, shop, showroom or godown or for carrying on any business, occupation, profession or trade, or for any other type of use ancillary to the purpose specified.

28) Thus, definition of the term 'fat' under Section 154B-1(13), includes even ofces, showroom, shop or godowns etc. used for commercial use.

Since, fat purchasers can form a 'housing society' under Section 154B- 1(17), it is axiomatic that owners of ofces, showrooms or shops are also entitled to form a housing society. The definition of 'other housing societies' makes this further clearer and postulates registration of a housing society in a case where all the units are ofces or commercial galas. Therefore, there can be no dispute to the proposition that in respect of any building, in which all units, ofces or commercial galas, it is permissible to form and register a 'housing society'. This applies to present case as the building 'Silver Utopia' comprises of only commercial units. Therefore, registration of housing society in respect of building 7 May 2024 Neeta Sawant WPL-11586-2024-FC constructed by the Petitioner named 'Silver Utopia' would undoubtedly be governed by Chapter XIII-B and the registration is required to be done in accordance with the provisions of Section 154B-2.

29) Coming back to the provisions of Section 154B-2, it is sought to be canvassed on Petitioner's behalf that the said Section does not make any provision for registration of ' other housing societies' and that therefore Respondent No. 4 Society, which is registered as 'other housing society' with further classification as 'premises cooperative society', its registration cannot be traced to provisions of Section 154B-2. Mr. Sawant has submitted that since Section 154B-2 provides for registration of only ' tenant co- partnership housing society' and 'tenant co-ownership housing society', the third types of societies viz. ' other housing societies' cannot be registered under Section 154B-2. Mr. Sawant therefore contends that there is a conscious omission by the legislature for registration of ' other housing societies' under Section 154B-2. That this is a case of casus omissus. According to Mr. Sawant since registration of 'other housing societies' is not provided for in Section 154B-2, their registration will necessarily have to be done in accordance with Sections 6 and 8 of the M.C.S. Act. I am unable to agree. If the theory of conscious exclusion is to be applied, the same works to the disadvantage of Petitioner as there is a conscious exclusion of application of Sections 6 and 8 to ' co-operative housing societies' under Sub-section (2) of Section 154B. The legislature has therefore consciously not made applicable Sections 6 and 8 to ' co-operative 7 May 2024 Neeta Sawant

WPL-11586-2024-FC housing societies', which also includes within its ambit 'other housing societies'. Application of theory of casus omissus, as is sought to be applied by Petitioner, would result in a situation where 'other housing societies' will be governed by provisions of Sections 6 and 8 despite specific exclusion of those sections for application to 'other housing societies' under sub-section (2) of Section 154B. Therefore, the theory of conscious omission cannot be applied to the present case as application of the same would fall foul of Section 154B providing for specific exclusion of application of Sections 6 and 8 of the M.C.S. Act.

30) The purpose of introduction of Chapter XIII-B in the M.C.S. Act is to make specific and special provisions to govern 'co-operative housing societies'. Insertion of Chapter XIII-B was felt necessary as co-operative housing societies are required to be governed differently than other societies under the M.C.S. Act. If this purpose behind insertion of Chapter XIII-B is borne in mind, in my view, purposive interpretation is required to be made in respect of the provisions of Section 154B-2 by reading into it even, 'other housing societies' for their formation and registration. In this regard, useful reference can be made to the Statement of Objects and Reasons to Amendment Act, 2019 which inserted Chapter XIII-B in the M.C.S. Act. The Statement of Objects and Reasons reads thus:

Among all co-operative societies governed by the provisions of the said Act, the co-operative housing societies are largest in number being around 50% of the total societies in the State. At present, even 7 May 2024 Neeta Sawant WPL-11586-2024-FC though the affairs of the co-operative housing societies are distinct and peculiar, they are regulated in the same manner as per the general provisions of the said Act, as applicable for all other co-

operative societies, such as Co-operative Sugar Factories, District Central Co-operative Banks, Co-operative Spinning Mills, etc. The uniform application of the provisions of the said Act, despite of the uniqueness of the co-operative housing societies. This lead to large number of disputes and litigation and thus creates hurdles in smooth functioning of the co-operative societies. In this view of the scenario, an urgent need was felt to provide a separate Chapter to cater to the specific requirements of the co-operative housing societies. Therefore a separate Chapter providing for regulation of co-operative housing societies, was inserted in the said Act. The proposed Chapter, among other things, has catered primarily to the issues of the co-operative housing societies viz. members and their rights, management of societies, audit, enquiry and inspection, settlement of disputes, liquidation, elections of societies, recovery of claims, etc.

31) Thus, Chapter XIII-B is consciously inserted in the M.C.S. Act with a view to avoid uniform application of provisions of the M.C.S. Act to 'co-operative societies' and 'co-operative housing societies'. The Statement of Reasons and Objects note that though the affairs of the co-operative housing societies are distinct and peculiar, they were still being regulated in the same manner as per the general provisions of the Act, which are applicable to all other co-operative societies such as sugar factory, co-operative banks, co-operative spinning mills etc. It was noted that uniform application of M.C.S. Act was creating problems and was inadequate to address the affairs of co-operative housing societies. It is with this objective that separate Chapter regulating co-operative housing societies was 7 May 2024 Neeta Sawant WPL-11586-2024-FC inserted in the M.C.S. Act. If

these reasons and objectives behind insertion of Chapter XIII-B are borne in mind, applying Sections 6 and 8 of the Act for registration of 'other housing societies' would clearly destroy the very objective behind insertion of Chapter XIII-B in the Act.

32) As observed above, housing societies include three classes of societies, including 'other housing societies'. Sub-section (3) of Section 154B-3 provides for making an application for registration of 'housing society'. Thus, for registration of 'other housing society' which is included in definition of the term 'housing society', application must be made under Section 154B-3. Therefore, it is not necessary to invoke provisions of Section 8 for making application for registration of 'other housing society', which Section is specifically excluded under Sub-section (2) of Section 154B. Section 154B-2 provides for minimum of number of persons for registration of 'tenant co-partnership housing society' and 'tenant ownership housing society', which would mean that no application under sub-section (3) of Section 154B-3 can be made for registration of those two types of societies unless there are minimum number of persons available as prescribed in Section 154B-2. If the theory of casus omissus is to be applied as sought to be suggested by Mr. Sawant, as Section 154B-2 does not provide for any minimum number of persons for registration of a 'other housing society', application for its registration under sub-section (3) of Section 154B-3 can be made by one person also. This is the reason why, in my view, omission of 'other housing societies' under Section 154B-2 7 May 2024 Neeta Sawant WPL-11586-2024-FC appears to be a mere drafting error. This is further clear from the first Proviso to Sub-section (3) of Section 154B-3 which provides that the application for registration must be signed by the 'minimum number of flat purchasers' as provides under 'foregoing section'. The first Proviso to Sub-section (3) of Section 154B-3 is reproduced thus:

Provided that, the application shall be signed by the minimum number of plot or flat purchasers or owners or intending Members as provided under foregoing section.

33) Thus, for registration of every 'housing society' there is a requirement of minimum number of persons provided in Section 154B-2. If the intention of the legislature was to apply Section 6 for minimum number of persons required for registration of 'other housing society' the first Proviso to Sub-section (3) of Section 154B-3, would not have used the words 'foregoing section'. Therefore, there is requirement of minimum number of persons for registration of every housing society, including 'other housing societies' and the same must be found under Section 154B-2.

34) Therefore, considering the broad objective behind making special provisions for registration of housing societies by insertion of Chapter XIII-

B, the provision for prescription of minimum number of persons for registration of 'other housing societies' must be traced within Chapter XIII- B and not outside it.

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35) On the issue of drafting error, a useful reference can be made to

decision of the House of Lords in *Inco Europe Limited & Ors. V/s. First Choice Distribution (A Firm) & Ors.*<sup>1</sup> in which it is held thus :

"The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opusculum, *Statutory Interpretation*, 3rd ed. (1995), pp.93-105. He comments at p.103:

"In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So, the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

(emphasis supplied)

(2000) 2 ALL ER 109

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36) The principle enunciated in *Inco Europe Limited (supra)* is reiterated

by our Supreme Court in *Surjit Singh Kalra V/s. Union of India & Anr. 2*, wherein the Apex Court held as under:

"19. True it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words" (Craies Statute Law, 7th edn., p. 109). Similar are the observations in *Hameedia Hardware Stores v. B. Mohan Lal Sowcar* [(1988) 2 SCC 513, 52425] where it was observed that the court construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the court should construe it in a harmonious way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. (See: *Sirajul Haq Khan v. Sunni Central Board of Waqf* [1959 SCR 1287, 1299 : AIR 1959 SC 198].)"

37) The Supreme Court, after referring to the judgment of the House of Lords in *Inco Europe Limited* and *Surjit Singh Kalra (supra)* has held in *Bhasker & Anr. V/s. Ayodhya Jewellers*<sup>3</sup> that though as a normal rule while interpreting a statute, the Courts are not expected to add words or omit words or substitute words, there is a well recognised exception to this Rule, under which the Courts can correct obvious drafting errors in suitable cases. The Apex Court further held in para 22 and 23 as under:

(1991) 2 SCC 87.

(2023) 9 SCC 281

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22. Coming back to the relevant provisions of Order XXI of CPC, on a conjoint reading of subrule (1) of Rule 92 and Rule 94 of Order XXI of CPC, it is apparent that the order of confirmation of sale under subrule (1) of Rule 92 of Order XXI culminates into a grant of a sale certificate under Rule 94 of Order XXI. The date of sale to be incorporated in the sale certificate is the date of passing of the order of sale confirmation. The very fact that Rule 94 of Order XXI incorporates a requirement of issuing a sale certificate shows that the Legislature was of the view that mere order of confirmation of auction may not be sufficient. The certificate is ultimately the evidence of the fact that the auction in favour of the person to whom a certificate is issued, has been confirmed by the Executing Court.

23. Prima facie, it appears to us that the only way of avoiding inconsistency between Rule 95 of Order 21CPC and Article 134 of the Limitation Act is to read into Article 134 that the starting point for making an application under Rule 95 of Order 21CPC is the date on which a certificate recording confirmation of auction-sale is actually issued to the purchaser. Such interpretation will satisfy the three tests laid down in *Inco Europe* [*Inco Europe Ltd. v. First Choice Distribution*, (2000) 1 WLR 586 (HL)]. .....

38) Following the judgments in *Inco Europe Limited*, *Surjit Singh Kalra and Bhasker* (supra), I am of the view that 'other housing societies' also need to be included in the provisions of Section 154B-2 of the M.C.S. Act so that there is no vacuum, inconsistency and absurdity in the provisions of the Act. If this is not done, registration of 'other housing societies' would be rendered virtually impossible as there is no other provision in the Act under which 'other housing societies' can otherwise be registered. As observed above, submission of Mr. Sawant that registration of 'other housing societies' is permissible or possible under Section 6 of the M.C.S. Act cannot be accepted in view of specific exclusion of provisions of 7 May 2024 Neeta Sawant WPL-11586-2024-FC Sections 6 and 8 of the M.C.S. Act in their application to co-operative housing societies under Section 154B.

39) There is yet another reason why the provision for prescription of minimum number of persons for registration of 'other housing societies' ought to be read into Section 154B-2. Section 154B-3 deals with reservation of name and permission for opening of Bank Accounts for registration of a housing society. While making a provision for reservation of name or opening of Bank Account, sub-section (1) of Section 154B-3 uses the words 'premises society' meaning thereby that 'other co-operative Societies' can make an application for reservation of name and permission for opening of bank account. If 'premises society' which finds its sub-classification as 'other housing society' can make an application for reservation of name or for permission for opening a bank account under one of the provisions included in Chapter XIII-B, I do not see any reason why such 'premises society' should be taken out of the scope of Chapter XIII-B and be relegated to Sections 6 or 8 for the purpose of application for criteria of minimum number of persons required for its registration. Acceptance of argument of Mr. Sawant would lead to incongruous and absurd situation where though all steps for registration of 'other housing society' like reservation of name, opening of bank account and making of an application of registration can be made under Section 154B-3, but for



purpose of applying the criteria of minimum number of persons, Section 6 will have to be referred to despite its specific exclusion.

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40) Infact the inclusion of 'premises society' under Section 154B-3 clearly

shows that the non-inclusion of 'other housing societies' in Section 154B-2 is a drafting error, which is required to be read in Section 154B-2 by this Court in its interpretative function. Considering (i) the intended purpose of M.C.S. Act, particularly of Chapter XIII-B, (ii) inadvertence of the draftsman, as well as (iii) substance of the provision being made by the Legislature, though the precise words are not used, the same are required to be read into the provision as held in Inco Europe Limited.

41) In my view since application for registration of 'other housing societies' can be made under Section 154B-3, the minimum number of persons specified in relation to 'tenant co-partnership society' and 'tenant ownership housing society' under Section 154B-2 would apply to 'other housing societies' as well. Therefore, 'other housing societies' including 'premises co-operative societies' where all the units are offices or commercial garages can be formed or registered by 5 persons or by 51% of flat purchasers who are intending members, whichever is higher.

42) In the present case, there is no doubt to the factual position that the application for formation and registration of the Society is made by following five persons/entities:

(i) Landmark Premises Pvt. Ltd.

(ii) Mahindra Likhete.

(iii) National Realty Pvt. Ltd.

(iv) Rishabh Infrastructure Pvt. Ltd.

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(v)Kheruka Properties LLP.

The requirement of signing the application by 5 persons under first Proviso to Sub-Section (3) of section 154B-3 is thus fully met.

43) Another issue raised by Petitioner is about the requirement of making application by purchasers of 51% of total number of fats is not made as the section 154B-2 uses the words ' whichever is higher'. The provisions is reproduced once again to deal with this submission:

(1) No tenant co-partnership housing society shall be registered under this Act, unless it consists of at least five persons (each of such persons being a Member of different family) or at least fifty-one per cent (of total number of fats as per sanctioned plan) fat purchasers or intending Members and who are qualified to become Members and who are qualified to become Member under this Act, whichever is higher, joins the registration proposal of housing society to be registered.

(emphasis and underlining supplied)

44) It is Petitioner's contention that total number of units in the building 'Silver Utopia' are 19. Therefore 51% of units would mean 10 units, whereas only 8 unit purchasers (consisting of only 5 persons/entities) had made application for registration of society. Careful reading of the provision would indicate that the bracketed portion of '(each of such persons being a Member of different family)' is applicable only to ' at least five persons' and not to 'fifty-one percent of total number of fats '. Therefore, when condition of 'total number of fats' is to be applied, it is not necessary that the purchasers thereof must be members of different 7 May 2024 Neeta Sawant WPL-11586-2024-FC family. Secondly, the expression 'at least fifty-one per cent (of total number of fats as per sanctioned plan) fat purchasers or intending Members ' would indicate that fifty-one percent figure would apply not to 'total number of fats' but to 'fat purchasers'. Therefore, the statutory scheme is such that the application for registration of a housing society can be made either by 5 persons (who need to be members of different family) or by 51% fat purchasers, whichever is higher. To illustrate, if a building consists of 20 fats and 16 fats therein are sold, atleast 8 such fat purchasers must join in formation of society. Conversely, if in the same building, only 8 fats are sold, 4 such fat purchasers cannot form a society and the condition of 5 persons of different families signing the application for registration of the housing society would apply. If the provision is read the way Mr. Sawant wants me to read i.e. to apply the percentage of '51' to total number of fats, the same would destroy the very objective behind making special provision for registration of a housing society. To illustrate, in a building wherein 100 fats are sanctioned in the Plan, if the developer delays construction and obtains part occupancy certificate and constructs and sells only 40 fats, cooperative housing society will not be formed till the developer exceeds construction of 51 fats and sells them. Thus, making a special provision of registration of a cooperative housing society would become counterproductive as such interpretation would then make registration of a cooperative housing society more difficult than a non- housing society, which can be registered with only 10 persons under Section 6. In my view therefore, the numerical value of '51%' will have to 7 May 2024 Neeta Sawant WPL-11586-2024-FC be applied to 'fat purchasers' and not to 'total number of fats as per sanctioned plan'. In the present

case, only 9 Units were sold at the relevant time and 8 unit purchasers applied for formation and registration of housing society, thereby meeting the requirement under Section 154B-2 of the MCS Act.

45) The next issue is about permissibility of same corporate entity owning two independent units to be counted as multiple persons within the meaning of Section 154B-2. It is sought to be contended by Mr. Sawant that both, under Section 6, as well as under Section 154B-2, there is a specific provision that the persons applying for registration of the Society, needs to be a member of a different family. In short, one person cannot purchase five flats in a building and then alone apply for formation and registration of a co-operative society. Mr. Kamat has relied upon Explanation to Section 154B-2 which provides that for the purpose of that Section, the expression 'Member of a family' means a wife, husband, father, mother, dependent son or unmarried dependent daughter. Thus, the entities other than natural persons, such as a company, trust, society etc. are not included within the expression 'Member of a family'. However, does it mean that one company can purchase five flats in a building and apply for formation of Co-operative Housing Society? In my view, this question need not be answered in the peculiar facts and circumstances of the present case where even if the companies who have purchased two units, each are to be considered as one person for the purpose of Section 154B-2, still the minimum required number of persons of 5 is met with.

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Also the alternate requirement of 51% unit purchasers is also met with. For the purpose of the present petition therefore, I would steer clear of the controversy as to whether a corporate entity owning more than requisite number of Flats under Section 154B-2 can form and apply for registration of a co-operative housing society. This issue is left open to be determined in appropriate case.

46) It must also be noted here that Petitioner himself has undertaken under the covenants of the Agreement that he shall become member of Co-operative Society in respect of unsold units. It Petitioner's case that as of now, only 9 units are sold in the building. If that is the case, it is beyond comprehension as to why Petitioner is not joining the Society and becoming a member in respect of unsold units. Petitioner's efforts in thwarting formation and registration of a cooperative society in respect of the building and engaging it in repeated litigations are not appreciated in the facts and circumstances of the case.

47) After considering the overall conspectus of the case, I am of the view that the order passed by the District Deputy Registrar and Competent Authority is unexceptionable. The Writ Petition being devoid of merits is dismissed without any order as to costs.

SANDEEP V. MARNE, J.

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