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Declaration Cannot Be Unilaterally Executed For Submitting Property To The Provisions Of The Maharashtra Apartment Ownership Act, 1970



Recently, apartments and condominiums have become increasingly popular property ownership structures in several Indian metropolitan cities. In Maharashtra, these structures are governed by the Maharashtra Apartment Ownership Act, 1970 ('MAO Act'). In order to submit property to the provisions of the MAO Act, a declaration must be duly executed and registered by the sole owner or all of the owners of the property.[\[1\]](#) The promoter is then required to inform the Registrar, Co-operative Societies ('Registrar') of the same and thereafter, it would be unlawful to form a co-operative society/company.[\[2\]](#)

Over the years, there have been numerous instances where developers and land-owners have unilaterally executed the requisite declaration without joining the unit-holders, to whom they had sold units on an ownership basis, as parties.

On 21 April 2021, in *Cipla Limited vs. The Competent Authority & the District Deputy Registrar, Co-operative Society & Ors.*^[3] ('Cipla Limited'), the Bombay High Court ('BHC') dismissed three writ petitions filed by the unit-holders of the Peninsula Business Park ('Property') challenging the formation of the 'PBP Commercial Complex Co-operative Society Limited' ('Society') on the grounds that the Property had already been submitted to the provisions of the MAO Act.

Unilateral Execution of the Declaration

In the present case, 95% of the units in the Property had been sold to various unit-holders on an ownership basis. Yet, the declaration had been unilaterally executed by the Developer.

In view of the definitions of "building" and "apartment" under the MAO Act,^[4] the Court stated that the term "property" includes a "building", which building comprises of apartments, and an "apartment" is that part of the property which is intended for independent use. Accordingly, the Court observed that each unit-holder who purchased an "apartment" (as defined under the MAO Act) was a part-owner of the property,^[5] and the submission of that property to the MAO Act ought to have been done through a declaration that was jointly executed by all the owners of the property.

Thus, in the present case, the declaration should have been jointly executed by the Developer and the unit-holders. This not being the case, the Court ruled that the declaration was not valid in the eyes of law and had to be considered as *non-est*.

Intimating the Registrar under S.10(2) of MOFA

S.10(2) of MOFA mandates a promoter to intimate the Registrar when property has been submitted to the provisions of the MAO Act.

In the present case, the intimation had been wrongly addressed by the Developer to the Deputy Registrar with a reference to S.11(2) of MOFA. The Court held that the intimation provided by the Developer could not be considered as a compliance of duty under S.10 of MOFA because the intimation (i) was not addressed to the correct authority i.e. the Registrar,

and (ii) referred to the wrong provision i.e. S.11(2) of MOFA (relating to an intimation of conveyance).

Further, the Court opined that the duty and powers of the Competent Authority are not merely a mechanical or executive function. The Competent Authority is empowered to hear the parties and ascertain (i) whether the declaration is in fact duly executed and registered by all the persons required to execute the same under the provisions of MAO Act, and (ii) whether the intimation is given to the correct authority prescribed under Section 10(2) of MOFA.

The Court was of the view that for the purpose of submitting the property to the provisions of MAO Act by the developer or the owner/owners under the provisions of the MAO Act, the developer/owner/owners were not only required to execute a Deed of Declaration duly registered but the developer was also required to inform the authority under Section 10(2) of the MOFA about such Deed of Declaration having been executed and registered. These twin requirements under the said provisions were mandatory and not directory.

Thus, in the present case, the declaration should have been jointly executed by the Developer and the unit-holders.

This not being the case, the Court ruled that the declaration was not valid in the eyes of law and had to be considered as non-est.

Same property cannot be partly submitted to the MCS Act and partly to the MAO Act

The Court also observed that submission of property to the provisions of the MAO Act must be a combined action on the part of all the owners of the property.[\[6\]](#) It is impermissible to allow some members to form a co-operative society and others to form a condominium i.e. the same property cannot be partly submitted to the jurisdiction of the MCS Act and partly to the MAO Act.

Binding precedents

In arriving at this decision, the Court relied on *Paul Parambi, Chief Promoter, Springs CHS Ltd. & Anr. vs. The Bombay Dyeing & Manufacturing Co. Ltd. & Ors.* [7] ('Paul Parambi') and *Sarita Nagari Phase-2 Cooperative Housing Society Ltd. & Anr. vs. The State of Maharashtra & Ors.* [8] ('Sarita Nagari').

In 2016, in Paul Parambi, the BHC held that a unilaterally executed declaration was *ex-facie* contrary to the provisions of the MAO Act and was not a 'Declaration' under S.10(2) of MOFA. However, by a Consent Order, the Supreme Court ('SC') set aside this judgment and the question of law decided therein was left open. [9] In 2018, the views expressed in Paul Parambi were reiterated by the BHC in Sarita Nagari. However, the SC stayed the operation of the impugned order. [10]

In Cipla Limited, the Court opined that when a question of law is left open, it must be reconsidered in the future by the SC and not by the High Court; although Sarita Nagari referred to Paul Parambi, it independently laid down various propositions of law, which would apply to the case at hand. Further, the Court observed that the Consent Order passed pursuant to Paul Parambi was not a speaking order and was not based on merits, and that the stay order passed pursuant to Sarita Nagari merely operated as between the parties to the *lis* and did not constitute a declaration of law under Art.141 of the Constitution. Based on this rationale, the Court adduced that the principles of law laid down in Paul Parambi and Sarita Nagari were binding precedent on the BHC and applied to the instant case.

In light of what is stated above, it would be prudent for Developers/Promoters to seek appropriate legal advice in order to ensure that the declarations executed by them are in conformity with the provisions of MOFA and the MAO Act.

Conclusion

Pursuant to the judgment in Cipla Limited, the BHC passed an Order dated 22 April 2021, whereby it continued the status quo ordered by it in 2019 for a period of four weeks. Thereafter, a Special Leave Petition was filed against the judgment in Cipla Limited, and by an Order dated 21 May 2021, the SC issued notice and granted a continuance of the status quo ordered by the BHC. However, the judgment has not been stayed by the SC. Therefore, the ratio laid down by the Division Bench in Cipla Limited will hold the field unless the same is reversed by the SC.

In light of what is stated above, it would be prudent for Developers/Promoters to seek appropriate legal advice in order to ensure that the declarations executed by them are in conformity with the provisions of MOFA and the MAO Act.

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[1] MAO Act, S.2.

[2] MOFA, S.10(2).

[3] 2021 SCC OnLine Bom 622.

[4] MAO Act, S.3(a) and S.3(e).

[5] MAO Act, S.2; and MOFA Rules, 1964, Rule 8.

[6] MAO Act, S.2.

[7] 2017(1) ABR 673.

[8] 2018 SCC OnLine Bom 591.

[9] Order dated 18 April 2018, Civil Appeal No.3973 of 2018.

[10] Order dated 1 May 2018, Special Leave to Appeal No.10215 of 2018.

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