

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7071 OF 2015

Smt. Mrudulaben Shamaldas .. Petitioner
Vs.
Riddhi Siddhi Apartment Hsg & Anr. .. Respondents

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Mr. Sameer Tendulkar a/w Ms. Sunita Khamkar a/w Mr. Waseem Khan for petitioner.

Ms. Usha R. Tiwari for respondent no. 1.

Mr. S. D. Rayrikar AGP for respondent no. 2

CORAM : A. K. MENON, J.
DATE : SEPTEMBER 29, 2015.

P.C.:

1] The present petition seeks to challenge a Judgment and Order dated 8th May 2015, passed by the District Deputy Registrar, Co-operative Society, F/N Ward, Mumbai, in Revision Application No. 14 of 2014, by which the Review Application filed by the petitioner was rejected and subsequently a Recovery Certificate dated 28th February 2014 has been issued, copy of which appears at **Exhibit "H"**. The petitioner has been called upon to pay maintenance charges and arrears payable to the society.

2] The case of the petitioner is that her husband late Shri Shamaldas Mehta, was the tenant of a building known as Sheth Bhagwandas Narottamdas Kapole Niwas. The owners of the

building later on decided to construct additional floors upon the existing structure and agreement was entered into with various occupants/tenants of the building. In the case of the petitioner the agreement is dated 29th June 1986.

3] Perusal of the said agreement reveals that under clause I, the petitioner had agreed that the owners would be entitled to construct additional units on the 3rd floor in accordance with the provisions of the Maharashtra Apartment Ownership Act 1970 and the Rules thereunder. The Petitioner and her late husband agreed that the owners would be entitled to sell or assign such constructed apartments to one or more apartment owners. Clause 11 of the agreement is a non-obstante clause which provided that the owners may form a co-operative society of the apartment owners who were required to join in formation of a society under the Maharashtra Co-operative Societies Act 1960 and that the apartment owner (the Petitioner in the instant case) would be deemed to have given their consent to the formation of the society. Thus, the Petitioner is bound by the said clause having willingly executed the agreement along with her husband (since deceased).

4] It is the case of the petitioner that although the agreement contemplated formation of the condominium, in view of the provisions of clause 1 which clearly states that the new construction and the existing building would be subject to the provision of Maharashtra Apartment Act 1960, no such condominium has been formed nor any declaration or deed of apartment executed. The petitioner contends that only a condominium is to be formed. The learned counsel for the petitioner submits that although clause 11 contains a deeming provision, having given consent to formation of the society, the owners are bound to form a condominium and subject the land and building to the provisions of Maharashtra Apartment Ownership Act, 1970.

5] The society meanwhile proceeded to demand arrears from time to time from the petitioner. The petitioner has since contended that she had paid an amount of Rs. 3600/- to the owners after the execution of the said agreement. The petitioner has relied upon the receipt issue by M/s. Doshi Sanghavi Builders for various amount paid by the petitioner's late husband between 29th June 1986 and 30th July 1992.

6] It is the petitioners case that she has been remitting money to the owner/builder and that she is not bound by the decision to form a society and that the formation of the society does not in any manner require her to become a member thereof or contributing to the outgoings including Municipal taxes, water charges and other incidental charges. The society having made all attempts to recover the monthly contribution from the petitioner adopted proceedings under the act for recovery thereof which is resulted in the issuance of certificate under section 101.

7] In her written statement filed by the petitioner before the Assistant Registrar, Co-operative Society, F/N Ward, Mumbai, she has contended that she is neither a member of society nor had she ever applied to become a member at any time. The society has failed to prove her membership and therefore she is a stranger to the society and its decisions are not binding on her. She contends that she is not liable to make any payment to the society and that her only obligation is to pay the amounts required to be paid to the builders. According to her these amounts have been regularly paid.

8] The learned counsel then made reference to the application made by the society for registration in Form A and submitted that the name of the petitioner does not figure anywhere in said form. It is the petitioner's case that she has not agreed to join as the member of the society. The written statement further contends that the society has failed to prove her membership and therefore the onus is on the society.

9] According to learned counsel for the petitioner under section 101 is applicable only to a member and not to a non-member, and though as an occupant of the building she is not liable to pay the monthly contribution according to her the society is not entitled to recover the amount now adjudicated. The learned counsel submitted that she has deposited 1,92,797/- pursuant to provision of section 154 (2) A.

10] The learned counsel for the petitioners further submitted that the rate of interest levied is also very high and that being a non-member the petitioner is not liable to pay interest @ 21% which in any event is the outer limit. Therefore, the present petition requires consideration and the recovery certificate as also the order dated 8th May 2015 is required to be set aside.

11] The learned counsel for the respondent society has relied upon the calculations which led to the issuance of the recovery certificate according to her the principal amount is Rs.2,98,774/- out of which the petitioner has deposited a sum of Rs.1,92,997/- leaving the balance due and payable under the recovery certificate. The learned counsel for the respondent society has also pointed out that the claim of the society is only for amounts due to it after its registration in the year 1996 and not before that. According to the learned counsel, the petitioner has not made any remittance towards day to day outgoings although she is enjoying the benefit of the premises including water supply and she has also refused to pay pro rata the Municipal taxes in respect of the premises. All taxes and incidental charges are therefore borne by the society.

12] It is the case of the respondent that certain other occupant had also refused to pay and to join the society at the time of formation these persons have since joined the society. The fact remains that the agreement clause 11 provides for express consent of the petitioner who was also a party to the agreement. Having executed the same along with her late husband she has conveyed

her consent to formation of the society which means she cannot be heard to say that she would not join as a member of the society or insist that only a condominium is to be formed. Learned counsel for the respondent also invites my attention to the letter dated 28th February 1997 written by certain apartment owners including the present petitioner, wherein she has herself recorded that the builder has refused to accept the maintenance charges after December 1995.

13] In my view, this letter assumes significance since it destroys the case of the petitioner that she has been regularly making payment of outgoings to the owners builder. The admission that the builder has stop accepting monthly maintenance charges effective after December 1995 is clearly borne out by the fact that the society itself having been registered in 1996, it has commenced billing its members for these outgoing. In these circumstances, the contention of the petitioner that she has been paying money to the builders is not correct and is misleading statement. Having considered the over all facts of the case it is obvious that the contentions of the petitioner that she had not consented to form the society cannot be accepted. Given the

conduct of the Petitioner, I do not find this is a matter which calls for exercising the jurisdiction vested in this court. I therefore pass the following Order;

- (i) The petition is rejected.
- (ii) At the request of the petitioner no coercive steps shall be taken for a period of 2 weeks from today.
- (iii) There will be no order as to costs.

(A. K. MENON, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/Order.