

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.10498 OF 2013

M/s. Vinayak Ashish Co-operative	]	
Housing Society Ltd., a Co-operative	]	
Housing Society registered under the	]	
provisions of Maharashtra Co-operative	]	
Societies Act, 1960, having its office at	]	
Vinayak Ashish Building, Plot No.11B,	]	
Madanmohan Malviya Marg, Mulund (W),	]	 Petitioner/
Mumbai – 400 008	]	Org.Plaintiff.

Versus

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|----|---|---|--|
| 1] | M/s. Essar Enterprises |] | |
| | A registered Partnership firm, having its |] | |
| | Office at Shop No.2, Ambaji Dham Building |] | |
| | M.G.Road, Mulund (West), Mumbai-400 080 |] | |
| | And also at A/201, Vinayak Ashish M.M. |] | |
| | Malviya Marg, Mulund (West), Mumbai – 80 |] | |
| | |] | |
| 2] | Dilip Gehimal Karia, Age : Not known |] | |
| | |] | |
| 3] | Naveen Dilip Karia, Age : Not known |] | |
| | |] | |
| 4] | Amit Dilip Karia, Age : Not known |] | |
| | |] | |
| 5] | Hari Govind Karia, Age : Not known |] | |
| | |] | |
| | Nos.2 to 5 of Mumbai, Indian Inhabitants |] | |
| | Carrying on business at Shop Nos.1 to 7 |] | |
| | Vinayak Ashish Society, M.M. Malviya Marg |] | |
| | Mulund (West), Mumbai – 400 080 |] | |
| | |] | |
| 6] | Hitesh G Thakkar, Age : Not known |] | |
| | of Mumbai, Indian Inhabitant, residing |] | |
| | at Flat No.A-503, Vinayak Ashish Society |] | |
| | M.M.Malviya Marg, Mulund (West) |] | |
| | Mumbai – 400 080 |] | |
| | |] | |

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|----|---|----------------------------|--|
| 7] | Ajay Hariram Ramani, Age : Not known
of Mumbai, Indian Inhabitant, having address
as of No.1 abovenamed. |]
]
]
] | |
| 8] | Mitesh L. Raikundaliya, Age : Not known
of Mumbai, Indian Inhabitants,
Residint at : Flat No. A-702, Vinayak Ashish
Society, M.M.Malviya Marg, Mulund (West)
Mumbai – 400 080 |]
]
]
]
]
] | |
| 9] | Govind R Naidu, Age : Not known,
of Mumbai, Indian Inhabitant, residing at :
C-10, Shanti Bhuvan, Dr. R P Road,
Mulund (West), Mumbai – 400 080. |]
]
]
]
] |]..... Respondents/
Orig.Defendants |

Mr. R A Thorat, Senior Advocate i/by mr. P J Thorat for the Petitioner
 Mr. P M Shah a/w Mr. M K Tanna for the Respondent No.1.
 Mr. P R Kadam for the Respondent Nos.6 to 8
 Mr. D S Chamboowala for the Respondent Nos.

CORAM : R. M. SAVANT, J.
 DATE : 25th August 2015

ORAL JUDGMENT

1 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2 The writ jurisdiction of this Court is invoked against the order dated 02/05/2013 passed by the learned Judge of the City Civil Court for Greater Bombay by which order the learned Judge has decided the preliminary issues relating to the jurisdiction of the City Civil Court and limitation, it is held that the City Civil Court does not have the jurisdiction to try and entertain the suit in question and has accordingly directed return of the plaint for being

presented to the Court having jurisdiction and has directed the parties to remain present in the Co-operative Court at Bombay on 28/06/2013, it is further held that the suit as filed is within limitation.

3 The facts giving rise to the above Petition in brief can be stated thus :- The Petitioner herein is a Co-operative Housing Society. The Plot of land on which the building of the Society has been constructed is out of the land bearing CTS No.551/3 corresponding to Survey No.94 (Part) and 119(Part) of village Nahur admeasuring 5665.66 sq.yards equivalent to 4737.22 sq.mtrs. It is out of the said larger area that a plot identified as Plot 11B was carved out which admeasures 1295.45 sq.mtrs and a Development Agreement was entered into by one Nahur Udyog Co-operative Housing Society with the Respondent No.1, who is a developer, which Development Agreement is dated 18/12/1988 and a Power of Attorney was also executed in favour of the Respondent No.1. It seems that the original Plot No.11 was sub-divided into Plot No.11A and Plot No.11B. In so far as Plot No.11A is concerned, it admeasures 3441.75 sq.mtrs and in so far as Plot No.11B is concerned, it admeasures 1295.45 sq.mtrs. Both the plots are in the residential zone. It appears that the Commencement Certificate came to be issued in favour of the Respondent No.1 on 18/7/2000. It is pursuant to the sanctioned plan that the Respondent No.1 constructed a building being "A" Wing with ground and 7 upper floors and "B" Wing with ground and 6 upper floors with part 7th floor

having two flats being Flat No. 701 and Flat No.702. By Diverse Agreements executed from the year 2006, the flats in the said building were sold to the purchasers. In so far as the covenants in the Agreements with the flat purchasers are concerned, the relevant covenants are as under :-

[a] Clause 2 of the said Agreement provide that Respondent No.1 agreed and assured that in case of any variation or modification of building plan in future, a reasoned sanction of flat purchaser will be obtained.

[b] Clause 3 provides that Respondent No.1 agreed to construct building as per plan approved and sanctioned on 18/07/2000.

[c] Clauses 14 and 15 – Respondent No.1 recorded that the said Agreements of Sale with the flat purchasers are covered under the provisions of Maharashtra Ownership Flats Act, 1963, herein after referred to as “the said Act” for the sake of brevity.

[d] Clause 17 provides that Respondent No.1 agreed to get Cooperative Housing Society of the flat purchaser formed and registered

[e] Clause 20 provided that Respondent No.1 has agreed to convey the suit property to the registered Societies.

Hence though in terms of the Agreements entered into with the flat purchasers, the Respondent No.1 had to register a Cooperative Society. The Respondent No.1 failed to register the same and ultimately the flat purchasers got the Society registered on 15/04/2008. It seems that the said registration of Society was challenged by the Respondent No.1 by filing proceedings which challenge failed. It appears that in the year 2008, the Respondent No.1 got the

plans sanctioned for construction of three garages in the compulsory open space towards west side of the “B” Wing numbered as Garages 1, 2 and 3 on the said plot. The Respondent No.1 also entered into a transaction of sale of the Society's Office to one Mrs. L S Jain who in turn sold the same to the Respondent Nos.2 to 5 by enclosing the entrance foyer. The said factum of the plans for construction of three garages in the open space as also the sale of the said garages by the Respondent No.1 to Mrs. L S Jain who in turn sold the same to Respondent Nos.2 to 5 has triggered of the filing of the instant suit.

4 In so far as the instant suit is concerned, the same is filed for a declaration that the Respondents herein are not entitled to sell the open parking spaces/proposed garages and for further declaration that the sale of the proposed garages and the society office in favour of the some of Respondents is contrary to the provisions of Maharashtra Ownership of Flats Act (“the MOFA” for short), and the Development Control Regulations for Greater Mumbai, 1991. The Society has also sought a declaration that the Respondent No.1 is not entitled to construct garages pursuant to the amended sanctioned plan dated 3rd April 2008 and for a mandatory injunction directing the Respondent Nos. 2 to 5 to hand over the possession of the Society's Office and a direction against Respondent No.9 to remove the enclosure made to the stilth portion etc. In the context of the challenge raised in the above Petition it would be apposite to refer to the prayer clauses in the suit in question which

for the sake of ready reference are reproduced herein under :-

[a] That it be declared by this Hon'ble Court that the Defendants are not entitled to sell the open parking spaces/proposed garages either by putting construction of garages thereon or otherwise and also the open stilts parking as well as approved Society office on the ground floor of Suit premises i.e. building consisting of "A" & "B" Wings known as Vinayak Ashish building on a plot of land admeasuring 1295.45 sq.mtrs bearing CTS No.551/3(part) corresponding to Survey No.94(part and 119(part) and bearing Sub Plot No.11B of Village : Nahur and situated at Madan Mohan Malviya Marg, Mulund (West), Mumbai – 400 080.

[b] That it be declared by this Hon'ble Court that the sale of the proposed garages to Defendant Nos.6 to 8 and open stilt parking to Defendant No.9 and Society office to the Defendant Nos. 2 to 5 by the Defendant No.1 in the Suit premises i.e. building consisting of "A" & "B" Wings known as Vinayak Ashish building on a plot of land admeasuring 1295.45 sq.mtrs bearing CTS No.551/3(part) corresponding to Survey No.94(part and 119(part) and bearing Sub Plot No.11B of Village : Nahur and situated at Madan Mohan Malviya Marg, Mulund (West), Mumbai – 400 080 is contrary to the provisions of Maharashtra Ownership Flats Act, 1963 as well as contrary to the provisions of Development Control Regulations for Greater Mumbai 1991 and hence the same is illegal and void and not binding upon the Plaintiffs.

[c] That by mandatory Order of this Hon'ble Court, the Defendant Nos. 2 to 5 be directed to handover vacant possession of approved and sanctioned Society office alongwith adjoining open space known as entrance foyer illegally marked as 1/A in the Suit premises i.e. building consisting of "A" & "B" Wings known as Vinayak Ashish building on a plot of land admeasuring 1295.45 sq.mtrs bearing CTS No.551/3(part) corresponding to Survey No.94(part and 119(part) and bearing Sub Plot No.11B of Village :

Nahur and situated at Madan Mohan Malviya Marg, Mulund (West), Mumbai – 400 080 to the Plaintiffs.

[d] That it be declared by this Hon'ble Court that the Defendant No.1 and the persons claiming through them are not entitled to construct garages in pursuance of amended sanctioned plan dated 3rd April 2008 on the suit premises i.e. the building consisting of “A” & “B” Wings known as Vinayak Ashish Building on a plot of land admeasuring 1295.45 sq.mtrs bearing CTS No.551/3(part) corresponding to Survey No.94(part and 119(part) and bearing Sub Plot No.11B of Village : Nahur and situated at Madan Mohan Malviya Marg, Mulund (West), Mumbai – 400 080.

[e] That by a mandatory Order of this Hon'ble Court, the Defendant No.9 be directed to keep open the Stilt portion sold to him in “B” Wing of the suit building by demolishing and removing its enclosure from front, left and at rear site thereof so as to enable and facilitate the Plaintiffs to clean the drainage line passing through the duct near said stilt portion.

5 In the said suit, the Defendants filed their Written Statement and the principal contention raised in the Written Statements of the Defendant No.1 i.e. the developer and the other Defendants who are the members of the Petitioner Society is as regards the jurisdiction of the City Civil Court, Mumbai to try and entertain the suit. It is the case of the Defendant No.1 as also the other Defendants that having regard to the reliefs sought, the City Civil Court, Mumbai does not have the jurisdiction to try the suit and the jurisdiction to try the said suit would be that of the Cooperative Court, Mumbai under Section 91 of the Maharashtra Cooperative Societies Act (“the MCS Act” for short). The Defendant No.1 has thereafter denied the case of the Plaintiffs as regards its

entitlement to put up the construction in the open space. It is also denied that some construction is sought to be put up between Flat No.701 and Flat No.702 on the part 7th floor.

6 In view of the fact that an issue of jurisdiction was raised by the Defendants in their Written Statements as also the maintainability of the suit is questioned on the ground of limitation, that the preliminary issues as regards jurisdiction and the limitation came to be framed by the Trial Court. The Trial Court initially by an order dated 10/07/2012 ruled that it had the jurisdiction to try and entertain the suit. The said order was challenged by the Defendants by way of a Petition being Writ Petition No.9162 of 2012 in this Court. By judgment and order dated 15/10/2012 the said Writ Petition came to be allowed and the said order dated 10/07/2012 came to be set aside the matter came to be remanded back to the Trial Court for a de-novo consideration of the said issue of jurisdiction as also the limitation. It is on remand that the instant adjudication has taken place culminating in the impugned order dated 02/05/2013 passed by the Trial Court.

7 The gist of the reasoning of the Trial Court as can be seen from the impugned order is that there is a relationship between the Plaintiff and the Defendant Nos.2 to 9 who are its members, and that the subject matter of the suit i.e. flat open space and office premises therefore touches directly to the

business of the Society and the same would therefore come within the mischief of Section 91 of the MCS Act. The Trial Court therefore seems to be swayed by the fact that the Defendant Nos.2 to 9 are the members of the Society and therefore reliefs sought against the said members in respect of the garages and office premises touches the business of the Society and hence the jurisdiction of the Cooperative Court under Section 91 of the MCS Act would have to be invoked. This is in so far as the jurisdictional aspect is concerned based on the objection raised by the Defendants on the touchstone of Section 91 of the MCS Act. In so far as limitation is concerned, the Trial Court held that the suit as filed is within limitation. The learned Counsel appearing for the Respondents fairly conceded that they are not aggrieved by the said finding of the Trial Court on limitation and therefore have not filed any cross Petition challenging the order passed by the Trial Court.

8 In so far as the aspect of jurisdiction is concerned, it is the submission of the learned Senior Counsel Shri R A Thorat appearing on behalf of the Petitioner Society that the Trial Court has glossed over the fact that the Petitioner is seeking reliefs against the Respondent No.1 Developer who is a third party being not a member of the Society, and hence the jurisdiction under Section 91 of the MCS Act cannot be invoked. It is the contention of the learned Senior Counsel that the suit is essentially for enforcing the obligations of the Respondent No.1 under MOFA. The learned Senior Counsel in support of

the said contention seeks to draw this Court's attention to prayer clauses (a)(b) and (d) which prayers are directed against the Respondent No.1 as developer. The learned Senior Counsel would contend that it is the case of the Petitioner-Plaintiff that the Respondent No.1 is not entitled to construct garages on the open space as the same would be violative of Section 7A of the MOFA. The learned Senior Counsel would contend that the Trial Court has failed to take into consideration the fact that it is not only the subject matter, but also the parties who have relevance in so far as Section 91 is concerned, as apart from the subject matter of the dispute the parties have also to be one of the parties who are mentioned in Section 91 and since in the instant case the Respondent No.1 cannot be said to be a party covered by Section 91, the finding of the Trial Court that it does not have jurisdiction is erroneous. The learned counsel sought to place reliance on the judgments of the Apex Court in the matter of Maragret Almeida and others v/s. Bombay Catholic Cooperative Housing Society Ltd and others¹ as well as in the matter of Marine Times Publications Pvt. Ltd v/s. Shriram Transport and Finance Co. Ltd. and another².

9 Per contra, the learned counsel appearing for the Respondents herein sought to justify the order passed by the Trial Court but, in my view, with not any deal of conviction. In fact it was the submission of the learned counsel appearing for the Respondent No.1 Shri P M Shah that another suit

1 (2012) 5 SCC 642

2 (1991) 1 SCC 469

filed by the Plaintiff is also pending in the City Civil Court wherein the identical reliefs are claimed. In so far as the members of the Society who are the Defendants to the suit are concerned, the learned counsel sought to contend that since the relief is sought against them vide prayer clause (c), the City Civil Court did not have jurisdiction to entertain the suit.

10 Having heard the learned counsel for the parties, I have considered the rival contentions. As indicated above, the moot question is whether the suit as filed is maintainable before the City Civil Court or the Plaintiff has to invoke the jurisdiction of the Cooperative Court under Section 91 of the MCS Act. In the said context, the foundation of the suit would have to be seen. In so far as the foundation of the suit is concerned, as indicated herein above, the same has been filed for enforcing the obligations of the Respondent No.1 under MOFA. The averments in the plaint are replete with reference to the MOFA and the obligations of the Respondent No.1 ;thereunder. In fact prayer clauses (a), (b) and (d) are prayers which have been directed against the Respondent No.1 who is the developer, and the cause of action for filing the suit has arisen in view of the fact that the Respondent No.1 proposed to construct garages in the open space as also sell the office premises which have been shown in the plan as originally approved to a member. It is in the said context that the Trial Court ought to have adjudicated upon the issue of jurisdiction. The Trial Court as can be seen from its impugned order has totally

glossed over the fact that the reliefs have been sought essentially against the Respondent No.1 who is the developer which reliefs revolve around the obligations of the Respondent No.1 under MOFA, and by merely observing that since the issue is as regards the open space and office premises of the Society, the same touches the business of the Society and, since the Respondent Nos. 2 to 9 are the members of the Society, the jurisdiction of the Civil Court is barred.

11 It is required to be noted that for the jurisdiction under Section 91 of the MCS Act to be invoked the subject matter has to be one which is mentioned in Section 91, and that the parties have also to be one or the other of the parties enumerated in the said provision. In my view the Trial Court has proceeded on a wrong premise in adjudicating the said issue. At this stage a useful reference could be made to the judgments of the Apex Court in *Margret Almeida's* case (supra) and *Marine Times Publications Pvt. Ltd.'s* case (supra). The said judgments are the exposition of the Apex Court in respect of Section 91 of the MSC Act. In *Margret Almeida's* case it has been held by the Apex Court that both the subject matter as well as the parties to the dispute must be those specified under Section 91 of the Maharashtra Cooperative Societies Act. The Apex Court has also gone on to observe that if either one of the two requirements is not satisfied then the dispute cannot be adjudicated by the Cooperative Court. In the said case an objection was raised to the filing of the suits by the members challenging the Resolutions passed by

the Society and the conveyance executed pursuant thereto of the Society's land in favour of the Respondents 22 and 23 in the said case who were developers. The suits were filed in this Court. A learned Single Judge of this Court held the suits as maintainable. On the matter being carried in Appeal, the Division Bench held that since what is principally challenged is the Resolution of the General Body, the suits were not maintainable and that the jurisdiction under Section 91 the MCS Act would have to be invoked. The Apex Court set aside the judgment of the Division and held that the Respondents 22 and 23 who were the developers, could not be proceeded under Section 91 and therefore the suits filed by the members were maintainable.

12 The Apex Court in the judgment in *Maragret Almeida's* case has referred to the judgment of the Apex Court in *Marine Times Publications (P) Ltd's case* (supra) wherein the Apex Court has held that before a dispute can be referred to a Cooperative Court under the provisions of Section 91(1) of the MCS Act, it is not only essential that the dispute should be of a kind described in sub-section (1) of Section 91, but it is also essential that the parties to the said dispute must belong to any of the categories specified in clauses (a) to (e) of sub-section (1) of the said Section. In both the cases the disputes/suits were filed wherein the parties claimed reliefs against the third parties who were not members. In my view, the judgments (supra) of the Apex Court would apply on all fours to the facts of the present case as in the present case the Petitioner

i.e. the Society is claiming reliefs against the Respondent No.1 who is the developer i.e. enforcing its obligations under MOFA, though the said reliefs may be touching the property of the Society, the Respondent No.1 is not a party which is covered by clauses (a) to (e) of Section 91 and the reliefs claimed are revolving around the obligations of the Respondent No.1 under another statute namely the MOFA, and therefore the proceedings would have to be filed against the Respondent No.1 in a Civil Court. In so far as the relief sought against the members of the Society are concerned, it is by way of prayer clause (c). It is for the concerned Court to decide whether the said relief can be granted to the Plaintiff by a Civil Court. However, that is not a ground on which the jurisdictional issue can be decided when the suit in essence has been filed against the Respondent No.1 who is the developer. The impugned order therefore suffers from an error of jurisdiction committed by the Trial Court, and the same is required to be quashed and set aside and is accordingly quashed and set aside. It is accordingly held that the City Civil Court, Greater Bombay has jurisdiction to try and entertain the suit in question. The above Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition. Needless to state that the suit in question would be tried on its own merits and in accordance with law. It is made clear that the contentions of the parties on merits are kept open for being urged before the Trial Court.

[R.M.SAVANT, J]