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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LODGING) NO.2641 OF 2019

Bhagwati Bhuvan Co-operative Housing)
Society Limited,)
a Co-operative Housing Society registered)
under the Maharashtra Co-operative)
Societies Act, under Registration No.)
BOM/HSG/4552/1975 having its office at)
31-B, Carmichael Road, Mumbai-400 026,)
through its Secretary)
Shri Rajesh Chheda, Adult, Indian Citizen) ...Petitioner

V/s.

1. The State of Maharashtra,)
Through the Additional Chief Secretary,)
Department of Cooperation, Mantralaya,)
Madam Cama Road, Mumbai 400 032)
2. The Divisional Joint Registrar,)
Cooperative Societies, Mumbai)
having his office at Malhotra House,)
6th Floor, Opp. G.P.O., Fort,)
Mumbai 400 001)
3. The Dy.Registrar, Co-operative Societies,)
'D' Ward, Mumbai having his office at)
Malhotra House, Opp. G.P.O., Mumbai)
4. Shri S.N.Khot,)
Asst.Co-operative Officer Subordinate to)
Respondent no.3 having his office at)
Malhotra House, Opp. G.P.O., Mumbai)
5. Amit Dholakia,)
Adult, Indian Inhabitant of Mumbai)
residing at Flat No.25, Bhagwati Bhuvan)
Co-operative Housing Society Limited,)
31-B, Carmichael Road, Mumbai-400026)

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CORAM : R.D. DHANUKA, J.
DATE : 25TH SEPTEMBER, 2019.

3. It is the case of the petitioner that the father of the respondent nos.5 and 6 was a member of the petitioner and was occupying flat no.25 situated in the petitioner society. In the nomination form submitted by the deceased father of the respondent nos.5 and 6, the mother of the respondent nos.5 and 6 jointly with the respondent no.5 were nominated by the deceased father. The society rejected the application made by the mother of the respondent nos.5 and 6 for membership of the petitioner society.

4. The mother of the respondent nos.5 and 6 expired. The respondent no.5 thereafter applied for membership in respect of the flat in question which was owned by the father of the respondent nos.5 and 6. The application was rejected by the petitioner society on the ground that there was an encroachment carried out by the deceased father of the respondent nos.5 and 6 in the flat in question and also on the open plot. After demise of the mother of the respondent nos. 5 and 6, the respondent no.5 applied for membership. Since the said application for membership was rejected, the respondent no.5 filed an appeal before the learned Deputy Registrar, Co-operative Societies. The said appeal was rejected by the Deputy Registrar.

5. Being aggrieved by the said order, the respondent no.5 filed a revision application under section 154 of the Maharashtra Co-operative Societies Act, 1960 before the Divisional Joint Registrar, Co-operative Societies. The Divisional Joint Registrar passed a detailed order on 9th May, 2019 allowing the said revision application filed by the respondent no.5, which is impugned by the petitioner in this writ petition. Learned counsel appearing for the petitioner submits that in view of the encroachment carried out in the flat in question as well as on the open plot of the petitioner society by the deceased father of the respondent nos.5 and 6, the application for membership filed by the respondent no.5 was rejected. He further states that the membership was also rejected on the ground that the

respondent no.5 had not disclosed that the respondent no.6 was also one of the legal heir of the original member.

6. Dr.Saraf, learned counsel appearing for the respondent nos.5 and 6 on the other hand would submit that no action was taken by the petitioner society against the deceased father of the respondent nos.5 and 6 alleging unauthorized construction carried out by the deceased father of the respondent nos.5 and 6 in the flat in question for last 35 years. He submits that the petitioner society cannot refuse the membership to the respondent no.5 on the ground of alleged unauthorized construction. It is submitted by the learned counsel that infact no such alleged unauthorized was ever carried out by the father of the respondent nos.5 and 6 in the flat in question or on the open plot. He submits that in any event if according to the petitioner there was any such alleged construction carried out by the deceased father of the respondent nos.5 and 6, on that ground petitioner could not have refused to grant membership to the respondent no.5. He submits that the right of the petitioner, if any, to take any action in respect of such alleged unauthorized construction carried out can be kept open.

7. Learned counsel for the respondent nos.5 and 6 submits that the respondent no.6 has also given her no objection in favour of the respondent no.5 for transferring the said flat bearing no.25 in favour of the respondent no.5 exclusively. The respondent no.5 is also ready and willing to give an indemnity bond if necessary to

indemnify the petitioner society in the event of any claim received by the petitioner society or any action against the petitioner in respect of the said flat other than the respondent no.6.

8. Dr.Saraf, learned counsel for the respondent nos.5 and 6 placed reliance on the judgment of this Court in case of **Videocon Appliances Ltd. vs. Maker Chambers V. Premises Co-op. Soc. Ltd., 2006(2) Mh.L.J. 388** and in particular paragraph 12 and also placed reliance on the judgment of this Court in case of **Sneh Sadan Co-op. Hsg. Soc. Ltd. vs. State of Maharashtra & Ors., AIR 2004, Bom.315** and in particular paragraphs 4 and 13. He also placed reliance on the order passed by this Court on 4th July, 2011 in case of **Usha Jhaveri vs. State of Maharashtra & Ors.,** in Writ Petition No.659 of 2011 in support of his submission.

9. Learned counsel for the petitioner in rejoinder placed reliance on the judgment of this Court in case of **Bandra Owners Court Co-operative Housing Society Ltd. vs. The Divisional Joint Registrar & Ors.** and in particular paragraph 4. He also made an attempt to distinguish the judgment of this Court in case of **Videocon Appliances Ltd.** (supra).

10. It is not in dispute that the father of the respondent nos.5 and 6 was a member of the petitioner society for last 35 years. The father of the respondent nos.5 and 6 had nominated the mother of the respondent nos.5 and 6 and also the respondent no.5 in respect

of the suit flat in question. The mother of the respondent nos.5 and 6 expired. The respondent no.5 thereafter applied for the membership as the legal heirs as well as the nominee in respect of the suit flat in the petitioner society.

11. A perusal of the record and upon hearing the learned counsel for the parties, it appears that the petitioner society has refused to grant membership to the respondent no.5 mainly on the ground that the father of the respondent nos.5 and 6 had carried out unauthorized construction in the flat in question and also on the open plot of the petitioner society.

12. This Court in case of **Videocon Appliances Ltd.** (supra) has held that whether the construction is authorized or unauthorized is a matter which is a matter of civil dispute and has to be determined by the Civil Court and neither the Co-operative Society nor the Deputy Registrar, nor the Divisional Joint Registrar is empowered to go into the said issue at all for determining whether the person is entitled to be a member or not. It is also held by this Court that the membership of the society has to be considered only after considering the rules, regulations and bye-laws and not on the basis of external factors such as whether the construction of the premises which is sought to be purchased by him is legal, illegal or authorized or unauthorized. It is held that it is not open to the society to reject the membership on the ground that any unauthorized construction is carried out. In my view, the petitioner society could not reject

membership on the ground that there was any alleged unauthorized construction carried out by the erstwhile member.

13. Be that as it may, the petitioner society will be at liberty to adopt appropriate action against the respondent no.5 in respect of the alleged unauthorized construction, if any, in the flat in question or on the open plot of the petitioner society in accordance with law. If any such action is adopted by the petitioner society, the respondent no.5 would be at liberty to resist such action, if any, which can be considered on its own merit and in accordance with law.

14. This Court in case of **Sneh Sadan Co-op. Hsg. Soc. Ltd.** (supra) has held that in case there is any dispute between the society on the one hand and the applicant who applies for membership on the other hand as to whether the garage could be transferred or not, the membership cannot be rejected on that ground. Neither the authority nor the society could go into the issue of ownership while considering the application of membership. Membership would be based on having a flat in the society. The petitioner has not disputed that the respondent nos.5 and 6 are the legal heirs of the original member.

15. In my view, the learned Divisional Joint Registrar has considered these issues in great detail in the impugned order dated 9th May, 2019 and after adverting to various judgments of this Court has held that the petitioner society could not have rejected the

membership on the ground of alleged unauthorized construction in the flat in question or on the open plot of land of the petitioner society. I do not find any infirmity in the impugned order passed by the learned Divisional Joint Registrar on 9th May, 2019.

16. I therefore, pass the following order :-

a). Writ Petition (Lodging) No.2641 of 2019 is dismissed. It is however, clarified that the petitioner society would be at liberty to initiate appropriate action against the respondent no.5 in respect of the alleged unauthorized construction, if any, in the flat in question or on the open plot of the petitioner society.

b). If any such action is initiated by the petitioner, the same to be decided on its own merit. This Court has not expressed any views on the merit of such allegations made by the petitioner society in this writ petition and also before the authorities below.

c). The respondent no.5 is directed to file an indemnity bond in favour of the petitioner within two weeks from today to the effect that if there are any claims from the third party received by the petitioner society or any action is initiated by the Corporation for such alleged unauthorized construction in respect of the flat in question or in the open land, the respondent no.5 shall indemnify the petitioner against such claim.

- d). Rule is made absolute in aforesaid terms.
- e). The petitioner is directed to implement the order passed by the learned Divisional Joint Registrar within four weeks from today in favour of the respondent no.5 upon receiving indemnity bond and on compliance of provisions of Bye-laws and MCS Act by the respondent nos. 5 and 6.
- f). There shall be no order as to costs.

(R.D. DHANUKA, J.)