

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.14077 OF 2018**

Mr. Navinchandra M. Dedhia & Ors.	...Petitioners
V/s.	
M/s Madhu Constructions & Anr.	...Respondents

Mr. Chetan Kapadia i/by Ms. J.P. Thakkar for Petitioners.
Mr. Karl Tamboli a/w Mr. Phiroze Merchant, Ms. Nandini Joshi i/by
M/s Kanga & Co. for Respondent no.1.
Mr. Rahul Sarda for Respondent no.2.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 22nd JULY, 2022**

P.C. :

1. Heard Mr. Chetan Kapadia, learned counsel appearing for the Petitioners, Mr. Karl Tamboli learned counsel appearing for Respondent no.1 and Mr. Rahul Sarda, learned counsel appearing for Respondent no.2.

2. By this petition, the Petitioners have challenged order dated 19th October 2018 passed by the learned Judge City Civil and Sessions Court, Greater Mumbai in Chamber Summons No. 1072 of 2018 in S.C. No. 5902 of 2007 (H.C. Suit No. 2915 of 2007). By the impugned order, the said Chamber Summons was rejected. By said Chamber Summons taken out by the Petitioners i.e. original Plaintiffs prayer was

made to add Shobha Suman Co-operative Society Limited i.e. present Respondent no.2 as proposed Plaintiff no.10. (hereafter referred to as “the said Society”).

3. Before setting out the rival submissions and consideration of the same, it is necessary to set out some factual aspects.

4. Respondent no.1 is the developer and the Petitioners are few flat purchasers. The Petitioners and other purchasers formed the said Society and the same was registered on 26th November 2002 by Deputy Registrar of Co-operative Societies, Mulund (West). Thereafter, the Society filed S.C. Suit no.627 of 2004 on 19th August 2004 against the developer as developer refused to execute the conveyance deed.

5. In the meanwhile, the said registration of the Society was challenged by the developer before the Joint Divisional Registrar. By order dated 23rd April 2004 passed by Joint Divisional Registrar, the Respondent No. 2-Society came to be de-registered. The Respondent No.2- Society challenged said order before Minister for Co-operation, who dismissed the said challenge by order dated 16th July 2004. The Respondent No.2- Society challenged the said order by filing Writ

Petition No. 2281 of 2004 and ultimately by order dated 28th November 2006 passed by this Court, the aforesaid orders dated 23rd April 2004 and 16th July 2004 are quashed and set aside. Thus, resultantly the registration of the Society is revived.

6. As set out herein-above, the Society filed Suit No. 627 of 2004 in the City Civil Court, Bombay. In the meanwhile as orders were passed de-registering the Society, the Society withdrew the Suit No. 927 of 2004 on 19th August 2004 with liberty to file fresh suit.

7. The present Petitioners i.e. few flat purchasers on 28th August 2004 filed S.C. Suit No. 4637 of 2004 in the City Civil Court at Bombay. The plaint in the said suit was returned for presentation to the High Court by order dated 18th June 2007 and the same was renumbered as H.C. Suit No. 2915 of 2007. Again the said suit was transferred to City Civil Court at Bombay in October 2012 and the same is renumbered as B.C.C.C. S.C. Suit No. 5902 of 2007. At this stage, it is relevant to note the prayers in the said suit. The prayers are set out herein-below for ready reference:

"a) That this Hon'ble Court be pleased to order and direct the Defendants, their directors, officers, agents and servants or any other person or persons claiming through or under them **to comply with the statutory obligations under the provisions of Maharashtra Ownership Flats Act as per the diverse Agreements entered into by the Defendants**

with the flat purchasers in respect of their respective flats in a building known as Shobha Suman' being specimen copy of one of such Agreements at Ex."F" hereto dated 29th March 1997 and **carry out their obligations as promoters and developers therein as also under the provisions of MOFA and** to do all acts, deeds, matters and things necessary **in furtherance thereto including:**

i) Formation and Registration of the Society of the flat purchasers,

ii) not to construct any other building on the said property; and

(iii) **to convey or caused to be conveyed the said property viz.** Plot No.44 and 45, CTS No.550/6 and 550/32 part and Survey No.127 and Survey No.115 part Hissa No.1 part at village Nahur Taluka Kurla in Greater Bombay admeasuring in the aggregate 5310.50 sq. mts. or thereabouts situated at village Nahur, Pandit Madan Mohan Malaviya Marg, Opp. Telephone Exchange, Mulund (W), Mumbai 400 080 **with the building standing thereon known as Shobha Suman in favour of the Plaintiffs and/or the Society to be so formed and registered** and to have or caused to have the said Deed of Conveyance duly registered under the provisions of Indian Registration Act and to comply with all necessary formalities in connection therewith.

b) That this Hon"ble Court be pleased to order and direct the Defendants, their directors, officers, agents and servants or any other person or persons claiming through or under them **to execute or caused to be executed Deed of conveyance and to convey or caused to be conveyed the said property** viz. Plot No.44 and 45, C.T.S. No.550/6 and 550/32 part and Survey No.127 and Survey No.115 part Hissa No.1 part at Village Nahur Taluka Kurla in Greater

Bombay admeasuring in the aggregate 5310.50 sq. mtrs. or thereabouts situated at village Nahur, Pandit Madan Mohan Malaviya Marg, Opp. Telephone Exchange, Mulund(W), Mumbai-400 080 **with the building standing thereon known as Shobha Suman in favour of the Plaintiffs and/or the Society to be so formed and registered** and to have the said Deed of Conveyance duly registered or caused to be registered under the provisions of Indian Registration Act and to comply with all necessary formalities in connection therewith and to do all such acts, deeds, matters and things in furtherance thereto:"

(Emphasis added)

8. It is significant to note the averments in the Plaint. In the plaint, the flat purchasers have averred that they are the flat purchasers and all flat purchasers have got their agreements registered and said Suit has been filed for enforcement of their rights and obligations of the developer under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 ("MOFA"), in view of the failure on the part of the developer. The relevant paragraphs of the plaint are set out herein-below for ready reference:

"The Plaintiffs are flat purchasers in a building known as Shobha-Suman situate at Village Nahur, Pandit Madan Mohan Malaviya Marg, Opp. Telephone exchange, Mulund (West), Mumbai-400 080. Hereto annexed and marked as Exhibit "A" is a list of the flat purchasers, their respective flat numbers, date of purchase as per Agreement thereto. All the flat purchasers have got their Agreements registered with the Sub-Registrar of Assurances.

2. The Defendants are a Company registered under the Companies Act. The Defendants are developers and builders as defined under Maharashtra Ownership Flats Act. The Defendants are concerned with the development and construction of a building known as Shobha-Suman situate at plot Nos.44 and 45 bearing C.T.S. 350/6 (Part) and 550/32 part and Survey No.127 and Survey No.115 part Hissa No.1 part at Village Nahur, Taluka Kurla in Greater Bombay admeasuring in the aggregate 5310.50 sq.mtrs. or thereabouts.

3. The Plaintiffs are filing the present suit against the Defendants for enforcement of their respective rights and obligations of the Defendants under Maharashtra Ownership Flats Act in view of the failure on the part of the Defendants as stated, hereinafter in detail".

9. In the meanwhile on the Respondent No. 1- Developer filed application bearing Application No. 4 of 2007 before the Divisional Joint Registrar, Co-operative Societies, Mumbai Division, Mumbai seeking de-registration of the Society registered by order dated 26th November 2002. By order dated 8th October 2007 of the Divisional Joint Registrar, Co-operative Societies, Mumbai Division, Mumbai, the said application was dismissed and registration certificate dated 26th November 2002 issued in favour of Respondent No. 2 is confirmed.

10. In this background, the Petitioners i.e. original Plaintiffs filed Chamber Summons No. 1072 of 2018 praying that the Petitioners be allowed to implead said Society as Plaintiff No.10. By the impugned

order, the said Chamber Summons has been dismissed.

11. Mr. Kapadia, learned counsel appearing for the Petitioners submitted that the prayers sought in the plaint are in fact in favour of the Society. By prayer clause (a) formation and registration of the Society was sought as well as relief regarding execution of conveyance of the property in favour of the Society is sought. He submitted that at the relevant time, the registration of the Society was cancelled and therefore the Society could not be made party to the suit. He submitted that in fact earlier Suit was filed by the Society, however, said Suit was withdrawn in view of de-registration of the Society and the flat purchasers have filed the present Suit. He submitted that the Society is proper and necessary party to the Suit and therefore the Society be impleaded as party. Mr. Kapadia, learned counsel relied on some authorities to which reference will be made as and when necessary.

12. On the other hand, Mr. Tamboli, learned counsel appearing for Respondent no.1 pointed out that the Society was re-registered on 8th October 2007 and the present Chamber Summons is filed on 25th June 2018, after delay of about 11 years. He submitted that the said delay is not explained. He submitted that the Petitioners have invoked the provisions of Order XXII, Rule 10 of Code of Civil Procedure, which

is regarding assignment or creation or devolution of interest during the pendency of the suit. He submitted that the said provision has no application to the present case. He therefore submitted that the impugned order is properly passed and therefore no interference in the impugned order is required.

13. Mr. Rahul Sarda, learned counsel appearing for Respondent no. 2 adopted the arguments of Mr. Kapadia and submitted that the Society be impleaded as party to the Suit.

14. The undisputed position on record clearly shows that Respondent no.1 is the developer and is promoter under the MOFA. It is his statutory responsibility to form the Society and convey the property in favour of the Society. The factual position on record clearly shows that by contending that Respondent no.1 has failed to comply with statutory obligations, the Society has initially filed the Suit and the said suit was required to be withdrawn as the registration of the Society was cancelled at the instance of Respondent no.1. In fact it is statutory duty of Respondent no. 1 to get the Society registered and in this case, at the instance of Respondent no.1, the Society was de-registered. In view of de-registration of the Society, the earlier Suit was withdrawn and the present suit was filed by few flat purchasers. However, the contentions

raised in the plaint itself clearly show that although the plaint has been filed by only 9 flat purchasers, along with plaint, list of all flat purchasers has been annexed. The prayer of registration of the Society and execution of conveyance in favour of the Society is sought. The reliefs sought in the plaint clearly shows that the reliefs are sought in favour of the Society. What is sought in the plaint is enforcement of rights of the flat purchasers under the MOFA, which Respondent no.1 is statutorily liable to perform. In view of this, there is no substance in the contention of Mr. Tamboli that there is delay of 11 years and the said delay is unexplained. This Court in the judgment reported in 2016 SCC Online Bom 6075 (*Smt. Indirabai Baburao Kanade V. Matru Chhaya Co-op. Hsg. Society Ltd. & Anr.*) has held that the relief sought in the Suit of direction to execute conveyance in favour of the Society was in substance relief of enforcement of statutory obligation under MOFA. Such relief can neither be barred by the law of limitation nor capable of monetary evaluation. Thus, there is no substance in the contention regarding delay.

15. However, there is some substance in the contention raised by Mr. Tamboli that the Petitioners have invoked Order XXII, Rule 10 CPC, wherein what is contemplated is assignment or creation or devolution of interest during pendency of the suit. He submits that due to

registration of Society, no interest of the Plaintiffs is devolved or assigned or created in favour of the Society. Although there may be some substance in the contention raised by Respondent no. 1 regarding invoking Order XXII, Rule 10 CPC., however, it is very significant to note that in the Affidavit-in-support of Chamber Summons in Para 13, the Petitioners have specifically invoked Order I, Rule 10 of C.P.C.. The learned Trial Court has overlooked the same.

16. Even if it is assumed that the Petitioners have invoked Order XXII, Rule 10 of C.P.C. then also power under Order I, Rule 10(2) is available to the Court at any stage of the proceedings. Mr. Kapadia, learned Senior counsel has pointed out the judgment of Supreme Court, reported in (1987) 3 SCC 587, in the matter of *Bal Niketan Nursery School V. Kesari Prasad*. Paragraphs 13 and 21 of the said judgment are very relevant and same are reproduced herein-below:

"13. The last and final ground which needs setting out in some detail is that even if a rigid view is taken and it is to be held that the suits have not been instituted in the name of the proper person viz. the Society, the High Court should have seen that Order 1 Rule 10-has been expressly provided in the Civil Procedure Code to meet with such situations so that the rendering of justice is not hampered. The Rule provides that if a suit has been instituted in the name of a wrong person as plaintiff or if there is a doubt as to whether the suit has been instituted in the name of the right plaintiff the court may, at any stage of the suit, if it is satisfied that the suit has been instituted due to a bona fide mistake and that is necessary for the determination of the real matter in dispute so to do, order any other person to be

substituted or added as plaintiff upon such terms as the court thinks just. The scope and effect of Order 1 Rule 10 has been considered in numerous cases and there is a plethora of decisions laying down the ratio that if the court is satisfied that a bona fide mistake has occurred in the filing of the suit in the name of the wrong person then the court should set right matters in exercise of its powers under Order 1 Rule 10 and promote the cause of justice. The courts have gone so far as to hold that even if the suit had been instituted in the name of a person who had no competence to file the suit, the courts should set right matters by ordering the addition or substitution of the proper plaintiff for ensuring the due dispensation of justice. We may only refer to a few decisions in this behalf."

"21. Having regard to this settled position of law the High Court ought not to have sustained the objection raised by the tenants regarding the competency of the appellant to file the suits and quashed the orders of eviction concurrently passed by the Small Cause Court and the Appellate Judge and remitted the suits for fresh consideration with directions to consider the merits of the application under Order 1 Rule 10 CPC but should have itself allowed the petition and added the Registered Society represented by its Secretary Dr. Om Prakash who is already on record, also as a party and disposed of the writ petitions on their merits."

17. Thus, it is clear that said power can be exercised at any stage of the proceedings. Thus, said judgment in the matter of Bal Niketan (supra) in fact held that the High Court can also exercise said power while dealing with the proceedings regarding addition of parties. The same will apply to the Chamber Summons which is filed by the present Petitioners. The trial Court has rejected the Chamber Summons by relying on Order XXII, Rule 10 of C.P.C., which may not be strictly applicable. However it is clear that this Court can exercise powers

under Order I, Rule 10 CPC by directing addition of the Society as Plaintiff no.10.

18. Order I, Rule 10(2) clearly specifies that the Court may exercise powers at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. The Plaintiffs i.e. the Petitioners are seeking execution of conveyance in favour of the Society and therefore the Society is not only the proper party but necessary party and certainly the Society can be directed to be joined as Plaintiff no.10 by exercising powers under Order I, Rule 10(2) CPC.

19. Mr. Tamboli's contention that there is delay of 11 years and therefore this power should not be exercised, has no substance for the reasons recorded hereinabove.

20. In view of above discussion, I pass the following order :

O R D E R

- (i) The impugned order dated 19th October 2018 rejecting Chamber Summons No.1072 of 2018 is quashed and set aside.
- (ii) The Chambers Summons No.1072 of 2018 is allowed in terms of prayer clauses (a) and (b). The amendment to be carried out within four weeks from today.
- (iii) Amended copy to be served on the learned Counsel for the Defendant within one week thereafter.
- (iv) The Respondent No.1-Defendant is at liberty to file additional written statement within four weeks thereafter.
- (v) The trial Court is requested to adjourn the Suit in accordance with the schedule fixed by this order.
- (vi) It is expressly made clear that all the contentions on merits are expressly kept open.

21. The Writ Petition is disposed of in above terms with no order as to costs.

BHALCHANDRA
GOPAL
DUSANE

(MADHAV J. JAMDAR, J.)

Digitally signed by
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GOPAL DUSANE
Date: 2022.08.06
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