



Harish

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8538 OF 2019

Nikita Enclave Apt. Condominium

...Petitioner

Versus

Connel Noel Gonsalves And Ors

...Respondents

Mr. Pradeep J. Thorat for the Petitioner.

Mr. Nachiket V. Khaladkar for the Respondent Nos. 1 to 4.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : AUGUST 9, 2023

P. C. :

1. Heard.

2. The challenge in the Petition is to the order dated 16th February, 2019 dismissing the Petitioner's Application under Order 1 Rule 10 seeking impleadment in the suit filed by the Respondents-Plaintiffs.

3. L.C. Suit No. 3034 of 2009 was instituted by the Plaintiffs seeking declaration that the deed of declaration registered under the provisions of Section 2 of the Maharashtra Apartment Ownership Act, 1970 for the formation of condominium of Flat owners is sham, bogus and for a direction to the Defendant No. 1 to form co-operative housing society

and to execute conveyance of the building known as Nikita Enclave. Chamber Summons No. 1138 of 2018 has been preferred by the Association of the apartment owners of the said Nikita Enclave which came to be rejected by the Trial Court by the impugned order giving rise to the present Petition.

4. Heard Mr. Pradeep J. Thorat, learned counsel appearing for the Petitioner and Mr. Nachiket V. Khaladkar, learned counsel appearing for the Respondent Nos. 1 to 4.

5. Mr. Thorat, learned counsel for the Petitioner submits that the admitted position is that there is a deed of declaration which has been registered under the provisions of section 2 of the Apartment Ownership Act, 1970. He would further submit that by the instant suit, the Plaintiffs are seeking to cancel the deed of declaration which has been executed and further for a declaration that a Co-operative society be formed. He would further submit that as such, the right of the association of the apartment owners is directly affected by the outcome of the proceedings. He would further submit that the Trial Court has rejected the Application on the ground that the Defendant No. 1 who is the developer is also the secretary of Association of the apartment owners and as such, was aware of the present proceedings and that the application having been filed after the period of nine years suffers from delay. He would further submit that,

the other ground on which the application has been rejected is that the chamber summons has been signed by the mother-in-law of the Defendant No. 1.

6. *Per contra*, learned counsel appearing for the Respondent submit that the rights of the Association of apartment owners is not affected inasmuch as, it is open for them to form a co-operative society or to register Deed of Declaration under section 2 of the Maharashtra Apartment Ownership Act, 1970. He would further contend that as per the decision of this Court, the Deed of Declaration has to be executed not only by the owner but also by the apartment owners and as such, the rights of the Association of apartment owners is not affected. He would further submit that the application is filed after substantial delay of nine years which has not been sufficiently explained.

7. Considered the submissions and perused the papers.

8. Firstly, it needs to be noted that the application is filed under the provisions of Order 1 Rule 10 of the CPC which provides that at any stage of the proceedings, the Court may direct addition or deletion of the parties. In the present case, the suit has been filed mounting a challenge to the Deed of Declaration registered under section 2 of the Maharashtra Apartment Ownership Act, 1970 as sham, bogus or illegal and seeking

inter alia other prayer of direction to the Defendant No. 1 to form a co-operative housing society. It is not disputed that the Plaintiffs are also the flat purchasers of some of the flats in the said building and as such, it was expected that when a declaration of this nature is sought, the association of the apartment owners is also made a party. The fact remains that under the provisions of Maharashtra Apartment Ownership Act, 1970, the apartment owners acquire undivided interest in the common areas and the common amenities whereas, that the same is not the case of a co-operative housing society. Learned counsel appearing for the Respondent has submitted that it is open for the apartment association of owner to either form a co-operative society or to register a fresh deed of declaration and that the only dispute is as regards the execution of deed of declaration by the Defendant No. 1. However, on perusal of the prayers in the suit which are at page No. 36 of the Petition it appears that the direction has been sought to direct the Defendant No. 1 to form co-operative housing society and the prayers do not reveal that any as such option has been left to the Association of the apartment owner. That being so, the Applicants-Respondents are necessary party inasmuch as, they have a direct and substantial interest in the subject matter of the proceedings. In my opinion, the Trial Court erred in holding that the Defendant No. 1 is the secretary of the Applicant condominium and as such, was aware of the

proceeding. Even if that being so, it needs to be taken into account that there are other apartment owners and their rights are directly affected by the Deed of Declaration being declared sham or bogus.

9. In view of the above, the impugned order dated 16th February, 2019 is hereby quashed and set aside. As a consequence the Chamber Summons No. 1138 of 2018 is allowed.

10. This Court is informed that by order dated 6th August, 2019 the proceedings before the City Civil Court were requested to be deferred. Considering that the suit is of the year 2009, the Trial Court is requested to decide the same expeditiously and in any event within a period of one year from today.

11. Writ Petition stands allowed in the above terms.

(SHARMILA U. DESHMUKH, J.)