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

CIVIL REVISION APPLICATION NO.51 OF 2023

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Gera's Greens Ville Trinity Towers
Co-op. Housing Society Ltd., through
chairman Mercy Babu Chacko & Ors. ... Applicants

V/s.

Gera Development Pvt. Ltd., through
Managing Director Rohit Kumar Gera ... Respondent

Mr. R.D. Soni i/by Mr. Kishor Shrirang Patil for the
applicants.

Mr. Prahlhad Pranjape i/by Mr. Manish Kelkar for the
respondent.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 20, 2023

P.C.:

1. This is a civil revision application under Section 115 of the Code of Civil Procedure, 1908 ("CPC" for short) challenging order dated 2 September 2022 passed by the learned 8th Civil Judge Senior Division, Pune in Special Civil Suit No.1721 of 2021 rejecting application of defendant No.2 under Order 7 Rule 11(a) of the CPC.

2. The respondent/original plaintiff filed the suit for following reliefs:

- “a) The suit may kindly be decreed.
- b) It be declared that the plaintiff has the proportionate charge on respective flats of members of the defendant no.1, as per “Annexure A” for unpaid maintenance charges by the defendant no.1 and it’s members and therefore the defendant no.1 society is under obligation to record such charge in it’s record.
- c) It be further declared that defendant No.1 is not entitled to issue consent or NOC, to any flat holders or members of defendant No.1 society to sell, transfer or for creating any third-party interest in respect of their respective flats, as per “Annexure A”.
- d) It be further declared that without payment of the said charges, the concern flat holders/members are not entitled to transfer, alienate or create third party interest, with respect to their flats.
- e) The members of Defendant No.1 Society and it’s members be restrained by decree of permanent injunction from selling, transferring, assignment or creating third party interest in their respective flats as per “Annexure A” without clearing and discharging, proportionate charge on the respective flats, for unpaid maintenance charges.
- f) The Defendant No.1 Society be restrained by decree of Permanent Injunction from issuing consent or NOC, to any flat holders or it’s members, for selling, assigning, transferring or creating any third party interest of whatsoever nature.
- g) The defendant No.1 and it’s members may kindly be directed to pay an amount of **Rs.3,39,20,132/- (Rupees Three Crore Thirty-Nine Lakh Twenty Thousand One Hundred Thirty-Two Only)** to the plaintiff along with the interest @ 18% p.a., as per the particulars of the claim mentioned in “Annexure A”.

h) The Defendant No.1 and its members may kindly be directed to pay the future interest @ 18% p.a. from the date of filing the suit till actual realization.”

3. According to plaintiff, till 23 July 2017 all the maintenance and services within the premises of defendant No.1/society were maintained by the plaintiff. Therefore, the plaintiff in paragraph 4 states that all the flat purchasers are members of defendant No.1/society and are under obligation to contribute towards maintenance of building and common areas and amenities in terms of their respective agreements. It is stated that save and except paying maintenance charges for one year starting from October 2015 and sinking fund, the flat holders/majority flat holders have not paid maintenance after October 2016. As per accounts maintained by the plaintiff, dues from members are reflected. However, in the latter part of the plaint the plaintiff alleges that defendant No.1/society is under obligation to pay such amounts to the plaintiff. It is also stated that despite collection of amount of maintenance from members, defendant No.1/society is not paying same to the plaintiff. The plaintiff thereafter refers to the averments in individual agreement entered into with the purchasers which created liability to pay outstanding maintenance to the developer. In paragraph 17, the plaintiff avers based on terms and conditions of the agreement and statutory obligation that members are under legal obligation to pay their maintenance charges towards maintenance of common facilities and amenities. It is alleged that defendant No.1/society failed and neglected to recover such charges from the concerned flat purchasers.

Paragraph 22 of the plaint also alleges that plaintiff on 1 October 2021 issued notice to the defendant No.1 and members of defendant No.1/society to pay jointly and severally the amount of suit claim. The cause of action disclosed in paragraph 25 is failure of defendants to pay legitimate demand as per notice dated 1 October 2021.

4. The applicants, therefore, filed an application under Order 7 Rule 11(a) of the CPC which came to be rejected by the impugned order by the Trial Court. Though the observations of the Trial Court that the defendant No.1 being legal entity can be sued and is under legal obligation to recover maintenance charges from the flat holders and pay the same to the plaintiff cannot be supported; however, it appears that the plaint is based on two causes of action which are: (i) contractual obligation under the agreement between developer and members to pay maintenance amount; and (ii) statutory obligation created under the provisions of the Maharashtra Ownership of Flats Act, 1963.

5. Reading of the averments in paragraphs 4 and 17 disclose cause of action against members. Moreover, demand notice dated 1 October 2021 is addressed to the defendant No.1/society and members of defendant No.1/society. Prayer clause (b) of the plaint seeks declaration that the plaintiff (developer) has proportionate charges on respective flats and members of defendant No.1 towards unpaid maintenance charges. Prayer clause (g) is a direction against both defendant No.1/society and its members.

6. The applicants may be right in contending that in absence of privity of contract between the developer and housing society, claim for enforcement of reliefs against defendant No.1/society may possibly be without cause of action; however, as averred in paragraphs 4 and 17 of the plaint based on agreement between developer and members towards unpaid maintenance charges, prayer clauses (b) and (g) cannot be termed as prayers without cause of action.

7. Assuming that prayer clauses (c), (d), (f) and (h) are based on no cause of action, however, in view of the judgment of the Apex Court in **Sopan Sukhdeo Sable & Ors. v. Assistant Charity Commissioner & Ors.** reported in (2004) 3 SCC 137, part plaint cannot be rejected.

8. Learned advocate for the applicants submitted that on meaningful reading of the plaint, it appears that the suit is essentially filed against defendant No.1 and the averments and prayers in the suit cannot be segregated. On meaningful reading of the plaint, according to him the suit is essentially against defendant No.1 only, and therefore, in the absence of cause of action against defendant No.1, plaint deserves to be rejected. According to him, clever drafting cannot create right in favour of a person, if otherwise such person is not entitled to claim such relief. In support of his submission, he relied on recent judgment of the Apex Court in **Frost International Ltd. v. Milan Developers and Builders Pvt. Ltd. & Anr.** reported in (2022) 8 SCC 633, and in particular paragraph 34.5.

9. Having considered the submissions and judgment of the Apex Court in the case of **Frost International Ltd.** (supra), in my opinion, this is not a case of clever drafting. In my opinion, on meaningful reading of the plaint, right to claim relief against members of the society is independently pleaded based on agreement entered into between the parties and relevant statutory provisions. On merits, whether the plaintiff is entitled to claim such relief, or not is a different matter but accepting averments in the plaint as correct, in my opinion, paragraphs 4 and 17 and prayer clauses (b) and (g) discloses cause of action *qua* members of the society in a suit filed by the developer for recovery of unpaid maintenance charges. Therefore, no fault can be found with the impugned order.

10. The civil revision application, therefore, stands rejected. No costs.

(AMIT BORKAR, J.)