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

WRIT PETITION NO. 10467 OF 2024

Shakuntala Kutty Shetty

.. Petitioner

Versus

Kailash Prabhat Co-operative Housing Society
Ltd. and Ors.

.. Respondents

-
- Mr. Shreepad Murthy a/w. Mr. Sahil Wagh, Advocates i/by Mr. Abhishek Patil for Petitioner.
 - Mr. Shanay Shah, Advocate i/by Sirus Legal for Respondent No.1.
 - Mr. Kunal Dwarkadas a/w. V.A. Joshi i/by Chitnis Vaithy & Co. for Respondent No.2.
 - Mr. Pradeep M. Patil, Advocate for Respondent No.3.

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CORAM : MILIND N. JADHAV, J.

DATE : JULY 29, 2024.

P.C.:

1. Heard Mr. Murthy, learned Advocate for Petitioner; Mr. Shah, learned Advocate for Respondent No.1; Mr. Dwarkadas, learned Advocate for Respondent No.2 and Mr. Patil, learned Advocate for Respondent No.3.

2. At the outset, Mr. Murthy would submit that only operative part of the impugned order is appended to the present Writ Petition as the reasoned order is not available. It is seen that the impugned order is passed in Application filed under Order XXVI Rule 9 of the Code of Civil Procedure, 1908 (for short “CPC”) in a Suit filed by the Plaintiff.

Prima facie, after perusing the pleadings in the Writ Petition and Suit plaint, I am not inclined to await the reasoned order till it is made available by the learned Trial Court since the issue is clear and unambiguous before me.

3. Hence after hearing the parties, by consent I have heard the parties and the following order is passed.

4. The impugned order in the present Writ Petition is passed by the learned Trial Court rejecting Application of the Plaintiff for appointment of Court Commissioner under Order XXVI Rule 9 of the CPC for inspection of the twin flats and to ascertain the nature of user of the said flats.

5. The facts in the present case are that the building in which the Suit flats are situated on the ground floor is going for redevelopment and in that view of the matter, Developer and the Society are required to ascertain the status of the individual flats including the Municipal Corporation also. This is because statutory requirements require and call upon the parties to maintain these records before going in for redevelopment on the basis of documentary evidence of acquisition.

6. There is a dichotomy expressed by Mr. Murthy that the Plaintiff had admittedly purchased the Suit flats some time in the year 1970 as residential flats as per the documentary evidence at the

inception, but subsequently the Plaintiff started using those flats for conducting a hotel business i.e. Commercial user. He would submit that the Plaintiff is having immense documentary proof to prove that the Suit flats should be countenanced as Commercial user but such a relief can only be allowed by the learned Trial Court subject to a proper trial in the Suit filed by Plaintiff seeking such documentary relief. This is because at the inception stage the Plaintiff had indeed acquired the Suit flats as residential flats. Subsequently the Plaintiff may have applied to the Corporation and got the permission for Change of user from the Corporation and thereafter may have applied to the Statutory Authorities to consider his occupation as commercial. How far this will hold the Plaintiff's claim that the Suit flats are to be categorised as commercial in nature will be the imprimatur of the learned Trial Court subject to completion of the trial.

7. While sustaining the impugned order, it is clarified that the learned Trial Court is directed by this Court to decide the Suit proceedings as expeditiously as possible and in any event within a period of six (6) months from today. Interfering with the impugned order or allowing the Plaintiff's Application shall lead to collection of evidence at this stage. Hence the impugned order is correctly passed.

8. All contentions of the Plaintiff are expressly kept open. Equally, the contentions of the Developer and the Society represented

by Mr. Dwarkadas and Mr. Shah are also expressly kept open.

9. Needless to state that, this Court has not opined on any merits of the matter as also not given any imprimatur on merits of the matter while sustaining the order passed by the Trial Court which is impugned herein.

10. Even if the reasoned order is made available, it is clarified that any findings and observations therein shall not influence the final outcome of the Suit proceedings and the Suit shall be determined strictly on the basis of the evidence led by the parties in support of the Plaintiff's case as averred in the Suit plaint and the evidence in rebuttal to be led by the Defendants.

11. Mr. Murthy informs the Court that the Plaintiff has also filed Chamber Summons and Notice of Motion for seeking further reliefs. These Applications shall be dealt with by the learned Trial Court strictly in accordance with law after hearing all concerned parties.

12. With the above directions, Writ Petition is disposed.

[MILIND N. JADHAV, J.]

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