

BEFORE THE CO-OPERATIVE COURT NO.1 AT MUMBAI

CASE No. CC/I/ 99 / 2021

Smt. Chhaya Vivek Shinde

... Disputant

Versus

Umerkhadi Co-operative Housing Society

Ltd. & Ors.

... Opponents

Order below application for recasting issues dated 22/11/2022.

1. The disputant have filed present application for recasting the issues framed on 20/09/2022. The opponent nos.1 to 3 contested the application and filed reply on record. Heard both sides.

2. It is contention of the disputant that, as per the framed issue no.4 the court has framed issue pertaining to maintainability of the dispute u/sec.91 of the MCS Act. In the present dispute, the opponents have filed applications under Order VII Rule 11 of the CPC which was allowed by the order dated 30/09/2021. The said order was challenged before Hon'ble Appellate Court vide Appeal No.6 of 2022. In the said Appeal the Hon'ble Appellate Court has given specific finding that present dispute is maintainable and the orders of trial court dated 30/09/2021 were set aside. Hence issue no.4 framed by this court be deleted as the same is already answered by Hon'ble Appellate Court. Hence, the application.

3. The opponent no.1 filed reply dated 13/12/2021 on record. It is contention of opponent no.1 that issue of jurisdiction raised in the application under Order VII Rule 10/11 of the CPC was raised by these opponents on the basis of averments of the plaint. The said issue was decided before filing reply

or written statement and without trial. The issue of maintainability is raised by opponents in written statement. Hence to decide said issue, trial is necessary. Hence issue on maintainability is correctly framed. Hence application deserves to be rejected with cost.

4. The opponent nos.2 and 3 also raised objection vide reply dated 13/12/2022. It is contention of the opponents that the application is not maintainable. The disputant have sought similar relief before the Hon'ble City Civil Court. The orders passed by Hon'ble Appellate Court are at interim stage i.e. prior to conclusion of trial and evidence of respective parties. Other contentions raised by opponent nos.2 and 3 are as per the lines of opponent no.1 itself. Finally opponents prayed to dismiss the application with cost.

5. I have gone through the entire record. It appears that, the disputant is widow of late Shri Vivek Shinde and daughter-in-law of late Shri Joseph Shinde, who have filed present dispute against the opponent society and other legal heirs of deceased. In the present dispute, the disputant have challenged legality and validity of opponent no.1 society in transferring share certificate in the joint names of opponent nos.2 and 3. At initial stage the opponents have challenged the dispute by filing the application under Order VII Rule 11 of CPC. In the said application it was contention of the opponents that this dispute is barred by law hence not maintainable u/sec.91 of the MCS Act. That application was decided on merits and this court has allowed the said application and returned the plaint for presentation before proper forum. The disputant have challenged that order before Hon'ble Appellate Court in which the Hon'ble Appellate Court set aside the order of trial court passed under the application of Order VII Rule 11 and observed that, maintainability of present dispute has to be considered with

provisions of section 30 and bye laws which are applicable to opponent society. The court has to consider aspect of acts of society with the claim of disputant and consider the dispute on its own merits.

6. The Ld Advocate for opponent no.1 vehemently argued that Hon'ble Appellate Court in para 23 of order specifically observed that, the contentions stated in the order are only with regard to the consideration of averments in the dispute and not upholding any of the contentions raised in the dispute. All rights and contentions of parties are kept open. It is pertinent to note here that, the application before trial court on the point of maintainability of dispute was set aside by Hon'ble Appellate Court. In the said order Hon'ble Appellate Court framed point of maintainability of dispute and given finding in the affirmative. I have gone through annxure 'A' filed with the application i.e. order of Hon'ble Appellate Court dated 16/03/2022. In para 19 of said order the Hon'ble Appellate Court clearly observed that, considering the legal position and nature of dispute, the dispute certainly fall within the ambit of section 91 of the MCS Act. The disputant claiming under the original member. Thus following mandate of section 30, the dispute fall within the jurisdiction of this court and dispute is perfectly maintainable. It is pertinent to note here that, the detail order of Hon'ble Appellate Court in appeal clarifies that duty cast on the society to consider claim of heirship and transfer the membership as per the provisions. When the society passes a resolution excluding disputant then the dispute would be maintainable. The finding given in the said appeal makes it clear that, the dispute is maintainable before this court hence no merits in the contentions raised by the opponents. Finally in the light of above discussion I come to the conclusion that the issue framed at point no.4 with regard to maintainability needs to be deleted with following order:-

ORDER

- 1) Application is allowed.
- 2) Issue no.4 framed on 20/09/2022 is hereby deleted.
- 3) Parties to take note.

Sd/-

Date : 17/03/2023.

**(Smt. M. M. Bade)
Judge,
Co-operative Court No.1,
Mumbai.**

<u>Certificate</u>	
I affirm that the contents of PDF file order are same word for word as per original order.	
Name of the Steno	Mrs. A. S. Sawant (L.G. Steno)
Court Name	Mrs. M. M. Bade, Judge, Co-operative Court No. 1, Mumbai.
Order uploaded on	24/03/2023