

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5476 OF 1990

N. Jethani	.. Petitioner
vs.	
Shri Shivaji Cooperative Housing Society Limited, Pune and ors.	.. Respondents

WITH
WRIT PETITION NO. 1497 OF 1992

Shri Shivaji Cooperative Housing Society Limited, Pune.	.. Petitioner
vs.	
N. Jethani and ors.	.. Respondents

Mr Prashant Chavan a/w. Ms R. J. Nathani for the Petitioner in W.P. No. 5476 of 1990 and for Respondent No.1 in W.P. No. 1497 of 1992.
Mr. Sanjay Kshirsagar for Respondent No.1 in W.P. No. 5476 of 1990 and for Petitioner in W.P. No.1497 of 1992.
Ms Sheetal Thakur i/b Mr. Vikram Chavan for Respondent No.3 in both petitions.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 15 January 2015.
Date of Pronouncing the Judgment: 22 January 2015.

JUDGMENT :-

1] Both these petitions take exception to the judgment and order dated 12 October 1990 made by the Maharashtra State Cooperative Appellate Court, Bombay, partly allowing the petitioner's appeal against judgment and award dated 28 August 1989 made by Cooperative Court No.II, Pune.

2] The Writ Petition No. 5476 of 1990 is directed against the entire judgment and order dated 12 October 1990, whereas, Writ Petition No.1497 of 1992 , which is preferred by Shivaji Cooperative Housing Society Limited (Society) is directed against that portion of the impugned judgment and order which requires the Society to pay to the petitioner the value of structure put up by the petitioner on terrace of bungalow in plot No.32. Accordingly, both the petitions are taken up for disposal together.

3] The Society, which is a '*Tenant Ownership Cooperative Housing Society*' deemed to have been registered under the Maharashtra Cooperative Societies Act, 1960 (said Act) had allotted Plot No.32 to Shri. S.P. Gupte (respondent No.2) in Writ Petition No. 5476 of 1990 for purposes of construction of a residential bungalow. On 2 July 1979, Gupte entered into an agreement for grant of lease of Terrace space of the bungalow, so as to enable the petitioner to put up a super structure thereon. The agreement stated that such lease would have a term of 79 years. In pursuance of such agreement, Gupte entered into Lease dated 12 December 1980 with the petitioner, which however, indicates that the term of lease shall be ten years alongwith option of renewal for further term extending, in entirety to 79 years. There is nothing on record to indicate that the term of lease was ever extended beyond ten years. The petitioner put-up a super structure ad-measuring approximately 700 sq. feet upon the terrace. There is dispute as to whether such super structure was completed or not. However, there is no dispute that the super structure was not actually occupied by the petitioner.

4] In April 1983, the Society raised a dispute being Dispute No. 503 of 1984 before the Cooperative Court, Pune, *inter alia*, against Gupte and the petitioner, primarily seeking demolition of the super structure put up by the petitioner. On 13 March 1982, an order was made by the Cooperative Court to maintain *status quo* with regard to the construction of super structure. This was challenged by the petitioner by way of writ petition before this Court, which challenge did not meet with any success. Soon thereafter, Gupte assigned and transferred his rights, title and interest in Plot No.32 and the bungalow thereon, in favour of Shri. A.S. Navathe (respondent NO.3). In 1984 or thereabouts, the Society permitted such transfer/assignment by Gupte in favour of Navathe. The petitioner, on 17 November 1984 applied for injunction from the Cooperative Court, to restrain such transfer/assignment by Gupte to Navathe. The petitioner, thereafter, i.e., on 11 February 1985 filed written statement in Dispute No.503 of 1984, raising, *inter alia*, the plea that such dispute could not be adjudicated under Section 91 of the said Act.

5] The Cooperative Court, by judgment and award dated 28 August 1989 overruled the petitioner's preliminary objection as to maintainability and directed demolition of super structure and restoration of possession of the terrace to Navathe. The petitioner appealed and the Appeal Court, vide impugned judgment and order dated 12 October 1990 has only partly allowed the petitioner's appeal. The directions as to demolition of super structure and restoration of possession to Navathe has been maintained, but the Society was directed to pay the market value in respect of the

superstructure to the petitioner. As noted earlier, both the petitioner and the Society have have impugned judgment and order dated 12 October 1990 made by the Appeal Court, to the extent it affects their interest.

6] This Court on 17 June 1991 had made an order of *status quo* by way of interim relief. It is the petitioner's case that some time in 2008, the petitioner learnt that Navathe broke open the lock put up by the petitioner and even demolished the certain wall of the super structure. The police complaints were filed in this regard and some correspondence exchanged as well. The petitioner instituted Contempt Petition No.421 of 2008 against Navathe, which was however, rejected by this Court vide its judgment and order dated 14 September 2009.

7] In background of the aforesaid facts and circumstances, Mr. Prashant Chavan, learned counsel for the petitioner in Writ Petition No. 5476 of 1990, made the following submissions in support of this petition :

(a) The main relief applied for by the Society in Cooperative Dispute No. 503 of 1984 was a declaration that the agreements dated 2 July 1979 and 12 December 1980, by which the petitioner was leased the terrace space are illegal and not binding upon the Society. As has been held by this Court in case of *Alok Agarwal & ors. vs. Punam Cooperative Housing Society Limited & ors.*¹, a dispute

1 2013(1)ALL MR 33

seeking declaratory reliefs of such nature, do not constitute a dispute under Section 91 of the said Act and in any case, the Cooperative Court in exercise of powers under Section 91 of the said Act lacks jurisdiction to grant declaratory reliefs. Accordingly, the judgment and order made by the Cooperative Court and the decision of the Appeal Court, are without jurisdiction, null and void;

(b) The petitioner, was not a member of the Society. Accordingly, a dispute between a Society and a non-member does not and cannot relate to Section 91 of the said Act. Inasmuch as, this jurisdictional issue has been ignored, the impugned judgments and orders are clearly without jurisdiction, null and void;

(c) The Cooperative Court and Appeal Court have erred in observing that there is legal bar to letting of super structure, as opposed to letting of land on the basis that concept of dual ownership is not recognized in India. Such approach and reasoning is contrary to the law laid down by this Court in case of *Sitaram N. Shinde & ors. Vs. Ibrahim I. Rais & ors.*²

8] Mr. Sanjay Kshirsagar and Ms Sheetal Thakur, learned counsels, appearing for the Society (respondent No.1) and Navathe (respondent No.3) respectively, by way of reply submitted as under:

2 2005 (1) ALL MR 74

(a) That the decision of this Court in case of *Alok Agarwal (supra)*, was clearly distinguishable, inasmuch as the dispute therein was against a rank trespasser. In this case, admittedly, Gupte was a member of the Society and the petitioner was claiming through such member, i.e., Gupte. The declaratory reliefs as claimed, were superfluous, the main dispute being alienation and erection of superstructure without permission of the Society and in breach of the bye-laws of the Society. As such the dispute between the Society, member and a person claiming through the member, clearly constituted a dispute under Section 91 of the said Act;

(b) The issue of dual ownership or otherwise was, in the facts of the present case, quiet irrelevant. Even if such concept is accepted, in the present case, Gupte and the petitioner had obtained no permissions from the Society and further attempted alienation and erection of superstructure, in breach of Societies bye-laws;

(c) This petition has been rendered infructuous, because, even if the Lease dated 12 December 1980 regarded as valid, the term of lease was only ten years. There has been no renewal of such term. As a result, the petitioner can no longer claim any rights whatsoever on the basis of such Lease Deed to the super structure in question.

9] Mr. Sanjay Kshirsagar, learned counsel for the Society, in support of Writ Petition No.1497 of 1992 submitted that the

Cooperative Court and the Appeal Court, having come to the conclusion that the actions of the petitioner (N.Jethani) were without authority of law, there was no question of requiring the Society to pay the market value in respect of the superstructure. The reasoning as well as the conclusion in this regard, is clearly erroneous and perverse. Mr. Prashant Chavan, learned counsel for Mr. N. Jethani, responded by way of demurer that the superstructure had been put up after obtaining permissions from all statutory authorities. Therefore, there was no error or perversity in the direction for payment of market value by the Society.

10] The rival contentions now fall for my determination.

11] In the present case, although one of the reliefs applied for by the Society in Cooperative Dispute No.503 of 1984 was a declaration that the agreement dated 2 July 1979 and 12 December 1980 are illegal and not binding upon the Society, that by no stretch could have been regarded as main relief applied for by the Society. The main dispute raised by the Society was the alienation or attempted alienation of property by Gupte (member of the Society) without permission from the Society and in breach of the bye-laws of the society. The Cooperative Court as well as the Appeal Court have recorded findings that such attempted alienation and erection of superstructure on the basis thereof were without permission of the Society and in breach of its bye-laws. There is no perversity in the matter of record of such concurrent findings of fact. The declaration as aforesaid, which was applied for, was redundant and superfluous. Based upon the said prayer, it cannot be said that the Cooperative

Court ceased to have any jurisdiction over the subject matter of the dispute. There is accordingly, no merit in the first submission raised by Mr. Chavan on behalf of the petitioner.

12] In case of *Alok Agarwal (supra)*, the allegation was encroachment over an area reserved as a common amenity, garden or open space reserved for the benefit of all the members of the Society. Such dispute involved declaration as to title and thereafter restoration of possession. A civil suit was accordingly instituted in the Civil Court, seeking *inter alia* declaration as to title and restoration of possession. The suit was resisted by the encroacher by contending that the cause of action pleaded would constitute a dispute under Section 91 of the said Act and consequently the jurisdiction of the Civil Court would be ousted. In such context, this Court held that the issues of declaration and restoration of possession *qua* an encroacher upon the property of the Society could legitimately be gone into by the Civil Court, as the same would not constitute a dispute under Section 91 of the said Act. There is no similarity between the fact situation which obtained in the case of *Alok Agarwal (supra)* and the present case. The dispute, which the Society has raised in the present case was against its own member, i.e., Gupte in the matter of attempted alienation of property without permission of the Society and in breach of the bye-laws of the Society. The petitioner was impleaded in such dispute, precisely because, the petitioner claims through Gupte. Section 91 of the said Act contemplates a dispute touching the constitution, management or business of the Society, if the parties thereto are (*inter alia*) Society, a member or a person claiming through a member. In view

of such factual position, the ratio in case of *Alok Agarwal (supra)* is clearly not attracted.

13] Instead, reference is required to be made to the decision of the Supreme Court in case of *O.N. Bhatnagar vs. Smt. Rukibai Narsindas*³, which was incidentally referred to in case of *Alok Agarwal (supra)*. *O.N. Bhatnagar (supra)* dealt with a situation where a member to whom premises had been lawfully allotted had granted licence of the premises and the licensee had thereupon failed to vacate. In this context, the Supreme Court held that nature of the business of a Society has to be ascertained from the object of the Society for which the Society is constituted and whatever the Society did in the normal course of its activities such as by initiating proceedings for removing an act of trespass from a flat allotted to one of its member, cannot but be a part of its business. In distinguishing *O.N. Bhatnagar (supra)*, this Court in case of *Alok Agarwal (supra)* proceeded to observe that in the said case, the premises to which the suit relates '*do not form the subject matter of the allotment by the Society to its member and it is from that perspective that the Society has sought a declaration in regard to the invalidity of the agreement dated 30 May 2008 under which the appellants claim title*'. Accordingly, it was observed that a suit of such nature would not fall within the jurisdiction of the Cooperative Court under Section 91 of the said Act. As noted earlier, in the present case the Society had lawfully allotted Plot No.32 to Gupte (member of the Society). The dispute very clearly related to the premises which were lawfully allotted by the Society to its member.

3 AIR 1982 SC 1097

The petitioner, in the present case, had laid claims to the superstructure, through Gupte (member of the Society). In such circumstances, the ratio in case of *Alok Agarwal (supra)* is clearly distinguishable. In matters of precedents, even a single fact may make significant difference. In the present case, there are several significant facts, which are at variance with the fact situation, which obtained in the case of *Alok Agarwal (supra)*. Instead, the fact situation in the present case is more akin to one which obtained in case of *O.N. Bhatnagar (supra)*. Accordingly, there is no jurisdictional error in the orders made by the Cooperative Court. There is accordingly, no merit in the first and second contentions raised by Mr. Chavan in support of the petition.

14] Although the Cooperative Court has observed that concept of dual ownership is not recognized in India and such observations do run counter to the observations made by this Court in case of *Sitaram N. Shinde (supra)*, nevertheless, such observations make no dent, either to the validity of the other findings recorded by the Cooperative Court or the relief which came to be finally granted. Even if we proceed on the basis that concept of dual ownership applies, nevertheless, Gupte had no authority to let superstructure without permission from the Society or in breach of the bye-laws of the Society. In the present case, admittedly, neither was any permission from the Society obtained nor was such attempted alienation or erection of superstructure consistent with the bye-laws of the Society. Accordingly, there is no reason to fault the impugned order on this score.

15] Further there is merit in the submission of Mr. Sanjay Kshirsagar that consequent upon Execution Lease dated 12 December 1980, there was no question of reversion to the agreement dated 2 July 1979 which was only an agreement to enter into a Lease Deed. Though the agreement dated 2 July 1979 makes reference to the term of proposed lease being 79 years, the actual Lease Deed dated 12 December 1980 provides that the term of lease shall be ten years commencing from 1 January 1981. This term has obviously come to an end. Mr. Chavan, however, made reference to clause 2(p) of the Lease dated 12 December 1980, which provides that if the Lessee has duly observed the conditions and covenants and shall apply in writing to the Lessor, not less than three months prior to the expiry of the term, the Lessor shall, in such event grant the Lessee new lease for the term of further 69 years and in case, the Society is not dissolved till the cessation of the said period, in that case, the Lessor shall grant a new lease of the said premises for the further period till the dissolution of the said Society or till the plot in question is made free hold. Such clause, can obviously not aid the petitioner, when no renewal was admittedly applied for. All this is to a great extent subsidiary, in view of the finding that the attempted alienation or erection of superstructure was without permission from the Society and in breach of its bye-laws. This is however, sufficient to dissuade this Court to exercise extra ordinary and equitable jurisdiction in favour of the petitioner, even if this Court were to find merit in some of the submissions made by and on behalf of the petitioner. This is an additional reason as to why this Court would not interfere with the impugned orders at the behest of the petitioner.

16] So far as Writ Petition No.1497 of 1992 instituted by the Society is concerned, the same deserves to be accepted. The Society in the present case, had promptly raised the dispute in the matter of attempted alienation of property and the erection of superstructure. The Cooperative Court as well as the Appeal Court has found merit in the dispute raised by the Society. The attempted alienation and erection was without permission of the Society and contrary to its bye-laws. In such a situation, there was no warrant for the Appeal Court to require the Society to pay to the petitioner the market value of the superstructure put up. At the highest, if the Appeal Court desired to make some equitable order, then such liability could have been imposed upon Gupte, who has accepted some consideration from the petitioner, in lieu of permission to erect the superstructure. Gupte was admittedly the member of the Society and had made attempts to alienate the property without permission of the Society and in breach of its bye-laws. The Society has not obtained any consideration either from Gupte or the petitioner, in the matter of attempted to alienation or the erection of superstructure. Accordingly, that portion of the impugned judgment and order dated 12 October 1990, to the extent it directs the Society to pay the market value of the superstructure to the petitioner is liable to be interfered with and set aside. Similarly, although the impugned judgment and order is not clear, it is necessary to clarify that payment of such market value, could never have been made the condition precedent for demolition of the superstructure or restoration of the terrace space to Navathe . Accordingly, direction to the said effect is also set aside. The impugned judgment and order dated 12 October 1990 is, therefore, modified at the behest of the

Society. The direction to the Society to pay market price in respect of the super structure to the petitioner, as a pre-condition or otherwise to the demolition of superstructure or restoration of the terrace space to Navathe is set aside. Instead, it is directed that Gupte (respondent No.2) shall be liable to pay to the petitioner (N. Jethani) reasonable costs towards the erection of superstructure in or about the year 1982. Rather than prolong the dispute by requiring assessment of the market value in respect of the superstructure in the year 1982, it would be appropriate if direction is made to Gupte (respondent No.2) to pay to the petitioner (N. Jethani) an amount of Rs.1,50,000/- (Rs. One Fifty Thousand only) towards the erection of the superstructure. The impugned judgment and order dated 12 October 1990 shall stand modified accordingly. It is made clear that the payment of the said amount by Gupte (respondent No.2) to the petitioner, shall not be a condition precedent to the demolition of the superstructure or restoration of terrace property to Navathe (respondent No.3). It is open, however, to Navathe, who has stepped into the shoes of Gupte to pay such amount to the petitioner. In such a situation, Navathe shall be entitled to recover the said amount from Gupte. Save and except such modification, the impugned judgment and order dated 12 October 1990 is confirmed.

17] Accordingly, Writ Petition No.5476 of 1990 is hereby dismissed and Rule is discharged. In Writ Petition No.1497 of 1992, Rule is made absolute to the extent indicated above. There shall be no order as to costs in both the petitions.

(M. S. SONAK, J.)

18] At this stage, learned counsel for the petitioner in Writ Petition No. 5476 of 1990 prays that the *status quo* be directed to be maintained in respect of the superstructure and the direction of restoration of possession. The request is opposed by learned counsel for the respondents. However, taking into consideration the circumstance that such position has continued for several years, *status quo* as prayed for is granted for a period of eight weeks from today.

(M. S. SONAK, J.)