

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

WRIT PETITION NO.2450 OF 2015

Kantilal Zumbarlal Mutha

.. Petitioner

Versus

Smt. Taramati Ambadas Saraf @ Bacchuwar

.. Respondent

Shri. S. S. Kanetkar, for the Petitioner.

Shri. Jaydeep Deo, for the Respondent.

CORAM : R.M. SAVANT, J.

DATE : 12th MARCH, 2015

PC.

1. The Writ Jurisdiction of this Court is invoked against the order dated 27.02.2015 passed by the Learned Joint Civil Judge, Junior Division, Ghodnadi (Shirur), District-Pune, by which order the applications Exh.22 and Exh.23 came to be rejected and the application Exh.29 has been allowed in Regular Darkhast being No.20 of 2014. The said Darkhast proceedings have been filed for execution of the Award of the Co-operative Court dated 02.04.1991 passed in Arbitration Case No.157 of 1983. The genesis of the present proceedings therefore lies in the said Award. The said Arbitration Case No.157 of 1983 was filed by the Respondent herein against the Petitioner for recovery of possession of the plot of land in the Opponent No.2 society which was a Co-operative

Housing Society. In view of the objections raised to the jurisdiction of the Co-operative Court for trying the said dispute under Section 91 of the Maharashtra Co-operative Societies Act, 1960, the Co-operative Court framed a issue which was to the following effect :-

“Whether this Court has jurisdiction to try the present dispute ?”

The Co-operative Court answered the said issue by ruling that it has the jurisdiction to try and entertain the dispute. The Co-operative Court thereafter allowed the dispute as indicated above by its judgment and order dated 02.04.1991 and directed the Opponent Nos.1 and 2 i.e. Petitioner herein and the Society to hand over possession of the premises being Plot No.20(A) in the society to the disputant i.e. Respondent herein. The said order passed by the Co-operative Court was challenged by the Petitioner herein by filing an Appeal before the Maharashtra State Co-operative Appellate Court being Appeal No.93 of 1991. The Co-operative Appellate Court allowed the Appeal filed by the Petitioner and set aside the Award passed by the Co-operative Court and thereby set aside the decree of possession which was passed in favour of the Respondent herein. It seems that contemporaneously the Petitioner had filed an application for membership of the Opponent No.2 society. The Assistant Registrar, Co-operative Societies it seems had allowed the application filed by the

Petitioner and granted membership to the Petitioner. The said order was carried in Revision before the Divisional Joint Registrar by the Respondent herein. The Divisional Joint Registrar allowed the Revision and set aside the order directing the grant of membership. The Respondent herein had filed Writ Petition No.2049 of 1993 challenging the order passed by the Co-operative Appellate Court allowing the Appeal and setting aside the Award passed by the Co-operative Court, whereas the Petitioner herein filed Writ Petition No.4564 of 2004 challenging the order passed by the Divisional Joint Registrar allowing the Revision Application and rejecting the application for membership filed by the Petitioner. In view of the fact that the issues were common as also the parties were the same, both the Petitions were clubbed together and heard by a Learned Single Judge of this Court. The Learned Single Judge of this Court by judgment and order dated 9th November, 2011 allowed Writ Petition No.2049 of 1993 filed by the Respondent herein i.e. original Disputant and set aside the order passed by the Co-operative Court, whereby the Award passed by the Co-operative Court was set aside by the Co-operative Appellate Court and reinstated the decree of possession which was granted in favour of the Respondent. In so far as Writ Petition No.4564 of 2004 is concerned, the Learned Single Judge dismissed the said Writ Petition and thereby confirmed the order passed by the Divisional Joint Registrar setting aside

the grant of membership to the Petitioner. The Learned Single Judge as can be seen from a reading of the said judgment dated 9th November, 2011 has dealt with the issue of jurisdiction in paragraph 14 of the said judgment, wherein the Learned Single Judge has observed that in view of the fact that the Co-operative Court had ruled that it had the jurisdiction to try and entertain the dispute and in view of the fact that the Appeal filed before the Co-operative Appellate Court was dismissed and since the matter was not carried further as the finding on the issue of the jurisdiction was not challenged the Learned Single Judge held that the issue of jurisdiction cannot be gone into. The Learned Single Judge further observed that in any event the first Respondent the Petitioner herein is claiming though the Petitioner, who is admittedly a member of the second Respondent society and therefore, Learned Judge held that the Co-operative Court had the jurisdiction to try and entertain the dispute. Hence the Learned Single Judge concluded the said issue of jurisdiction which adjudication has become final as the SLP filed in the Apex Court came to be dismissed. However, in the operative part of the said judgment and order dated 9th November, 2011, the Learned Judge vide clause (g) of the operative part has observed that the remedies of the first Respondent in Writ Petition No.2049 of 1993 i.e. Petitioner herein are kept open.

2. It is after the adjudication of the said two Writ Petitions that

the Darkhast proceedings came to be initiated being Regular Darkhast No.20 of 2014 for execution of the Award passed by the Co-operative Court in Arbitration Case No.157 of 1983.

3. The Judgment Debtor i.e. Petitioner herein has filed applications Exh.22 and Exh.23 in the said proceedings. In so far as Exh.22 is concerned, the same is filed invoking Section 47 of the CPC whilst application Exh.23 has been filed by the Judgment Debtor for staying the possession warrant. The Decree Holder i.e. Respondent herein has filed Exh.29 for direction to prepare the possession warrant. The said application Exh.22 is founded on the allegation that the decree is a nullity as the Co-operative Court did not have the jurisdiction to decide the nature of the document being the agreement dated 07.03.1978, however, the Co-operative Court has erroneously proceeded to consider the said document and held it to be for collateral security. Hence, the Award or decree passed by the Co-operative Court is sought to be challenged on the ground that the Co-operative Court did not have the jurisdiction to try and entertain the dispute and therefore, is a nullity. The Executing Court i.e. Learned Joint Civil Judge, Junior Division, Ghodnadi (Shirur) as indicated above has by the impugned order dated 27.02.2015 has rejected the applications Exh.22 and Exh.23. Whilst so rejecting the applications the Executing Court referred to the adjudication of the issue of jurisdiction of

the Co-operative Court right up to this Court as also the Apex Court. The Executing Court therefore held that it would not be possible to entertain the said contentions regarding the jurisdiction of the Co-operative Court. The Executing Court also adverted to the fact that since the year 1978 the Decree Holder has been kept away from the plot of land which is her own property. The Executing Court further adverted to the fact that the Judgment Debtor had filed Regular Civil Suit No.36 of 2015 for seeking declaration and specific performance of the agreement dated 7th March, 1978. In which suit the application for temporary injunction Exh.5 came to be dismissed against which an Appeal was filed by the Judgment Debtor which was also dismissed. The Executing Court held that having regard to the aforesaid facts the applications Exh.22 and Exh.23 would have to be rejected and accordingly rejected the same and has directed the issuance of possession warrant. As indicated above, it is the said order dated 27.02.2015 passed by the Executing Court which is taken exception to by way of the above Petition.

4. The Learned Counsel appearing on behalf of the Petitioner Shri. S. S. Kanetkar would seek to reiterate the issue of jurisdiction of the Co-operative Court to try and entertain the dispute and would contend that the adjudication of the dispute in the earlier round was not satisfactory as the Co-operative Court has not considered the issue of

jurisdiction on the touchstone of Section 91 and especially having regard to the fact as to whether the parties qualified under the said provision for the dispute to be maintainable as also from the aspect as to whether the issue was touching the business of the society. The Learned Counsel sought to place reliance on the judgment of the Apex Court reported in 2013(1) ALL MR 914 in the matter of Margaret Almeida & Ors. Vs. The Bombay Catholic Co-operative Housing Society Ltd. & Ors., on the aspect of whether the dispute touches the business of the society. The Learned Counsel would contend that the Learned Single Judge of this Court also in the judgment rendered on 9th November, 2011 has considered the issue of jurisdiction only from one aspect and not whether the issue touches the business of the society.

5. Per contra, Learned Counsel appearing for the Respondent Shri. Jaydeep Deo would submit that on the application of the principle of res-judicata the Petitioners cannot raise the issue of jurisdiction as the said issue has been concluded in the earlier round between the same parties. The Learned Counsel would contend that even assuming that the said issue was erroneously decided as contended by the Learned Counsel for the Petitioner the same would still operate as res-judicata in the absence of any further challenge.

6. Having heard the Learned Counsel for the parties, in my view

there is no merit in the above Petition. As indicated above, the principal ground on the which the execution is sought to be questioned is on the ground of Award being passed by the Co-operative Court being nullity in view of the dispute in question having regard to the subject matter thereof. In my view in the light of the earlier adjudication that has taken place right up to this Court, where a Learned Single Judge of this Court has referred to the adjudication that has taken place before the Co-operative Court and the Appellate Court and thereby has observed that the said issue cannot be gone into which judgment has been confirmed by the Apex Court. In my view this Court cannot go into the said aspect. Hence, the reliance placed by the Learned Counsel for the Petitioner on *Margaret Almeida's case (supra)*, would be of no avail in view of the fact that the said issue of jurisdiction has already been concluded in the earlier round. The Executing Court was therefore right in rejecting the applications Exh.22 and Exh.23 in the light of the said earlier adjudication and directed the issuance of possession warrant. The impugned order passed by the Executing Court therefore cannot be found fault with on the ground of any error of jurisdiction or any other illegality or infirmity. The exercise of Writ Jurisdiction is therefore not warranted. The Writ Petition is accordingly dismissed.

[R.M. SAVANT, J]