

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

WRIT PETITION NO.4111 OF 2014

Shree Kedarnath Co-operative
Housing Society Ltd. .. Petitioner.

Vs.

Divisional Joint Registrar,
Co-operative Societies Division,
Mumbai & Ors. .. Respondents.

Mr. Vishal Kanade with Mr. Vivek Rana i/b I.R. Joshi & Co. for the
Petitioner.

Ms. Alpana Ghone with Mr. G.C. Mohanty for Respondent No.3.

Mr. S.D. Rayrikar AGP for Respondent Nos.1, 2 and 4.

CORAM : A.K. MENON, J.

DATED : 14 SEPTEMBER 2015

P.C. :

1. The present petition impugns the order dated 18th April, 2013 passed by the Deputy Registrar, Co-operative Societies, R/North Ward, Mumbai and the order dated 30th November, 2013 of the Divisional Joint Registrar, Co-operative Societies, Mumbai. The facts in brief arise out of Consent Terms filed in Appeal (L) Nos.856/2010, 874/2010, 879/2010, 880/2010 and 902/2010 and Suit Nos.1198/2009, 1199/2009, 151/2010 and

1422/2009 which were pending in this Court and were disposed of by the order dated 31.1.2011 by the Division Bench whereby the disputes between the partners of firm were resolved and had been recorded in the consent terms.

2. The bone of contention in the present case is premises admeasuring 10,700 sq. ft. in the building known as Kedarnath which was originally granted on leave and license basis to an automobile showroom (“the premises”) and which remained with partnership firm at all material times. In the process of hearing of the Notice of Motion the Court Receiver, High Court, Bombay was appointed as the Receiver by the interim order dated 24th July, 2009 and which was confirmed by the order dated 25th October, 2010, by virtue of these orders, the Court Receiver was discharged without passing of accounts. However, he was directed to handover possession of the premises to the plaintiffs as described in clause (i) of the consent terms within one week from the date of order. The defendants in the suit, namely, respondent in appeal stated that occupation certificate in respect of premises had already been issued and that a notarized copy of the same had

been provided to the plaintiff. The plaintiff or his nominee was to be admitted as a member of the Co-operative Society that may be formed of the occupants of Kedarnath building on payment of necessary membership fees.

3. The Court Receiver has since put respondent no.3 in possession of the premises. The petitioner-society was registered on 17.2.2012 under Registration No.MUM/WR/HSG/TC-15158/2011-2012. It seems that the respondents had applied for membership of the society pursuant to the order, of the Division Bench in terms of the Consent Terms. The application for membership of the society came to be considered by the society at its meeting dated 1st April, 2010. After considering the application, the General Body decided not to approve the petitioners' membership due to incomplete documentation. The society at its meeting on 1st April, 2010 resolved that respondent no.3, Dhansukh Ramji Rathod was required to submit a duly stamped and registered document allotting/transporting the premises to him and till such time a document was provided the application cannot be considered. The society thus denied

membership to respondent no.3. It is case of the respondent no.3 that by virtue of provisions of section 22(2) the respondent no.3 is a deemed member because the petitioner society did not intimate him of the society decision within the statutory period provided in section 22(2).

Section 22(2) is reproduced for below for ease of reference:

“22. PERSON WHO MAY BECOME A MEMBER

(1)

(2) Where a person is refused admission as a member of a society, the decision (with the reasons therefore) shall be communicated to that person within fifteen days of the date of the decision, or within three months [from the date of receipt of the application for admission, whichever is earlier. If the society does not communicate any decision to the applicant within three months from the date of receipt of such application, the applicant shall be deemed to have been [admitted] as a member of the society. [If any question arises whether a person has become a deemed member or otherwise, the same shall be decided by the Registrar after giving a reasonable opportunity of being heard to all the concerned parties]].

4. Mr. Kanade, learned counsel for the petitioner submits that the society is bound to act as per bye laws. The bye laws

inter alia provides that an individual is eligible to membership on complying with conditions of byelaws No.19(A) (i) to (vii). According to Mr.Kanade the application as contemplated was made, however, it was not accompanied with the copies of documents required to establish the title of respondent no.3 and, therefore, the society was unable to consider the application favourably. However, he chose not enter upon the controversy whether the said decision was communicated to respondent no.2, since the provisions of law are clear and there was no evidence of the decision having been taken without notice to the petitioner. He submitted that the consent order passed by the Division Bench cannot operate as conveyance of the property from the firm to the individual partner - respondent no.3 and it is not possible to accept the respondent no.3's case that no further instrument was required.

5. Ms.Ghone, learned counsel appearing on behalf of respondent no.3 submitted that the order passed by the Division Bench in terms of the consent terms clearly crystalised rights and obligations of the parties and the respondent no.3 was entitled to ownership of the premises in question. She submitted that the

issue of stamp duty was not material since at the time of acquiring the property, the partnership firm had already paid the stamp duty upon conveyance deed and once having paid the duty, the same firm was providing a part of the built up premises to one of the partners and pursuant to the order of the Court.

6. According to Ms.Ghone, it was not necessary for the third respondent to execute any document or make any payment towards stamp duty. She further submitted that since no further documentation was required and the order of the Court in terms of consent terms were operative, there was no document required to be executed. In the circumstances there was no instrument chargeable to duty in contemplation of the parties. She, therefore, supported the impugned order and contended that third respondent was entitled to membership of the society on the basis of the consent terms alone.

7. Having heard counsel for the parties, I find that it is an admitted position that apart from the order passed by the Division Bench there is no drawn up decree that operates as conveyance. It

would be useful to refer to the consent order, the relevant clauses of which are as follows :

“2. The learned Senior Advocates appearing for the parties on instructions from their clients who were present in Court have agreed that the following order be passed by consent of the parties:

(i) The property at Dahisar in the building named ‘Kedarnath’ which was earlier given on rent to M/s Aparna Motors for Toyota showroom comprising of basement, ground floor and first floor is allotted to the original Plaintiff Dhansukh Ramji Rathod in Suit Nos.1198 of 2009, 1199 of 2009, 151 of 2010 and Defendant No.1 in Suit No.1422 of 2009;

(ii)

(iii)

(iv)....

(v)....

(vi)....

(vii)....

(viii)....

(ix) Upon passing of this order and in view of the undertakings contained in clauses (ii) and (iii) above Mr. Dhansukh Rathod and Mrs. Manjula D. Rathod forthwith stand retired from all the respective partnership firms being subject matter of Suit Nos. 1198 of 2009, 1199 of 2009 and 151 of 2010 and Defendant No.1 in Suit No.1422 of 2009 and shall issue letters to the Defendants partners or the Plaintiff partner as the case may be recording his/her retirement from all the partnership firms and shall also co-operate with the Defendants-partners or the Plaintiff partner as the case may be by executing all the necessary documents giving up all his/her claims in the partnership firms.

Similarly the Defendants partners or the Plaintiff partner shall also cooperate with the Plaintiff and the Defendant Partners as the case may be in executing all the necessary documents. Parties shall jointly address letters to the Bankers of the firm to defreeze the accounts forthwith.”

8. Although it is the case of the Respondent no.3 that in accordance with the order of the Division Bench the respondent was not required to execute any further documents, I find that clause 2(1)(ix) clearly contemplates that documents in support of retirement of respondent no.3 were required to be executed since the words used in the order are very clear. On a careful reading of the consent terms it is clear that without execution of necessary documents, the order of Court did not contemplate conveyance or transfer of the property from the firm to an individual partner. It was submitted by Mr.Kanade and correctly so, that an instrument of transfer was necessary to transfer the property. Needless to mention that any instrument of transfer will have to be stamped with applicable stamp duty.

9. Faced with this position on behalf of respondent, it was contended that at the time when the property forming subject matter of development was acquired by the partnership firm,

stamp duty has been paid on the said conveyance. Taking shelter under the said conveyance and the payment of stamp duty on the deed of conveyance it is the respondent's case that no stamp duty was required to be paid on the present transfer contemplated pursuant to the consent terms.

10. To my mind this contention is devoid of merit since in the instant case the order of the Division Bench clearly contemplates that the parties would execute necessary documents in view of the settlement between the parties. The parties would be required to complete basic document so as to enable respondent no.3 to claim rights to the suit commercial premises.

11. In order to test the contention of the respondent no.3 a query was posed to counsel for respondent no.3 as to whether the property in question could have been transferred to third party by the respondent no.3 without first executing a deed of transfer in his favour. To which the learned counsel submits that by virtue of order of the Division Bench it would be perfectly legal to transfer the said property to a third party. It is well known that in the

case of Co-operative Societies, the Co-operative Society is vested with the ownership of the building and members are its beneficiaries by virtue of ownership of shares issued to them and which would be governed according to the bye-laws of the Co-operative societies.

12. In the instant case there is no instrument of transfer that would entitle the respondent no.3 to the shares of the society. There is no question of society acting upon the application of the membership and granting membership to the applicant in the absence of an instrument of transfer. The order of the Division Bench contemplates execution of a retirement deed. It is the case of the respondents that they have executed all necessary documents to give effect to retirement of respondent no.3 from the firm. However, from the record it does not appear that the Registrar of Firm has taken cognizance of the same. It is normal for the partners of the firm to execute and file with the Registrar of Firms all necessary forms as required under the Indian Partnership Act and thereby seek to update status of the firm. In the instant case this does not appear to have been done.

13. I am of the view that in absence of a duly executed and registered instrument of transfer, the petitioner was justified in declining membership to respondent no.3. Needless to mention, it is open to the parties to execute necessary documents and submit the same to the society after following all due process as required under the Bombay Stamp Act and Registration Act. If the respondent no.3 calls upon the firm to execute such a document, the firm shall be bound to do so under the Consent Terms or order passed thereon. In such event, the society shall consider the application for membership in accordance with law. Accordingly, I pass the following order :

- (i) The impugned order dated 18th April, 2013 passed by the Deputy Registrar, Co-operative Societies, R/North Ward, Mumbai and the order dated 30th November, 2013 of the Divisional Joint Registrar, Co-operative Societies, Mumbai are hereby set aside.
- (ii) The writ petition is allowed in above terms.

(A.K.MENON, J.)

CERTIFICATE

Certified to be true and correct copy of the
original signed Judgment/order.