

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

CIVIL REVISION APPLICATION NO. 37 OF 2015

Shri Sharad S. Deshpande

Applicant

Vs

Smt. Sudha S. Khandekar and
Ors.

.. Respondents

Mr. S.S.Patwardhan i/b Ruturaj P. Pawar, Advocate for Applicant.
Mr. S.V.Pitre, Advocate for respondents no.1 and 2.

CORAM : R.G.KETKAR,J.
DATE : 20/07/2015

PC:

1. Heard Mr. S.S.Patwardhan, learned counsel for the applicant and Mr. S.V.Pitre, learned counsel for respondents no.1 and 2 at length.

2. By this Application under section 115 of C.P.C, the applicant has challenged the Judgment and order dated 7.4.2014 passed by the learned Jt. Civil Judge, Sr.Dn., Kolhapur below Exhibit-10 in Special Civil Suit No.127 of 2013. By that order, the learned trial Judge rejected the application made by the applicant, hereinafter referred to as 'defendant', for rejection of Plaint under Order VII, Rule 11(d) of C.P.C on the ground that the suit is barred by Section 91 of the Maharashtra Cooperative Societies Act, 1960 (for short, 'Act').

3. In support of this Application, Mr. Patwardhan has taken me through paragraphs 14 and 16 of Plaint. In paragraph 14, the plaintiff asserted that on Pratibhanagar Co-op. Housing Society

Ltd, Kolhapur (for short, 'society'), Administrative Board was appointed on 21.6.2007. On the same day, the defendant made application for enrolling him as a member. Administrative Board issued notice which was received by the plaintiff. The plaintiff gave reply on 10.7.2007. It is further contended that out of the three members of the Administrative Board, only two members were present. The defendant, in collusion with two members who were present, got resolution no.2 passed on 3.8.2007 enrolling him as a member.

4. In paragraph 16, the plaintiff asserted that after election of the society, new Managing Committee took the charge and the General Body passed resolution no.5(b) on 14.8.2008 cancelling resolution dated 3.8.2007. Mr. Patwardhan relying upon the assertions made in paragraphs 14 and 16, contended that the defendant is a member of the society. Thus, the dispute is between a member and a member and in view of Section 91 of the Act, civil court has no jurisdiction to entertain and try the suit. He further submitted that the dispute also touches the business of the society and, therefore, civil court has no jurisdiction. The learned trial Judge ought to have rejected the plaint on the ground that it is barred by section 91 of the Act.

5. On the other hand, Mr. Pitre supported the impugned order. He has taken me through paragraph 2 and 12 of the plaint. He submitted that for deciding the application under Order VII, Rule

11(d), only averments made in the plaint are germane. If the plaint is read in its entirety, it cannot be said that this is an dispute between a member and a member attracting section 91 of the Act. He submitted that presently plaintiff no.2-Suresh Khandekar is a member of the society. Plaintiffs' father Dattatray Khandekar was earlier member. He carried out additional construction and executed lease deed for a period of 99 years in favour of the defendant. He submitted that only plot holders can become members of the society and since the defendant is lessee in respect of the constructed portion, he cannot become member of the society. He submitted that C.T.S No.1332/2 is owned by the society. Out of this C.T.S. number, plot no.42 was originally allotted to Anant Laxman Khanolkar. Plot is owned by the society and the structure is owned by its members. Subsequently, the plaintiff's father Dattatray Khandekar acquired membership on 5.11.1972. Plot is allotted to him by the society for a period of 997 years. He submitted that the defendant is not allottee of the plot and consequently cannot become a member of the society.

6. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the defendant has filed application under Order VII, Rule 11(d) of C.P.C for rejection of plaint on the ground that the defendant is a member of the

society. For considering the application under Order VII, Rule 11(d), the averments made in the plaint are germane and not the defence set up by the defendant. Perusal of paragraph 2 of the Plaint shows that society is the owner of the plot and buildings constructed thereon are of the ownership of the members. Perusal of paragraph 2 shows that initially one Anant Laxman Khanolkar was a member as he was allotted plot no.42 on which he carried out construction. By resolution no.2 passed on 5.11.1972, society enrolled plaintiff's father Dattatraya Khandekar as a member. On 5.1.1973, resolution was passed by the society for transferring the plot in the name of Dattatraya Khandekar. The said plot is held by Dattatraya as a lessee for a period of 997 years and accordingly on 22.4.1979 society had issued share certificate in favour of Dattatraya.

7. In paragraph 10, it is asserted that Dattatraya Khandekar expired on 7.7.1996. Plaintiff no.2 made application for enrolling him as member. On 9.9.1996 resolution no.4 was passed by the society enrolling plaintiff no.2 as a member of the society. In paragraph 11, the plaintiffs asserted that he is exclusive member of the society and is owner of the structures standing on plot no.42. It is further asserted that as per Bye laws of the society only one member holding plot can be enrolled as member and same cannot be bifurcated. In paragraph 12, the plaintiffs made reference to the attempts made by the defendant in the year

2005 for enrolling him as member. The application dated 7.2.2005 was rejected by the society on 1.3.2005 on the ground that plot no.42 was already allotted to plaintiff no.2 and consequently granting plot no.42 on lease basis and enrolling the defendant as member does not arise. It is further asserted that the defendant had no right to apply again for enrolling him as a member as he did not challenge decision of the society.

8. In paragraph 14 the plaintiff asserted about illegally enrolling the defendant as member by passing resolution by the Administrative Board on 3.8.2007. It is further asserted that the defendant never became member of the society and also he cannot become member of the society. In paragraph 16, it is asserted that on 14.8.2008 the General Body passed resolution cancelling Administrative Board's resolution dated 3.8.2007. It is further asserted that the defendant at no point of time was a member of the society.

9. As noted earlier, in paragraph 2 it is specifically asserted that plots are owned by the society and the constructions carried on the respective plots are owned by its members. In other words, the society is a Tenant Ownership Housing Society where land is held by the society either on leasehold or freehold basis and houses are owned or to be owned by members. It is also not in dispute that the plaintiff's father Dattatraya had executed lease deed in favour of defendant in respect of the constructed

portion. In other words, the defendant has no right, title and interest in respect of the plot allotted by the society. That apart, only plot holders can become member of the society as is evident from the assertions made in paragraph 1 of the plaint. If the plaint is read in its entirety, I do not find that this dispute is between a member and a member and that it touches the business of society. The learned trial Judge while rejecting the application has observed in paragraph 6 that the dispute pertains to a constructed property on the plot owned by the society. In such a dispute, neither the Collector nor the society has role to play nor their presence is necessary for deciding the issue in dispute. The dispute is purely of civil nature and the dispute does not touch the business of the society. The learned trial Judge, therefore, held that bar of section 91 is not attracted and the civil court has jurisdiction to entertain and try the suit.

10. In the light of the aforesaid discussion, I do not find that the learned trial Judge has committed any error in rejecting the application. No case is made out for invocation of powers under section 115 of C.P.C. Application fails and the same is dismissed.

(R.G.KETKAR, J.)