

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

WRIT PETITION NO.1207 OF 2015

Mahendrakumar K. Malhotra .. Petitioner.

Vs.

Mangalya Co-operative Housing
Society Ltd. & Anr. .. Respondents.

Ms. Aparna Vhatkar i/b Ashish U. Mishra for the Petitioner.
Mr. Ved Prakash Chandrikaprasad Singh for the Respondents.

CORAM : A.K. MENON, J.

DATED : 14TH OCTOBER, 2015

P.C. :

1. This petition challenges the judgment dated 2nd April, 2014 passed by the Maharashtra State Co-operative Appellate Court passed in Appeal 180 of 2013 as also the judgment and order dated 12th August, 2013 passed by the Co-operative Court in CC-IV/172 of 2006. It is the petitioner's case that he was a promoter member of respondent no.1 society and that he was allotted flat No.10. He contends that respondent no.2 is his brother, who falsely and dishonestly claims to be a member of respondent no.1 society.

2. According to the petitioner after having promoted the society and having procured land and got plans approved, he was instrumental in contributing initial funds required for acquiring the flat and accordingly the

petitioner is the owner of suit Flat No.10. It is the petitioner's case that on account of his employment he was required to stay away from Mumbai and he was required to stay in company leased premises and in the meantime the building was completed in 1969. In the year 1972 he went to Aurangabad on account of employment. In the year 1975 he acquired another flat at Bandra but due to exigency of his employment continued to stay at Aurangabad.

3. The Petitioner's father expired in 1976, however, his mother and brother – respondent no.2 continued to remain in Flat No.10. The petitioner has further contended that his brother respondent no.2 got married in 1981 but continued to stay in Flat No.10. However, since his mother was alive at the time he did not take up the issue and permitted respondent no.2 to continue to stay as gratuitously licensee. Thereafter his mother passed away in 2001 but respondent no.2 continued to stay in the flat with consent and permission of the petitioner gratuitously. It is the petitioner's case that in 1980 he returned to Mumbai and started to reside in the flat acquired at Bandra. However, after expiry of his mother, the petitioner requested respondent no.2 to vacate the flat. But he did not and it is in these circumstances that in the year 2004 he inquired with the society and learnt that without his consent or execution of any transfer deed the society has transferred shares in the name of mother and a new share certificate was issued. He relied upon a copy of the share certificate which appears at page 30 and which bears endorsement at both places saying that “This share certificate is issued in cancellation of

earlier certificate issued”. According to him the certificate relied upon by Respondent No.2 is different from other certificates issued by the same society such as the one at Exhibit-F. According to the petitioner on coming to know of this misdeed he filed an application under section 25A of the Act before the Co-operative Court and sought declaration that he continues to be a member of the society and that the records of the society are being manipulated. The respondent contested the application and took up plea that flat was acquired by the father of the parties. The dispute was barred by limitation and dispute was beyond the scope of section 91. Surprising what I find is that Exhibit-F is a share certificate issued on 9th September, 1964 to one Mr.K A Subramaniam. The share certificate bears the very same distinctive numbers i.e. 26 to 30 that are reflected at page 30 of the plaint.

4. It is the petitioner's case that the respondent society did not enter into the witness box and the learned trial Judge by the judgment dated 12th August, 2013 dismissed the dispute on ground of lack of jurisdiction to entertain the dispute. The petitioner then filed an appeal before the Co-operative Appellate Court which confirmed the order of the Co-operative Court. In the meanwhile the petitioner has filed a suit in the Court of Small Causes at Bombay claiming that respondent no.2 is liable to be evicted since he was a gratuitous licensee. The said suit is pending. In the meantime the appeal came to be decided by the Co-operative Appellate Court confirming the order vide its judgment dated 2nd April 2014 and has held against the

petitioner on various points. The Appellate Court found that the Co-operative Court did not have jurisdiction to entertain the dispute and thus decided question of jurisdiction in favour of respondent no.2 by holding that the dispute is essentially a family dispute between two brothers and one of whom claimed that the property was a joint family property and it is original property of the father.

5. After advertng to various facts pleaded and the contentions of the parties the Court was of the view that it is a genuine dispute of title and it relied upon various decisions in support of its contention. Even otherwise the two Courts have concurrently found and held against the petitioner. The Appellate Court also found that according to the petitioner he originally claimed to be member and that respondent no.2 was not member of the society and even mother was not a member of the society yet the share certificate was illegally transferred in the name of mother. The transfer of flat in the name of mother is also questioned and the Appellate Court found that opponent no.2 brother could not be styled as person claiming through member and therefore the dispute is undoubtedly between a member and non member, therefore, was not maintainable.

6. In any event having perused the pleadings and having heard learned counsel the petitioner has not been able to offer any explanation as to why the dispute was filed belatedly although the Co-operative Appellate Court has held the issue of limitation in favour of the petitioner. In the meantime to

assert his membership and ownership of the flat there is no material on record to indicate that any steps were taken by the petitioner. The pleadings are vague and these are disputed questions of fact which cannot be gone into under writ jurisdiction. There is no perversity in the impugned order.

7. In the circumstances I do not find that the present petition calls for any interference. Though suit filed by the petitioner is said to be pending in the Court of Small Causes it is open for the petitioner to adopt such remedies as he may be advised in respect of his claim to membership qua his brother respondent no.2.

8. The writ petition is dismissed. No orders as to the costs.

(A.K.MENON, J.)