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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION

WRIT PETITION NO. 4009 OF 2014

Shri Dattatray Mahabaleshwar Nadkarni & anr Petitioners

vs

Shree Saraswati Cooperative Housing
Society Ltd and anr. Respondents

Mr. Shrivallabh S. Panchpor i/by Mr. Sanjay C. Natu for the
Petitioners

Mr. S.S. Kanetkar for Respondent No.1.

Mr. Vaijanath P. Vaze for Respondent No.2.

CORAM: ANOOP V. MOHTA, J.

DATE : January 29, 2015

P.C.:

The Petitioners have challenged order dated 22.07.2013 passed by the Maharashtra State Cooperative Appellate Court allowing the Applications (Exhibits 36 and 37) whereby the objections and the contention of the Respondents revolving around clause (d) of Rule 11 of Order VII of Code of Civil Procedure (the Code) are accepted and order dated 25.4.2013 passed by a Judge, Cooperative Court, Pune, rejecting the Applications has been set aside that resulted into the dismissal of the dispute/Suit No.390/2008 filed by the Petitioners. The main prayer of the dispute is revolving around the membership of

the society and the allotment of plot Nos. 15 (old), 12 and 13 (new) has been denied at the threshold of the proceedings in question.

2 By a reasoned order, the learned Judge of the Cooperative Court rejected the Applications, specifically by dealing with and referring to the earlier Dispute No.103/2000 filed by the society against the Petitioner and other 11 tenants whereby the society sought a declaration that the Petitioners have no right, title or interest in the property/plot in question which was in possession of tenants of the Petitioner. Admittedly, the suit was dismissed on 25.01.2007. These averments of the society, therefore, just cannot be overlooked at this stage, considering the averments made by the Petitioners in support of claim of membership and the allotment of the same plot in question.

3 The Petitioners have filed a suit/raised the dispute based upon the specific averments made in the plaint and specifically paragraphs 8 to 12. The cause of action, according to the Petitioners, arose some time in October 2008 when the Petitioners (Disputants) came to know, Opponent No.2 (subsequent member) who admittedly on the basis of subsequent allotment of plot in question had demolished the structure owned by the Petitioners. As the same was

allotted by opponent No.1-society, the claim was based upon judgment and order dated 29.12.1990 in Appeal No.328 of 1985 filed by opponent No.1. The cause of action, as stated, continued every day thereafter. On 18.11.2008, even office of sub-Registrar, Haveli No.2, Pune furnished the copy of Indenture of Lease dated 5.09.2006 executed by and between opponent Nos. 1 and 2 wherefrom the Petitioners came to know about the lease for the plot in question. The fact of pendency of the Suit filed by the society against the Petitioners referring to the plot in question was admittedly disposed of in 2007 and definitely after the Indenture lease dated 5.09.2006. This facet, in my view, ought not to have been overlooked while dismissing the Suit/dispute filed by the Petitioners. The revisional court, however, did not consider the society's Suit against the Petitioner and tenants, and so also the averments referring to the plot in question and the connected and similar prayer so made against the Petitioner therein.

4 The rights were crystallized in favour of the Petitioners based upon the earlier order of 29.12.1990 in Appeal No.328 of 1985 is again a matter which cannot be decided and destroyed at this stage, without giving an opportunity to the Petitioners to justify their

case/claim. The failure of respective obligations, even if any, which was stated to be the conditions in the order also cannot be overlooked at this stage and so also the reason behind the same. This also, in my view, requires an opportunity to support the claim, to the Petitioners specifically in the background of the litigation filed by the Petitioners for the same plot, which was admittedly pending when they executed the lease dated 5.09.2006.

5 The issue of burden of proof, in such circumstances, when there are two rival Suits/proceedings initiated, though at the earliest stage, that itself means equal opportunity to both the parties to put their case. It is a question of claiming title and possession of the property, based upon the earlier judgments and the transaction between the Petitioners and the society.

6 The issue decided in the litigation, just cannot be decided without giving opportunity to the Petitioners to lead the evidence to justify the the case and cause of action so mentioned in the present claim/litigation so initiated. In the present case, as averred, the cause of action arose some time in October 2008 and the Suit is filed in December 2008. Though reference is made to the earlier orders dated

29.12.1990, that itself in my view is not sufficient to deal and reject the claim on the ground of limitation and/or dismiss the Suit in threshold by invoking Order VII, Rule 11 (d) of CPC.

7 There is no question of giving interpretation and/or reading earlier judgments between the parties and its effect while deciding such Applications/objections so raised in such fashion without giving opportunity.

8 Both the parties read and referred the judgments and orders and documents so placed on record to justify their rival contentions. The judgment so read referring to the principle of Order VII of CPC is not in dispute, but the Court need to consider the facts and circumstances of the case and so also the pleadings so raised.

9 In view of above, the rights of the Petitioners to claim and/or entitlement of the property ought not to have been decided at the threshold of the litigation, in such manner. Equal opportunity need to be given to all the parties justifying their rival contentions. The plain reading of the plaint/averments so made and so referred, that itself cannot be the only foundation to allow such Applications as

done in the present case by the revisional authority and not by the courts below. There was no perversity as such. The Cooperative Court Judge, after hearing both the parties by reasoned order on 25.4.2013 rejected these Applications. Considering the scope and purpose and power of the revisional authority, the reversal order, in my view, is not correct. Therefore, the impugned order needs to be quashed and set aside and the order of Judge, Cooperative Court dated dated 25.4.2013 deserve to be maintained and order accordingly.

10 It is made clear that the observations made herein will not disturb the merits of the matter after due trial.

11 Therefore, the following order :

O R D E R

- (i) Impugned order dated 22.07.2013 is quashed and set aside.
- (ii) The order passed by the Judge, Cooperative Court dated 25.04.2013 is maintained, whereby the Applications at Exhibits 36 and 37 are rejected.
- (iii) The writ petition is accordingly allowed.
- (iv) No costs.

12 The learned counsel appearing for the Petitioners submitted to continue order dated 22.07.2013. The submission is however made by the learned counsel for the Respondents that the order was never continued further even by this Court. Therefore, I am not inclined to grant any order of status-quo for want of details and positive affidavit in support of the case as to what happened from 22.07.2013 till this date. However, in the interest of justice, for the reason so recorded above, liberty is granted to the Petitioners to invoke appropriate proceedings for the interim relief, if any.

(ANOOP V. MOHTA, J.)