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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION

WRIT PETITION NO. 11732 OF 2014

Ramesh Nanalal Shah

.... Petitioner

vs

1 The Maharashtra State Cooperative
Appellate Court at Mumbai

2 The Cooperative Court No.4 at Mumbai

3 Vivek Enclave Cooperative Housing
Society Limited

.... Respondents

Mr. S. U. Kamdar, Senior Advocate with Helina Desai i/by Wadia
Ghandy & Co. for the Petitioner

Mr. Dushyant Pagare i/by Mr. R.S. Datar for the Respondents 1 and 2.

Mr. J.S. Kini with Mr. Suresh Dubey for Respondent No.3.

CORAM: ANOOP V. MOHTA, J.

DATE : February 16, 2015

ORAL JUDGMENT:

Considering the averments made and by consent of parties and as the Petitioner has also no objection, Respondents 1 and 2 being the Courts under the Maharashtra Cooperative societies Act, 1960 (MCS Act), are deleted from the array of parties. Amendment to be carried out forthwith.

2 Rule. Rule is made returnable forthwith. Heard finally by
consent of parties.

3 The Petitioner has challenged the orders passed by the
Cooperative Court/Appellate Authority thereby an Application for
injunction pending the main dispute is rejected. Therefore, the
present Petition.

4 Admittedly, the Petitioner's claim for deemed membership
as contemplated under Section 22 of the MCS Act has been accepted
and confirmed even by the first Revisional Court though challenged by
the Respondent/Society. The second Revision before the concerned
Authority is pending. There is no stay against the order of granting
membership referring to the premises described in the Application
which is as under :

“(a) That pending the hearing and final disposal of the
Dispute, this Hon'ble Court be pleased to pass a temporary
order and injunction, restraining Opponents, their office
bearers and their members from disturbing and/or
obstructing and/or creating hindrance and/or interfering in

any manner whatsoever, the quiet, use, occupation and peaceful possession of the Disputants to premises being Premises 1 & 2 admeasuring 1366 square feet carpet area approximately, on ground floor of 'A' Wing of building "Vivek Enclave", together with 1 (one) stilt car parking space and 2 (two) open car parking spaces lying, being and situate at on land bearing CTS No.169, Survey No.15, Hissa No.6 admeasuring approximately 1815 square yards equivalent to 1518.4 square metres situate at Village Mandapeshwar, Taluka Borivali, within the Registration District and Sub-District Bombay City and Bombay Suburban."

5 One Mr. Ashok Gobind Mohanani by agreement of sale dated 22.04.1999, stated to be sold the property to the Petitioner. The Respondent/society and the said Ashok Mohanani, at the relevant time, even till the date of the dispute are at issue on various aspects including the legality and/or illegality of the premises in question. The issue is also raised revolving around the alleged stilt parking and/or shop premises and/or residential premises. All those issues definitely need trial and/or due inquiry subject to equal opportunity to

the parties, for the Court to come to a conclusion for or against the Petitioner.

6 There is also no issue in view of the judgments/orders passed by this Court that the Authorities under the MCS Act have limited jurisdiction to determine and decide the title to the property and so also even the validity of the documents. This, in my view, also covers the agreement between Ashok Mohanani and the Petitioner and the society about the premises in question. This itself, unless decided finally, sufficient for the society not to interfere with the possession of the premises.

7 The submission of the learned counsel appearing for the Society that both the Authorities, after considering the case of the Petitioner, have not accepted the case of actual possession of the property in favour of the Petitioner; there are no documents to support the actual physical possession of the property in question; therefore, there is no question of passing order as prayed thereby permitting the Petitioner to use and occupy the premises. The further submission that even there is no question to interfere with the concurrent findings so given by the Authorities. All these submissions,

in my view, just cannot be the reason to overlook the order of granting deemed membership for the premises as the same goes to the root of granting protective order, considering the restrictive scope and power to decide the validity of the documents. The fact of pendency of the second revision, unless decided, at this stage, the order passed in favour of the Petitioner as holding the field, needs to be noted even by the Cooperate Court/Authorities.

8 The legality and/or illegality of possession and/or unauthorised and/or impermissible occupation; and the fact that the proceedings are pending as initiated by the Society to take action against the occupants and stated unauthorised premises, unless decided and/or concluded finally, the right so created by Ashok Mohanani in favour of the Petitioner, is sufficient factor to consider the case of the Petitioner against the Society.

9 Strikingly, the society used to collect since long, by sending regular bills for the maintenance, water, parking and all other necessary charges which are required to be collected by the society from the members. The requisite payment made and the receipts issued to the Petitioner in this regard are also part of record. There is

no justification coming from record and/or even if any, how society used to collect and demand such money from Mr. Ashok Mohanani, who was stated to be unauthorisedly occupying and/or has no right or title to occupy the premises for want of specific documents by the builder in his favour. It is a matter of trial, but the society's submission in this regard and/or finding given by the Authorities by overlooking this basic facts and the documents including the conduct of the society, in my view, goes to the root of the matter in support of the Petitioner specifically with regard to the aspects of physical possession of the premises. There was no question of claiming maintenance and/or any charges from the person, if he is not occupying the premises and/or is in possession of the premises. The legality and/or validity, as recorded above, unless decided finally, the society's collection of the maintenance charges and issued receipts regularly even on 27.06.2011, whereby the society has accepted the amount of Rs.10,34,697/- though under protest and/or without prejudice, sufficient foundation to grant protective order.

10 Therefore, taking overall view of the matter including the conduct of the society and further, the balance of convenience and equity lies in favour of the person who has documents and/or material

to justify their claim of occupancy/possession and unless those documents and/or transactions are set aside, any sort of obstruction and/or interference with the right to use and possession of the property, at the instance of society or other member needs to be protected pending the dispute.

11 Both the Authorities, in view of above background, have overlooked and nor dealt with specifically the documents so placed on record referring to the demand of regular society charges and the requisite payments from time to time by Ashok Mohanani from whom the Petitioner has ultimately purchased this property.

12 The aspect of actual physical possession so read and referred by the Courts below, in the background of above stated facts, in my view, goes to the root of the matter while granting and/or taking note of the basic principle of injunction, as permission was never sought, neither the order was sought by the Petitioner to enter into the premises for the first time. The prayer is for protection and use and occupation. I am inclined to observe that for physical possession in society premises, merely because there are no electricity bills placed on record, that itself is not sufficient to, in the

background, to overlook the issuance of regular maintenance, water and other connected charges and paid by the earlier member. The society, therefore, cannot agitate that issue merely because there are no full activities and/or Mr. Ashok Mohanani was not in actual physical possession and/or the Petitioner as stated to be not in use of the premises. It may not be on everyday basis, but it should not be the reason to deny the prayer.

13 Both the Courts below not even dealt with in detail the reasoned orders passed by the Authorities under Section 22 of the MCS Act referring to the premises, though point of title and/or documents kept open for consideration. There is no stay order of any kind against the Petitioner referring to the membership. A person cannot be member of any society, unless he has shares and/or related document. The property was referred and read while granting deemed membership, it is difficult to dissect at this stage and deny the injunction so sought protecting the possession of such premises. The society in no way averred and/or claiming that they are in actual physical possession of the premises. By the impugned order of rejecting the claim/injunction by overlooking the above reasons, the Authorities decided the issue even of possession against the Petitioner.

14 It is quite settled that actual possession of the property has various facets and so also the legal and/or illegal possession. A person may be in possession of the property by occupying himself and/or through his agents and/or may permit any other person to use and occupy the premises. The aspect of title, ownership and/or legality of documents, unless decided finally, even if it is stated to be void and/or illegal and as observed above requires a detail trial and inquiry. The person like the Petitioner and/or the members of the society, in the present case, the deemed member, just cannot be denied and/or deprived of the use and occupation of the premises and so also related rights flowing from the membership as contemplated under the MCS Act and the Rules and the Bye-laws of the society.

15 Therefore, taking overall view of the matter and in the interest of justice and to avoid further complications and as the balance of convenience, equity lies in favour of the Petitioner and considering the conduct of the Respondent/society, I am inclined to interfere with the order passed by the Courts below and grant the Application in terms of prayer (a), as quoted hereinabove, pending the disposal of the Dispute in question.

16 However, it is made clear that the observation so referred above, are for deciding the present petition as well as this interim application. The Authorities are free to take the decision and the related aspects of giving equal opportunity to all the parties. The Writ Petition is accordingly allowed.

17 Rule is made absolute in the above terms. There shall be no order as to costs.

18 The learned counsel for the Respondent/society submitted to stay the order so passed today and continue with the order so passed on 30.01.2015. This submission, for the reason so recorded above also, I am not inclined to accept as the order so passed today in open Court, is after hearing both the parties finally and taking note of the material so placed on record. Therefore, the submission of the learned counsel for the Respondent/society to stay the order so passed today is also rejected.

(ANOOP V. MOHTA, J.)