

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

WRIT PETITION NO. 11748 OF 2015

1. Ramesh Agarwal and Anr. ..Petitioners

Vs

Lily Apartment Co-operative
Housing Society Ltd. .. Respondents

Mr. Rajesh Singh, Advocate for Petitioners.
Mr. Floyd Gracias, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
DATE : 07/12/2015

PC:

1. Heard Mr. Rajesh Singh, learned counsel for the petitioners and Mr. Floyd Gracias, learned counsel for the respondents at length.

2. Rule. Mr. Gracias waives service for the respondents. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, defendants no.1 and 2 have challenged the Judgment and order dated 2.11.2015 passed by the learned Judge, City Civil Court, Dindoshi (Borivali Division) on preliminary issue in Short Cause Suit No.1299 of 2014. By that order, the learned trial Judge held that civil court has jurisdiction to entertain and try the suit.

4. Mr. Singh submitted that the plaintiffs have instituted suit, inter alia, contending that it is a Co-operative Housing Society registered under the Maharashtra Co-operative Societies Act, 1960, (for short, 'Act') and the defendants are members of the society residing in Flats no. A/13 and A/14 respectively. It is alleged that the defendants are illegally occupying the terrace of the building without paying any consideration for the same or without any licence or permission from the plaintiffs. It is alleged that terraces are society's common property and the defendants have obstructed other members from using the terrace in the past and is presently obstructing the staff of the construction company executing the structural repairs for and on behalf of the plaintiffs from carrying out work in that area. It is further alleged that the defendants, by illegally occupying the society's terrace and by constructing the wall, have caused severe risk and jeopardy to the lives and property of the society's members. The defendants are illegally making structural alterations in the society's common areas and premises and are exposing the society to the risk of legal action.

5. Mr. Singh submitted that the plaintiffs, however, have not claimed any final relief in the suit. During the pendency of the suit, the plaintiff took out Notice of Motion praying, inter alia, for mandatory injunction ordering the defendants to demolish the

illegal wall and all other structures constructed by them without delay either through BMC or through society's contractor or from such other persons or authority. The defendants filed reply and raised issue of jurisdiction on the ground that the suit is essentially between the society and its members and, therefore, civil court has no jurisdiction to entertain and try the suit. The plaintiffs-society has to invoke Section 91 of the Act and file dispute. The plaintiffs led evidence and defendants did not lead evidence. The learned trial Judge has allowed Motion and has held that civil Court has jurisdiction to entertain and try the suit.

6. Mr. Singh submitted that basically the plaintiffs have not claimed any final relief. During the course of hearing of this petition, I suggested to parties that I will permit the plaintiffs to amend plaint so as to incorporate final prayers, as also if it so desires, file additional affidavit-in-support of Motion. Defendants 1 and 2 will be at liberty to file additional affidavit-in-reply opposing Motion. Mr. Singh states that though earlier the defendants did not lead evidence, they will lead evidence for substantiating their claim that civil court has no jurisdiction to entertain and try the suit.

7. The matter was kept back so as to take instructions from respondents' Advocate. Upon taking instructions from Mr. Nimkar (Chairman) and Mr. Maureen Rebello, he consents for setting

aside the impugned order and by following the course suggested herein above. In view thereof, by consent of the parties, Petition is disposed of in following terms:

- (i) The plaintiffs shall amend Plaint, as indicated herein above, and serve amended plaint on Advocate for other side. The plaintiffs are also at liberty to file additional affidavit-in-support of Motion, if so advised. The defendants are at liberty to file additional reply opposing the Motion.
- (ii) The plaintiffs are at liberty to lead further evidence, if it so desires. The defendants shall lead evidence in support of their claim that they have acquired ownership of terrace which may be subject matter of dispute so as to substantiate their objection under section 9-A of C.P.C.
- (iii) The impugned order is quashed and set aside and the learned trial Judge will decide the preliminary issue of jurisdiction afresh. It is made clear that I have not examined merits of the case. All contentions of the parties on merits are expressly kept open.
- (iv) Rule is made absolute in aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)