

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2478 OF 2014

Darius Kaikhushroo SoonawallaPetitioner

: V/S :

Jawaharbad Co-op Hsg. Society
Ltd. & Ors.Respondents

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Mr. Darius K. Soonawala, petitioner in person/applicant in person.

Mr. S.K. Jain a/w. Ms. Poonam Sharma i/by. Mr. Siddharth Murarka,
Advocate for respondent no.1.

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Coram :- Smt. R.P. SondurBaldota, J.

Date :- 29th October, 2015.

P.C. :-

1). This petition exhibits blatant abuse of process of law by the petitioner who appears in person. By this petition filed on 14th October, 2014 he seeks declaration that, (i) the judgment and award dated 23rd February, 2004 passed by the Co-operative Court at Mumbai in Case No. CC/III/ABN No.1300 of 1974 (Case No. CC/III/ABN No.323 of 1991), and (ii) the judgment and award dated 16th December, 2006 passed by the Appellate Co-operative Tribunal, Mumbai in Appeal No. 43 of 2004,

as bad, *ab-initio*, being vitiated by fraud and not binding upon him. He also challenges the Execution Application No. 3 of 2014 in Case C.C. No. CC/III/ABN No. 1300 of 1974. The petitioner significantly was not a party to any of the proceedings. Copies of the orders under challenge and copy of the execution application are not annexed to the petition. Similarly, No details of the pleadings in the Dispute and various orders passed therein are stated in the petition. The necessary details have been provided by respondent no.1, Society in its affidavit-in-reply. The Society has also filed compilation of the pleadings in the Dispute.

2). Respondent no.1, Society ('the Society', in short) is the original disputant. Respondent no.2 is original respondent no.3, the alleged unauthorised occupant of the premises in dispute. The present respondent no.3 is the heir of original respondent no.2, Freny, the owner of the premises in dispute and member of the Society as per its records.

3). The claim as set out in the petition by the petitioner is as follows :-

. In the year 1960-61, partnership firm by name, Tehernai Construction Company purchased the land and constructed the building of the Society thereon. Thrity the mother of the plaintiff, Freny, original respondent no.2 and 2 more persons were partners in the firm. The unsold Flat no.2 in Block-B of the building ("the premises in dispute") was jointly held by Thrity and Freny. As per the consent terms dated

30th November, 1968 filed in the Bombay City Civil Court Suit No. 2043 of 1966, possession of the premises in dispute and various other premises was taken by Thrity and she was in possession thereof through her husband, Keki. Thrity and Freny had taken various loans from Keki to meet their financial needs. When both were unable, due to their financial constraints, to pay the loan taken from Keki, they by the agreement dated 27th September, 1972 transferred their right, title and interest in the premises in Dispute to Keki. Since then, Keki was in continuous use, occupation and possession of the premises as its owner. Freny was never in possession of the premises in dispute since the time of inception i.e. construction in the year 1960-61. She had never entered into any agreement with respondent no.2, Mohammed Imam and had not put him in possession of the premises at any point of time. Keki had, in the year 1995, obtained an eviction decree against respondent no.2 in Ejectment Application No.257/E/1976 which had been carried further, by the parties to the proceedings, upto this Court. A writ petition in this Court preferred by Keki is pending. Respondent no.2 in active connivance and collusion with the Society, tampered with the title of the Ejectment Application No. 257/E/1976 so as to make the eviction decree in favour of Keki infructuous. Therefore, several proceedings, including criminal proceedings, were initiated by Keki during his lifetime and thereafter by the petitioner. Keki died on 29th July, 2005. He had left

Will in respect of which probate has been granted to the petitioner, pursuant to which the petitioner is in possession of the premises in question alongwith his sister who is presently out of India.

4). The petitioner learnt that, the Society in collusion with respondent no.2 has fraudulently obtained the impugned Award dated 23rd February, 2004 without impleading Thrity the original joint owner and later, Keki as parties to the Dispute and attempted to take possession of the premises. He alleges that the proceedings filed by the Society were bad in law for non-joinder of the necessary parties. The petitioner also alleges that, all the actions, decisions and resolutions of the Managing Committee of the Society are illegal, void and *ab-initio* because the members of the Managing Committee have not complied with the provisions of Section 73(1)(AB) of the Maharashtra Co-operative Societies Act, 1960 since the year 2000. The next allegation of the petitioner is that, respondent no.3 Pervin is not the only heir of Freny. There are two more surviving heirs i.e. her son and daughter who were not brought on record in the proceedings. The heirs had sent letter dated 28th April, 2003 by speed-post addressed to the President of the Co-operative Appellate Tribunal, Mumbai along with the declaration of Pervin of the same date. The same were ignored by the Co-operative Court and the Appellate Tribunal.

5). The petitioner has annexed to the petition the following

documents as evidence of his claim to the premises in dispute :

- (i) copy of the consent terms in the Bombay City Civil Court in Suit No. 2043 of 1966 (Exhibit-A),
- (ii) copy of the probate in respect of the Will of Keki (Exhibit-B),
- (iii) copy of the letter dated 28th April, 2003 sent by the two additional heirs of Freny addressed to the President of Co-operative Appellate Tribunal, Mumbai along with the declaration (Exhibit-C), and
- (iv) copies of the applications for certified copies of the proceedings made by the petitioner (Exhibit-D) and (Exhibit-E).

A reference in detail to the documents will be made later hereinafter.

6). The facts disclosed by respondent no.1 in the affidavit-in-reply are as follows :-

. Respondent no.1 is a tenant co-partnership Society. Freny was admitted as member of the Society in respect of the premises in Dispute on 17th November, 1967 and as such was in its possession. Form-I of register of members shows her name as the member of the Society. She had parted with the possession of the premises to respondent no.2 Mohd Imam contrary to the bye-laws of the Society and without written consent and permission of the Society. She was also in arrears of maintenance charges. Therefore, the Society by its advocate's letter dated 24th September, 1973 terminated the tenancy of Freny and

filed Dispute in the Co-operative Court being Case No. CC/ABN/III/1300 of 1974 against her and Mohammed Imam. On receiving notice of the Dispute, Freny appeared through her Advocate and was represented throughout in the proceedings by Keki from August, 1975 till December, 1988 as her Constituted Attorney. Keki had collected share certificate in respect of the premises in dispute in the name of Freny by signing the counterfoils of the share certificates as the Constituted Attorney of Freny. On the death of Freny, respondent no.3 Pervin was brought on record as the legal heir. Freny had filed her written statement in the proceedings and at no point of time stated that, she had transferred the premises to Keki or that she was not the owner of the premises in Dispute.

7). The Co-operative Court partly allowed the Dispute by its order dated 23rd February, 2004. Since the relief of possession was denied to the Society, it preferred appeal before the Appellate Co-operative Tribunal. The appeal was heard and was posted for orders to 23rd November, 2006. On that date, the petitioner, apprehending that the relief of possession may be granted to the Society, committed theft of the entire proceedings from the premises of the Appellate Co-operative Tribunal in the evening after Court hours. Some of the staff members of the Appellate Co-operative Tribunal saw the petitioner carrying the proceedings and ran after him. The petitioner then threw the entire

proceedings in the premises of the Bombay City Civil Court, which is located near the Appellate Co-operative Tribunal and ran away. A complaint then was lodged by the Registrar of the Appellate Co-operative Tribunal with Colaba Police Station and in the course of investigation, original papers of the proceedings were seized from the extreme corner of the City Civil Court building. Since then, the record was lying in the police custody. Later, the Appellate Tribunal, had to make an application to the Metropolitan Magistrate under Section 451 Criminal Procedure Code to obtain custody of the original proceedings. Only thereafter the judgment in the appeal could be delivered on 16th December, 2006. These facts have been narrated in detail at para-1 of the judgment of the Appellate Co-operative Tribunal. By it's judgment, the Co-operative Appellate Tribunal allowed the appeal of the Society. It directed respondents No.2 and 3 to vacate the premises in Dispute and handover its possession to the Society within 3 months from the date of the order. Respondent no.2, Mohammed Imam, unsuccessfully challenged the order in this Court by preferring Writ Petition No. 1648 of 2007. That petition was dismissed on 19th July, 2013.

8). In the proceedings before the Co-operative Courts, the Society had produced it's record showing that Freny was the owner of the premises in Dispute. As per the Society record, Thrity was the owner of two other flats in the buildings i.e. Flat No.A-1 and B-1. She also owned

three garages in the Society. Because she acted contrary to the bye-laws of the Society and failed to pay the maintenance, the Society filed Dispute in the Co-operative Court in respect of the premises owned by her, being Case No. 1299 of 1974 (Case No. CC/IV/101/73 of 1991) in respect of the flats and Case No. CC/II/215 of 1986 in respect of the garages.

9). The evidence in the said dispute against Freny and Mohammed Imam commenced on 19th April 1989 and continued upto 25th October, 1991. Thereafter, Freny expired and on the application of respondent No.2 Mohammed Imam, legal heir of Freny one Pervin Bengali was brought on record. The legal heir engaged services of one advocate Mr. Ashok Mody with his office at Shrinath Bhavan, 27, Picket Cross, Mumbai and filed her written statement dated 2nd August, 2002. Issues in the matter were then re-framed on 5th August, 2002 and further evidence was led by the parties. Advocate Mr. A. N. Mody, cross-examined the witness of the Society, but thereafter, Pervin did not appear in the Court. She also did not make herself available for the cross-examination.

10). According to the Society, the petitioner learnt about the contest of the dispute by Pervin as the legal heir of Freny. He then prevailed upon Pervin to execute a declaration that the premises in dispute were sold to Keki in the year 1972 and that she and other heirs of

Freny had no rights to the same. That declaration along with application was sent to the President of the Co-operative Appellate Tribunal, who forwarded it to the concerned Co-operative Court. The reply of the Society and the Mohammed Imam to that application was filed and after hearing the parties the application was rejected. Thus, Pervin continued to remain on record as the legal heir of Freny.

11). After the evidence in the dispute was closed, the advocates appearing for the parties advanced their arguments and the learned Judge by the order dated 23rd February, 2004 partly allowed the dispute. Since, relief of possession of the premises in dispute was denied to the Society, it preferred appeal before the Appellate Co-operative Tribunal being Appeal No.43 of 2004. Pervin was duly served with the Appeal but she did not appear before the Tribunal. After extensive argument on behalf of the Society and Mohammed Imam, the appeal was posted for orders to 26th November, 2006 when the incident described at para 7 above took place.

12). According to the Society, the petitioner was aware and had full knowledge of the proceedings before the Co-operative Court as well as the Appellate Tribunal. He is also aware that his father Keki had represented Freny as a Constituted Attorney to contest the dispute. At no point of time either Keki or Freny came with a case that the premises in dispute were sold by Freny to Keki in the year 1972.

13). Mr. S. K. Jain, the learned advocate for the Society earnestly submits that the petitioner has no *locus-standi* to challenge the orders impugned in the petition. He was neither the party thereto nor can claim any right to the premises in dispute. He argues that this is a patently false petition filed with the sole intent of grabbing the premises in dispute.

14). Admittedly, the petitioner was not a party to the proceedings before the Co-operative Court. Therefore, he needs to first establish his *locus-standi* in filing the present petition. In his petition, he claims to be entitled to the premises in dispute through his father, Keki. According to him, Keki left a Will by which the premises are bequeathed to him and Schedule-I of the probate granted in respect of the Will, refers to the premises. Probate, not being a document of title, cannot independently, by itself establish the right of the petitioner to the premises in dispute. He needs to establish that, Keki was the owner of the premises. For that purpose, he relies upon agreement dated 27th September, 1972 between Thrity and Freny on one side and Keki, on the other, for transfer of the premises in dispute to Keki. The petitioner, however, has not produced that document. In any case, he needs to first establish that, Thrity and Freny were the joint owners of the premises. The document to establish this fact, according to him, is the document of consent terms dated 30th November, 1968 filed in Suit No. 2403 of 1966. This document, has been

referred to by him at serial no.1 mentioned at para-5 above. There is no averment in the petition that, the consent terms had been taken on record in that suit and decree in terms thereof was passed in the suit. Therefore, the consent terms by themselves can be of no value whatsoever. In any case, the consent terms do not refer to the premises in dispute. Its perusal shows that, the same essentially provided for distribution of various amounts amongst the partners of Tehernai Construction Company. The only reference therein to any premises is at Clause-A, wherein it is stated that the flats and garages allotted to the parties are of their respective ownership without specifying either the flats or the garages. Therefore, the consent terms cannot establish that Thrity and Freny were the joint owners of the properties in dispute.

15). The petitioner has not produced any share certificate issued by the Society in respect of the premises in dispute. On the other hand, the record produced by the Society in the proceedings before the Co-operative Court, shows that, the share certificate stood in the name of Freny alone. This share certificate had infact been collected by Keki in his capacity as the Constituted Attorney of Freny. It is to be noted at this place that, Keki himself, during his lifetime, claimed no rights whatsoever to the premises in dispute. This was, despite the fact that, Keki was not only well aware of the proceedings initiated by the Society but was actively involved therein, in his capacity as the Constituted

Attorney of Freny. Perusal of the record shows that, the proceedings on behalf of Freny had been contested by Keki as her Constituted Attorney. Had Keki really been the owner of the premises in dispute, he would have without doubt, staked a claim thereto in the proceedings filed by the Society. In these circumstances, the document of probate filed by the petitioner as evidence of his right to the suit premises, is of no value whatsoever and cannot establish his *locus-standi* to file the petition.

16). In his petition, the petitioner avers that, he is in possession of the premises in dispute. No incident whatsoever of his possession is indicated in the petition. On the contrary, there is an admission on his part, that respondent no.2, Mohammed Imam is in possession thereof. He has specifically pleaded that, Keki had obtained eviction decree against Mohammed Imam and sought execution of the decree. He alleges that the documents of the decree had been tampered with so as to make the decree in favour of Keki infructuous. Thus, his claim of possession is patently false.

17). It is patent from the averments in the petition and the documents relied upon by the petitioner himself that, it is a patently false petition filed by him with the sole intent of grabbing the premises in dispute. He clearly has, no *locus-standi* to challenge the orders impugned in the petition. By filing the present petition and taking out several applications therein, the petitioner has successfully delayed

execution of the impugned orders for eviction of Mohammed Imam who has been proved to be an unauthorised occupant of the premises in dispute. Therefore, the petition is dismissed with costs. The petitioner shall pay costs quantified at Rs.50,000/- (Rs. Fifty Thousand only) to respondent no.1, Society.

(SMT. R.P. SONDURBALDOTA, J)