

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 8681 OF 2012

Prakashpur Co-operative Housing Society Ltd.,
Ahmednagar through its Chairman
Vijaydatta Peter Londhe
Age 56 years, Occu. Social Work,
R/o. 233, Prakashpur Ahmednagar,
Tq. and Dist. Ahmednagar

....Petitioner.

Versus

1. Bapu Yashwant Kambale,
Deceased Through L.Rs.
- 1A. Kishor Bapu Kambale,
Age 40 years, Occu. Service,
2. Sau. Shakila Iqbal Shah,
Age 35 years, Occu. Advocate,

Both R/o. Prakashpur Co-operative
Housing Society Ltd., Tarakpur,
Tq. and Dist. Ahmednagar.

....Respondents.

Mr. A.S. Bajaj, Advocate for petitioner.

Mr. V.D. Salunke h/f. Mr. P.S. Koshti, Advocate for respondent No. 1A.

Mr. V.J. Dixit, Senior Counsel i/b. Mr. K.J. Suryawanshi, Advocate for respondent No. 2.

CORAM : T.V. NALAWADE, J.

DATED : 21st December, 2016.

ORDER :

1. The petition is filed against the decision of Cooperative Court, Ahmednagar given in Dispute No. 110/1988 and also against the decision given by the Maharashtra

Cooperative Appellate Court, Mumbai, Bench at Aurangabad in Appeal No. 112/2012 which was filed against the decision of Dispute No. 110/1988. The dispute was filed by present petitioner, Cooperative Housing Society against respondent No. 1, Member and respondent No. 2, purchaser of property of Member. Both the sides are heard.

2. The dispute was filed under section 91 of the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as 'the Act' for short). The petitioner is Housing Society and it is registered as Middle Class Tenant-Ownership Society. The dispute was filed in respect of two pieces of land Survey No. 99 situated at village Savedi, Tahsil and District Ahmednagar. The two pieces of land were described as follows in the dispute :-

- (a) Plot No. 45-A, having area of 40 ft. x 41 ft. and
- (b) Space of 60 ft. x 20 ft. situated on eastern southern side of plot No. 45-A which is allegedly encroached by defendant No. 1 and over which shed of 20 ft. x 12 ft. and one Mill of 15 ft. x 12 ft. are constructed by defendant No. 1.

3. It is the case of petitioner Society that it's business is to purchase lands, convert them to non-agricultural use and then

give, allot plots to its Members, who are supposed to be from middle class and the plots are to be given at concessional rate. It is the case of petitioner Society that its object involves helping the Members in getting loan for construction of such houses and the Society also functions for maintenance of roads, open spaces, kept during development and for giving amenities, services to its Members.

4. It is the case of petitioner Society that its bye-law has given it right to purchase plots of Members if the Members want to sell the plots and the Members cannot sell the plots without seeking permission of Society. It is the case of Society that Members cannot sell the plots to third party.

5. It is the case of petitioner Society that in the year 1968, the property described as 1A in the dispute was given to defendant No. 1, Member of the Society. It is contended that respondent No. 1 made encroachment over portion described as 1B and then executed sale deed in the year 1986 in respect of both the portions in favour of defendant No. 2. It is the case of Society that offer was not given to Society as provided in bye-laws and no permission was given by the Society to respondent No. 1 for selling the property to respondent No. 2.

6. It is the case of Society that respondent No. 2 is from rich family, her husband is estate broker and developer and only for the business purpose, respondent No. 2 has purchased the property. It is contended that respondent No. 2 is not eligible to become the Member of petitioner Society as per bye-laws and there is possibility that respondent No. 2 will develop the plot and do the business of estate broker and developer. It is contended that due to this conduct of respondent No. 1, the Membership of respondent No. 1 was cancelled by the petitioner Society.

7. It is the case of Society that it is ready to give reasonable price in respect of property described as 1A , Plot No. 45A to respondent No. 1. Following reliefs were claimed by the petitioner Society in the dispute proceeding :-

- (i) Give award for execution of sale deed of property described as 1A from the defendant Nos. 1 and 2 (present respondent Nos. 1 and 2) and if they fail to execute the sale deed, the sale deed be executed under award through Court.
- (ii) Give award of declaration that sale deed executed in the year 1986 by respondent No. 1 in

favour of respondent No. 2 is not binding on the Society and give further declaration that Society has preferential right to purchase the suit property described as 1A in the suit.

(iii) Give award of possession in respect of the property described as 1A and 1B and mesne profit.

8. Present respondent Nos. 1 and 2 filed common written statement. They mainly contended that the Cooperative Court had no jurisdiction to entertain such matter. They denied that present respondent No. 1 had made encroachment and portion described as 1B was encroached portion. It was contended for respondent No. 2 that the terms and conditions mentioned in the sale deed executed in favour of respondent No. 1 by the Society in the year 1968 are not binding on present respondent No. 2. It was also contended that as Membership of respondent No. 1 is cancelled, the Cooperative Court has no jurisdiction to decide such dispute.

9. The Courts below have held that there is no bye-law due to which it can be said that right is given to the Society to purchase the plots allotted or sold to the Members. Both the Courts below have held that the right claimed is mainly on the

basis of sale deed executed by Society in favour of present respondent No. 1 in the year 1968 and such relief cannot be given by Cooperative Court and the dispute does not fall under section 91 of the Act. Thus, it is held that there are no bye-laws on the basis of which it can be said that the relief, claim has anything to do with the business of petitioner Society.

10. Relevant bye-laws are as under :-

(I) The object of the Society can be found in bye-laws given in Chapter B. These bye-laws show that it is the business of the petitioner Society to purchase space, agricultural lands, develop it and sell the plots to Members for construction of houses. It is also the business of the Society to allot the constructed houses to the Members. It is also the business of the Society to give loan on long term basis to the Members for construction of houses on the plots or for making alteration in the construction already in existence. Bye-law No. B-1-6 shows that the Society is formed to sell all immovable and movable property or part of the property or to give it on lease basis or to dispose it of in any other way. Thus, in the objects given in Chapter B of the bye-laws, it is not mentioned that the Society is expected to purchase the plots or houses from the Members when they are sold to them.

(II) Bye-laws framed under title 'Functions of the Society' which are numbered as (F) bye-laws show as to how the Society will function. These bye-laws show that the Society is expected to function within territorial limits fixed while registering the Society and the property is to be purchased within its territorial limits. Bye-law No. F-1-3 (E) shows that it will be function of the Society to transfer plots of Members in the names of others, to sell or to give to new Members after taking permission of Assistant Registrar of Cooperative Societies. Though bye-law No. F-2-3 shows that the Society is expected to allot plot or house to a person, who is not Member of the Society, these bye-laws also do not show that restriction is put on the Members not to transfer the plots sold to them to the third party. The bye-laws showing it's function that Society is to effect the transfer of the plots does not mean that only the Society can transfer. When property is actually sold under absolute sale document by Society and then Member sells it, what remains is creating record in the Society of the transfer of such plots if the plots are sold by the Members. Bye-law No. F-5 shows that the Member, who has taken loan from the Society is not expected to create charge on the property given to him by Society or mortgage it or transfer it. If a Member who has taken loan from the Society,

either wholly or partly transfers his property to third party or creates charge etc. on the property, in that case, the Society is expected to take steps for recovery of entire loan at once and so, the period given for repayment of loan is to be curtailed. This bye-law again shows that there was apparently no restriction on the Members of the Society to sell the plots to third party.

11) The sale deed was executed in favour of respondent No. 1 on 25.8.1968. Clause No. 8 of the sale deed reads as under :-

"The purchaser shall not assign, transfer or sell the said property to any person other than the Managing Committee unless he has first offered the same to the said Committee (hereinbefore referred to) and the Committee has declined or neglected to purchase the same at the price offered by such other person and unless the Committee has taken objection to the subsequent purchaser, assignee or transferee in the general interest of the Society."

The aforesaid clause of the sale deed shows that the clause can be read in both ways. The Society is expected to take objection at the time of sale, if the Member wants to sell his property. There is no need to go in to the merits, detail of this clause. It can be said that apparent right was given to the Society under

the sale deed which can be called as preferential right to purchase the plot from present respondent No. 1. This clause has no connection with bye-laws already quoted.

12) From the bye-laws already quoted and clause of sale deed, it can be said that in the present matter, the petitioner Society wanted to enforce the right given to it under aforesaid clause incorporated in the sale deed but there is no such right given to the petitioner Society under the bye-laws. Thus, it is a right given under document and this right is against the respondent No. 1 who needs to be treated as third party, stranger for the present purpose. For the present purpose, respondent No. 1, the Member of the Society cannot be treated as Member for the purpose of section 91 of the Act. On this point, the learned Senior Counsel for respondents placed reliance on the observations made by this Court in the case reported as **2016 (1) ALL MR 417 [Mula Pravara Electric Co-operative Society Ltd. Vs. The Maharashtra State Electricity Distribution Company Ltd.]**. The observations are at paragraph No. 7 and they are as under :-

"7. The learned Senior Counsel for respondent placed reliance on one more case reported as **2013 (1) Mh.L.J. 104 BOMBAY HIGH COURT [Alok Agarwal and Ors. Vs.**

Punam Co-operative Housing Society Ltd. and Ors.]. In this matter when there was suit filed for removal of encroachment of open space made available for enjoyment of the members of the Society, it was held that the suit was maintainable in the Civil Court though the person who was member of the Society had made encroachment. In this case, the Division Bench of this Court has referred the observations made in the old case of this Court reported as **AIR 1952 Bombay 445 [Shyam Co-operative Housing Society Ltd. Vs. Ramibai Bhagwansing Advani]**, which are as under :-

"The dispute must be between the society and the member as a member or qua a member. The learned Chief Justice held that it must be a dispute in which the member must be interested as a member and it must relate to a transaction in which the member must be interested as a member. From this perspective it was held that it was not every dispute between the society and a member that would fall within the purview of the provisions of section 54 of the Bombay Co-operative Societies Act, 1925. The learned Chief Justice held that for instance, there may be many disputes between the society and its members in which the members are not concerned as members at all and they are in the same position as strangers."

13) The observations made by this Court in the case of **Mula Pravara Electric Co-operative Society Ltd.** cited supra can be used in respect of the property described as 1A and 1B. Reliance was placed by the learned Senior Counsel for respondents on the case reported as **2012 (5) Mh.L.J. 4 [Margret Almeida and Ors. Vs. Bombay Catholic Co-operative Housing Society Ltd. and Ors.]**. The learned Senior Counsel submitted that only if during pendency of matter before Cooperative Court third party acquires interest in the property of one of the parties to the dispute, the Cooperative Court can exercise its jurisdiction against such third party. This Court holds that there is no need to go in to the details of this proposition in view of the facts of the present matter.

14) The learned Senior Counsel for respondents placed reliance on Division Bench of this Court reported as **2013 (1) ALL MR 33 [Alok Agarwal & Ors. Vs. Punam Co-operative Housing Society Ltd. and Ors.]** and submitted that the declarative relief of nature like declaring transaction null and void can be given only by Civil Court and such jurisdiction is not vested in Cooperative Court. For making this observation the provision of section 91 of the Act is discussed by the Division Bench. In view of the peculiar facts of the present matter, this

Court holds that there is no need to go in to the details of this proposition.

15) On the other hand, the learned counsel for respondents placed reliance on some cases reported as follows :-

(1) (2015) 10 Supreme Court Cases 277 [Bhanushali Housing Cooperative Society Limited Vs. Mangilal and Others],

(2) AIR 2005 SUPREME COURT 2306 [Zoroastrian Co-operative Housing Society Ltd. and Anr. Vs. District Registrar, Co-operative Societies (Urban) and Ors.] and

(3) AIR 2003 SUPREME COURT 2508 (1) [Ramesh Chand Ardawatiya V. Anil Panjwani].

In the first and third case, there is discussion over the jurisdiction of Civil Court vis-a-vis jurisdiction of Cooperative Court. The facts and circumstances of each and every case are always different and every time Court is expected to go through the bye-laws to ascertain as to whether the dispute falls under section 91 of the Act. The second case is in respect of the right of Society formed for particular community and in this case, the Apex Court held that the bye-laws restricting membership to members of one community cannot be called as invalid. On this point, the learned Senior Counsel for respondents placed reliance on the case reported as **2000 (4) Mh.L.J. 642 [St.**

Anthony's Co-operative Society Ltd. Vs. Secretary (Co-operation & Textile Department) Mumbai and Ors.] in which there are some contrary observations. On this point this Court will be bound by the ratio of the case decided by the Apex Court. However, in the present matter, that point need not be touched. Admittedly, when the transaction was made in favour of respondent No. 2, there was no such restriction in the bye-laws. The bye-laws framed at the time of registration do not show that the Society was formed for particular community. It was formed for the benefit of middle class persons and poor persons. Thus, there is no need to discuss that point also.

16) In view of the discussion made above, this Court holds that it is not possible to interfere in the decision given by the Cooperative Court which is confirmed by the Trial Court. In the result, the petition stands dismissed.

17) The learned counsel for petitioner seeks for continuation of interim relief. Interim relief earlier granted to continue for four weeks.

[T.V. NALAWADE, J.]

ssc/