

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2408 OF 2016

Shri. Kamlesh J. Patadia and others

.. Petitioners

Versus

New Chandraoday Co-op. Hsg. Soc. Ltd.

and others

.. Respondents

Mr. Rajesh Kachare a/w Ms. Sarita Sawalkar, Mr. Ashish Ghadge i/by
Ms. Tamhane & Co., for the Petitioners.

Mr. K. V. Tembe i/by Mr. H. A. Bhojwani, for the Respondent No.3.

CORAM : R.M. SAVANT, J.

DATE : 7th MARCH 2016

PC.

1. The writ jurisdiction of this Court is invoked against the order dated 31.07.2015 passed by the Learned Judge of the Co-operative Appellate Court, Mumbai, by which order, the Application Exh.25 filed by the Respondent No.3 herein came to be allowed and the Appellate Court has observed that the issue of jurisdiction would be tried before the other issues.

2. The Petitioners herein are the Disputants in Dispute Case No.CC/II/249 of 2005. It seems that the subject matter of the dispute is

the resolution of the society approving the execution of the development agreement in favour of the Respondent No.3 herein. The Respondent No.3 has filed its written statement and has raised the issue of jurisdiction of the Co-operative Court to try the dispute. It seems that though the issues were framed by the Co-operative Court, the issue relating to the jurisdiction of the Co-operative Court was not framed. As a result of which, the Respondent No.3 filed an application by way of an affidavit for framing of the issue of jurisdiction so that the same can be heard and decided along with the other issues. The fact that the evidence of the Disputants was recorded has been mentioned in the said affidavit dated 11.10.2013. The Learned Judge of the Co-operative Court No.II, Mumbai by his order dated 31.10.2013 allowed the said application and framed the additional issue in respect of the jurisdiction of the Co-operative Court to try the suit. The Disputants were granted liberty to adduce additional evidence on the additional issue if they so desired. It seems that no evidence in respect of the issue of jurisdiction was led by the Disputants. The evidence of the Disputants was completed on 05.03.2015 and the dispute was posted for the evidence of the Respondents to the dispute that included the Respondent No.3 herein. The dispute it seems was adjourned from time to time for the Respondent No.3 to adduce its evidence. However, Respondent No.3 filed the instant Application Exh.25 for trying

the said issue of jurisdiction as a preliminary issue under Order XIV Rule (2) of the CPC. The Respondent No.3 placed reliance on the judgment of the Apex Court reported in **2012(5) SCC 642** in the matter of **Margret Almeida etc. Vs. Bombay Catholic Co-operative Housing Society Ltd.** as also judgment of the Division Bench of this Court reported in **2012(6) Bom.C.R. 194 Mohinder Kaur Kochar Vs. Mayfair Housing Private Ltd. & Ors.** The said application has been allowed by the Learned Judge of the Co-operative Court by order dated 31.07.2015. The Appeal filed against the said order dated 31.07.2015 being Appeal No.A.O.69 of 2015 came to be dismissed by the President of the Co-operative by his order dated 14.01.2016.

3. The Learned President of the Co-operative Appellate Court rejected the Appeal on the ground that merely because the evidence of the Disputants was closed was no ground to interfere with the order passed by the Trial Court. The Co-operative Appellate Court was of the view that no harm would be caused to the Disputants if the preliminary issue is decided as both the parties would get an opportunity. The Co-operative Appellate Court lastly observed that whether the Co-operative Court has jurisdiction to entertain the dispute in view of the judgment of the Apex Court in **Margret Almeida's** case (supra) or **Mohinder Kaur Kochar's** case (supra) would considered at the time of hearing of the issue of jurisdiction.

4. The Learned Counsel appearing on behalf of the Petitioners Mr. Rajesh Kachare would submit that since the evidence of the Disputants is complete and since on an earlier occasion the Respondent No.3 had applied for the issue of jurisdiction to be tried along with other issues, it was wrong on the part of the Trial Court to direct that the issue of jurisdiction would be tried before the other issues as a preliminary issue. The Learned Counsel in respect of his contention that such issue could not be tried as a preliminary issue relies upon the judgment of the Division Bench of this Court reported in 2007(1) Bom.C.R. 577 in the matter of Jagdish Hari Thatte & ors Vs. Municipal Corporation of Greater Bombay & anr.

5. Per contra, the Learned Counsel appearing for the Respondent No.3 Mr. K. V. Tembe supports the orders passed by the Co-operative Court and the Co-operative Appellate Court. It was submission of Mr. K. V. Tembe that in the instant case the issue could be tried under Order XIV Rule (2) of the CPC.

6. Having heard the Learned Counsel for the parties, in my view, it is not possible to accept the contentions urged by Mr. Kachare. It is required to be noted that under Order XIV Rule (2) of the CPC, if the Court is of the opinion that the case or any part thereof may be disposed

of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court. Hence, the said provision can be invoked even after all the issues are framed and there is some evidence recorded. In the instant case, the said issue of jurisdiction was framed pursuant to the application made by the Respondent No.3 by way of an affidavit. No doubt, the evidence of the Disputants has been completed but that cannot be a fetter on the power of the Trial Court to try the said issue of jurisdiction if the same relates to a question of law and does not entail any enquiry into facts. The judgment of the Division Bench in *Jagdish's* case (*supra*), does not further the case of the Petitioners. In as much as, in the said case the evidence of the parties was complete on all the issues and the suit was fully heard and thereafter the issue of jurisdiction was sought to be tried as an issue under Order XIV Rule (2) of the CPC and it is in the said circumstances that the Division Bench held that rendering a finding only on issue of the jurisdiction would not be proper and it would be necessary to record findings on issues so as to avoid protraction of litigation in the event the Appellate Court comes to the conclusion that the issue of jurisdiction has not been properly decided. In the instant case, there is no dispute about the fact that the evidence on behalf of the Respondents is yet to begin and it is only the evidence of the Disputants which is complete and as indicated above, there is no additional evidence

which was led on the issue of jurisdiction. Prima-facie it appears that the issue of jurisdiction in the instant case is a pure question of law. The Trial Court was therefore within its right to try the issue of jurisdiction before the other issues. In my view, the concurrent orders passed by the Courts below therefore do not warrant interference by this Court under Article 227 of the Constitution of India. However, it is clarified that it would be open for the Petitioners i.e. the Disputants to contend that the said issue is not only relating to law but also involves facts and it would be for the Trial Court to consider such submission if raised. It is also open for the Trial Court after deciding the preliminary issue to decide the other issues, if it deems appropriate after permitting the Respondents to lead evidence. With the aforesaid observations the Writ Petition is dismissed.

[R.M. SAVANT, J]