

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1109 OF 2004
ALONG WITH
CIVIL APPLICATION NO.869 OF 2014

Shri Vishwanath Vasant Poyekar	]
Flat No.4/A, Vishal Konkan	]
Co-operative Housing Society	]
Ltd. Fatehbaug,S.V. Road,	]..... Petitioner.
Kandivili (W), Bombay 400 067	] (Org. Disputant)

Versus

1]	Mr.Prafull Shankar Sabnis	]
	Flat No.A/3, residing at	]
	Vishal Konkan Co-operative	]
	Housing Society Ltd.	]
	Fatehbaug, S. V. Road,	]
	Kandivili (West), Bombay – 400 067	].....(Org.Opponent No.2)
		]
2]	Vishal Konkan Co-operative	]
	Housing Society Ltd.	]
	Fatehbaug, S. V. Road,	].....(Org.Opponent No.1)
	Kandivili (West), Bombay – 400 067	] Respondents.

Mr. A G Pandit for the Petitioner in Writ Petition and for the Applicant in the Civil Application.

Mr. G Krishna Mohan Nair for the Respondent No.1 in Writ Petition as well as in Civil Application.

Mr. R P Walwaikar for Respondent No.2 in Writ Petition as well as in Civil Application.

CORAM : R. M. SAVANT, J.

DATE : 06th April 2016

ORAL JUDGMENT

1 The writ jurisdiction of this Court is invoked against the order dated 01/09/2003 (signed on 27/11/2003) passed by the learned President of the Maharashtra State Co-operative Appellate Court, Mumbai by which order

the judgment and Award of the Co-operative Court was set aside and the Petitioner herein who was the Respondent No.1 in the Appeal in question being Appeal No.199 of 2003 was given liberty to move an application to seek condonation of delay which has occurred in seeking the amendments sought in the Dispute.

2 By the impugned order the learned Judge of the Co-operative Court has also been directed to give finding on the application first and then to give fresh findings on all other issues that might have arisen in view of the pleadings that are already on record. The learned Judge of the Co-operative Court has also been granted liberty to re-cast the issues.

3 The facts necessary to be cited for adjudication of the above Petition in brief can be stated thus :-

The Petitioner herein claims to be a founder/promoter member of the Respondent No.2 Society. The dispute in the proceedings is as regards allotment of Flat No.3 to the Petitioner in the Respondent No.2 Society. It is the case of the Petitioner that the said flat was allotted to him and the total estimated cost of the said flat was Rs.49,760/-. It is the case of the Petitioner that he has paid a total amount of Rs.32,310/- as his contribution towards the cost of the said Flat No.3. It is the case of the Petitioner that the brother of the Respondent No.1 one Prakash Shankar Sabnis was a member of the Managing

Committee of the Respondent No.2 Society and in his capacity as such a stratagem came to be adopted to show the Petitioner as a defaulter and allot the flat to his brother i.e. the Respondent No.1 herein. It seems that a Resolution came to be passed in the meeting dated 15/06/1980 cancelling the allotment to the Petitioner and in turn by a further decision taken in the said meeting it was decided to allot the flat to the Respondent No.1 herein. The Petitioner was therefore constrained to file the Dispute in question being Case No. CC/IV/77 of 1980 in the Co-operative Court, Mumbai. In the Dispute as filed the following reliefs were claimed :-

(a) that the Opponent No.1 be ordered to restore the membership of the Disputant which has been illegally expelled by the Opponent No.1;

(b) That the Opponent No.1 and 2 be ordered to hand over the vacant possession of the flat No.3 on ground floor, Vihal Konkan Co-operative Housing Society Ltd., Fateh-baug, S.V.Road, Kandivili (West), Bombay 400 067.”

To the said Dispute a Written Statement came to be filed on behalf of the Respondent No.2 Society which is dated 29/04/1981. The Respondent No.1 herein also filed a Written Statement which is dated 06/08/1981.

4 The Petitioner thereafter filed a Misc. Application on 15/12/1994 for a direction to be issued to the Respondent No.2 Society to give inspection of all the documents which are mentioned in the said application amongst which were the relevant resolutions of the General Body and of the Managing

Committee allotting the flat to the Opponent No.2 i.e. the Respondent No.1 herein; the application for membership filed by the Respondent No.1 herein, and the personal ledger account of the Petitioner as maintained by the Respondent No.2 Society etc. The learned Judge of the Co-operative Court IV Mumbai by his order dated 15/12/1994 allowed the said application and directed the Respondent No.2 Society to give inspection of the documents referred to in the said order as also directed to give certified copies after receiving the necessary fees for the same. Pursuant to the said order dated 15/12/1994, the Petitioner was furnished with the documents mentioned in the said order.

5 On obtaining copies of the documents, the Petitioner moved an application for amendment of the Dispute on 22/11/1996 and the amendments sought were in terms of the schedule to the said application. Amongst the amendments sought was incorporation of prayer clause (a) by which a declaration was sought that the resolutions passed by the Respondent No.2 Society with regard to cancellation of the allotment of flat in favour of the Disputant alleged to have been passed in the meeting of the Extra Ordinary Special General Body meeting held on 15/06/1980 be declared as illegal, invalid, improper and as null and void. The other prayer sought was for a declaration that the Disputant i.e. the Petitioner herein is entitled to allotment and possession of flat No.3 on the ground floor of the building of the Opponent

No.1 i.e. the Respondent No.2 Society herein. Hence the amendment sought was in respect of the alleged cancellation of allotment of the flat to the Petitioner and his entitlement for allotment and possession of flat No.3 on the ground floor of the building of the Respondent No.2 Society.

6 The said application for amendment filed by the Petitioner came to be allowed by the Co-operative Court by the order dated 25/09/1997. By the said order the Disputant i.e. the Petitioner herein was directed to carry out the amendments in the Dispute before the next date of hearing and the Opponents who are the Respondents herein were directed to file additional Written Statements in the light of the amendments.

7 The said order dated 25/09/1997 passed by the Co-operative Court allowing the amendment in the Dispute came to be challenged by the Respondent No.1 herein by filing Writ Petition No.2521 of 1999. A learned Single Judge of this Court disposed of the said Writ Petition by observing that the contentions and defences are kept open with regard to the issue of limitation which the Petitioner in the said Writ Petition i.e. the Respondent No.1 herein was directed to plead in the Additional Written Statement to be filed.

8 In view of the dismissal of the said Writ Petition No.2521 of 1999,

the impediment in the way of the Petitioner herein from amending the Dispute was removed. The Petitioner accordingly amended the Dispute in terms of the amendments that were allowed. On behalf of the Opponents to the Dispute i.e. the Respondent Nos.1 and 2 herein Additional Written Statements were filed.

9 The Co-operative Court on the basis of the pleadings of the parties framed as many as 19 issues, amongst which were the issues relating to whether the Disputant (i.e. the Petitioner) proves that flat No.3 has been allotted to the Disputant, whether the Opponent No.2 (i.e. the Respondent No.1) acquired right, title and interest in respect of flat No.3 for the consideration and without notice and therefore he is a bonafide purchaser of the said flat; whether the Opponents prove that Opponent No.2 was legally, validly and properly admitted to the membership of Opponent No.1, and whether Opponent No.2 proves that Dispute is barred by limitation.

10 The parties led evidence in respect of their respective assertions. On behalf of the Respondent No.2 Society one Smt. Lourdes Chandrahas Shetty, the Secretary of the Society, was examined. It has come in her evidence that the Disputant (i.e. the Petitioner herein) had paid the amount of Rs.24,169/- for the flat in question. It has further come in her evidence that she is unable to show that notice if any was sent to the Disputant for the cancellation of his allotment. It has also come in her evidence that on

15/06/1980 Opponent No.2 in the Dispute i.e. the Respondent No.1 herein was not a member when the flat was allotted and that his application for membership was filed on 05/07/1980.

11 The Co-operative Court on the basis of the evidence that has come on record came to a conclusion that the allotment has been made to the Respondent No.1 herein i.e. the Opponent No.2 in the Dispute by the Respondent No.2 Society when he was not even a member of the Society. The Co-operative Court also answered the issue of limitation in favour of the Disputant by holding that since the cause of action for filing the Dispute is continuous, the Dispute can be said to be within limitation. The Co-operative Court on the basis of the material on record partly allowed the Dispute and issued a declaration that the Resolutions dated 15/06/1980 and 28/06/1980 in favour of the Opponents are illegal. A further declaration was issued that the Disputant is entitled for allotment and vacant possession of flat No.3. The Opponents were directed to hand over vacant possession of flat No.3 in the Opponent No.1 Society to the Disputant within a month from the date of the said order. The Receiver, who was appointed in respect of flat No.4, was directed to hand over flat No.4 to the Opponent No.2 i.e. the Respondent No.1 herein immediately after he vacates and hands over flat No.3 to the Disputant. The Disputant was directed to pay balance amount of Rs.17,461/- as cost of flat No.3 to the Opponent No.1 i.e. the Respondent No.2 Society within a

month from the date of the said order. The judgment and order of the Co-operative Court No.V, Mumbai is dated 09/06/2003.

12 The Respondent No.1 herein as well as the Respondent No.2 Society filed separate Appeals being Appeal No.199 of 2003 and 195 of 2003 respectively. The said Appeals since being directed against the same Judgment and Order of the Co-operative Court were heard together by the learned President of the Co-operative Appellate Court, Mumbai. The learned President of the Co-operative Court, Mumbai upon hearing the learned counsel for the parties framed three issues which are to the following effect :-

- 1] Whether the initial pleadings in dispute application were defective and whether the amendment made subsequently was barred by limitation?
- 2] Whether the society's resolution dated 15/06/1980 in respect of cancellation of allotment of the dispute flat was proper?
- 3] Whether the Appellant was a bona fide purchaser for value without notice of the Respondent No.1's claim?

The Co-operative Appellate Court adverted to the antecedent facts prior to filing of the Dispute by the Disputant i.e. the Petitioner herein. The Co-operative Appellate Court was of the view that the principal issue that arises is whether the application filed by the Petitioner for amendment of the Dispute was within limitation. As it is by the said amendment sought that a challenge was sought to be raised to the two resolutions i.e. resolutions dated

15/06/1980 and 28/06/1980. The Co-operative Appellate Court observed that the said aspect assumes importance considering the fact that the controversy in the proceedings was as regards cancellation of allotment of the flat to the Disputant and subsequent allotment to the Appellant i.e. Respondent No.1 herein. The Co-operative Appellate Court was of the view that Disputant should have amended the Dispute within 6 years from the cause of action to include a specific challenge to the action of the society of cancellation of allotment in his favour. The Co-operative Appellate Court observed that the same was not done until 1996. The Co-operative Appellate Court observed that though the amendment sought by the Petitioner was allowed, the issue of limitation was kept open by virtue of the order passed by this Court in Writ Petition No.2521 of 1999. The finding of the Co-operative Court that the Dispute was within limitation having regard to the amendments, as the cause of action was continuous, did not find favour with the Co-operative Appellate Court which recorded a finding that the said finding of the Co-operative Court was incorrect. The Co-operative Appellate Court observed that in terms of Section 92 of the Limitation Act a Dispute for such a declaration ought to be filed within 6 years of the act of omission or commission being committed by the Society and that though in the instant case the Dispute was filed in the year 1980 the challenge to the two resolutions dated 15/06/1980 and 28/06/1980 was incorporated in the year 1996 by way of amendment. The Co-operative Appellate Court, therefore, posed a question as to whether the Respondent

No.1 should be permitted to go before the lower court with an application for condonation of delay in filing the dispute.

13 In the context of the said question posed by the Co-operative Appellate Court, the learned counsel appearing for the Petitioner herein Shri A.G.Pandit i.e. the Respondent No.1 in the Appeal before the Co-operative Appellate Court submitted that in the interest of justice the Respondent No.1 in the Appeal may be permitted to approach the Co-operative Court with an application for condonation of delay in filing the application for amendment. It was further submitted on behalf of the Respondent No.1 in the Appeal i.e. the Petitioner herein that if he is allowed to approach the lower court, then the lower court may in the facts of the present case give a finding as regards whether the Respondent No.1 was prevented from seeking the amendment within time. The Co-operative Appellate Court thereafter adverted to Section 92(3) of the Limitation Act wherein there is a power vested with Co-operative Court to admit a dispute after the expiry of the limitation period, if the applicant satisfies the Co-operative Court that he had sufficient cause for not referring the dispute within such period. In view of the said statement made on behalf of the Respondent No.1 in the Appeal i.e. the Petitioner herein the Co-operative Appellate Court held that it would be appropriate to remand the case back to the lower court for deciding the proposed application for condonation of delay. The Co-operative Appellate Court further directed that

the lower court shall consider the application on merits after giving opportunity to the Appellant as well as the society to oppose such application. However, the Co-operative Appellate Court has set aside the impugned judgment and Award of the Co-operative Court in its entirety and remanded the matter back to the Co-operative Court with liberty to the Respondent No.1 i.e. the Petitioner herein to move the application seeking condonation of delay in moving the application for amendment. As indicated above it is the said order dated 01/09/2003 (signed on 27/11/2003) passed by the learned President of the Co-operative Appellate Court, Mumbai which is taken exception to by way of the above Petition.

14 The above Petition and the companion Petition being No.1250 of 2004 were admitted in the year 2006 and are pending hearing and final disposal since then. The matter had reached the Apex Court and the Apex Court by the order dated 17/04/2015 has permitted the Respondent No.1 herein to make an application for the Petitions to be taken up for early hearing. That is how the Petitions have been placed for final hearing.

15 Heard the learned counsel for the parties. The learned counsel for the Petitioner Shri Pandit sought to make submissions on the merits of the order passed by the Co-operative Appellate Court. It was the submission of the learned counsel for the Petitioner that the Co-operative Appellate Court has not

given any reasons as to why it does not agree with the finding recorded by the Co-operative Court in so far as the issue of limitation is concerned. The learned counsel for the Petitioner also sought to make submission as regards allotment made to the Respondent No.1 herein. It was submissions of the learned counsel for the Petitioner that the allotment made to the Respondent No.1 herein as held by the Co-operative Court was not sustainable, however, the Co-operative Appellate Court has on an erroneous ground set aside the said order passed by the Co-operative Court. It was the endeavour of the learned counsel for the Petitioner to demonstrate to this Court that the amendment sought would relate back to the date of the Dispute. Since the Respondent Nos.1 and 2 have not challenged the order passed by the Co-operative Appellate Court, the learned counsel for the Petitioner submitted to the orders of this Court.

16 The question that is posed in the above Petition is whether the Co-operative Appellate Court was required to set aside the Award passed by the Co-operative Court in its entirety, or whether the issue as to whether the delay in seeking the amendments could be condoned, was only required to be referred to the Co-operative Court.

It is required to be noted that the Co-operative Court has framed as many as 19 issues amongst which were the issues which were directly in relation to the allotment of the flat to the Petitioner i.e. the Disputant, as also

the issue whether the Dispute was within limitation having regard to the amendments incorporated in the year 1996. No doubt the challenge to the two resolutions dated 15/06/1980 and 28/06/1980 can be said to be the main substantive challenge in the context of the allotment of flat No.3 as claimed by the Disputant i.e. the Petitioner herein. It is required to be noted that the Co-operative Appellate Court whilst considering the Appeals has to consider the issues framed by the Co-operative Court as also the findings recorded by the Co-operative Court. It is well settled that in the event the Appellate Court disagrees with the findings of the Trial Court then it has come to close quarters with the said findings of the Trial Court and thereafter set aside the said findings by giving its own reasons for setting aside the said findings. However, in the instant case the Co-operative Appellate Court has not even considered the findings recorded by the Co-operative Court on the other issues except the issue of limitation. Without so considering, the Co-operative Appellate Court has set aside the findings recorded by the Co-operative Court on all other issues. No doubt the issue as to whether the delay was required to be condoned in filing the application for amendment and therefore whether the amendments sought were within limitation goes to the root of the matter i.e. the Dispute, however, it was not necessary for the Co-operative Appellate Court to set aside the findings of the Co-operative Court on all other issues.

17 In my view, the Co-operative Appellate Court has erred in setting

aside the Award passed by the Co-operative Court in its entirety and remanding the case back to the Co-operative Court, though the remand was principally for considering whether the delay in filing the application for amendments could be condoned. In my view, therefore, the impugned judgment and order passed by the Co-operative Appellate Court dated 01/09/2003 (signed on 27/11/2003) is required to be quashed and set aside to the extent that it sets aside the Award passed by the Co-operative Court in its entirety and disposal of the Appeals, and is accordingly quashed and set aside. The Award passed by the Co-operative Court would stand restored save and except in respect of the finding recorded on the aspect of limitation. The Appeals filed by the Respondent Nos.1 and 2 herein would also stand restored to file. Hence the following directions are issued :-

- I] The Award passed by the Co-operative Court would stand restored save and except in respect of the finding on the issue of limitation recorded by the Co-operative Court in its judgment and order dated 09/06/2003.
- II] Since the order passed by the Co-operative Appellate Court is set aside to the extent mentioned herein above. The disposal of the Appeals is also set aside and the Appeals being Nos.199 of 2003 and 195 of 2003 would also stand restored to file.

- III] The Petitioner herein would file an application seeking condonation of delay in terms of Section 92(3) of the Limitation Act in respect of the amendments sought in the Dispute. The Respondent Nos.1 and 2 would file their respective replies to the said application. The Co-operative Court, Mumbai would then frame issue/issues covering the said aspect and record a finding as to whether the Dispute as filed is within time having regard to the amendments sought.
- IV] The Co-operative Court to remit its finding on the said issue/issues to the Co-operative Appellate Court. The same to be done latest by 31st July 2016.
- V] The application for condonation of delay to be served and filed by the Petitioner within four weeks from date. The reply affidavits to be filed within four weeks thereafter and the said issue/issues to be decided and report to be submitted to the Co-operative Appellate Court latest by 31st July 2016.
- VI] After the report is received in respect of the issue of limitation, the Co-operative Appellate Court would decide the Appeals one way

or the other by giving proper opportunity to the parties. The same to be also done expeditiously having regard to the fact that the Dispute in question is of the year 1980.

- VII] In the event the Co-operative Court records the finding on the issue of limitation against the Petitioner, the Petitioner would be entitled to file an Appeal challenging the said finding.
- VIII] The contentions of the parties, including the contention that the amendments relate back to the date of the filing of the Dispute, are kept open for being urged before the Co-operative Court, Mumbai as well as the Co-operative Appellate Court, Mumbai when the matter reaches the Co-operative Appellate Court after the report in respect of the finding is submitted to the Co-operative Appellate Court.
- IX] The Co-operative Appellate Court to hear and decide the Appeals within 3 months of the receipt of the report from the Co-operative Court.
- X] In so far as flat No.4 is concerned, the Respondent No.2 Society is directed to maintain status quo in respect of the same and the suit

flat would continue to remain in the name of the Society subject to the decision that would be rendered by the Co-operative Appellate Court in the Appeals.

XI] The above Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs.

XII] In view of the directions as aforesaid, the Civil Application No.869 of 2014 filed by the Petitioner/Applicant for stay does not survive and the same to accordingly stand disposed of as such.

[R.M.SAVANT, J]