

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO. 120 OF 2006**

1.Smt. Radhabai Jagannath Gokhale
and Anr.

..Applicants

Vs

Abhinav Sahakari Griha Rachana
Sanstha Maryadit and Ors

.. Respondents

Mr. Uday Warunjikar, Advocate for Applicants.
None for Respondent no.1, though served.
Ms. Jai Kanade, Advocate for Respondent no.2.
Mr. Vilas B. Tapkir, Advocate for Respondent no.3 .

**CORAM : R.G.KETKAR,J.
DATE : 24/02/2016**

PC:

1. Heard Mr. Uday Warunjikar, learned counsel for the applicants, Ms Jai Kanade, learned counsel for respondent no.2 and Mr. Vilas Tapkir, learned counsel for respondent no.3 at length. None appears for respondent no.1, though served.

2. By this Application under Section 115 of Civil Procedure Code, 1908 (for short, 'C.P.C.'), the applicants have challenged the Judgment and order dated 10.3.2006 passed by the learned Member, Maharashtra State Cooperative Appellate Court (Mumba) Bench, Pune, (for short, 'Appellate Court') in Appeal No.181 of 2005. By that order, the Appellate Court allowed Appeal preferred by respondent no.2 herein and quashed and set aside the judgment and Award dated 1.9.2005 passed by the

learned Judge, Co-operative Court No.2, Pune in Dispute No.98 of 1990. The relevant and material facts giving rise to filing of this application, briefly stated, are as under.

3. The applicants, hereinafter referred to as 'disputants', have instituted dispute on 21.4.1990 under section 91 of the Maharashtra Cooperative Societies Act, 1960 (for short, Act) against (1) Opponent no.1-Abhinav Sahakari Grihrachana Sanstha Maryadit (for short, 'Society'), (2) opponent no.2- Shri Lalchand Hemraj Nahar (hereinafter referred to as 'opponent no.2') (3) opponent no.3 -Shri Vishwanath Jagannath Gokhale (hereinafter referred to as 'opponent no.3'), inter-alia, for declaration that the disputants are legal heirs of Jaganath Vithal Gokhale, since deceased (for short, 'said Gokhale'); for declaration that opponent no.2 has no concern whatsoever with plot no.39 with structure standing thereon (for short, 'suit property') by succession; for possession of the suit property. Pending the suit, the disputants also claimed injunction restraining the society from recording the name of opponent no.2 in the records of the society as also from transferring shares.

4. The society opposed the dispute by filing written statement, inter-alia, contending that the dispute under section 91 is not maintainable; the prayer for declaration that the disputants are heirs of said Gokhale is beyond the jurisdiction of

the co-operative court. The society also contended that said Gokhale had written letter dated 26.6.1981 to the society informing appointment of opponent no.2 as his nominee. The said Gokhale also made affidavit on 11.8.1988 nominating opponent no.2. It was further stated therein that he (said Gokhale) does not wish to nominate his relatives/children as nominee. The said Gokhale nominated opponent no.2 as his nominee and also give power of attorney dated 19.8.1982 in favour of opponent no.2.

5. In pursuance of the letter dated 26.6.1981 the society had recorded name of opponent no.2 as his nominee and opponent no.2 is also enrolled as member of the society and is issued share certificate. The society has also given permission to opponent no.2 to carry out construction on 9.9.1990.

6. Opponent no.2 filed written statement resisting the suit. It was inter-alia contended that the dispute is not covered under Section 91 of the Act; Cooperative Court has no jurisdiction to declare that the disputants are heirs of said Gokhale. The said Gokhale had transferred membership to opponent no.2. The said Gokhale had executed agreement dated 26.6.1981 in favour of opponent no.2 for a consideration of Rs.31,000/-. Accordingly opponent no.2 had paid Rs.31,000/- to said Gokhale. As Sale Deed could not be executed in favour of opponent no.2, the said

Gokhale had given letter dated 26.6.1981 to society and nominated him in his place. The name of opponent no.2 is entered into nomination register in pursuance of the letter dated 26.6.1981 and said Gokhale had signed on that register confirming entry of opponent no.2. After opponent no.2 was nominated by said Gokhale, from time to time he had paid money to the society. Said Gokhale had also made affidavit dated 11.8.1988 expressing desire to transfer membership in favour of opponent no.2 and that he does not desire to nominate his relatives/children. On 17.1.1990, after the death of said Gokhale, opponent no.2 is enrolled as member and accordingly share certificate is issued in his favour.

7. The disputants filed rejoinder to the written statement filed by opponent no.2 denying the assertions made in the written statement. Parties led evidence before the trial Court. By Judgment and Award dated 1.9.2005, the Cooperative Court allowed the dispute. It was declared that opponent no.2 has no right or concern with the suit property either as heir or nominee of said Gokhale. Opponent no.2 was directed to hand over vacant and peaceful possession of the suit property to the disputants and pay costs of Rs.3000/-. Aggrieved by this decision, opponent no.2 preferred appeal before the Appellate Court. By the impugned order, the Appellate Court allowed the appeal. It is

against this decision, the disputants have instituted the present application.

8. In support of this application, Mr. Warunjikar submitted that the society is classified as tenant co-ownership under Rule 10 of the Maharashtra Societies Cooperative Rules, 1961 (for short, 'Rules'). The plot belongs to the society and with the permission of the society, a member can carry out construction on the plot so allotted. The construction belongs to concerned member and plot belongs to the society. The suit property consists of plot and structure standing there. In the dispute prayers are made against the society. He submitted that this aspect is not considered by the Appellate court. He further submitted that after considering the evidence on record, the Cooperative Court allowed the dispute. As against this, the Appellate Court, though held that the parties in the dispute are covered by Section 91 of the Act, allowed the Appeal and dismissed the dispute on the ground that the subject matter does not touch the business of the society. The Appellate Court did not advert to bye-laws of the society for considering the aims and objects as also the question whether the dispute touches the management of the society. He further submitted that the Appellate Court answered point no.2 and held that opponent no.2 had proved that he is a nominee of said Gokhale. He, therefore, submitted that the finding recorded

against point no.2 may be maintained and rest of the order may be set aside. Mr. Warunjikar relied upon the following decisions:

- (i) Abdulla Bin Ali Vs. Calappa, (1985) 2 SCC 54;
- (ii) M/s A.V.R. & Co. Vs. Fairfield Cooperative Housing Society Ltd, 1988 (4) SCC 408.

9. As against this, Ms Kanade submitted that in the dispute, disputants specifically asserted that opponent no.2 is in illegal possession of the suit property. In other words, opponent no.2 is a trespasser. She further submitted that the disputants had prayed for declaration that they are heirs of said Gokhale; for declaration that opponent no.2 has no concern with the suit property in his capacity as heir of said Gokhale and for possession of the suit property. She submitted that in view of Section 91 of the Act, opponent no.2 does not fall in any of the categories (a) to (e) of sub-section (1) of Section 91. The Co-operative Court will, therefore, have no jurisdiction to entertain and try the dispute. She submitted that for deciding the issue of jurisdiction, the averments in the plaint and not the defence of the respondent is to be seen. As the disputants have averred that opponent no.2 is a trespasser, the dispute does not fall within Section 91 of the Act. She has relied upon decision of Ramchandra Harischandra Varkar Vs. Jawaharnagar Co-op Housing Society, 2002 (Supp) 2 Bom. C.R. 225. She further relied upon the decision of this Court

in the case of Gopal Vishnu Ghatnekar Vs. Madhukar Vishnu Ghatnekar, 1981 Bom.C.R. 1010 to contend that a person who disputes a right of person to be a member or to continue to be a member of the society, will have to obtain relief in normal court against that person and get his rights ascertained and declared, and thereafter apply to the society on the basis of the judgment to make him member of the society. In other words, she submitted that the disputants will have to first approach civil court for obtaining relief in terms of prayer clause (a), (b), and (c) of the dispute and on the basis of the order passed by the Civil Court, then to approach the society for enrolling them as member.

10. Ms Kanade also relied upon the decision of Division Bench of this Court in the case of Om Siddharaj Cooperative Housing Society Limited Vs. State of Maharashtra, 1998 (4) Bom. C.R. 506, to contend that in terms of section 30 of the Act, on the death of a member of a society, it is incumbent upon the society to transfer share or interest on the deceased member to “a person or persons nominated in accordance with the Rules”. It is only in the event of their being no nomination of any person, society can transfer share or interest of the deceased member to “such person as may appear to committee to be the heir or legal representative” of the deceased member. In the present case,

deceased Gokhale had nominated opponent no.2 as his nominee. Society, therefore, has no option but to transfer share and interest of the deceased member in favour of opponent no.2 being a person nominated in accordance with Rules. She, therefore, prayed for dismissal of the application.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the Co-operative Court has allowed the dispute. The Cooperative Court, inter alia, held that the disputants had proved that said Gokhale had purchased plot and constructed building from joint family money. The disputants proved that they have legal rights about title of plot and construction thereon as legal heirs. The Cooperative Court also held that the disputants proved that opponent no.2 has no concern with the suit property. The Cooperative Court further held that opponent no.2 failed to prove that the suit property was legally transferred by the society in his name and that he failed to prove that shares of said Gokhale, were legally transferred in his name. Opponent no.2 also failed to prove that the suit property was legally transferred by said Gokhale to him for Rs.31,000/- as per agreement dated 26.6.1991. Opponent no.2 also failed to prove that he was made nominee by said Gokhale on 26.6.1981 and that he proved payment of Rs.28,630/- to the

society.

12. As against this, the Appellate Court allowed the appeal. The Appellate Court held in paragraph 4 that parties to the dispute are parties as contemplated by Section 91 of the Act. The Appellate Court thereafter proceeded to hold that the subject matter does not touch the business of the society. It was observed that the dispute is essentially between legal heirs and opponent no.2 who is nominee of said Gokhale who was admitted as member on account of nomination by Jagannath Gokhale. The dispute between the private parties is seeking implementation of their civil rights, that is, rights accrued to disputants and opponent no.3 as heirs of said Gokhale and as such the dispute is essentially of civil nature requiring it to be tried by civil court. By making society as formal party, suit cannot be termed as injury to the society. In short, the Appellate Court held that the disputants and opponent no.3 ought to obtain declaration of their heirship from competent court and thereafter ask for membership of the society. If the society then refuses membership, to file appeal under section 23 of the Act and get themselves admitted as members and then ask the society to transfer shares and plot in their name.

13. In my opinion, the learned Appellate Court was not justified in holding that the subject matter does not touch the business of

the society without going through the bye-laws. In my opinion, before recording this finding, the Appellate Court ought to have considered aims and objects of the society as set out in the bye-laws as also clause d and more particularly clause d-2.2 relating to membership aspect. The Appellate Court ought to have considered whether the dispute touches the management or business of the society. Without going through the bye-laws and finding out whether the dispute touches the management or business of the society, the Appellate Court recorded finding that the dispute does not touch the business of the society. As I am inclined to set aside impugned order on this count, I am not dealing with judgments and other contentions, lest the Appellate Court would be influenced by the observations made in this order. In view thereof, the impugned order is liable to be set aside, thereby, restoring the Appeal for deciding the Appeal de novo.

14. It is made clear that all the contentions that are available to the parties including objection as regards maintainability of the dispute under section 91 are expressly kept open. The Appellate Court will examine whether the parties to the dispute are falling in any of the clauses of (a) to (e) of sub-section (1) of section 91 and whether the Co-operative court has jurisdiction to entertain and try the dispute on the basis of the averments made

in the dispute. The learned Appellate Court will consider the contentions recorded herein as also any other contentions that are available to the parties. Hence, the following order.

- (i) Impugned order dated 10.3.2006 is set aside. Appeal No. 181 of 2005 is restored to the file of the Appellate Court.
- (ii) All contentions of the parties are expressly kept open.
- (iii) Parties agree that they will appear before the Appellate Court on 23.3.2016 and for that purpose no fresh notice be issued to them.
- (iv) Appellate Court is requested to decide the appeal as expeditiously as possible and preferably within three months from the date of appearance of the parties.
- (v) Rule is made absolute in aforesaid terms with no order as to costs.
- (vi) Parties including Appellate Court to act on the authenticated copy of this order.

(R.G.KETKAR, J.)