

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8559 OF 2015

Priti Mahesh Patel & Anr.	..	Petitioners
VS.		
Ashok K. Kuvadia & Ors.	..	Respondents

Mr. Nitin Thakkar – Senior Advocate with Ms. Tanmayee Salekar
i/b. Shah & Sanghavi for Petitioners.

Mr. Vishal Kanade i/b. Mr. S. S. Gawde for Respondent No. 1.

CORAM : M. S. SONAK, J.
DATE : 03 MARCH 2016

P.C.:

1] This petition challenges order dated 5 August 2015 made by the Maharashtra State Co-operative Appellate Court, Mumbai (Appeal Court) granting leave to the respondents to amend their memo of appeal in appeal no. 128 of 2014, presently pending before the Appeal Court. In terms of the impugned order, the petitioners have now been impleaded as respondents in the said appeal.

2] Mr. Thakkar, the learned counsel for the petitioners submitted that the dispute raised by the respondents under Section 91 of the Maharashtra Co-operative Societies Act, 1960 (said Act) was disposed of finally by the Co-operative Court by judgment and order dated 11 June 2013. If the application seeking leave to amend the

memo of appeal is perused, it is quite clear that the petitioners acquired interest and came into occupation of the flats in the building with which the dispute is concerned, during the pendency of the dispute before the Co-operative Court. Despite knowledge, the respondents, did not apply for any amendment whilst the dispute was pending. At least, if this were to be done, the petitioners, would have had opportunity to raise their defence in the Co-operative Court itself. The application, seeking leave to amend the memo of appeal, in the aforesaid circumstances, can neither be said to be based upon some subsequent events which have arisen during the pendency of the appeal nor can it be said that the predicates of proviso 2 to Order VI Rule 17 of CPC been complied with in the facts and circumstances of the present case.

3] Mr. Thakkar placed reliance upon the decision of the Madras High Court in the case of ***E. Vanaroja, E. Raja (alias) E. Balasubramani and N. Kala (alias) N. Janaki vs. S. K. Krishnan & Ors.***¹ and the decision of the Rajasthan High Court in the case of ***Phool Chand vs. Appellate Rent Tribunal, Bikaner & Ors.***² to submit that an amendment of this nature could never have been allowed.

1 MANU/TN/1371/2011

2 AIR 2008 RAJASTHAN 156

4] Having heard the learned counsel for the parties, and perused the material on record, in my judgment, there is no case made out to interfere with the impugned order in the exercise of supervisory jurisdiction under Article 227 of the Constitution of India. In this case, the dispute raised by the respondents, is in relation to the building, in which the respondents as well as certain other members of the society reside. The society, had appointed the original respondent no. 2 as a builder / developer to undertake certain further constructions upon the building (vertical development). Upon completion of such construction, the original respondent no. 2 i.e. builder / developer has transferred two apartments to the petitioners. Admittedly, all this has taken place during the pendency of the dispute before the Co-operative Court. In that sense, it is quite apparent, that the Petitioners, have derived interest through the original respondent no. 2, who was very much a party to the proceedings in the Co-operative Court.

5] The Appeal Court has observed that at least *prima facie*, the transactions which took place during the pendency of such dispute can be affected by the doctrine of *lis pendens* or principles analogous thereto. The Appeal Court has also observed that, in a sense, the petitioners, have stepped into the shoes of the original respondent no. 1 (society) or the original respondent no. 2 i.e. the

developer / builder. The question at this stage, is not whether the Appeal Court, is entirely right in the view which it has taken. These are only *prima facie* observations at the stage of deciding whether leave to amend should be granted. However, it cannot be said that such reasoning is vitiated by perversity or unreasonableness. Upon perusing the impugned order, it cannot be said that the same is vitiated by any error of jurisdiction warranting interference under Article 226 of the Constitution of India.

6] The final relief applied for by the respondents in the dispute as well as at the stage of appeal is to seek demolition of the building or in any case, the additional floors constructed thereon. The petitioners, admittedly, occupy two of the apartments in these additional floors. The petitioners occupation is undoubtedly, during the pendency of the dispute before the Co-operative Court. For all these reasons, if the petitioners are impleaded as parties to this appeal, it cannot be said that the Appeal Court, has committed some jurisdictional error, which warrants interference, at this stage.

7] Ultimately, the petitioners have only been impleaded as parties to the appeal and all legal defences that are available to the petitioners have been kept open and in tact. In any case, it is clarified that the mere impleadment of the petitioners in the appeal,

does not, by itself, disentitle the petitioners to raise and agitate all permissible defences in the matter.

8] The decision in the case of *Vanaroja* (supra) is distinguishable on facts. In any case, the said decision, to a certain extent, assists the case of the respondents herein. In the said decision, it has been held that the plaintiff in a suit is a *dominus litus* and accordingly, it is for the plaintiff to choose persons against whom he wishes to litigate and the plaintiff cannot be compelled to litigate against a party whom he does not wish to.

9] The decision in the case of *Phool Chand* (supra), also turns on its own facts particularly in the context of the provisions contained in the Rent Control Act, 2011 as applicable in State of Rajasthan. The statement therein that under no circumstances amendment can be permitted at the appellate stage, appears to be rather wide. The proviso to Order VI Rule 17 of the CPC, does not, *per se*, bar amendment at the appellate stage, provided, necessary diligence is demonstrated by the applicant.

10] In the present case, it is pointed out that there were no particulars disclosed by the parties whilst dispute was pending with regard to the precise status of the petitioners. In any case, the

petitioners claim the two apartments through the original respondent no.2. This interest, as noted earlier, was acquired by the petitioners during the pendency of the dispute. Considered from this perspective, it cannot be said that the impugned order is in excess of jurisdiction.

11] For all the aforesaid reasons, this petition is dismissed. There shall be no order as to costs.

12] It is however clarified that the observations in the impugned order or for that matter present order shall not be construed as any observations on the merits of the actual disputes between the parties. The observations are made only in the context of determining whether the impugned order by which leave to amend has been granted, is vitiated by any jurisdictional errors.

(M. S. SONAK, J.)