

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL APPLICATION NO.2330 OF 2016

IN

WRIT PETITION NO.4523 OF 2014

Diamond Co-operative Housing Society Ltd. ... Applicant

v/s.

Al-Hamd Co-op. Housing Society Limited

& ors. ... Respondents

Mr. Khan Mohd. Yousuf for the applicant.

Mr. Ravi Kadam, Senior Advocate, a/w Y. R. Mishra i/b. B. Unnikrishnan
for respondent no.1.

Mr. Mohd. Ahmed for respondent nos.20, 24 & 26.

CORAM : A. K. MENON, J.

DATED : 21st SEPTEMBER, 2016

P.C. :

1. This civil application is taken out in a disposed writ petition. The prayers in the civil application are as follows:-

“(A) That this Court exercising powers under Article 227 of the Constitution of India, 1950 and inherent powers, be pleased to recall and modify the common order dated 13.10.2015 passed in W.P. No.4523 of 2014 by suitably modifying and changing the plot area of 2470.580 sq. mtr. Claimed by respondent no.1 [Al-Hamd CHSL] Kapadia Nagar, Kurla (West), Mumbai-400070 after calling the records of assessment records, plans of year 1988,

1991 and 2007 etc. and after adjudication of the correct plot area.

(B) That this Court be pleased to hold inquiry into the fraudulent inclusion of non-existing Flat premises bearing numbers 405, 406, 407 and 408 claimed by respondent no.1 [Al-Hamd CHSL] in A wing of Building no.6 as stipulated under section 340 (1) or Cr. P.C. and thereafter to file complaint through Registry of this Court before the Ld. Metropolitan Magistrate, Esplanade Court, Mumbai against the office bearers of respondent no.1 [Al-Hamd CHSL] and other persons involved in the commission of offence of perjury.

(C) Pending the hearing and final disposal of this petition, this Court be pleased to restrain the respondent no.3-State Government and City Survey Officer – Kurla Division from proceeding with actual physical demarcation and Sub-Division of the plot area on-site under reference of respondent no.1 [Al-Hamd CHSL].”

2. As far as the reliefs sought is concerned it pertains to an order dated 13th October, 2015 passed in a group of petitions which challenge an order passed by the competent authority under Section 11 of the Maharashtra Co-operative Societies Act whereby the District Deputy Registrar Co-operative Societies granted a certificate of deemed conveyance in respect of a plot of land wherein several societies have their buildings. The grant of the certificate was challenged by 11 petitioners. The present applicant was the respondent in writ petition

no.11234 of 2014. The petitions were argued extensively and by the aforesaid order dated 13th October, 2015 the petitions were dismissed. The present application seeks recall of that order on the basis that one Al-Hamd Co-operative Housing Society–respondent no.3 in writ petition no.4523 of 2014 had perpetrated a fraud in having obtained a certificate of deemed conveyance by mis-representing the actual number of flats in their building.

3. According to the applicant, when the application for deemed conveyance was made it was represented that the said society housed flat nos.405, 406 and 408 in its building no.6 whereas in fact it has now been found that these flats do not exist in the said society. The total area of these flats are stated to be 540 sq. ft 370 sq. ft and 910 sq. ft respectively. Apart from suppressing the correct area and the number of flats willful mis-representation was made that the said three flats were housed in building no.6 and on that basis the area of which the society claimed deemed conveyance was enhanced. This alleged act of fraud is sought to be challenged by this application.

4. Mr. Khan, the learned counsel for the applicant states that fraud vitiates all judicial acts whether in rem or in personam. He relies upon the observation of the Supreme court in the case of A. V. Papayya Sastry and others v/s. Govt. of A.P. And others (2007) 4 SCC 221 and

judgment of S.P. Chengalvaraya Naidu he submits that by a fraudulent act the aforesaid Al-Hmad Co-operative Housing Society and its office bearers had tendered a false affidavit in a quasi judicial before the District Deputy Registrar and as a result of this fraud they obtained a certificate of deemed conveyance. It is this certificate that was challenged by the petitioners in the aforesaid writ petitions and which challenge came to be repelled vide order dated 13th October, 2015.

5. Mr. Khan submits that at the time when the petitions were heard his clients were unaware of the fact that the aforesaid three flats were not existing. Mr. Khan submits that after passing of the judgment dated 13th October, 2015 and upon scrutiny of papers they learnt that the aforesaid flats were not existing. He relies upon the averments in paragraph 3 sub-clause (iii) and submits that it is only after the order of 13th October, 2015 was passed that they became aware of the fraud. The averments in the said application lack conviction inasmuch as the application is silent as to when exactly they learnt of the alleged fraud and how they came to know of the fact that the flats were not existing. The fraud was not a subject matter of writ petition when it was heard. Apart from the fact that the applicant has not chosen to file its own petition against the order of the competent authority after dismissal of the writ petition

this court is functus officio. Moreover it is now common ground that the order is now subject matter of a challenge in the Supreme Court in a Special Leave Petition.

6. In the circumstances, I do not find there is any reason to recall or modify the order dated 13th October, 2015. The other prayer for changing the plot area is also beyond the scope of this application. If a fraud has been perpetrated it was always open to adopt appropriate proceedings. The present application cannot be used as a tool to seek to frustrate the order passed by the District Deputy Registrar. I find there is no substance in the application. For the said reasons, I pass the following order:-

(i) Application was accordingly rejected.

(ii) No costs.

(A. K. MENON, J.)