

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11508 OF 2014

The Vithalnagar Co-operative
Housing Society Ltd.

A Co-operative Housing Society
registered under the Bombay
Co-operative Housing Societies
Act, 1925 and deemed to be registered
under the Maharashtra Co-operative
Societies Act, 1960, having its office
at Jai-Hind Club, Jai Hind Society,
N.S. Road No.11, J.V.P.D. Scheme,
Vile Parle, (West), Mumbai-400 056

.....Petitioner

: V E R S U S :

1. The Divisional Joint Registrar,
Co-operative Societies, Mumbai
Division, Mumbai, Malhotra
House, 6th Floor, Opp. G.P.O.
Fort, Mumbai-400 001.
2. Deputy Registrar, Co-operative
Societies K-West Ward, Mumbai
Room No. 69-A, Ground Floor,
MHADA Building, Bandra (E),
Mumbai.
3. Mr. Gautam Patel, Indian inhabitant
and residing at Abhijit, Plot No.B-9,
9th & 10th Floor, Kapol Co-operative

Housing Society Ltd., Junction of
11th & V.M. Road, J.V.P.D. Scheme,
Vile Parle (West), Mumbai-400 56.

4. Ms. Sonal G. Patel, Indian Inhabitant
and residing at Abhijit, Plot No.B-9,
9th & 10th floor, Kapol Co-operative Housing
Society Ltd., Junction of 11th & V.M. Road,
J.V.P.D. Scheme, Vile Parle (W),
Mumbai-400 056.

.....Respondents

* * * * *

Mr. Rahul Narachania, Senior Advocate a/w. Mr. Rohan
Rajadhyaksha a/w. Mr. Viral Amin i/by. B. Amin & Co.,
Advocate for the petitioner.

Ms. Vaishali Nimbalkar, AGP for respondents no.1 and 2.

Mr. Surendra Desai, Senior Advocate a/w. Mr. R.V. Govilkar
a/w. Mr. Manohar Shetty a/w. Ms. Mamta Sadh
i/by. M/s. Pandya & Co., Advocate for respondents no.3
& 4.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 27TH JULY, 2016.

JUDGMENT :-

1). This is the second petition filed by the petitioner,
Society relating to the same dispute with respondents no.3 and
4. The grievance set out in the present petition is identical to
the grievance stated in it's earlier Writ Petition No. 6144 of
2008. By the order dated 17th July, 2014 the earlier petition
was disposed off, with the consent of the parties, by remanding

the matter to respondent no.1 for de-novo consideration of the petitioner's revision application. The order gave following specific directions to respondent no.1 :-

“The Divisional Joint Registrar to give proper opportunity to both the parties. The Divisional Joint Registrar is also directed to consider the material on record, the contentions which would be urged before him by the parties and record findings thereon so as to facilitate the adjudication of any proceedings that would be adopted by either of the parties challenging his order.”

The petitioner alleges that respondent no.1 failed to follow the directions, consider the material on record and record findings on the contentions raised before him. According to the petitioner, the only improvement in the second order passed by respondent no.1 is of meticulous recording of the contentions raised by both the sides and the petitioner in particular. These contentions, however, have not been decided.

2). The facts giving rise to the present petition stated in brief are as under :-

. The petitioner is a “tenant ownership housing Society” under Rule 10 of the Maharashtra Co-operative Societies Rules, 1968 (“the Societies Rules”) and registered under the Bombay Co-operative Societies Act (“the Societies Act” for short). One Harbhagwan Malhotra was the member of the petitioner holding shares bearing distinctive numbers 406 to

410 in respect of Plot No.64 leased to him by the petitioner vide registered lease deed dated 10th December, 1965. He died on 18th May, 1967. Thereafter, on 8th September, 1980 the petitioner admitted his widow, two sons and the daughter-in-law as joint members in respect of Plot No.64 and executed fresh indenture of lease dated 27th February, 1981 in their favour. The heirs are hereinafter referred as the lessees. On 1st October, 2005 an Administrator was appointed of the petitioner Society. On 28th March, 2006 he sent Advocate's notice for termination of the lease to the leasees alleging breach, *inter-alia*, of Clause-2(5), 2(9), 2(11) and 2(14) of the lease-deed. The notice alleged that the leasees had failed to maintain the plot of land, the premises thereon, the boundary walls, gates etc. in proper condition so as to prevent encroachers on the lands. The leasees had failed to keep the land in sanitary condition and allowed wild vegetation to grow thereon. This had caused damage, nuisance and annoyance to the occupants of the adjoining plots of land. The leasee had also caused assignment of their right in favour of third parties i.e. respondents no.3 and 4 without obtaining prior written consent and approval of the petitioner. The leasees had also failed to pay transfer charges in accordance with the terms of the lease-deed.

3). In November, 2006 the leasees filed a dispute in the Co-operative Court being Dispute No. 37 of 2006 praying for declaration that the notice of termination dated 28th March,

2006 is illegal, bad-in-law, null and void and to restrain the petitioner from taking any action in pursuance of the same. Respondents no.3 and 4 have been subsequently impleaded as Disputants No.7 and 8 to the dispute. In that dispute, the leasees had sought an interim injunction to restrain the petitioner from objecting to the submission of plans for construction on Plot No.64 to BMC and from objecting to enter their names in the revenue record. The application was initially allowed by the trial Court but later dismissed by the Maharashtra State Co-operative Appellate Court. The leasees had unsuccessfully challenged that order in the higher Court. During the pendency of the dispute, the leasees on, 11th December, 2006 assigned their right, title and interest in Plot No.64 to respondents no.3 and 4. On 26th December, 2006 the Administrator came to be discharged and on 31st May, 2007 the petitioner passed a Resolution ratifying the action of the Administrator in terminating the lease in favour of the leasees.

4). In the month of June, 2007 an application was made by respondents no.3 and 4 for being admitted as members of the petitioner Society. According to the petitioner, that application was received by its Secretary on 21st June, 2007 whereas according to respondents no.3 and 4 the same was sent on 13th April, 2007 and was received on the same day by a person working as a Sweeper with the Society who not only signed acknowledgement of receipt of the application but also put stamp of the Society thereon. It is the petitioner's case

that, the application that was received by it on 21st June, 2007 was considered and rejected by the Managing Committee in its meeting on 30th August, 2007. The rejection was for the reason that since the lease in favour of the leasees had been terminated by the petitioner on 28th March, 2006, they could not have assigned any right to the leased land in favour of respondents no.3 and 4. The petitioner communicated the rejection to respondents no.3 and 4 as also the leasees. It returned the pay-orders enclosed with the application to respondents no.3 and 4.

5). On the basis of their claim that the application for being admitted as members of the petitioner was delivered on 13rd April, 2007, respondents no.3 and 4 filed Application No.9 of 2007 before the Deputy Registrar, Co-operative Societies, K-West Ward seeking deemed membership of the petitioner on the ground that their application for membership had not been accepted/rejected within the statutory period of 3 months. The application was contested by the petitioner. By his order dated 15th October, 2007 respondent no.2 allowed the application and declared respondents no.3 and 4 as deemed members of the petitioner Society and directed the petitioner to take appropriate entries in its record within one month from the date of the order.

6). The petitioner challenged the order by filing Revision Application No. 536 of 2007 before respondent no.1. The petitioner also filed a dispute being Dispute No.217 of

2008 before the Co-operative Court against the leasees and respondents no.3 and 4 seeking, inter-alia, a declaration that the deed of assignment in favour of respondents no.3 and 4 by the leasees is illegal, non-est, void ab-initio, bad-in-law and for possession of Plot No.64. The petitioner also sought an injunction to restrain respondents no.3 and 4 from creating any third party rights over Plot No.64.

7). The petitioner had contested the proceedings by respondents no.3 and 4 before respondent no.2 contending, firstly that the same was not maintainable as the provision of Section 22(2) of the Societies Act had no application to the facts of the case and the same had been invoked by respondents no.3 and 4 with oblique motive. It also alleged that, respondents no.3 and 4 had perpetrated fraud upon the petitioner and had fabricated false documents for the purpose of taking resort to Section 22(2) of the Societies Act. After placing on record the facts as regards the conduct of the leasees, notices issued to them, termination of lease of Plot no.64 in their favour, the petitioner stated in its affidavit-in-reply that an employee of respondents no.3 and 4 had delivered the letter dated 13th April, 2007 along with its enclosures on 21st June, 2007 to Mr. Vyas, Manager of the Society who had issued acknowledgement on the zerox copy of the application. The letter was delivered in the office of the Society in the presence of one, Maloy Bhatt, a member of the Society. Thereafter, the Managing Committee in its meeting

dated 30th August, 2007 considered the application and took the decision of its rejection. By its letter dated 5th September, 2007 it conveyed the decision of rejection on the specific grounds and reasons stated in the letter. According to the petitioner, delivery of the application for membership on 13th April, 2007 cannot be believed since the acknowledgement of receipt stated thereon is not of a person authorised by the Society. The petitioner had relied upon the affidavits of its Manager who received the application and of its member, Maloy Bhatt who was present in the office of the Society at the time of delivery of the application. As against this, the bald claim of respondents no.3 and 4 is that, their employee had delivered the letter to one, Ravi who is undisputedly a Sweeper working not just for the petitioner but other Societies also. It is nobody's case that, Sweeper, Ravi was authorised by the petitioner to receive any document or correspondence on behalf of the petitioner. Though, respondents no.3 and 4 have filed affidavit of Ravi claiming to have received the application neither he nor respondents no.3 and 4 have disclosed the details of receipt i.e. the place where it was received and the time at which it was received. Admittedly, the application was accompanied by demand drafts of varying amounts. The application was infact accompanied by only demand drafts and the other demand draft was not available for the perusal of the Court.

8). The petitioner, had also contested the eligibility of

respondents no.3 and 4 to become its member. It had pointed out that the transaction of assignment by the leasees in favour of respondents no.3 and 4 was contrary to the terms and conditions of the lease-deed. Secondly, the transferee of respondents no.3 and 4 had already lost their right, title and interest in the property transferred and thirdly respondents no.3 and 4 being already the members of another Society also being on its Managing Committee i.e. of Kapole Co-operative Housing Society Ltd were not eligible for membership of the petitioner Society. Respondent no.2 in his order dated 15th October, 2007 had failed to take note of and dealt with the above arguments of the petitioner leading to filing of Writ Petition No. 6144 of 2008. Mr. Narichania, the learned Advocate appearing for the petitioner submits that, respondent no.1 has committed the same mistake as earlier in the impugned order.

9). As already mentioned above, this Court while passing order of remand in Writ Petition No. 6144 of 2008 had given certain directions to respondent no.2. They were, (i) to give proper opportunity to both the sides, (ii) consider the material on record, (iii) consider the contentions of the parties that would be urged before him, and (iv) record findings on the contentions.

10). Mr. Narichania, submits that, two most crucial aspects of the dispute between the parties are left unattended

in the impugned order. They are, (i) the date of receipt by the parties of the application from respondents no.3 and 4, and (ii) the eligibility of respondents no.3 and 4 for being admitted as member of the petitioner, Society. As already noted above, according to respondents no.3 and 4, their application for being added as member was received by the petitioner on 13th April, 2007 whereas, according to the petitioner, the same was received on 21st June, 2007. The date of receipt of the application is the deciding factor as regards the application of Section 22(2) of the Societies Act for declaration of deemed membership for respondents no.3 and 4. Therefore, reasoned decision on the factual aspect was imperative. Next, the petitioner has alleged in its pleadings that, respondents no.3 and 4 are not eligible to be members of the petitioner, Society stating four reasons. The first reason is that, on the date of execution of deed of assignment i.e. on 11th December, 2006 the assignors of respondents no.3 and 4 had no right to the plot in question as lease in their favour stood terminated on 28th March, 2006. The second reason is that, the assignors had not obtained prior consent in writing of the petitioner before transfer of shares and rights of the plot in question in favour of respondents no.3 and 4. The third reason is that, no prior consent was obtained by respondents no.3 and 4 from the petitioner before entering into the deed of assignment dated 11th December, 2006. And the fourth reason is that, respondent no.3 is already a member of another Society i.e.

Kapole Co-operative Housing Society.

11). Mr. Narichania, submits, relying upon decision dated 17th June, 2016 of Single Judge Bench of our High Court in **Mitra Pariwar Co-operative Housing Society Ltd V/s. The Division Joint Registrar & Ors. (Writ Petition No. 153 of 2007)** that while deciding the application for deemed membership, the Registrar must also consider, whether the applicant is eligible for admission for membership of the Society. There can be no doubt about this proposition. Rule 8 of the Maharashtra Co-operative Societies Rules, 1961 provides for the matters in respect of which Registrar may direct the Society to make by-laws or Society may make by-laws. It's two sub-rules separately specify the matters within the province of the Registrar and the Society. Sub-Rule (1) empowers the Registrar to require a Society to make by-laws in respect of the matters enumerated therein. The matter at sub-rule (1)(e) is “the terms and qualifications for admission to membership”. Sub-rule (2) is the enabling provision for the Society to make by-laws in respect of certain matters. The relevant matters at sub-rule (2)(a) and sub-rule (c) are, “the circumstances under which withdrawal from membership may be permitted.” and “the conditions, if any, under which the transfer of shares or interest of a member may be permitted”. The by-laws are in the nature of rules made for managing the internal affairs of the Society. Once by-laws are certified and registered, they are binding, until such time, the by-laws are amended or set aside

by following the due procedure. In the circumstances, one of the considerations for deciding an application for membership either by the Society when an application is made to it or by the Registrar while exercising his powers under Section 22(2) and 23(2) would be, satisfaction by the applicant of the provisions made under the by-laws, as regards the criteria of eligibility, in the matter and the manner of transfer. There is no dispute that, by-laws of the petitioner, Society provides for the terms and qualifications for admission of membership.

12). The impugned order runs into 22 pages of which more than 17 pages record the history of the litigation and pleadings of the parties. Thereafter, the Divisional Joint Registrar records that, he heard the advocates, perused the written submission, the documents produced by the parties and the order of the sub-ordinate authority. Then, once again there is gist of the pleadings recorded as regards the date of submission of the application for transfer of the Society. The same are then dealt with in the following manner :

. “It appears from the documentary evidence that the Respondent No.2 & 3 herein had submitted the Application for membership on 13/04/2007 by one Mr. Ravi Devendra, who was working as Sweeper in the Applicant society. It is further noticed that the Respondent No.2 & 3 had again filed Application for membership dated 13/04/2007, which was received by one Mr. Harshvardhan Vyas Manager of the Applicant Society on 21/06/2007. In pursuance to the aforesaid Application dated 13/04/2007 of the Respondent No.2 & 3 (which was received by the

Society on 21/06/2007), the Applicant Society vide their letter dated 05/09/2007 rejected the Application of the Respondent No.2 & 3 herein on the grounds mentioned therein.

. The Applicant society has mainly raised the grounds that the Application is not maintainable u/s 22 (2) of the M.C.S. Act, 1960 as the society had received the Application on 21/06/2007. The Respondent Deputy Registrar in the impugned order has drawn the conclusion that though the said Application dated 13/04/2007 was accepted by the Sweeper, however, the Society had received the said Application, but the society failed to take decision within 03 months of the said Application. Whereas the applicant society herein states that by letter dated 05/09/2007 had rejected the said Application of the Respondent No.2 & 3 herein received on 21/06/2007.”

From the above, it is seen that, the Divisional Joint Registrar does not even give a finding as to whose version as regards the service of the application for membership is to be accepted on the basis of the evidence produced by the parties, much less, state reasons therefor. Without arriving at the conclusion on this aspect the claim of deemed membership could not have been decided.

13). Same is the situation as regards the eligibility of respondents no.3 and 4. The Divisional Joint Registrar, completely misdirected himself by referring to a couple of decisions of this Court to hold that, considering eligibility of respondents no.3 and 4 to become member of the petitioner, would amount to deciding their title to the property in question

or consider validity of their documents. Nonetheless, he has proceeded to hold ultimately that, the deed of assignment in favour of respondents no.3 and 4 is valid and subsisting solely for the reason that the petitioner has failed to produce any prohibitory order of competent civil Court in respect of transfer of the property. Undoubtedly, the Divisional Joint Registrar cannot decide either the title of the applicant before him or validity of the deed relied upon by the applicant. But if the defect therein is patent, he can certainly observe so in his order and reject the application. In any case, this reason takes care of only one of the four objections to the eligibility. The other three objections remain unconsidered.

14). Mr. Desai, the learned Senior Counsel appearing for respondents no.3 and 4, relying upon the decision of the Apex Court in **Ramesh Himmatlal shah Versus. Harsukh Jadhavji Joshi, reported in (1975) 2 SCC page 105** submits that a non-member, if he is qualified otherwise and makes an appropriate application, the transfer of shares will be operative and the assignment of the right to occupation will hold good. Then, it will be incumbent upon the Society to transfer the shares. In the case on hand, the very qualification of respondents no.3 and 4 to be a Member of the Society and the appropriateness of the application being in question, the decision relied upon can be of no assistance. The other decision relied upon by Mr. Desai is also of the Apex Court in **Hill Properties Ltd. Vs. Union Bank of India and Ors. reported**

in MANU/SC/0921/2013. In this decision, the Apex Court was not required to consider the question of deemed membership under Section 22(2) of the Societies Act. In the facts of that case, a flat in a Society was attached under the warrant of attachment issued in the proceedings initiated under the Securitisation Act and an application had been made for release of the flat from attachment. In that application, liberty was given to the appellant to give an offer to purchase the flat at a price determined by the valuer. A contention came to be raised that the owner of the flat being only a shareholder of the Company, had a right merely to occupy the flat belonging to the Company. The Apex Court was required to consider the status of each occupant. Therefore, even this decision is not applicable to the case on hand.

15). For the above reasons, the petition is allowed. The impugned order cannot be sustained and set aside. The Revision Application No. 536 of 2007 is remanded to respondent no.1 for fresh consideration.

(SMT. R.P. SONDURBALDOTA, J)