

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

WRIT PETITION NO.1476 OF 2016

M/s Adhiraj Constructions Pvt. Ltd
Vs
Nikunj Co-operative Housing
Society Ltd and Ors.

Petitioner
.. Respondents

Mr. Rajesh L. Shethia, Advocate for Petitioner.
Mr. Chandrakant P. Deogirikar, Advocate for Respondent no.1.

CORAM : R.G.KETKAR,J.
DATE : 04/04/2016

PC:

1. Heard Mr.Rajesh Shethia, learned counsel for the petitioner and Mr. C.P. Deogirikar, learned counsel for respondent no.1 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the Judgment and order dated 1.9.2015 passed by the learned District Judge-3, Raigad Alibag, below Exhibits 12 and 19. By that order, the learned trial judge allowed Applications-Exhibits 12 and 19 filed by respondent no.1 under Order XLI, Rule 27(b) of C.P.C.

3. Respondent no.1, hereinafter referred to as 'plaintiff', has instituted suit against the petitioner, hereinafter referred to as 'defendant no.1', and respondents no.2 to 4(A), hereinafter referred to as 'defendants no.2 to 4A', for performance of statutory obligations under Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management

and Transfer) Act, 1963 (for short, 'MOFA'). By the Judgment and decree dated 12.12.2013, the learned trial Judge dismissed the suit. One the grounds for dismissal of the suit is that the plaintiff did not implead all legal representatives of Hemant Bhosale and impleaded only his widow as defendant no.2.

4. Aggrieved by that decision, the plaintiff instituted Regular Civil Appeal before the District Court. Pending that Appeal, the plaintiff took out application at Exhibit 12 on 22.8.2014 seeking permission to produce (1) Death Certificate of Hemant Bhosale, (2) Share Certificate transferred in the name of Mrs Neelam Hemant Bhosale, (3) Affidavit of other heirs of deceased Hemant Bhosale signifying no objection to transfer the flat in the name of defendant no.2. The plaintiff also filed affidavit-in-support of application which was marked as Exhibit 19. By the impugned order, the learned trial Judge allowed the applications. It is against this order, defendant no.1 has instituted the present petition.

5. Mr. Shethia submitted that the plaintiff instituted suit on 7.2.2006. The legal representatives of deceased Hemant Bhosale made affidavit on 2.3.2009 signifying no objection for transferring share certificate in favour of his widow-defendant no.2. Share certificate was issued in favour of defendant no.2 on 6.6.2009. The plaintiff amended plaint on 15.1.2010. Thus, though the plaintiff was aware of these developments, no steps

were taken to bring these documents on record. The learned trial Judge dismissed the suit and one of the grounds was non joinder of necessary party. If the plaintiff is now permitted to produce these documents, it will amount to filling of lacunae in his case. He further submitted that the learned District Judge was also not justified in allowing the application at inter-locutory stage and ought to have considered that application while deciding the appeal finally. In support of this proposition, he relied upon the decision of the Apex Court in the case of Union of India Vs. Ibrahim, 2012 (8) SCC 848 and in particular paragraph 49.

6. On the other hand, Mr. Deogirikar supported the impugned order. He submitted that defendant no.2 did not oppose application Exhibit-12 filed by the plaintiff. He further submitted that the death certificate, affidavit signifying no objection by legal representative of deceased Hemant Bhosale as also share certificate transferring flat in favour of defendant no.2 is a matter of record. It is not the case of defendant no.1 that legal representatives are opposing transfer of the flat in favour of defendant no.2 or that share certificate does not stand in the name of defendant no.2. He further submitted that the learned District Judge has allowed the application under Order 41, Rule 27(b) as Appellate Court requires these documents to enable it to pronounce judgment.

7. I have considered rival submissions advanced by the

learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit for performing statutory obligations under the MOFA against the defendants. Defendant no.2 filed written statement on 17.7.2006. In paragraph 4, she asserted that at no point of time, defendant no.2 had any right, title and interest in the said flat and the said one open parking space under the stilt of the building. In paragraph 5, it was asserted that the plaintiff did not implead the legal heirs and/or successors-in-title of the said flat and the said one open parking space under the stilt of the building. One of the issues framed by the learned trial Judge, namely, issue no.4 was whether the suit is bad for nonjoinder of necessary party and the learned trial Judge answered that issue in affirmative and held that as the plaintiff did not implead of the heirs of the deceased Hemant Bhosale, suit is bad for non joinder of necessary parties and, therefore, not maintainable. The learned trial Judge dismissed the suit.

8. Aggrieved by that decision, the plaintiff preferred appeal and during the pendency of the appeal, the plaintiff took out application Exhibit 12 under Order 41 Rule 27(b) for production of copies of (1) Death Certificate of Hemant Bhosale, (2) Share Certificate transferred in the name of Mrs Neelam Hemant Bhosale, (3) Affidavit of other heirs of deceased Hemant Bhosale signifying no objection to transfer the flat in the name of

defendant no.2. It is material to note that defendant no.2 did not oppose the said application. In other words, defendant no.2 did not dispute the correctness of the contents of the application Exhibit-12. By application Exhibit-12, the plaintiff proposes to produce the death certificate of Hemant Bhosale and share certificate transferring the suit flat along with stilt parking in favour of defendant no.2, affidavit dated 2.3.2009 executed by legal representatives of deceased Hemant Bhosale.

9. Perusal of paragraph 3 of the affidavit shows that legal representatives of Hemant Bhosale, since deceased, gave their no objection for becoming defendant no.2 as member of the society as also transferring all shares held by deceased Hemant Bhosale and his interest in the suit flat to defendant no.2, being one of the nominee/her legal representatives. As the legal Representatives of Hemant Bhosale or defendant no.2 has not disputed the correctness of the contents of the application, I do not find that the learned District Judge committed any error in allowing the application, more so when the learned District Judge has observed in paragraph 6 of the impugned order that the documents sought to be produced by the plaintiff would enlighten the Court to determine the technical ground of non joinder of necessary party and admittedly all the legal representatives of deceased Hemant Bhosale gave no objection in favour of defendant no.2.

10. Mr. Sethia relied upon the decision of the Apex in the case of Union of India (supra) and in particular paragraph 49 to contend that the learned District Judge was not justified in allowing the application at inter-locutory stage. In my opinion, the learned District Judge has considered the finding recorded by the learned trial Judge while dismissing the suit, namely, non joinder of necessary party. In paragraph 49, the Apex Court observed that the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not; but it depends upon whether or not the appellate court requires evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore, is whether the appellate court is able to pronounce judgment on the material before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court.

11. In the instant case, one of the grounds for dismissal of the suit is nonjoinder of necessary party, namely, other legal representatives of Hemand Bhosale, since deceased. This is because of the defendant no.2's case in paragraph 4 of the

written statement that at no point of time, she had any right, title interest and in paragraph 5 that all the legal heirs of Hemant Bhosale, since deceased, are not impleaded. The learned District Judge after considering the documents sought to be produced observed that it would enlighten the appellate court to determine the technical ground of non joinder of necessary party. Applying the test laid down in Union of India (supra), I do not find that the learned District Judge has committed any error in allowing the application. Hence, no case is made out for interference in the impugned order. Petition fails and the same is dismissed.

12. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)

