

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.47 OF 2017

Lokmanya Nagar Priyadarshini CHSL ... Applicant
Vs.
Mangala Ramesh Shetye and another ... Respondents

WITH
CIVIL REVISION APPLICATION NO.48 OF 2017

Lokmanya Nagar Priyadarshini CHSL ... Applicant
Vs.
Ravindra Rajaram Redij ... Respondent

WITH
CIVIL REVISION APPLICATION NO.49 OF 2017

Lokmanya Nagar Priyadarshini CHSL ... Applicant
Vs.
Shivaji Balkrishna Desai (deleted since deceased)
through his LRs Samir Shivaji Desai and others... Respondents

Mr. Prashant G. Karande for Applicant in all the Applications.
Mr. Yogendra Kumar Sharma for Respondents in all the Applications.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 06, 2017

P.C. :

Heard Mr. Karande, learned Counsel for applicant and Mr. Sharma, learned Counsel for respondents in all the Applications at length.

2. By these Applications, under Section 115 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), applicant, hereinafter referred to as 'Society', has challenged the judgment and orders dated 05.10.2016 passed by the learned Judge, City Civil Court, Greater Mumbai in Notice of Motion No.2215 of 2015, 2213 of 2015 and 2214 of 2015 in Suits No. 2925 of 2010, 2931 of 2010 and 2924 of 2010 respectively.

By these orders, the learned trial Judge dismissed the Motions taken out by the Society and held that the Suits instituted by the respondents, hereinafter referred to as 'plaintiffs' are maintainable and the City Civil Court has jurisdiction to entertain and try the Suit. Since the common questions of law and fact arise in these Applications, the same can conveniently be disposed of by common order. For appreciating controversy raised in these Applications, facts from C.R.A.No.49 of 2017 are considered.

3. Plaintiffs have instituted Suit inter alia for declaration that the agreement evidenced by the resolution dated 11.03.1988 and part payment made thereunder by them is valid, subsisting and binding; for directing defendant Society to fulfill their part of agreement and allot a flat admeasuring carpet area of 800 sq.ft. at the rate of Rs.800/- per square feet in the saleable area of the redeveloped scheme. During the pendency of the Suit, plaintiffs sought injunction restraining defendants from selling, disposing of, alienating and creating third party rights with regard to a flat admeasuring 800 sq.ft. as also from carrying on the redevelopment work on the said plot; for appointment of the Court Receiver, High Court, Bombay as a Receiver of the entire redevelopment project of the said plot.

4. Defendant Society resisted the Suit by filing written statement. Defendant Society contended that Civil Court has no jurisdiction to entertain and try the Suit as the dispute is essentially between the member and the Society, governed by Section 91 of the Maharashtra Co-operative Societies Act, 1960 (for short 'Act') as also the Suit is barred by limitation. By the impugned orders, the learned trial Judge held that the Suit is maintainable and is also not barred by limitation. It is against these orders, defendant Society has instituted the above Civil Revision

Applications.

5. In support of these Applications, Mr. Karande submitted that while deciding the issue of jurisdiction, the Court has to essentially consider the averments made in the plaint. He has invited my attention to paragraph 3 of the plaint wherein plaintiff has specifically averred that Society made him member of the Society by accepting membership application; share money of Rs.250/- and miscellaneous charges of Rs.10/-. Subsequently, plaintiff was requested by the Managing Committee to pay some additional amount and accordingly plaintiff has made additional payment of Rs.50,000/- towards booking of the flat. He submitted that perusal of the averments made in the plaint clearly shows that the dispute is essentially between the member and the Society and therefore, Civil Court has no jurisdiction to entertain and try the Suit. He further submitted that the learned trial Judge committed serious error in considering the defence set up by the Society. While considering the issue of jurisdiction, Court cannot consider the defence set up by the defendants and has to be guided only by the averments made in the plaint.

6. Mr. Karande further submitted that the Suit is clearly barred by limitation as it is instituted in the year 2009 for enforcing resolution of 11.03.1988. He, therefore, submitted that the Applications require consideration.

7. On the other hand, Mr. Sharma supported the impugned orders. He has invited my attention to the averments made in paragraphs 17 and 21 of the plaint. He submitted that although the issue of membership of the Society was not directly linked with the allotment of flats as agreed by the Society, plaintiff moved Deputy Registrar of Co-operative

Housing Societies, Bandra for issuing direction to the Society to issue share certificate to the plaintiff for which Society had already collected amount. By order dated 21.02.2006, Deputy Registrar directed Society to issue share certificate to all the three purchasers including the plaintiff. Instead of complying that order, defendant Society approached Joint Divisional Registrar, Co-operative Societies by filing appeals being Appeals No.121 and 122 of 2006. These Appeals were allowed and the orders of the Deputy Registrar were set aside. He further submitted that as of date, Society has not issued share certificate and plaintiff is not a member of the Society.

8. As far as the issue of limitation is concerned, he submitted that none of the parties adduced evidence. After considering the material on record, the learned trial Judge held that issue of limitation is not a pure question of law and is a mixed question of law and fact. He, therefore, submitted that no case is made out for interfering with the impugned orders.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the plaint, and in particular, paragraphs No.17, 20 and 21 shows that defendant Society did not accept plaintiff as a member of the Society. In fact, against the order passed by the Deputy Registrar on 21.02.2006, Society preferred appeals before the Joint Divisional Registrar, Co-operative Societies. Those appeals were allowed on 19.08.2006. It is not in dispute that Society has not issued share certificate to the plaintiff. The learned trial Judge has considered this aspect in paragraphs 32 and 33. In paragraph 34, the learned trial Judge noted that defendant though can be allowed to take inconsistent pleas, he cannot be allowed to take mutual destructive pleas before the different

fora. In paragraph 37, the learned trial Judge held that plaintiff is not member of the Society and consequently, there is no relationship between the plaintiff and defendant as a member and Society. The learned trial Judge accordingly held that Civil Court has jurisdiction to entertain and try the Suit. In paragraph 40, the learned trial Judge also held that it also does not touch business of the Society and therefore, notice under Section 164 of the Act is not required.

10. As far as issue of limitation is concerned, the learned trial Judge has dealt with this aspect in paragraphs 43 and 44 of the impugned order. The learned trial Judge also noted that neither the plaintiffs nor the defendant Society adduced any oral evidence. The learned trial Judge held that the issue of limitation is a mixed question of law and fact and that issue can be kept open for hearing along with the other issues.

11. Mr. Karande failed to establish that plaintiff has notice that Society has refused performance. Article 54 of the Limitation Act, 1963 reads thus,

	<i>Description of Suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
54	For specific performance of a contract.	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

12. As defendant has not established that plaintiff has notice of refusal of performance, prima facie, it cannot be said that Suit is barred by limitation.

13. That apart, Section 46 of the Indian Contract Act, 1872 lays down

that where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. Explanation thereto lays down that the question 'what is a reasonable time' is, in each particular case, a question of fact.

14. Mr. Karande relied upon the decision of the Apex Court in the case of ***Foreshore Co-operative Housing Society Vs. Praveen*, 2015 (3) Mh.L.J. 315** to contend that Section 9-A mandates the Court to decide jurisdiction before proceeding with the Suit and granting interim relief by way of injunction. There is no dispute with this proposition. At the same time, question is whether defendant has established that the Suit is barred by limitation. For the reasons recorded in paragraphs 43 and 44 of the impugned order as also in view of Article 54 of the Limitation Act and Section 46 of the Contract Act, I do not find that the learned trial Judge has committed any error in holding that the Suit is not barred by limitation and that the issue of limitation can be kept open for hearing along with the other issues. Hence, Applications fail and the same are dismissed. Order accordingly.

(R. G. KETKAR, J.)

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