

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 3983 OF 2017

Ekopa Cooperative Housing Society Ltd.
through its

1. Chairman Khushpatraj Haraj Chand
 2. Secretary Nurundayya Vasayya Maroor
- ... Petitioners
Vs.

Smt. Vinodini Krishnaji Deshpande (Decd)
through her LR Devendra Manohar Deshpande ... Respondent

Mr. S.C. Wakankar a/w. Mr. Kedar Dhongde, S.V. Abhang, Advocate
for the petitioners.

Mr. Vishal C. Ghosalkar, Advocate for the respondent.

CORAM : MRS.MRIDULA BHATKAR, J.
DATE : 24th July, 2017.

P.C.:

Rule. Rule made returnable forthwith. By consent, the
petitioner is heard finally and decided at the stage of admission.

2. In this Writ Petition, the petitioners/Society has challenged the
judgment and award dated 10th January, 2017 passed by the
learned Cooperative Appellate Court bench at Pune in Appeal No.
52 of 2015 and Appeal No. 116 of 2015 for setting aside.

3. Respondent no. 1 is the deceased original disputant and

respondent no. 2 is her legal heir, who has filed a dispute before the Cooperative Court for declaration that he be declared as allottee of plot no. 55. He also sought injunction against the Society. The said dispute was decided on 23rd July, 2004. In the said dispute along with declaration, the relief of possession was also granted though was not asked for. Hence, in appeal, the Appellate Court by order dated 6th December, 2006 remanded the matter. It was again tried and heard afresh by the Cooperative Court and decided on 15th December, 2014. During the pendency, a prayer for possession was added and dispute was partly allowed. No possession was granted but declaration for damages was awarded. Two Appeals, i.e., Appeal NO. 52 of 2015 and Appeal No. 116 of 2015 were filed, one by the disputant and other by the Society. By the order dated 10th January, 2017, the Appeal filed by the Society was dismissed and Appeal filed by the original disputant for possession was allowed. Hence, this Writ Petition.

4. The learned counsel for the petitioners has submitted that the orders of the trial Court and District Court are illegal and are to be set aside. He submitted that the original respondent, i.e., disputant lady became member of the Society in the year 1972 but she

resigned in 1973. Her membership was disputed. Those documents were found subsequently to the Society and, therefore, they had moved an application under Order 41 Rule 27 seeking permission to tender afresh evidence in Appeal. The said application was not decided by the Appellate Court but it was decided at the time of disposing of the Appeal and no proper reasoning is given that why evidence is not necessary and why it is not allowed to bring on record. On this point of Order 41 Rule 27, the learned counsel for the petitioner relied on the judgments of Hon'ble Supreme Court in the case of **Wadi vs. Amilal & Ors., reported in (2015) 1 SCC 677** and in the case of **K. Venkataramiah vs. A. Seetharama Reddy & Ors., reported in AIR 1963 SC 1526.**

5. The learned counsel for the petitioner has submitted that -
 - (i) plot no. 55 was not in existence till 1977 and therefore, there was no question of allotment of plot no. 55 to the original disputant in the year 1973, so approved sanction plain of the Corporation in respect of layout of the plots was to be brought on record to prove this fact;

- (ii) The original disputant has moved an application at Exhibit 83 requesting the Court to discard her evidence because she is unable to attend the Court for her further examination-in-chief or her cross-examination. She also sought permission in Exhibit 83 that the present disputant, who is her son and power of attorney holder be allowed to lead evidence and his evidence is to be substituted in place of discarded evidence of original disputant. The learned counsel has argued that despite this application, the Appellate Court has relied on the said discarded evidence of the disputant and allowed the Appeal. He also challenged the admissibility of the evidence of Power of Attorney on the ground that he had no knowledge of the transaction. In support of his submission, he relied on the judgment of the Hon'ble Supreme Court in the case of **Janaki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. & Ors., reported in AIR 2005 SC 439;**
- (iii) The learned counsel pointed out that the trial Court and Appellate Court have committed error in accepting the share certificate of the disputant lady without any proof and only on the ground that it is 30 years old document. He further submitted that though this is an old document, its contents are

required to be proved. On this point, the learned counsel relied on the judgment of Single Judge of Bombay High Court in the case of **Shivram Mahadev Shinde vs. Maharashtra Housing and Area Development Authority & Anr., reported in AIR 2016 Bom. 63.**

6. Per contra, the learned counsel for the respondent has submitted that the Power of Attorney Holder can lead evidence if at all he has personal knowledge of the details of the transaction. To substantiate his submissions, he relied on the judgment of the Hon'ble Supreme Court in the case of **Man Kaur (Decd.) by LRs vs. Hartar Singh Sangha, reported in (2010) 10 SCC 512.** He argued that in **Man Kaur**, the Hon'ble Supreme Court gave the directions in respect of Power of Attorney Holder and has held that power of attorney having personal knowledge about the facts can lead evidence. He has further argued that the respondent is fighting for her rights since last 30 years. The plaint is filed in February, 1988. On 6th October, 1989, the Society filed written statement, however, did not appear and so it was decided ex-parte on 23rd July, 2004. Thereafter the Society appeared and the said order was set aside and the main matter was decided by the Cooperative Court on

15th December, 2014 in favour of the respondent. On 17th December, 2016 an Appeal was preferred. The learned counsel for the respondent while dealing with the objection of the learned counsel of the petitioner in respect of discarded evidence by the Appeal Court, placing reliance he read over the said portion and explained that in the beginning the original plaintiff has filed her affidavit-in-chief, however, due to old age it was not possible for her to give further evidence and so she could not come for the cross-examination, hence her evidence was discarded and the trial Court allowed the power of attorney holder to lead evidence for the plaintiff. That discarded evidence is only referred but not relied. On the point of share certificate and membership, he relied on the averments made by the original disputant in the dispute and has submitted that she has paid the amount of Rs.6,251/- for the shares of the Society and the Society has allotted 5 shares i.e., Nos. 21 to 25 to the disputant in the year 1972 and she was allotted plot no. 55 by the Society. He argued that the evidence tendered by the power of attorney is consistent with the averments in the dispute.

7. The learned counsel, on the point of production of additional evidence at the Appellate stage, has strongly resisted the

submissions made by the learned counsel for the Society. He has submitted that in the written statement, the Society has contended that the respondent had resigned from her membership and an amount of Rs.6,251/- is refunded to her, therefore, she has moved an Application for the production of the said documents, i.e., resignation letter, receipt of refunded amount and bye-laws of the Society. The said Application was allowed by the learned trial Judge by order dated 13th March, 1993. However, the documents were not produced by the petitioner-Society but the said order was challenged by the Society by filing Revision bearing No. 88 of 1993. The said Revision was dismissed by the Appellate Court by order dated 29th October, 1994. The said order was not challenged further. Thus, the Society though was directed to produce the documents, did not produce the documents at all. The learned counsel has further submitted that though the disputant filed the Applications Exhibits 16 and 24 for inspection and production of the documents, the petitioners did not bother to produce and give inspection of those documents to the respondent and now at Appeal stage, the Appellate Court has rightly rejected their prayer to allow to file additional evidence under Order 41 Rule 27 of the CPC. He has argued that the Society did not lead any oral evidence

before the trial Court but relied only on the documents which were filed by the disputant and the Society. He submitted that in the year 2016 during the pendency of the Appeal, the original petitioner has expired on 16th September, 2016. Thus, she is not available to refute the execution of the documents. The trial Court has considered all the facts and has given a reasoned finding, which is to be confirmed.

8. Heard the submissions, perused the documents and the case laws. In the case of **Wadi** (*supra*), the Hon'ble Supreme Court while dealing with sub-rule 27 of Order 41 of CPC, has held that "If the Appellate Court feels that pronouncing the judgment in absence of such evidence would result in defective decision and to pronounce an effective judgment, admission of such evidence is necessary then Application under Order 41 Rule 27 be allowed. In the present matter, the Society did not lead any evidence but has cross-examined the witnesses and has argued the matter.

9. In the case of **K. Venkataramiah** (*supra*), what the Court has to consider is if it is required to enable the Court to pronounce judgment satisfactorily, then it is to be allowed. In the said case, the

full Bench of the Hon'ble Supreme Court has held that “it is well to remember that the Appellate Court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment', but also for “any other substantial cause.”

10. In the case of **Janaki Vashdeo Bhojwani** (*supra*), Order 3 Rules 1 and 2 empowers the holder of Power of Attorney to act on behalf of the principal. The Supreme Court held that the Power of Attorney holder may depose for the principal in respect of the acts which he has knowledge but he cannot depose the acts done by the principal and not by him and also about the facts of which only the principal can have a personal knowledge for which the principal is required to be cross-examined.

11. However, in the case of **Man Kaur** (*supra*) the Hon'ble Supreme Court has considered the ratio laid down in **Janaki Vashdeo Bhojwani** (*supra*) and has further elaborated and explained the admissibility of the evidence of Power of Attorney Holder having the personal knowledge of the acts done by the principal. The necessity demands the Power of Attorney Holder to step in the box in the shoes of the principal. In the said judgment,

the Hon'ble Supreme Court has summarized under what circumstances the Power of Attorney Holder is a competent witness and can be examined. In paragraph 18(g) of the said judgment, it is held that

“Where all the affairs of the party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or “readiness and willingness”.

Examples of such attorney-holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parents, a father/mother exclusively managing the affairs of a son/daughter living abroad. In the present case, the case of Power of Attorney holder being son under the said specified category and hence he is a competent witness.

12. It is an admitted position that the respondent/original plaintiff was the member of the Society in 1972. She was given shares No. 25 to 29 and she has paid an amount of Rs.6,251/- for the said shares. A key question in this matter is whether she had resigned in

the year 1977 and she had received money and, therefore, she lost her claim in the membership or not? The said defence was taken by the petitioners in their Written Statement which was filed by them well within time, i.e., in October 1989. In the said written statement, the Society has taken stand that the lady has resigned from the membership and an amount of Rs.6,251/- was returned to her and receipt to that effect is also issued by the Society. It was further submitted that resolution to that effect was passed in the meeting of the Society. This disclosure of the facts in the written statement necessarily to be followed by the production of those documents. However, when documents were not produced with the written statement, the respondents filed application for inspection. The respondent/disputant demanded production and it was allowed by the trial Court. The petitioners not only failed to produce those documents but did not bother to comply with the order of the Court directing the petitioners to produce the documents.

13. After considering the facts of the case and the documents which the respondents want to produce, I found that these documents ought to have been produced during the trial, as the defence is entirely based on these documents. The petitioners

should have pressed the said application and should have demanded the order on it. However, it is unfair and unjust to allow this Application at this stage when original plaintiff/respondent no. 1 is no more and expired on 16th September, 2016. Moreover when the plaintiff/respondent no. 1 demanded the inspection of these documents, it was not given by the defendant-society. Despite the order of production of the documents, the defendants did not produce those documents throughout the trial. If the documents, i.e., resignation letter, refund or any other documents are allowed to be produced, then those documents cannot be read in evidence without its proof and for that purpose, the trial Court will have to be directed to record the evidence. Now the Society is eager to prove these documents, however, in the event of death of original plaintiff, the present respondent, who is the son and power of attorney-holder of the original plaintiff, is not in a position to obtain instructions in respect of the resignation letter or the receipt of refunded money by his mother which has taken place way back in the year 1976-77. The efforts of the plaintiff to bring these documents on record were frustrated because of the defendants denial to produce these documents. Under such circumstances, after the death of original plaintiff, if the Society/respondent now

wants to produce those documents, which appears a strategic move of the defendants. The trial is a fair play wherein opportunity to both players is equally given and once the appellants have refused to produce these documents earlier, they are estopped from production of these documents at Appellate stage. Hence, Writ Petition is dismissed.

14. The learned counsel for the petitioners orally prays for stay of this order, as he wants to challenge this order in the Supreme Court. Hence, the operation of this order is stayed for 8 weeks i.e., till 18th September, 2017.

(MRS.MRIDULA BHATKAR, J.)