

Mr. Girish J. Paryani for Petitioner.
Mr. K. J. Hakani for Respondent No.1.

P.C. :

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the judgment and award dated 31.08.2013 passed by the learned Judge, Co-operative Court, Thane in Dispute No.99 of 2010 as also the judgment and order dated 23.01.2015 passed by the learned Member, Maharashtra State Co-operative Appellate Court, Mumbai (for short 'appellate Court') in Appeal No.177 of 2013. By these orders, the Courts below allowed the dispute filed by the first respondent, hereinafter referred to as 'disputant', and directed respondent No.2, hereinafter referred to as 'society' to take initiative to carry out repairs so as to stop water seepage and damage to flat No.204 of the disputant and to maintain the same in habitable and safe condition. The petitioner and the society are directed to rectify the seepage in the kitchen room of the disputant's flat by undertaking necessary repairs and water proofing treatment in the kitchen of the petitioner at his cost. The Courts below declared that the disputant is entitled to the damages to the tune of Rs.60,000/- from the society along with the interest thereon @ 6% p.a. from the date of institution of the dispute till realization of the

entire amount. The petitioner and the society are directed to carry out repairs so as to abate the water seepage and damage to the disputant's flat and thereafter to colour the kitchen of disputant's flat within two months from the date of the order and in case of non-compliance of the order within the stipulated period, the petitioner and the society were directed to pay Rs.500/- per day (by each of them) to the disputant till completion of the repairs, painting and allied work so as to abate the water seepage in the disputant's flat.

3. In support of this Petition, Mr. Paryani submitted that the disputant had filed application for appointment of the Court Commissioner. Though the Court Commissioner inspected the property for finding out the leakage, seepage and damage caused by the petitioner, the Court Commissioner did not file report on record. The Court Commissioner was also not examined as a witness to establish leakage and seepage in the disputant's flat. The disputant did not examine any witness in order to substantiate his contentions. He submitted that the Court Commissioner did not produce the report on record because the report was adverse to the disputant. In fact, during the course of hearing before the trial Court, petitioner had filed application calling Commissioner as a witness. Though the summons was served, the Court Commissioner did not enter the witness box. In other words, he submitted that adverse inference is required to be drawn against the disputant. In any case, the Courts below were not justified in directing the society and petitioner to pay Rs.500/- per day to the disputant till completion of the repairs, painting and allied work as the petitioner has carried out the necessary repairs. He has invited my attention to the communication dated 14.03.2015 addressed by Nayan Dholakia, Civil Engineer to the petitioner wherein he has stated that the leakage in the disputant's flat is not due to flat of the petitioner. He

submitted that the said letter is obtained after the impugned order was passed by the appellate Court on 23.01.2015. He, therefore, submitted that the Petition requires consideration.

4. On the other hand, Mr. Hakani supported the impugned orders. He submitted that petitioner cross-examined the disputant. The petitioner did not file written statement. He did not adduce any evidence. Though the petitioner filed application calling Commissioner as a witness, he did not press that application. The Courts below considered the evidence adduced by the disputant and passed the impugned orders. He submitted that the Courts below have concurrently held that the disputant has established the damage caused to his flat due to extensive renovation carried out by the petitioner, particularly in kitchen attached to his flat. He, therefore, submitted that no case is made out for interfering with the impugned orders.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the petitioner herein, who was opponent No.2 in the trial Court, did not file written statement. He cross-examined the disputant. He however filed Purshis on 05.07.2013 at exhibit-51 declining to lead any evidence. The Courts below have considered the material on record and the fact that the flat of the petitioner herein is situate above the flat of the disputant. The disputant has also filed criminal complaint under Sections 509, 323 and 504 Indian Penal Code, 1860 against the petitioner herein. It has come on record that on 20.12.2008, a piece of kitchen slab crashed causing physical injuries to the disputant as also his wife. The society admitted that petitioner had shifted kitchen sinks and platform in 2008 without written permission of the society. The petitioner did not take NOC from the society. Not only

that, petitioner did not file written statement opposing the dispute. In paragraph 9, the appellate Court held that the petitioner did not lead any evidence to show that the averments made by the disputant as regards the extensive renovation of his flat were false. The appellate Court therefore, held that the view taken by the learned trial Judge that the disputant had established his case cannot be said to be erroneous. The appellate Court also noted admission of the society that petitioner had carried out extensive renovate to his flat. The Courts, after appreciating the evidence on record, had concurrently held that the petitioner herein had carried out extensive renovation to his flat, and in particular in his kitchen, which has resulted causing damage to the disputant's flat. Though the petitioner filed application calling Commissioner as a witness, he did not press that application. Mr. Paryani relied upon the letter dated 14.03.2015 addressed by Nayan Dholakia, Civil Engineer. Admittedly, the said letter is produced for the first time along with this Petition. No explanation is given by the petitioner for not filing the written statement and leading evidence. The letter dated 14.03.2015 also cannot be accepted at its face value as the petitioner did not examine the said witness in the trial and the respondent No.1 could not cross-examine him.

6. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)