IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 190 OF 2017

Kamgar Swa Sadan Co-operative Housing
Society Ltd. ...Applicant

Versus

Mr.Vijaykumar Vitthalrao Sarvade & Ors. ...Respondents

WITH

CIVIL APPLICATION NO. 176 OF 2017
IN
CIVIL REVISION APPLICATION NO. 190 OF 2017

Mr.Vijaykumar Vitthalrao Sarvade ...Applicant

In the matter between

Kamgar Swa Sadan C.H.S.Ltd.
Registered Co-op. Hsg. Society ...Applicant

Versus

Mr.Vijaykumar Vitthalrao Sarvade & Ors. ...Respondents

WITH
CIVIL REVISION APPLICATION NO. 235 OF 2017

Ratnaraj Reality & Anr. ...Applicants

Versus

Vijaykumar Vitthalrao Sarvade & Ors. ...Respondents

…...

Mr.Vishwajit Sawant a/w. Mr.N.R.Modi, Mr. B.N.Jadhav, Mr.Utsav Ghosh and Mr. K.Kadam i/b. M/s. Rustamji & Ginwala for the Applicant in CRA No. 190 of 2017.

Mr. Sandeep Vasant Bane for Respondent Nos. 1 to 11 in CRA No. 190 of 2017 and the Applicant in CAC No. 176 of 2017.

Mr.Karl Tamboly a/w. Mr. Jesse Cornelious, Mr.Nishit Tanna and Mr. Vibhor Kapoor i/b. Dhaval Vussonji and Associates for Respondent Nos.26 and 27 in CRA No. 190 of 2017 and the Applicant in CRA No. 235 of 2017.

Mr.Pradeep M.Patil for Respondent Nos. 33 and 38 for BMC.

Ms. Aparna Muralidharan i/b. Mr. P.G.Lad for Respondent Nos. 35, 36 and 37 in CAC No. 176 of 2017.

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CORAM : Mrs.MRIDULA BHATKAR, J.
RESERVED ON : JULY 12, 2017
PRONOUNCED ON : JULY 31, 2017

JUDGMENT

1. These Civil Revision Applications are directed against the order dated 08.03.2017 passed by the learned Judge, City Civil Court at Mumbai, in Notice of Motion No. 1763 of 2016 in L.C.Suit No. 575 of 2016.

2. The respondents/plaintiffs are the members of Kamgar Swa Sadan Co-operative Housing Society Ltd., Currey Road, Mumbai. They had filed a Suit for declaration and injunction. Defendant no. 1 is a

Co-operative Society and other defendants are the office bearers of the society and defendant nos. 16 to 19 are the developers/ builders. Other defendants are the Chief Officers and members of High Power Committee. Defendant no. 16 is a developer/ builder and a winner of the tender. Defendant nos. 17 and 18 are also developers/builders. The said society decided to go for the redevelopment of their plot and therefore, decided to call the tenders. Pursuant to which, the tenders were called and opened in the office of Defendant no. 28 i.e. the Executive Engineer of the Municipal Corporation. Thereafter, the development agreement was executed on 24.12.2012 between the parties i.e. defendant no. 1 i.e. the society and defendant nos. 17 and 18 i.e. the builders/developers. Defendant no. 19 is also a developer and landlord of the adjacent plot and intended to execute the subsequent development agreement with defendant nos. 1 to 17. The plaintiffs, some members of the said society, have found that the process of taking the decision of the selection of highest bidder, redevelopment and appointment of some other developer in the place of tender winner is illegal and therefore, they have challenged two resolutions passed by Special General Meeting of the society dated 12.02.2011 and 02.12.2012 and they are to be declared as null and void and contrary to the provisions of law and adverse to the guidelines framed in Government Resolution dated 03.01.2009 of the State of

Maharashtra. They also want a declaration against defendant no. 29 i.e. the Project Management Consultant (PMC) that the entire tender process and declaring defendant no. 16 as a tender winner is illegal and not transparent. Therefore, the directions be given to issue fresh tender for the appointment of the developer as per the Government Resolution. The plaintiffs had further sought relief of injunction against the defendants especially the authority that it should not grant further permission for redevelopment. Defendant nos. 1 to 9 and 11 to 15 had moved Notice of Motion No. 1763 of 2016 that the issues of limitation and jurisdiction be framed and be tried as preliminary issues under Section 9A of the code of Civil Procedure, 1908 and also prayed for ad-interim reliefs. The trial Court accordingly framed the preliminary issues as below:

(i) Whether the Court has jurisdiction to try and entertain the Suit?

(ii) Whether the present Suit is filed within limitation?

Both the issues were answered in affirmative and the said Notice of Motion was dismissed on 08.03.2017 by the learned Judge, City Civil Court, Mumbai. Hence, this Civil Revision Application.

3. Mr.Sawant, the learned counsel for the applicant submitted that in the Suit two resolutions dated 12.02.2011 i.e. about the selection of the developer and second on 02.12.2012 to enter into an agreement with the developers' i.e. original defendant nos. 16 and 17 are under challenge. He argued that out of 240 members, 229 members have agreed for the redevelopment. Only 11 members are opposing for the redevelopment. Till today, nobody has vacated the premises. He further submitted that the maintainability of the Suit is challenged on two grounds. Firstly, there is a bar under Section 154 of the Maharashtra Co-operative Societies Act, 1960. The resolutions passed by the society pertains to the maintenance and management of the building of the society and are touching the business of the society and therefore, the Suit cannot be filed before the Civil Court, but respondent no.1 ought to have raised the dispute before the Co-operative Court. Secondly, the resolutions dated 12.02.2011 and 02.12.2012 are challenged by filing the Suit in the year 2016 and hence, it is time barred. He pointed out the prayers made in the plaint. The learned Judge, City Civil Court has held that third relief sought by the plaintiffs is the substantive relief and reliefs in prayer clause (a) and (b) are ancillary. This view of the learned Judge of the City Civil Court is erroneous because (a) and (b) prayers sought by the plaintiffs are the prayers of declaration of the resolutions passed by defendant no.1,

which are in fact the substantive reliefs. He further submitted that the ratio lay down in the case of ***Mohinder Kaur Kochar Vs. Mayfair Housing Private Ltd. & Ors.,*** reported in ***2012(6) Bom. C.R.194*** is not applicable. However, the trial Court has wrongly held that it is applicable to the present case because the plaintiffs have challenged the tender procedure adopted by defendant no. 29, who is not a member of defendant no.1 and the redevelopment of the plots is inter-se dispute between the Co-operative Society and its members. He, on the point of limitation, has submitted that the trial Court has accepted the explanation of the society that the plaintiffs have initially filed a complaint before the Divisional Joint Registrar Co-operative Society and therefore, the plaintiffs have prosecuted in good faith before concern authority under the Maharashtra Co-operative Societies Act and thereafter, persuading the proceedings before the High Court. The suit was filed by the plaintiffs on 20.02.2016. Giving benefit of Section 14 of the Limitation Act in computing the period of limitation by the trial Court is unwarranted. He further submitted that in the plaint, there is no mention about Section 14 of the Limitation Act and no pleadings in respect of the exemption from limitation were made. He further submitted that the order passed by the Divisional Joint Registrar Co-operative Societies is challenged by the petitioner before the High Court by filing Writ Petition No. 6701 of 2013. The said Writ Petition is still pending. Under such circumstances, no benefit under Section 14 of the Limitation Act can be granted to the plaintiffs.

4. Mr. Tamboly, the learned counsel for the applicants/original defendant nos. 16 and 17 has argued that as an absolute proposition of law, Section 9-A of the Code of Civil Procedure is a final decision on the issue, which is raised preliminary and it is not a demurer. In Civil Revision Application, he has raised main contention that Section 14 of the Limitation Act cannot be attracted to this case. Firstly, that previous proceeding was not conducted before the Court, it was before the Divisional Joint Registrar Co-operative Society, which is not a Court. Secondly, the plaintiffs have failed to show that there is a delay due to acts done in good faith. On the point of Section 14 of the Limitation Act and good faith, he relied on the following cases :

(1) ***Ghisulal Ganeshi Lal Vs. Gumbhirmull Pandya & Anr***, reported in ***AIR 1938 Calcutta 377.***

(2) ***Kondepu Raghavayya Vs. Elukkoru Vasudevayya Chetty***, reported in ***AIR (31) 1944 Madras 47.***

(3) ***Suraj Nath Prosad Kedarnath Vs. Union of India,*** reported in ***AIR 1975 Calcutta 203***.

(4) ***Zafar Khan & Ors Vs. Board of Revenue, U.P***., reported in ***AIR 1985 SC 39***.

(5) ***Madhavrao Narayanrao Patwardhan Vs. Ram Krishna Govind Bhanu,*** reported in ***AIR 1958 SC 767.***

5. He has further argued that respondent nos. 26 and 27 have also filed a separate Civil Revision Application No. 235 of 2017. He has submitted that these resolutions were moved and approved in Special General Body Meeting, wherein all the plaintiffs, except plaintiff no. 4 were present and have signed. He added that plaintiff no. 1 was not present when first resolution dated 12.02.2011 was passed. Thus, all the plaintiffs had knowledge of the resolution. None of the plaintiffs have challenged the said resolution till 2016. He relied on Article 58 of the Limitation Act. As per Article 58 of the said Act, the period of limitation to obtain any declaration is three years from the date since the right to sue first accrues and thus first it was on 12.02.2011 and thereafter on 02.12.2012. The said Suit is filed on 20.02.2016 and thus the Suit is time barred. He further submitted that the case of the plaintiffs did not lead any evidence to bring the Suit within the limitation and therefore, the trial Court ought to have held the issue in favour of the applicants. In support of his submissions, he relied on the case of

K.S.Nanji and Company Versus Jatashankar Dossa and Ors. reported in ***(1962) 1 SCR 492.*** He further argued that Section 14 of the Limitation Act cannot be attracted to the facts of the present case. Under Order 7 Rule 6 of the Code of Civil Procedure, if the parties are relying on the exemption from the law of limitation, the plaint should show the ground upon which exemption from such law is claimed. It is for the plaintiffs who claim exemption from the law of limitation to show their bonafides. He further argued that good faith is defined under Section 2 (h) of the Limitation Act that nothing shall be deemed to be done in good faith which is not done with due care and attention. The plaintiffs have failed to show the same. As per Section 14 of the Limitation Act, it is necessary that the plaintiffs have to prosecute the case before another Court and not before any other authority. He has further submitted that the dispute was raised by the plaintiffs before the Divisional Joint Registrar Co-operative Society for the same reliefs and thereafter the said order passed by the Divisional Joint Registrar Co-operative Society was challenged before the High Court in Writ Petition No. 6701 of 2013.

6. Per contra, the learned counsel for the original plaintiffs/contesting respondents has submitted that Civil Revision Application No. 190 of 2017 is not maintainable as respondent nos. 12 to 25 are the committee

members of the applicant-society and they should have been also the applicants in this Civil Revision Application. He further submitted that respondent no. 10 –Sanjay Mohite is a Chairman of the society, but he has not joined as the applicant to this Civil Revision Application. He further submitted that the plaintiffs have challenged the appointment of the developers for the redevelopment process. Respondent nos. 1 to 11 are the occupants of the flats in the society and the said society was registered in the year 1960 and the Deed of Conveyance was executed in favour of the society. He argued that the Government has issued a Resolution dated 03.01.2009, wherein the Government has laid down the rules and regulations as to how the redevelopment should be scheduled and carried out. The plaintiffs had filed a complaint to the Divisional Joint Registrar Co-operative Society, Mumbai Division about illegalities in the process of declaring respondent no. 17 is a bidder and giving tender to him. He further submitted that M/s. Ratanraj Reality was shown as a highest bidder. However, M/s. Ratnaraj Blessing Milestone has appointed as a developer, though M/s.Ratnaraj Blessing Milestone is not a tender winner. He argued that the Divisional Joint Registrar Co-operative Society passed order on 14.05.2013 by which the letters dated 11.04.2011, 27.12.2012 and 17.01.2013 issued by the Assistant Registrar, Co-operative Societies, F/S Ward, Mumbai were quashed and set aside. The said order was challenged by the petitioner/society in Writ Petition No. 6701 of 2013, in which interim order was passed on 11.2.2013. In the said Order, the High Court has granted status quo to the petitioner-society and the learned Single Judge of this Court has observed that two resolutions cannot be challenged before the Assistant Registrar or the Joint Registrar, but it can be only challenged before the Co-operative Court or the Civil Court of competent jurisdiction. Thereafter, the plaintiffs/ respondents filed the Suit and challenged these resolutions before the City Civil Court. He further submitted that till 11.12.2013 i.e. the date of the order of this Court, the plaintiffs/respondents were bonafides challenging the resolutions before the authority and therefore, L.C.Suit No. 575 of 2016 was filed by the plaintiffs/ respondents. He further argued that the resolutions passed by Special General Meeting dated 12.02.2011 and 02.12.2012 were not circulated and not approved by the Committee Members and thus Rule 108 of Bye Laws of the society was violated by the society and therefore, the challenge to the appointment of the developer is within limitation. The minutes of the Meeting dated 12.02.2011 and 02.12.2012 are still not approved. In support of his submission, he relied on the letter dated 31.12.2016 by which a meeting was called to approve the minutes of meeting dated 02.12.2012. He argued that the society has appointed Shri G.D.Sambhare, Project Management Consultant (PMC), who has filed a report in November

2010. However, in the report, PMC has not considered that Ratnaraj Reality was not in existence, but in the place of Ratnaraj Reality, some other group of Ratnaraj Blessing Milestone has started functioning. He argued that out of 246 members, 175 persons are the members and occupants, but all of them are not members.

7. I have considered the submissions of the learned counsel of both the parties. So also the judgments relied by the parties on the point of limitation. It is contended that the cause of action was fixed on the date of resolutions i.e. 12.02.2011 and 02.12.2012 and the Suit for declaration is filed after 4 to 5 years and hence, it is time barred. In between there were other proceedings filed before the Registrar, Co-operative Societies Act. The plaintiffs have filed a complaint before the Assistant Registrar and the Divisional Joint Registrar Co-operative Society in the year 2013. The letters dated 11.04.2011, 27.12.2012 and 17.01.2013 issued by the Assistant Registrar, Co-operative Societies, F/S Ward, Mumbai were challenged and the Divisional Joint Registrar Co-operative Society quashed and set aside those letters. The said order was challenged in Writ Petition No. 6701 of 2013 by the petitioner society. In the said Writ Petition, the learned Single Judge of this Court, vide order dated 11.12.2013 has held that the challenge given to the resolutions cannot be decided either by the Assistant Registrar or the Divisional Joint Registrar and hence, the Co-operative Court or Civil

Court are the Courts having Competent Jurisdiction as the case may be and refused to grant stay. The said interim order dated 11.12.2013 was taken up before the Supreme Court by the present respondents/ original plaintiffs in Special Leave Petition. The said Writ Petition is still pending. Thereafter, the original plaintiffs/respondents filed the Suit in the year 2016 and the Notice of Motion raising preliminary issue filed by the defendants is rejected. Hence, these Civil Revision Applications.

8. The pleadings are to be read and relied to decide the jurisdiction of the Court. After going through the pleadings and the prayers, it is made clear that the plaintiffs have prayed for declaration that two resolutions are void and contrary to the provisions of law and not consistent with the guidelines framed in Government Resolution dated 03.01.2009 of the State of Maharashtra. They seek declaration that the process of declaring defendant no. 16 as a tender winner is illegal and it is not transparent. It is true that passing resolutions is a part of the administration of the Co-operative Housing Societies. Undoubtedly, it touches the business of the society and any relief pertaining to the declaration of such resolutions passed in the General Body Meeting of the co-operative society is to be challenged before the Co-operative Court and the Civil Court is not a proper forum, as it is barred under Section 154 of the Maharashtra Co-operative Societies Act, 1960. However, alongwith the challenge to the resolutions, the plaintiffs have

also prayed for another substantive relief, which cannot be tried and decided by the Co-operative Court, but by the Civil Court only. The society wants redevelopment. So, appointment of Project Management Consultant (PMC), calling tenders, choosing highest bidder, declaration and giving tender to the winner all these actions and decisions are included in the redevelopment scheme. The plaintiffs have challenged the process of selection of defendant no. 16 as a tender winner. In the case of ***Mohinder Kaur Kochar*** (supra), the Division Bench of this Court has held as under :

> *“19......initial construction of a building and its redevelopment are different activities. By passage of time, as the building becomes older, the Housing Society may take a decision to repair or redevelop the property. Such activity is totally different from initial development of the building. The dispute arising from such redevelopment, which becomes necessary by passage of time, is not "business" of the society. Such activity cannot be considered as “touching” the business of the society'. The dispute involving members, developers, managing committee in respect of redevelopment of the property which becomes necessary in view of passage of time, is not relatable to the business of the society.....”*

Therefore, I am of the view that considering the nature of the Suit and the relief of declaration as a whole the bar under Section 154 of the Maharashtra Co-operative Societies Act, 1960 is not applicable to the present case.

9. It is well settled that it is obligatory on a Court to dismiss the suit barred by limitation, although limitation has not been set up as a defence, indicating thereby that it is the duty of a plaintiff to establish, at any rate *prima facie*, that the suit is within time. It is the obligation of the plaintiff to satisfy the court that his action is not barred by lapse of time.

10. The Article 58 of the Limitation Act takes care of declaratory relief prayed by the plaintiffs. A Suit for declaration is to be filed within three year from the date of cause of action for the purpose of limitation.

11. I have considered the submissions of the learned counsel on the point of Section 14 of the Limitation Act. In the case of ***Ghisulal Ganeshi Lal*** *(supra)*, if the earlier Suit is dismissed due to negligence of the plaintiff cannot be attracted, as the act cannot be said done in good faith. The same view is reiterated by the Single Judge on the point of good faith in the case of ***Kondepu Raghavayya (supra)*** and in the case of ***Suraj Nath Prosad Kedarnath*** (supra)

12. In the case of ***Zafar Khan & Ors*** *(supra)*, the Supreme Court has held three guidelines to attract the application of Section 14 of the Limitation Act.

(i) The plaintiff was prosecuting another civil proceeding with due diligence.

(ii) The earlier proceeding and the later proceeding relate to the same matter in issue.

(iii) The former proceeding was being prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

13. In the case of ***Madhavrao Narayanrao Patwardhan*** *(supra)* the burden is always on the plaintiff to prove that the case is covered under Section 14 of the Limitation Act. The plaintiff will have to move to lead evidence to show that the earlier suit was being prosecuted in good faith and with due diligence.

14. In the present case, in fact the plaintiffs have not pleaded their case under Section 14 of the Limitation Act. The learned Judge has himself invoked the Section 14 of the Limitation Act. Strictly speaking Section 14 of the Limitation Act cannot be attracted because earlier civil proceedings filed by the original plaintiffs were not prosecuted before any Court. Admittedly, the Office of the Assistant Registrar or the Divisional Joint Registrar Co-operative Society though is an authority, it

is not a Court and therefore, approaching the said authority and praying a relief before it is not a civil proceeding before the Court. Thus, the case of the plaintiffs is not covered under Section 14 of the Limitation Act, but is covered under proviso of Rule 6, of Order 7 of the Code of Civil Procedure. Order 7 Rule 6 of C.P.C. reads as follows :

> *"6. Grounds of exemption from limitation of law – Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed:*
>
> *[Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint]"*

Thus, the plaintiffs can explain in the plaint about computation of period of limitation if extended. It is sufficient that the ground of exemption is apparent on the basis of the plaint and it is not necessary that the plaint should specifically claim the ground of limitation. The proviso to Rule 6 of C.P.C. was inserted by the Code of Civil Procedure (Amendment) Act, 1976 with effect from 01.02.1977. It gives power to the Court to look into the grounds for claiming exemption from the law of limitation if not set out in the plaint, but such grounds are not inconsistent with the grounds set out in the plaint.

15. On this background, the case of the original plaintiffs is to be examined.

16. The first cause of action accrued in the year 2011 and thereafter, again in the year 2012. The issue was in respect of redevelopment, appointment of Project Management Consultant (PMC), selecting highest bidder and declaring and confirming as a developer in redevelopment project of the petitioner society. In the course of argument, the learned counsel for the original plaintiffs has relied on a notice dated 31.12.2016, wherein approving the minutes of meeting dated 02.12.2012 is shown on its Agenda. Thus, as the minutes of the meeting are not approved till the date of filing of the Suit, which is a requirement under the Bye-laws, the challenge remained open and the cause of action continued. The evidence of Sanjay Rajaram Mohite, DW-1 also corroborates this fact in his cross examination recorded on 14.02.2017, wherein the witness gave admission that the minutes of Special General Meeting dated 02.12.2012 are not approved by General Body till 2016. Thus, the declaration sought in respect of the minutes of the said meeting is very much within limitation. So also further acts and actions arising out of the said meeting are also within limitation. Thus, the decision given by the learned Judge that the Civil Court has jurisdiction to try and entertain the Suit and the Suit is within limitation is correct and hence, no interference is required.

17. In view of the above, both the Civil Revision Applications are disposed of.

18. In view of the disposal of the Civil Revision Application No.190 of 2017 nothing survives in the Civil Application and the same is disposed of as such.

19. Learned counsel for the applicants seeks stay of this order for 'six' weeks, so as to challenge this order before the Hon'ble Supreme Court.

20. Learned counsel for the respondents opposed the same.

21. In the circumstances of the case, stay is granted for six weeks.

(MRIDULA BHATKAR, J.)