

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO. 48 OF 2017
IN
WRIT PETITION NO. 9503 OF 2004

Bhalchandra Prabhakar Pansare .. Petitioner
VS.
Shri Tulshiram Asaram Tarode
(since deceased through his heirs)
Smt. Rekha Tulshiram Tarode & Ors. .. Respondents

Mr. R. S. Apte – Senior Advocate and Mr. S. R. Nargolkar with L. Coutinho i/b. Meenakshi Sakhare for Petitioner.
Mr. N. V. Walawalkar – Senior Advocate i/b. Mr. G. H. Keluskar for Respondent No. 1.

AND
WRIT PETITION NO. 9503 OF 2004

Shri Tulshiram Asaram Tarode,
since deceased through his
heirs and legal representatives
Smt. Rekha Tulshiram Tarode & Ors. ..Petitioners
VS.
The President / Secretary,
Navin Pawana Nagar Vasahat
Sahakari Graha Rachana Sanstha & Ors. ..Respondents

Mr. N. V. Walawalkar – Senior Advocate i/b. Mr. G. H. Keluskar for Petitioners.
Mr. R. S. Apte – Senior Advocate and Mr. S. R. Nargolkar with L. Coutinho i/b. Meenakshi Sakhare for Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment: 17 March 2017
Date of Pronouncing the Judgment: 24 March 2017

COMMON JUDGMENT :-

1] Heard Mr. R. S. Apte, learned Senior Advocate with Mr. S. R. Nargolkar instructed by Meenakshi Sakhare for review petitioner in review petitioner and for respondent no. 3 in main petition i.e. writ petition no. 9503 of 2004.

2] Also heard, Mr. Walawalkar, learned Senior Advocate instructed by Mr. G. H. Keslukar for respondent no. 1 in the review petition and the petitioner in the main petition i.e. writ petition no. 9503 of 2004.

3] Despite service, none for respondent nos. 2 and 3 in review petition and for respondent nos. 1 and 2 in main petition.

4] On previous occasion, it was made clear to learned counsel for the parties, 332659that the main petition would be taken up for consideration on merits, taking into consideration the reasons set out in the review petition for review of judgment and order dated 22 November 2016, by which, the main petition had in fact been disposed of. Accordingly, learned counsel for the parties, made their detailed submissions in the main petition, upon the premise that the judgment and order dated 22 November 2016, stands recalled.

5] In the review petition, taken out on behalf of respondent no. 3 in the main petition, it is stated that on 22 November 2016, the Advocate for respondent no. 3 could not remain present, since, his ailing father-in-law had recently expired after a stint in the intensive care unit of Dinanath Mangeshkar Hospital, Pune, which lasted for more than three weeks. He stated that since the Advocate was attending to his father-in-law, it was not possible to even inform the

respondent no. 3 to remain present in the court or to make any alternate arrangements. This reason, in the facts and circumstances of the present case, is sufficient to recall judgment and order dated 22 November 2016, which is hereby recalled. The review petition stands disposed of accordingly.

6] The challenge in the main petition is to the judgment and order dated 8 October 2004 made by the Maharashtra State Co-operative Appellate Court (Appeal Court) allowing the appeal instituted by respondent no. 3 (Pansare) in the main petition against judgment and order dated 12 December 1996 made by the co-operative court, in the dispute raised by Tarode before it.

7] The subject matter of the main petition is plot no. 94, admeasuring 606 sq. meters, bearing survey no. 2, lay out no. JWS.I.576/1967 dated 8 April 1967, Chinchwad, Haveli, Pune, which shall hereafter be referred to as 'said plot'.

8] The said plot was initially leased by Navin Pawana Nagar Vasahat Sahakari Graha Rachana Sanstha (society) to Mansingrao Vithalrao Rannavare, the husband of Sushila Rannavare (respondent no. 2). By surrender deed dated 7 April 1983, Mansingrao Rannavare, surrendered the leasehold rights in respect of the said plot to the society.

9] On the same date, i.e. 7 April 1983, the society, leased the said plot to Sushila Rannavare and the petitioner Tarode. From the perusal of the registered lease deed dated 4 July 1983 it is quite clear that the society constituted both Rannavare and Tarode as the joint lessees or the co-lessees in respect of the said plot.

10] On 16 September 1985, Sushila Rannavare executed a deed of surrender of lease purported to surrender in favour of the society area admeasuring 4000 sq. ft. i.e. 372 sq. meters in the western portion of the suit plot from out of the area of 606 sq. meters. On the same date, i.e. on 16 September 1985, the society the society, leased such surrendered portion of the said plot to Pansare vide registered deed of lease.

11] Thereupon, Tarode raised dispute no. 462 of 1987 before the co-operative court invoking the provisions of section 91 of the Maharashtra Co-operative Societies Act, 1960 (said Act), seeking *inter alia* the following reliefs :

“(a) to pass an order and declare that the surrender deed executed between Opponent No. 2 & 1 and Lease-Deed executed between the Opponent No. 3 & 1 be declared as null and void;

(b) To pass an order directing the Opponent No. 1 to transfer the name of disputant at serial No. 1 on the share certificates in respect of Plot No. 94;

(c) to order the opponents to pay the cost of this dispute to the disputant,

(d) any other just and proper orders deemed necessary in the circumstances of the case and oblige.”

12] The society and Pansare filed a common (reply) response in order to oppose the reliefs applied for by Tarode. They submitted that Tarode was only an associate member and although, he may have held the said plot jointly with Pansare, it is only with '*mutual understanding of all the parties*' that Rannavare was permitted to surrender area of 372 sq. meters from out of 606 sq. meters and such surrendered area was then leased to Pansare. Accordingly, it was submitted that no reliefs may be granted to Tarode in such facts

and circumstances.

13] The Co-operative Court by its judgment and order dated 12 December 1996 accepted the case of Tarode and made the following order :

“ORDER

1. *The dispute is allowed with costs.*
2. *The surrender deed executed between opponent Nos. 2 and 1 i.e. Sou. Sushila Mansingrao Ranaware and the society and the lease deed executed between the opponent No. 3 and 1 i.e. Shri Bhalchandra Prabhakar Pansare and the society are hereby declared as illegal and null and void.”*

14] Pansare, aggrieved by the co-operative court judgment and order dated 12 December 1996 instituted appeal no. 33 of 1997 before the Appeal Court. By the impugned judgment and order dated 8 October 2004 the Appeal Court has allowed the appeal and set aside the declaration granted by the Co-operative Court in its judgment and order dated 12 December 1996. The operative portion of the impugned order, reads thus :

“ORDER

1. *The appeal is allowed.*
2. *The declaration granted by trial court by order dt. 12-12-1996 in dispute No. 462/87 is hereby set aside.*
3. *No order as to costs.”*

15] Tarode, who is now represented by his legal representatives, instituted present petition no. 9503 of 2004 to challenge the impugned judgment and order dated 8 October 2004 made by the Appeal Court.

16] On 28 November 2005, this court, whilst issuing Rule, made

the following order :

“ Rule.

2. Admittedly, the parties are the joint owners of the plot of land. There is no partition of the said property. However, at the time of carrying out construction of the bungalow, plans were submitted indicating construction of the building by both the parties in a particular area of the plot. The said plan admittedly does not divide the property equally between the parties. The portion of the land which is in the possession of the respondent has no access and, therefore, an access has been taken from the plot of land belonging to the petitioner herein. It is now well settled that till and until there is partition of the property each of the parties are entitled to each and every part of the said plot of land. In that view of the matter, there will be an interim order in terms of prayer clauses (c) and (d). The petitioner is also directed not to encumber, alienate or create any third party right in respect of part of land which is in his possession.

3. An attempt was made to get the matter worked out by working out the compensation by the respondent towards holding of larger portion of the plot of land on the basis of equal share in respect of the said property. However, respondent is not inclined to settle the said dispute. In that view of the matter, the petition is required to be decided finally. Hence, Rule and interim order as aforesaid. No order as to costs.”

17] Mr. Walawalkar, learned Senior Advocate for Tarode now submits that there is no present dispute in relation to the issue of access but, Tarode's equal rights along with Pansare as joint lessee or co-lessee of the said plot are required to be declared and suitably protected. He submits that the impugned judgment and order made by the Appeal Court suffers from errors which are apparent on the face of record. The Appeal Court failed to even read the reliefs applied for by Tarode, from which it would be quite clear that Tarode, apart from seeking declaratory relief, had also applied for consequential reliefs in terms of prayer clause (b) of the dispute application.

18] Mr. Walawalkar submits that by the lease deed dated 7 April 1983, both, Tarode and Sushila Rannavare were constituted as joint lessees or co-lessees in respect of the entire said plot admeasuring 606 sq. meters. In such circumstances, Sushila Rannavare was not at all entitled to surrender to the society any portion of the said plot since, admittedly, there was no partition, assuming that such partition was possible. Without prejudice, Mr. Walawalkar submits that Sushila Rannavare, could have at the highest, surrendered her share to the society, which would, correspond to half share notionally admeasuring 303 sq. meters from out of the said plot admeasuring 606 sq. meters. Sushila Rannavare had no legal right or authority to purport to surrender an area of 372 sq. meters in favour of the society. Therefore, the surrender deed dated 16 September 1985 was liable to be declared null and void. The society, consequently had no right or authority to lease to Pansare any surrendered portion admeasuring 372 sq. meters. Therefore, even the lease deed dated 16 September 1985, is also null and void.

19] Mr. Walawalkar submits that in so far as civil rights are concerned, the status of an associate member, is no lesser than the status of a regular member of the society. Therefore, this aspect was quite irrelevant for the purpose of deciding the main issue raised in the appeal instituted by Pansare. The Appeal Court, permitted itself to be unduly influenced by the circumstance that Tarode was enrolled as associate member of the society and on the said basis denied reliefs to Tarode.

20] Mr. Walawalkar submits that it is settled position in law that no party is entitled to transfer, whether by way of surrender or

otherwise, rights in any property which it does not possess or in excess of what it possesses. Applying this principle to the facts of the present case, Mr. Walawalkar submits that the reliefs which were granted by the Co-operative Court to Tarode were unduly disturbed by the Appeal Court by the impugned judgment and order. Accordingly he submits that this petition is liable to be allowed and the impugned judgment and order dated 8 October 2004 made by the Appeal Court is liable to be set aside and the judgment and order dated 12 December 1996 made by the Co-operative Court is liable to be reinstated.

21] Mr. Apte, learned Senior Advocate for Pansare submits that the surrender deed dated 16 September 1985 and the consequent lease deed dated 16 September 1985, by which, the society leased to Pansare an area of 372 sq. meters from out of the said plot, were deeds and documents entered into between the parties on basis of mutual understanding and agreement. He submits that there is material on record which suggests that Sushila Rannavare was in possession of area of 372 sq. meters, since the access to this portion, was through the portion, upon which, Tarode has put up his construction. Mr. Apte, made reference to documents like commencement certificate, completion certificate and certain plans in order to indicate this position. He submits that the plan clearly indicates that the road / access to the portion upon which Rannavare had put up construction was through the portion upon which Tarode had put up his construction. If such access / road, which is meant for the use of Rannavare's construction is taken into account, then, there is nothing wrong in the surrender by Rannavare of an area of 372 sq. meters and its consequent allotment to Pansare.

22] Mr. Apte also adverted to the oral evidence tendered by the parties on record in order to submit that such evidence also establishes that an area of 372 sq. meters was in fact leased to Rannavare. Mr. Apte submits that the ambiguities in registered lease deed dated 7 April 1983 have been explained by such oral evidence. For all these reasons, Mr. Apte submits that the main petition is liable to be dismissed and the impugned judgment and order of the Appeal Court is liable to be upheld / reinstated.

23] The rival contentions now fall for determination.

24] On the basic facts, there does not appear to be any serious dispute. The said plot admeasures 606 sq. meters, which corresponds to approximately 6531.25 sq. ft.. The said plot was initially leased out by the society to the husband of Sushila Rannavare, in its entirety. However, by registered surrender deed dated 7 April 1983, Rannavare surrendered the lease rights in respect of the entire said plot to the society. On the same date, i.e. on 7 April 1983, the society, by registered lease deed, leased the entire said plot to Sushila Rannavare and Tarode. Although, there is no specific reference, from the perusal of this registered deed and its tenor, it is quite clear, that both Sushila Rannavare and Tarode were constituted as co-lessees or joint lessees in respect of the said plot. There was admittedly, no partition between the two co-lessees, assuming that such partition was possible in the peculiar facts and circumstances of the present case. In any case, there is absolutely nothing in the registered lease deed dated 7 April 1983 to suggest that Sushila Rannavare was constituted as a lessee in respect of area of 4000 sq. ft. or 372 sq. meters from out of the total area of the said plot which is 6531.25 sq. ft. or 606 sq. meters. There is really nothing on record to indicate that Sushila Rannavare, had

any rights in the said plot to an area exceeding, at least notionally, 303 sq. meters.

25] Accordingly, there was no question of Sushila Rannavare purporting to surrender in favour of the society, leasehold rights, in respect of portion of the said property, even notionally exceeding 303 sq. meters. The registered surrender deed dated 16 September 1985, to the extent, it records that Sushila Rannavare has surrendered portion of the said plot bearing area 4000 sq. ft or 372 sq. ft., is, accordingly, void or in any case clearly not binding upon Tarode. This is because it is settled position in law that no party can transfer a better title than what it is vested in it. Even notionally, leasehold rights of Sushila Rannavare, were restricted to area of 303 sq. meters and not 372 sq. meters from out of the said plot. In such circumstances, there was no question of Sushila Rannavare purporting to surrender to the society, leasehold rights to the extent of 372 sq. meters from out of the said plot. Secondly, there is no dispute that Tarode was not a party, either to the surrender deed dated 16 September 1985 or consequent lease deed dated 16 September 1985, by which, the portion of the said plot surrendered by Sushila Rannavare was leased by the society to Pansare. These two deeds purport to affect Tarode's rights vested in him by virtue of registered lease deed dated 7 April 1983. In order to bring about any variation or modification to the registered lease deed dated 7 April 1983, it was necessary that all the parties thereto execute another registered document. There is no question of only some of the parties executing and registering documents to the detriment of the interests of the parties left out.

26] Mr. Apte's contention, based upon the alleged possession at the site cannot be accepted. In the first place, there is hardly any

material on record to support the position that the registered deeds dated 16 September 1985 were on the basis of '*mutual understanding*' between the parties. There is no question of any variation or modification to a registered document, on the basis of such a vague plea of any alleged mutual understanding or agreement. Secondly, the material on record in any case, does not support any such case. Thirdly, the documents like commencement certificate or completion certificate or for that matter the depositions on record also do not establish that there was any mutual division between the parties *inter se* so as to constitute Sushila Rannavare and thereafter, Pansare as lessees to the extent of 372 sq. meters from out of the said plot. One of the plans, no doubt, does depict access / road. However, that by itself, does not mean or imply or can be taken to mean or imply that even the road portion was exclusively leased to Sushila Rannavare and consequently to Pansare. Such access / road will be relevant for determination of issues of access, if any, which may arise between the parties. However, learned Senior Advocates appearing for both the parties have stated that there is no controversy about issue of access between the parties.

27] In ***S. Saktivel (Dead) by L.Rs. vs. M. Venugopal Pillai & Ors.***¹, the Hon'ble Supreme court at paragraphs 5 to 7 has observed thus :

"5. Learned counsel appearing for the appellant urged that the view taken by the High Court in decreeing the suit of the plaintiff was erroneous inasmuch as the settlees under Ext.A/1 got the suit property and by the subsequent oral arrangement, they agreed to work out their rights without varying or substituting the terms of Ext.A/1 and, therefore, the High Court was not right in not considering the oral arrangement as pleaded by the defendant/appellant. It is not disputed that disposition under Ext.A/1 in the present case is

1 (2000) 7 SCC 104

by way of grant and under the said disposition all the sons of Muthuswamy Pillai acquired rights. It is also not disputed that the settlement deed is a registered document and by virtue of alleged subsequent oral arrangement other sons of Muthuswamy Pillai were divested with the rights which they acquired under the settlement deed. **Under such circumstances the question that arises for consideration is as to whether any parol evidence can be let in to substantiate subsequent oral arrangement rescinding or modifying the terms of the document which, under law, is required to be in writing or is a registered document, namely, Ext.A/1. Section 92 of the Evidence Act reads as thus:**

"92. Exclusion of evidence of oral agreement. - When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (4) - The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents."

A perusal of the aforesaid provision shows that what Section 92 provides is that when the terms of any contract, grant or other disposition of the property, or any matter required by law to be reduced in the form of document, have been proved, no evidence of any oral agreement or statement is permissible for the purpose of contradicting, varying, adding or subtracting the said written document. However this provision is subject to proviso 1 to 6 but we are not concerned with other provisos except proviso 4, which is relevant in the present case. The question then is whether the defendant-appellant can derive any benefit out of proviso (4) to Section 92 for setting up oral arrangement arrived at in the year 1941 which has the effect of modifying the written and registered disposition. Proviso (4) to Section 92 contemplates three situations, whereby:

(i) *The existence of any distinct subsequent oral agreement as to rescind or modify any earlier contract, grant or disposition of the property can be proved.*

(ii) *However, this is not permissible where the contract, grant or disposition of property is by law required to be in writing.*

(iii) *No parol evidence can be let in to substantiate any subsequent oral arrangement which has effect of rescinding a contract or disposition of property which is registered according to the law in force for the time being as to the registration of documents.*

6. *In sum and substance what proviso (4) to [Section 92](#) provides is that where a contract or disposition, not required by law to be in writing, has been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by parol evidence and such evidence is admissible. Thus if a party has entered into a contract which is not required to be reduced in writing but such a contract has been reduced in writing, or it is oral in such situations it is always open to the parties to the contract to modify its terms and even substitute a new by oral contract and it can be substantiated by parol evidence. In such kind of cases the oral evidence can be let in to prove that the earlier contract or agreement has been modified or substituted by new oral agreement. **Where under law a contract or disposition are required to be in writing and the same has been reduced in writing, its terms cannot be modified or altered or substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or substituted. There is another reason why the defendant/appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a registered document. The second part of proviso (4) to Section 92 does not permit leading of parol evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument. The terms of***

registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. If the oral arrangement as pleaded by the appellant if allowed to be substantiated by parol evidence it would mean re- writing of Ex.A/1 and, therefore, no parol evidence is permissible.

7. In view of the aforesaid legal position on interpretation of proviso (4) to Section 92 we have to examine as to whether settlement deed Ext.A/1 was required to be in writing under the law or not. It is not disputed that by settlement deed Ext.A/1 which is a disposition Muthuswamy Pillai passed on right to property to all his sons who acquired right in the property. **Where there is such conferment of title to the property, law requires it be in writing for its efficacy and effectiveness. A document becomes effective by reason of the fact that it is in writing. Once under law a document is required to be in writing parties to such a document cannot be permitted to let in parol evidence to substantiate any subsequent arrangement which has effect of modifying earlier written document. If such parol evidence is permitted it would divest the rights of other parties to the written document. We are, therefore, of the view that the subsequent oral arrangement set up by the defendant-appellant cannot be proved by the parol evidence. Such an evidence is not admissible in evidence”.**

[Emphasis supplied]

28] The aforesaid observations clearly support the case of the petitioner and run counter to the defence of Pansare.

29] The Appeal Court, it appears, failed to notice that Tarode, in addition to declaratory reliefs, had applied for consequential reliefs as well. Therefore, there was no reason to non-suit Tarode by relying upon the principle in section 34 of the Specific Relief Act. Further, in the facts and circumstances of the present case, the reliefs, as applied for by the parties, were required to be pragmatically construed. From the perusal of the dispute statement of Tarode, it was quite clear that Tarode was basically contesting the

registered documents dated 16 September 1985, to the extent, that the said documents had purported to vary, modify or reduce the rights vested in Tarode by virtue of registered document dated 7 April 1983. It is true that Tarode had applied for relief to declare as null and void the registered documents dated 16 September 1985, in their entirety. It is also true that the co-operative court, had granted such relief to Tarode, in its entirety. However, in the facts and circumstances of the present case, the Appeal Court, was required to mould the relief and issue declaration and grant consequential reliefs, in order to protect the rights of Tarode, in terms of registered lease deed dated 7 April 1983.

30] The Appeal Court was not justified in non-suiting Tarode on the grounds that he was enrolled as an associate member of the society and not full member. Section 19(b) of the Maharashtra Co-operative Societies Act defines the term '*associate member*' to mean a member who holds jointly share of the society with others, but whose name stand first in the share certificate. Therefore, merely because Tarode's name does not stand first in the share certificate, that by itself, does not mean that Tarode ceases to jointly hold the shares of the society along with others. The reasoning of the Appeal Court on this aspect cannot be approved.

31] Mr. Keluskar, learned counsel for the petitioner had already made a statement that the petitioner would be satisfied and not pursue the relief of setting aside allotments in favour of Pansare, if it is clarified and declared that the petitioner has rights in the said plot to the extent of 50%, in terms of the registered lease deed dated 7 April 1983. This statement was recorded in the order dated 22 November 2016, which has since been recalled.

32] For all the aforesaid reasons, the impugned judgment and order dated 8 October 2004 made by the Appeal Court is set aside. However, judgment and order dated 12 December 1996 made by the Co-operative Court is also modified. The declaration that the deeds dated 16 September 1985 are null and void in their entirety is set aside. The deeds dated 16 September 1985, to the extent, they purport to effect surrender and allotment of area in excess of 303 sq. meters are however declared as void and consequently set aside. It is declared that Tarode (now his legal representatives) and Pansare are co-lessees in respect of the said plot, having joint and equal rights to the suit plot. The two deeds dated 16 September 1985 have to be construed as conferring equal rights upon Tarode (now his legal representatives) and Pansare in respect of the said plots as co-lessees.

33] Accordingly, review petition no. 48 of 2017 is allowed and the judgment and order dated 22 November 2016 in writ petition no. 9503 of 2004 is recalled. The Rule is made absolute in writ petition no. 9503 of 2004 to the extent indicated in paragraph 32 of this judgment and order. There shall be no order as to costs.

(M. S. SONAK, J.)

Chandka