

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.303 OF 2015
IN
NOTICE OF MOTION NO.170 OF 2012
IN
SUIT NO.2678 OF 2010**

1 Ranjitsingh Linga	)	
2 Chhatrasingh M Malu	)	
both of Bombay Indian Inhabitant	)	
carrying on business in the firm	)	
name and style of M/s Air Cool	)	
unit No.1/C (also referred to Unit	)	
No.1/3 adm.976 sq.ft. at Dhiraj	)	
Pen Compound, Andheri Road,	)	
Bombay 400 059	)	..Appellants

Versus

1 Parwan Constructions Pvt Ltd.	)	
A Company incorporated under the	)	
Companies Act, 1956 having its	)	
registered office at A-40 Narayana	)	
Industrial Area, Phase-I	)	
New Delhi- 110 028	)	
 2 Jayshree Sanghvi	)	
607, 6th floor, Shrinath Tower	)	
Shankar Lane, Kandivali (w)	)	
Mumbai 400 067	)	..Respondents

**WITH
APPEAL (L) NO.509 OF 2015
IN
NOTICE OF MOTION NO.173 OF 2014
IN
SUIT NO.2678 OF 2010**

1 Ranjitsingh Linga	)	
2 Chhatrasingh M Malu	)	

both of Bombay Indian Inhabitant)
 carrying on business in the firm)
 name and style of M/s Air Cool)
 unit No.1/C (also referred to Unit)
 No.1/3 adm.976 sq.ft. at Dhiraj)
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 607, 6th floor, Shrinath Tower)
 Shankar Lane, Kandivali (w))
 Mumbai 400 067) **..Respondents**

Mr. Shishir Joshi a/w Ms Bhakti Jogal for the Appellants
Mr. P. K. Dhakephalkar Senior Advocate a/w Mr. S.R. Bhalekar for the Respondents

**CORAM :R. M. SAVANT, &
 SARANG V KOTWAL, JJ
 RESERVED ON: 9th NOVEMBER, 2017
 PRONOUNCED ON : 28th NOVEMBER, 2017**

JUDGMENT (PER R.M.SAVANT J.)

1 The above Appeals challenge the order dated 23-3-2015 passed in Notice of Motion No.170 of 2012 (subject matter of Appeal No.303 of 2015) as also the order dated 20-3-2015 passed in Notice of Motion No.173 of 2014 (subject matter of Appeal No.324 of 2015). By the said orders, the Notice of

Motion No.170 of 2012 filed seeking rejection of the Plaint under Order VII Rule 11(a) and (d), Order XXIII Rule 1(1) read with 3(b) (4) of the Civil Procedure Code and Notice of Motion No.173 of 2014 for rejection of the Plaint under Order VII Rule 11(a) of the Civil Procedure Code came to be dismissed. Since the facts involved in the above Appeals are common and since the challenge is also identical, the above Appeals are heard together.

2 The facts necessary to be cited for the adjudication of the above Appeals can in brief be stated thus:

The Appellants herein are the original Defendant Nos.1 and 2 to the Suit in question. The said Suit has been filed by the Plaintiff i.e. the Respondent No.1 in the above Appeal. The property in question is plot No.A-1 bearing CTS No.34 admeasuring 64.2 sq.mtrs., CTS No.34/1 admeasuring 4254.5 sq.mtrs, CTS No.34/4 admeasuring 1343.4 sq.mtrs. of Village Chakala and CTS No.183(c) admeasuring 233.1 sq.mtrs. of Village Mulgaon Taluka Andheri, the total land admeasuring 5895.2 sq.mtrs. On the said plot of land there are two sheds identified as Shed No.I and Shed No.II and one cabin admeasuring 83 sq.mtrs. attached to Shed No.II alongwith watchman's cabin and one electricity sub station which are also situated on the said property.

3 The original owner of the said property was one Muktaben Sanghvi. The Defendant No.3 one Jayshree Sanghvi was a tenant of the said

Muktaben Sanghvi in respect of a gala being unit No.1C admeasuring 976 sq.ft. which was situated in the said Shed No.I. Originally there was a Tenancy Agreement between the said Muktaben Sanghvi and the said Jayshree Sanghvi which was dated 1-7-1985. The said Muktaben Sanghvi agreed to sell the said premises to the said Jayshree Sanghvi by agreement dated 14-7-1987. In view of the said Agreement to Sale executed in her favour, the said Jayshree Sanghvi continued as a prospective purchaser of the said gala / unit No.1C. By Agreement for Sale dated 31-8-1992 entered into between the said Jayshree Sanghvi and the Defendant Nos.1 and 2, the said Jayshree Sanghvi agreed to sell the suit premises to them for consideration of Rs.4,21,000/-. By an Indenture of Conveyance dated 2-1-1997 registered with the Sub-Registrar of Assurances read with Deed of Rectification dated 4-2-1997, duly registered with the Sub Registrar of Assurances, the original owner i.e. the said Muktaben Sanghvi conveyed and transferred the said larger property i.e. plot admeasuring 5895.2 sq.mtrs to one Mr. Rasik Kanakia (HUF) and Mr. Paresh H. Mehta. The said Kanakia and Mehta under registered Deed of Conveyance dated 31-10-2002 conveyed the said property to the present Plaintiff who thereupon became the owners of the said plot of land admeasuring 5895.2 sq.mtrs. It seems that the Defendant Nos.1 and 2 executed a Deed of Confirmation dated 11-10-2005 annexing the Agreement to Sale dated 31-8-1992 executed in their favour and registered the same on 10-11-2005. The Defendant Nos.1 and 2 thereby remained in occupation as prospective

purchasers from the said Jayshree Sanghvi who herself was also a prospective purchaser having an Agreement to Sale executed in her favour by the said Muktaben Sanghvi. The said Muktaben Sanghvi had 12 different occupants including the said Jayshree Sanghvi in possession of the said Shed No.I by entering into different agreements. One of the occupants sub divided the Unit which was in his possession and transferred the same in favour of a third party. Thus on the date of the filing of the Suit there were 13 occupants including the Appellants i.e. the Defendant Nos.1 and 2, occupying different portions of the said Shed No.I which was situated on the larger plot of land i.e. land admeasuring 5895.2 sq.mtrs. In view of the fact that the Defendant Nos.1 and 2 and the other unit holders had carried out unauthorised additions within their units by constructing unauthorised floors without permission of the Municipal Corporation of Greater Mumbai (for short MCGM) as well as the landlord. The Plaintiff was constrained to file the Suit bearing No.1251 of 2007 in this Court for various reliefs against the Defendants in the said Suit who were the occupants of the said 13 units. It seems that on account of the correspondence which was entered into by the Plaintiff with the MCGM in respect of the unauthorised construction carried out by the said 13 unit holders which included the Defendant Nos.1 and 2, the Municipal Corporation of Greater Mumbai had issued notice to the said 13 unit holders under Section 351 of the MMC Act which notices were dated 17-9-2008 alleging unauthorised construction carried out by the said 13 unit holders. The said

unit holders filed their replies to the said notice and after consideration of the said replies the MCGM directed the said unit holders to remove / demolish the said unauthorised construction by various orders passed by the Competent Authorities of the MCGM. The unit holders filed various Suits in the Bombay City Civil Court at Dindoshi challenging the said notices.

4 The Defendant Nos.1 and 2 with the other unit purchasers formed a proposed co-operative society and thereafter filed an application with the Deputy Registrar of Co-operative Societies "K" East Ward, Mumbai on 17-7-2009 for registration of the said society. On the Plaintiff coming to know about the said application being made by the Defendant Nos.1 and 2 and the other unit purchasers, the Plaintiff immediately approached the Deputy Registrar and filed two representations thereby objecting to the registration of the society and the principal objection was that the Defendant Nos.1 and 2 and the other unit purchasers had no right to form a society as under the agreements the right is reserved to the landlord which in the instant case would be the original Plaintiff. The Deputy Registrar ultimately by order dated 15-9-2009 rejected the said application. The Plaintiff therefore filed the Suit in question for possession of the suit premises for breach and violation of the Agreement for Sale which was executed in favour of the unit purchasers.

5 In so far as the registration of the society is concerned, against the

order passed by the Deputy Registrar Co-operative Societies rejecting the application for registration the unit holders which included the Defendant Nos.1 and 2 filed an Appeal challenging the said order. The Appeal also came to be dismissed by the Appellate Authority by order dated 14-10-2010. The unit holders thereafter filed a Review Application No.187 of 2011 before the State Government challenging the order passed by the Appellate Authority. The State Government allowed the said Revision by order dated 15-12-2010 which was passed by the then Hon'ble Minister for Co-operation, Government of Maharashtra on 27-9-2011. This resulted in the Plaintiff filing a Writ Petition in this Court being Writ Petition No.8329 of 2011. The said Writ Petition came to be admitted on 12-1-2012 and by way of interim reliefs this Court permitted the society to function and carry on its day to day activities, however restrained the society from exercising any further rights on the strength of the impugned order of registration.

6 The Plaintiff withdrew the said Suit No.1251 of 2007 filed by them on account of the formal defect with liberty to file a fresh Suit against the Defendant Nos.1 and 2 and the other unit holders. The Suit was accordingly allowed to be withdrawn with liberty as prayed for. It is post withdrawal of the Suit that the Plaintiff terminated the Agreement to Sale in favour of the Defendant Nos.1 and 2 on 13-7-2010. The said notice of termination was duly replied to by the Defendant Nos.1 and 2. The Plaintiff

thereafter had filed the instant Suit being No.2678 of 2010 for the reliefs more particularly mentioned in the Suit. The Plaintiff had also filed 9 other suits in this Court which have been transferred to the Bombay City Civil Court on the pecuniary jurisdiction of the Bombay City Civil Court being enhanced. The factum of the Defendant Nos.1 and 2 acting in breach and violation of the agreement have been more elaborately stated in the instant Suit. The relief sought is based on the same cause of action i.e. the Defendant Nos.1 and 2 acting in violation of Agreement to Sale by putting up construction without the permission of the MCGM and the landlord.

7 In view of the subsequent development of the Defendant Nos.1 and 2 along with other unit holders seeking to register a society, the Plaintiff has sought reliefs in that regard also. The Defendant Nos.1 and 2 filed the instant Notices of Motion in the said Suit for rejection of the Plaint. In so far as Notice of Motion No.170 of 2012 is concerned, the same has been filed for rejection of the plaint under Order VII Rule 11(a) and (d), Order XXIII Rule 1 (1) read with Rule 3(b) and (4) of the CPC. In so far as Notice of Motion No.173 of 2014, is concerned, the same has been filed for rejection of the plaint under Order VII Rule 11(a) of the CPC. The Learned Single Judge tried the Notices of Motions and by the impugned orders dated 20-3-2015 and 23-3-2015 has dismissed both the Notices of Motions. In so dismissing the Notices of Motion the Learned Single Judge has come to a conclusion that the Suit as

filed is based on the same cause of action as the earlier Suit and in so far as the bar of limitation is concerned the Learned Single Judge held that the Suit as filed was within limitation especially having regard to Section 14(3) of the Limitation Act, which the Learned Single Judge has reproduced in her order. In so far as the other relief is concerned, viz against the registration of the society, the Learned Single Judge has held that the Plaintiff has sued upon two causes of action which are in respect of the same property and the same party. The Learned Single Judge was of the view that the Plaintiff was entitled to join the said causes of action. The Learned Single Judge has held that the Plaintiff was entitled to sue in respect of the initial cause of action in view of the leave granted whilst withdrawing the earlier Suit and in so far as the other cause of action is concerned, the Learned Single Judge held that the Plaintiff was entitled to sue on such other cause of action within the period of limitation for the said cause of action. The Learned Single Judge therefore observed that instead of filing two Suits and thereby resulting in multiplicity of proceedings, the Plaintiff has decided to file one composite Suit. In so far as the Notice of Motion No.173 of 2015 is concerned, the Learned Single Judge held that whether the Plaintiff is entitled to reliefs is a matter which would have to be decided in the Suit. The Learned Single Judge observed that what is required to be seen is whether the Suit is founded on a cause of action which in the instant case was satisfied and accordingly dismissed the Notice of Motion by order dated 20-3-2015. As indicated above it is the said orders dated 20-3-

2015 and 23-3-2015 which are taken exception to by way of the above Appeals.

8 Heard the Learned Counsel for the parties.

9 The Learned Counsel appearing for the Appellants Mr. Joshi would contend that a perusal of the reliefs sought would indicate that the reliefs sought are not the one's claimed in the earlier Suit which was allowed to be withdrawn with liberty to file a fresh Suit. Hence according to the Learned Counsel the instant Suit being Suit No.2678 of 2010 is not maintainable. The Learned Counsel would contend that the Suit as filed is beyond limitation. The Learned Counsel would next contend that the Suit filed for questioning the registration of the society was not maintainable in view of the fact that the Agreement to Sale entered into between the Defendant Nos.1 and 2 and their predecessor postulates forming of a co-operative society. In so far as the subject matter of the Suit not being the same is concerned, the Learned Counsel sought to place reliance on the judgment of the Apex Court in the matter of **Vallabh Das Vs. Madan Lal**¹. It was also the submission of the Learned Counsel that in view of the acceptance of the fact that the Defendant Nos.1 and 2 are the owners, the Plaintiff could not have filed the Suit seeking possession on the basis of the alleged unauthorised construction carried out by the Defendant Nos.1 and 2 therefore there was no

1 AIR 1970 SC 987

cause of action for the Plaintiff to file the Suit.

10 Per contra the Learned Senior Counsel appearing for the Plaintiff i.e. the Respondent No.1 herein Mr. Dhakephalkar would support the impugned order. It was the submission of the Learned Counsel that the Defendant Nos.1 and 2 are under a misconception that any right was created in them by virtue of the Agreement to Sale executed between the original owners and the said Jayshree Sanghvi who is the predecessor in title of the Defendant Nos. 1 and 2. The Learned Senior Counsel would contend that it is well settled that an Agreement to Sale does not create any right in the property and therefore the Defendant Nos.1 and 2 continue to be prospective purchasers. The Learned Counsel would contend that the earlier Suit was withdrawn in view of the fact that the same was filed against all the unit holders in Shed No.1 and in view of the fact that the cause of action in respect of each unit holder was different and therefore there was a misjoinder of parties in view thereof the Plaintiff had withdrawn the earlier Suit and filed the instant Suit. The Learned Senior Counsel would further contend that it is the Plaintiff on the fulfillment of the conditions mentioned in the Agreement to Sale who was to form a co-operative society. However, in view of the fact that the unit holders had carried out unauthorised construction, the Plaintiff has not been able to put up any construction over the sheds and therefore there is no question of any flat being sold hence, the occasion to form the

society has not arisen. It was also the submission of the Learned Senior Counsel that the cause of action for filing the Suit in respect of the first relief relating to possession is the same as the cause of action in the earlier Suit. The Learned Senior Counsel would contend that only the averments made in the Plaint are amplified and are more elaborate in the instant Suit. The Learned Senior Counsel would contend that the Agreement in favour of the Defendant Nos.1 and 2 having been terminated by the Plaintiff for breach of the said Agreement, the Plaintiff had a cause of action for filing the Suit.

11 Having heard the Learned Counsel for the parties, we have considered the rival contentions. In the context of the rejection of the Plaint which has been sought by the Defendant Nos.1 and 2 who are the Appellants in the above Appeals, a few facts would have to be revisited. There can be no dispute about the fact that the Plaintiff had withdrawn their earlier Suit being No.1251 of 2007. The cause of action for the said Suit was the encroachment and the unauthorised construction carried out by the 10 unit holders, and another 13 persons as rank trespassers having encroached upon the respective premises. The said Suit was permitted to be withdrawn by the Trial Court with liberty to file a fresh Suit on the same cause of action. A perusal of the averments made in the earlier Suit and the perusal of the averments made in the instant Suit leaves no manner of doubt that the present Suit is also based on the earlier cause of action namely the encroachment carried out by the unit

holders which in the instant Suit are the Defendant Nos.1 and 2 and which in the other Suits are the other unit holders. It is required to be noted that the earlier Suit was filed against 10 persons carrying out unauthorised construction within the tenanted premises and also against 13 persons alleging that they were rank trespassers. It was in view of the fact that there was a misjoinder of parties and causes of action that the Plaintiff had thought it fit to withdraw the earlier Suit and seek liberty to file a fresh Suit. As indicated above the Plaintiff has filed the instant Suit and had also filed 9 other Suits in this Court which have been transferred to the Bombay City Civil Court on the the pecuniary jurisdiction of the Bombay City Civil Court being enhanced. In our view the reliance placed by the Learned Counsel for the Appellants on judgment of the Apex Court in Vallabh Das's case (*supra*) is misplaced. The Apex Court in the said judgment held that unless the cause of action and the relief claimed in the second Suit are the same as in the first Suit it cannot be said that the subject matter of the second Suit is the same as that in the present Suit. In the instant case it cannot be said that the subject matter of the earlier suit and the present suit is different. In our view the contention of the Learned Counsel appearing on behalf of the Appellants original Defendant Nos.1 and 2 that the instant Suit is not based on the same cause of action as the earlier Suit would therefore have to be rejected.

12 In so far as the relief relating to the registration of the co-

operative society is concerned, the cause of action for the same is independent. However, since the relief sought is against the same party and in respect of the same property, the Plaintiff has filed the instant Suit combining the said reliefs. As rightly observed by the Learned Single Judge that the Plaintiff could have filed two separate Suits but avoided multiplicity of proceedings by filing one composite Suit. In so far as the relief claimed in respect of the registration of the society is concerned, it is not the case of the Defendant Nos.1 and 2 that the claim to the said relief is barred by limitation. Hence merely because the fresh Suit filed contains another relief for which the cause of action has arisen after the withdrawal of the earlier Suit. It cannot be said that the instant Suit as filed is not in terms of the liberty granted by this Court whilst permitting the withdrawal of the earlier Suit.

13 In so far as the issue of whether the instant Suit is barred by limitation is concerned, as indicated above the earlier Suit has been withdrawn in view of the fact that there was a misjoinder of parties. In the said context it would be relevant to refer to Order 23 Rule 2 of CPC and Section 14 (3) of the Limitation Act. The same are reproduced hereinunder for the sake of convenience :

Order 23 Rule 2

Limitation law not affected by first Suit –
In any fresh suit instituted on permission granted under the last proceeding rule, the plaintiff shall be bound by the law of limitation in the same

manner as if the first suit had not been instituted.

Section 14(3) of the Limitation Act

Notwithstanding anything contained in rule 2 of the order XXXIII of the Code of Civil Procedure, 1908 (5 of 1908) the provision of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation:- for the purposes of this section -

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

14 In so far as Rule 2 of Order 23 is concerned, it provides for the Plaintiff being bound by the law of limitation in the same manner as if the first Suit had not been instituted. Hence in terms of Order 23 Rule 2 the limitation for filing the second Suit would be the same as was the limitation for filing of the first Suit.

Now coming to Section 14(3), it provides that notwithstanding anything contained in Rule 2 of order XXXIII of the Code of Civil Procedure, the provision of sub-section (1) shall apply in relation to a fresh suit instituted

on permission granted by the court under Rule 1 of that Order. It further provides that such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. By explanation it is provided as to what would be the other cause of a like nature and in clause (c) of Sub Section (3) misjoinder of parties or cause of action is mentioned as a cause of a like nature. Hence having regard to the said provisions that the instant Suit as filed on 25-8-2010 can be said to be within limitation as time which was spent in proceeding with the earlier Suit would have to be excluded. In our view whether the Plaintiff is entitled to reliefs in the Suit in view of its letter dated 14-9-2009 is a matter for trial. However, it cannot be said that the Plaintiff has filed the Suit without there being any cause of action for the same.

15 In our view, therefore, there is no merit in the contention of the Learned Counsel for the Appellant that the present Suit is barred by limitation. In that view of the matter, there is no merit in the above Appeals which are accordingly dismissed.

[SARANG V KOTWAL, J]

[R.M.SAVANT, J]