

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 20 OF 2018**

Ankush R. Naik (deceased),
through LR's and Another ... Appellants

Versus

Recovery Sales Officer, Central Registrar of
Co-operative Societies, Mapusa & 4 Others ... Respondents

Ms. Asha Desai, Advocate for the Appellants.

Shri J.P. Mulgaonkar, Advocate for the Respondent Nos. 1, 2 & 3.

Coram : C.V. BHADANG, J.

Date : 5th JULY 2018

ORAL ORDER:

Now deceased, Ankush Naik and his wife Smita Naik, filed Special Civil Suit No. 56/2003/B, before the learned Civil Judge Senior Division at Panaji, for declaration and permanent injunction. The case made out in the plaint is that there is a property situated at village Kalapur (St.Cruz), Tehsil Tiswadi, bearing land survey no. 681 (old), corresponding to survey nos. 79/1, 107/1 and 121/1, more specifically described in para 1 of the plaint. Now deceased, Ankush Naik (plaintiff no. 1) had purchased a plot bearing plot no. C-8, from out of the aforesaid property and by virtue of his marriage with the plaintiff no. 2, Smita Naik, under the regime of Communion of Assets, plaintiff no. 2, Smita Naik had acquired co-ownership rights on the same.

2. The plaintiff no. 1 under a mistaken belief that he could sell half of the plot to their son Paresh Naik (defendant no. 4), executed a sale deed dated 26.04.1991, in favour of the defendant no. 4. After the deed of transfer, the plaintiff nos. 1 and 2, with the permission of their son, had constructed a house on the said plot, which is presently existing therein.

3. It appears that Paresh Naik (defendant no. 4) had obtained a loan from the Mapusa Urban Co-operative Bank Limited (defendant no. 3). On 01.04.2003, the plaintiffs learnt about the letter dated 26.03.2003, issued by the Recovery Officer of the Registrar of Co-operative Societies, regarding prohibition of private transfer of the said plot. As the defendant no. 3, sought attachment and sale of the said plot, for recovery of the loan, the plaintiffs filed the aforesaid suit, claiming that the sale deed executed in favour of the defendant no. 4 was null and void, in as much as, the plaintiff no. 1 had no authority to sell his half share to the defendant no. 4, without the consent of the plaintiff no. 2, the plaintiffs sought for several reliefs, including for a declaration that the said sale deed is null and void and that the sale deed does not confer any title to the moiety of the plaintiff no. 2 of the suit plot.

4. The plaintiffs sought for injunction restraining the defendant nos. 1, 2 and 3 for taking over or selling or transferring the suit plot for recovering the “alleged loan”. The plaintiffs also sought for declaration that Section 115 of the Multi-State Co-operative Societies Act, 2002 (Act, for short), is unconstitutional.

5. The defendant nos. 1, 2 and 3 resisted the suit. It was contended that the suit as framed and filed is not maintainable, particularly, for want of statutory notice under Section 115 of the Act.

6. The learned Trial Court framed the following issues:

1. *Whether the plaintiffs prove that by virtue of the marriage the plaintiff no. 2 acquired co-ownership right to the suit property ?*
2. *Whether the plaintiffs prove that the deed of sale dated 26.04.1991 is null and void ?*
3. *Whether the plaintiffs prove that the said deed does not confer any title to the moiety of the plaintiff no. 2 to the plot C-8 in favour of the defendant no. 4 ?*
4. *Whether the plaintiffs prove that the said deed does not confer any title in favour of defendant no. 4 to the suit bungalow ?*
5. *Whether the plaintiffs prove that the defendants no. 1, 2 and 3 have absolutely no right to sale and to dispossess the plaintiff from the suit property and from the suit building ?*

6. *Whether the plaintiffs prove that Section 115 of the Multi-State Co-operative Societies Act is unconstitutional ?*
7. *Whether the defendant no. 3 proves that the suit is not maintainable, as the plaintiffs have not served notice on the Central Registrar of Co-op. Society, as required by Section 115 of the Multi-State Co-operative Societies Act ?*
8. *Whether the defendant no. 3 proves that the defendant no. 3 had got the right to sell the suit plot and the house existing therein in public auction ?*

Additional Issue

1. *Whether the plaintiffs prove that the suit is filed within limitation period ?*

7. The learned Trial Court by a judgment and decree dated 31.07.2012, dismissed the suit, *inter-alia* on the ground that the suit was not maintainable, for want of notice under Section 115 of the Act and also on the ground that the same was barred by limitation. Feeling aggrieved, the appellants challenged the same before the learned District Judge in Regular Civil Appeal No. 132/2012.

8. The learned District Judge framed the following points for determination:

- (i) *Whether the plaintiffs could seek a declaration that the Deed of Sale dated 26.04.1991 in favour of defendant no. 4 is null and void ?*

- (ii) *Whether the suit property and the suit bungalow could have been attached by defendants no. 1 to 3 ?*
- (iii) *Whether the suit was not maintainable as it was filed prior to the expiry of 90 days after the notice under Section 115 of the Multi-State Co-operative Societies Act, 2002 ?*
- (iv) *Whether the suit is barred by limitation ?*

9. The learned District Judge answered point nos. (i), (ii) and (iv) in the negative and point no. (iii) in the affirmative. In short, the learned first Appellate Court held that the plaintiffs could not seek declaration that the deed of sale dated 26.04.1991, in favour of the defendant no. 4, was null and void and the suit was not maintainable, for want of compliance of notice under Section 115 of the Act. However, at the same time, the learned first Appellate Court found that the suit plot/bungalow could not have been attached by the Bank and has also found that the suit was not barred by limitation. In that view of the matter, the learned District Judge dismissed the appeal by a judgment and decree dated 24.10.2017. Feeling aggrieved, the appellants/plaintiffs are before this Court.

10. I have heard Ms. Desai, the learned Counsel for the appellants and Shri Mulgaonkar, the learned Counsel for the respondent nos. 1, 2 and 3. With the assistance of the learned

Counsel for the parties, I have gone through the record and the impugned judgment of the Trial Court and the first Appellate Court.

11. Ms. Desai, the learned Counsel for the appellants has raised a solitary contention. It is submitted that the provisions of Section 115 of the Act, requiring a notice before filing of the suit were not attracted in this case, in as much as, the suit and the reliefs claimed therein, would not be touching the constitution, management or the business of the Society. It is submitted that there was a separate loan obtained by the defendant no. 4, mortgaging the suit plot, which has been repaid in its entirety and thus, the Bank was not entitled to attach the suit plot in respect of the present loan. It is submitted that the suit was essentially for declaration of the sale deed, executed by the plaintiff no. 1, in favour of the defendant no. 4, as null and void. The learned Counsel was at pains to point out that the relief restraining the Bank from proceeding against the suit plot, was consequential or ancillary relief. It is thus submitted that for this reason also, there was no need to comply with the provisions of Section 115 of the Act.

On behalf of the appellants, reliance is placed on the decision of the Kerala High Court, in the case of **All India**

**Handloom Fabrics Marketing Co-operative Society Limited
Vs. Mathew, 2005 (2) Ker LT 191.**

12. On the contrary, Shri Mulgaonkar, the learned Counsel for the respondent nos. 1, 2 and 3 has supported the impugned judgment. The learned Counsel has pointed out para 20 of the plaint, in which, the appellants had accepted that the suit has to be preceded by a prior notice. However, the appellants expressed their inability to comply with the same, as according to the appellants, the Bank was trying to dispossess the plaintiffs from the suit property. It is thus submitted that the plaintiffs never made out any case that the notice under Section 115 of the Act was not necessary, on the ground that the suit and the reliefs claimed therein, were not touching the constitution, management or the business of the Society. It is submitted that the reliefs claimed in the suit clearly fall under the scope and ambit of Section 115 of the Act and the suit has rightly been held to be bad, for want of compliance with Section 115 of the Act. The learned Counsel has also made an attempt to challenge the findings on point no. (iv). It is submitted that the sale deed was executed on 26.04.1991, while the suit is filed in the year 2003. It is submitted that ignorance of law cannot be a ground to claim that the, period of limitation commenced, when the appellants

learnt about the incompetency of the plaintiff no. 1, to execute the sale deed in favour of the defendant no. 4. It is submitted that the decision in the case of **Mathew** (supra) is clearly distinguishable, as it arose under the provisions of the Rent Act.

13. I have carefully considered the circumstances and the submissions made. The appellants, in the appeal memo, have framed the following draft substantial questions of law:

- (i) *Whether the learned first Appellate Court was right in holding that the suit is not maintainable as the appellant has not served notice on the Central Registrar of Co-operative Societies of Multi State Societies Act as required under Section 115 of the Multi State Co-operative Societies Act in light of the fact that notice required under Section 115 of Multi State Co-operative Society Act is necessary only in respect of such acts of constitution, management or business or society ?*
- (ii) *Whether the learned first Appellate Court was right in holding that the respondent no. 3 has a right to sell the suit plot and house in public auction when infact the loan with respect to the property "Gonembatta e Parte da Horta Correspondents Ao Mesmo e Oiteiro Cazrem Manda Terceira Adicao, situated in the village of Calapur (St. Cruz), Taluka was already closed and a letter was obtained from the respondent bank that the loan was repaid on 08/06/1993 and as such the findings of the first Appellate Court is perverse ?*

Insofar as the substantial question of law at serial no.

(ii) above, the first Appellate Court has held that the respondent

no. 3 has no right to sell the suit plot and the suit house (which would be apparent from the findings at para 30 of the judgment) and therefore, the question does not arise in the said appeal.

14. The parties mainly addressed on the aspect of compliance of Section 115 of the Act, which reads thus:

“115. Notice necessary in suits.—No suit shall be instituted against a multi-State co-operative society or any of its officers in respect of any act touching the constitution, management or the business of the society until the expiration of ninety days next after notice in writing has been delivered to the Central Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.”

It can thus be seen that no suit can be instituted against the Society (defendant no. 3, which is admittedly a Multi State Co-operative Society by the said Act, governed by the said Act) or any of its officers, in respect of any act touching the constitution, management or the business of the Society, until the expiration of 90 days next after notice is served on the Central Registrar, in the manner as provided under Section 115 of the Act.

15. A bare perusal of the reliefs claimed in the suit would clearly show that the suit and the reliefs claimed therein are touching the business of the Society, in as much as, the appellants had sought injunction restraining the Bank from selling or transferring the suit plot for recovery of the loan. Granting and recovery of the loan, would clearly fall within the ambit of the business of the Society. The fact that the appellants were also seeking declaration that the sale deed executed in favour of the defendant no. 4, was null and void, would not make any difference, insofar as the substantive reliefs claimed against the Bank, is concerned. The relief about the declaration that Section 115 of the Act is unconstitutional, was beyond the purview of the jurisdiction of the Civil Court. Thus, the contention on behalf of the appellants that the suit is not the one touching the business of the Society, to my mind, cannot be accepted.

16. Reliance placed on the decision of the Kerala High Court in the case of **Mathew** (supra), to my mind, is misplaced. The issue in that case was whether, a notice under Section 115 of the Act, was necessary for filing an eviction petition under the Kerala Buildings (Lease and Rent Control) Act against a Multi-

State Co-operative Society. The Kerala High Court *inter alia* held that the proceedings for eviction, under the Rent Act cannot be termed as a suit. The Court further went on to hold that even if, the petition for eviction under the Rent Act can be said to be a suit, still a notice under Section 115 of the Act, would not be necessary, in as much as, the business of the petitioner-Society, was not to let out the buildings for rent. It can thus clearly be seen that the case turned on its own facts.

17. In the result, the Second Appeal is hereby dismissed, with no order as to costs.

C.V. BHADANG, J.

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