

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

LETTERS PATENT APPEAL NO.108 OF 2012

IN

WRIT PETITION NO. 1570 OF 2011

1. Yuvraj S/o Suka Mahajan,
Age: 66 Years, Occu: Retired,
R/o Plot No.1, Gajanan Kharedi
Vikri Kendra, Near Ganesh Colony
Stop, Jalgaon, Tq. & Dist. Jalgaon.
2. Hitwardhani Sahkari Gruha Nirman
Society Ltd., Jalgaon,
Through its Chairman,
Yuvraj S/o Suka Mahajan,
R/o Plot No.1, Gajanan Kharedi
Vikri Kendra, Near Ganesh Colony
Stop, Jalgaon, Tq;. & Dist. Jalgaon.

... APPLICANTS
(Orig. Resp. Nos.1 & 2)

VERSUS

1. Bajirao S/o Martand Mali,
Age: 66 Years, Occu: Retired,
R/o 4, Ganesh Colony Stop,
Jalgaon, Tq. & Dist. Jalgaon.
2. Pandharinath S/o Suka Mahajan,
Age: Major, Occu: Business,
R/o Plot No.1, Gajanan Kharedi
Vikri Kendra, Near Ganesh Colony
Stop, Jalgaon, Tq. & Dist. Jalgaon.

(Orig. Petitioner)

... RESPONDENTS
(Orig. Resp. No.3)

...
Mr. V. D. Hon, Senior Counsel, i/b Mr. A. D. Shinde, Advocate for Appellants.

Mr. Vijay B. Patil, Advocate for Respondent No.1.

Mr. Kailas B. Jadhav, Advocate for Respondent No.2.

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CORAM : **T. V. NALAWADE &
SUNIL K. KOTWAL, JJ.**

DATE : 06th February, 2019.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is filed to challenge the decision of the learned Single Judge of this Court delivered in Writ Petition No.1570 of 2011. The petition was filed by Respondent, Bajirao s/o Martand Mali to challenge the decision of Co-operative Appellate Court, Aurangabad. The said appeal was filed by the present Appellants to challenge the decision of the Co-operative Court given in Dispute No.44 of 1998, which was pending in Co-operative Court, Jalgaon. The dispute was filed under Section 91 of the Maharashtra Co-operative Societies Act for relief of declaration that the disputant, present Respondent Bajirao was owner of the disputed plot of the

housing society, sale-deed executed by the society in favour of Respondent No.3 of the dispute, namely Pandharinath Mahajan was not binding on him and also for relief of injunction. The Co-operative Court had decided the dispute in favour of Bajirao. Declaration was given that he is the owner of disputed plot and he was also in possession of the disputed plot. Relief of injunction was given and it was also declared that the sale-deed executed by the society in favour of Respondent No.3, Pandharinath Mahajan was illegal.

2 Both the sides are heard.

3 Appellant Yuvraj was the Chairman of the Appellant housing society on the date the dispute was filed in the Co-operative Court. It is the contention of Bajirao that one of portion of plot admeasuring 222.81 square meter belongs to him and it is in his possession. It is part and parcel of Gat No.99/3 situated at village Nimkhedi Khurd, Tahsil and District Jalgaon and it is part of plot No.17. It is contended that one Ramji Patil was member of the society and on 20th June, 1988 Ramji Patil transferred the plot and share under written agreement in favour of disputant Bajirao and

application was also moved by Ramji to see that share was transferred in the name of Bajirao. It is the contention of Bajirao that he had paid amount of Rs.14,000/- to the society and he had given amount of Rs.11,000/- as additional amount to defendant Yuvraj. It is contended that on the written document the then Chairman, R. A. Thakur and present Chairman Yuvraj had signed showing that they have no objection and they had witnessed the transaction between disputant Bajirao and member Ramji Patil. It is contended that the Plaintiff and Defendant Yuvraj were relatives from prior to the date of transaction, but due to some dispute between them which started subsequently, the relations became strained.

4 It is the case of Bajirao that after the transaction, pencil entry was made in his favour in the revenue record, but objection was taken to the said entry for the society by Yuvraj and the dispute started. It is contended that on 23rd February, 1998, he learnt that by taking some money, Yuvraj was trying to transfer the disputed plot to other person. It appears that after filing of the dispute before the Co-operative Court, the society transferred the disputed plot in favour of Respondent No.3, Pandharinath Mahajan and by making amendment

in the dispute, Pandharinath Mahajan was made party Respondent and aforesaid reliefs were claimed.

5 Yuvraj filed written statement for housing society and denied everything including the consent given on written transaction dated 20th June, 1988. It was also denied that Ramji was owner of the disputed plot. It was contended that the society was owner of the disputed plot and it had every right to transfer the plot to the eligible person.

6 Before the Co-operative Court, only Bajirao gave evidence and produced record. The society did not give evidence in rebuttal. The Co-operative Court held that it had jurisdiction to entertain the dispute in view of the nature of dispute and it gave aforesaid reliefs. The record like agreement signed in favour of disputant Bajirao, which was bearing the signature of Chairman was considered, letter issued by the society dated 4th January, 1989 to the disputant was considered, circumstance like sending of Agenda of the General Body of the Society with communication dated 24th January, 1989 and also with communication dated 4th July, 1989 was

considered. The signatures of the Chairman and also the present Appellant appearing on the record were considered and as this transaction was having consent of the then Chairman and subsequent record was there to show that the disputant Bajirao was treated as member, the Co-operative Court held that Bajirao was the member of the society. The other record like receipts in respect of payments are also considered.

7 The Co-operative Appellate Court decided in favour of the society by holding that there was no record of following the proper procedure to make Bajirao member of the society and so he was not the member. The Appellate Court also held that the Co-operative Court had no jurisdiction to entertain the dispute and set aside the decision of the Co-operative Court.

8 The learned Single Judge of this Court has restored the decision of the Co-operative Court by giving reasoning, which is similar to the reasoning given by the Co-operative Court. It is held by the learned Single Judge that the society was still in the stage of formation, process of acceptance of money was going on and there

was a record to show that Ramji, who was to be made member changed his plan and in his place Bajirao agreed to become member and the said transaction between Ramji and Bajirao was witnessed by the then Chairman of the society and also Yuvraj, who is present Chairman. The relevant provisions of the Maharashtra Co-operative Societies Act were considered by the learned Single Judge.

9 In view of the aforesaid circumstances, the learned counsel for disputant, Bajirao submitted that the appeal itself is not tenable. He submitted that the learned Single Judge exercised the power given under Article 227 of the Constitution of India as the Co-operative Court and Appellate Co-operative Court are under supervisory jurisdiction of this Court. Attention of this Court was drawn to the relevant Appellate Side Rules, Rules from Chapter XVII (Rule 18).

10 The learned counsel for Respondent, Bajirao placed reliance on some observations made by the Apex Court in the case reported as **(2015) 9 Supreme Court Cases 1**, (*Jogendrasinhji Vijaysinhji Vs. State of Gujarat and others*). The learned senior

counsel for Appellants argued not only on the point of tenability, but also on merits of the matter.

11 The rival claims and contentions of the two sides are already mentioned by this Court. The contention that Bajirao cannot be treated as member was considered by the Co-operative Court and the decision of the Co-operative Court is confirmed by the learned Single Judge of this Court. On merits also, it can be said that the learned Single Judge has held that there was a transaction as contended by Bajirao and rights of Ramji Patil were transferred in favour of Bajirao. It can be said that absence of record of procedure is not given much weight as the case of Bajirao that he got ownership rights from Ramji, who is not contesting the claim is accepted and due to this fact it was possible to hold that membership transferred along with ownership in respect of the plot. No evidence in rebuttal is given by the society and the present Chairman Yuvraj had signed on the aforesaid document of transaction and so it is not possible for him to take other defence like procedure. It is not the specific case of the society that any committee was constituted for giving membership and due to that the learned Single Judge of this Court has observed that

the society was in the process of formation and giving of membership was going on. Due to absence of evidence in rebuttal and due to presence of the record bearing the signatures of the then Chairman and also the present Chairman, such finding was possible.

12 On the point of maintainability, the learned senior counsel has placed reliance on the observations made by the Apex Court and this Court in many cases as under:

- a) **2018 (4) Mh.L.J. 952**, (*Janardhan Sadashiv Rane. Vs. Everkeen Blade Company Ltd. and another*);
- b) **(2004) 13 Supreme Court Cases 665**, (*Durga Enterprises (P) Ltd. and another Vs. Principal Secretary, Govt. of U.P. and others*);
- c) **2006 (7) SCC 496**, (*Kishori Lal Vs. Sales Officer, District Land Development Bank & Ors*);
- d) **2009 (10) SCC 584**, (*Ashok K. Jha & ors. Vs. Garden Silk Mills & Anr.*);
- e) **2011 (2) Mh.L.J. 916**, (*Advani Oerlikon Ltd.*

Machindra Govind Makasare and others);

- f) **2016 (13) SCC 561**, (*Delhi Development Authority Vs. Kenneth Builders and Developers Limited and others*);
- g) **1993 (1) Mh.L.J. 958**, (*Jagdish Balwantrao Abhyankar Vs. State of Maharashtra and others*);
- h) **1989 (3) Bom.C.R. 165**, (*Eknath Ashiram Alekar & others Vs. State of Maharashtra & others*);
- i) **2010 (1) Mh.L.J. 232**, (*Ramchandara Krushnarao Pitale Vs. Scientific Co-operative Housing Society Ltd., Laxminagar, Nagpur and others*);
- j) **2011 (4) Mh.L.J. 655**, (*Gautam s/o Kacharu Jagtap and others Vs. Assistant Registrar Co-operative Societies (Milk), Ahmednagar and others*) and
- k) **Letters Patent Appeal No.209 of 2010 in Writ Petition No.3559 of 1999**, (*Shri Sharad s/o Keshavrao Kubde and others Vs. Shri Jawahar Co-operative Housing Society Limited and*

others) decided by Nagpur Bench of this Court on 20th January, 2011.

13 The decision of the Apex Court in the case of *Jogendrasinhji Vijaysinhji Vs. State of Gujarat and others* (supra) shows that all the cases, which were decided in the past by the Apex Court on tenability of letters patent appeal under Clause 15 of Letters Patent are considered. The Apex Court has made it clear that when the matter comes from Civil Court to High Court, it can be only under Article 227 of the Constitution of India and that observation is in paragraph 18, which is as under:

“18. The aforesaid authoritative pronouncement makes it clear as day that an order passed by a civil court can only be assailed under Article 227 of the Constitution of India and the parameters of challenge have been clearly laid down by this Court in series of decisions which have been referred to by a three-Judge Bench in *Radhey Shyam*, which is a binding precedent. Needless to emphasise that once it is exclusively assailable under Article 227 of the Constitution of India, no intra-court appeal is maintainable.”

The observations made in paragraph 30 are as under:

“30. From the aforesaid pronouncements, it is graphically clear that maintainability of a letters patent appeal would depend upon the pleadings in the writ petition, the nature and character of the order passed by the learned Single Judge, the type of directions issued regard being had to the jurisdictional perspectives in the constitutional context. Barring the civil court, from which order as held by the three-Judge Bench in *Radhey Shyam* that a writ petition can lie only under Article 227 of the Constitution, orders from tribunals cannot always be regarded for all purposes to be under Article 227 of the Constitution. Whether the learned single Judge has exercised the jurisdiction under Article 226 or under Article 227 or both, needless to emphasise, would depend upon various aspects that have been emphasised in the aforestated authorities of this Court. There can be orders passed by the learned Single Judge which can be construed as an order under both the articles in a composite manner, for they can co-exist, coincide and imbricate. We reiterate it would depend upon the nature, contour and character of the order and it will be the obligation of the Division Bench hearing the letters patent appeal to discern and decide whether the order has been passed by the learned Single Judge in exercise of jurisdiction under Article 226 or 227 of the

Constitution or both. The Division Bench would also be required to scrutinise whether the facts of the case justify the assertions made in the petition to invoke the jurisdiction under both the articles and the relief prayed on that foundation. Be it stated, one of the conclusions recorded by the High Court in the impugned judgment pertains to demand and payment of court fees. We do not intend to comment on the same as that would depend upon the rules framed by the High Court.”

14 In view of the aforesaid observations of the Apex Court and the facts of the present matter, this Court has no hesitation to hold that there is nothing in the decision of the learned Single Judge to show that original jurisdiction, jurisdiction under Article 226 of the Constitution of India was required to be used by the learned Single Judge. Even if it is presumed that the petition was filed under Articles 226 and 227 of the Constitution of India, due to nature of relief claimed and decision given by the learned Single Judge, it needs to be presumed that the supervisory jurisdiction available under Article 227 of the Constitution of India is used by the learned Single Judge. For these reasons, this Court holds that on merits and also on tenability, the Appellants have no case. In the result, the letters

patent appeal stands dismissed. Pending civil application also stands disposed of.

15 The learned senior counsel requests for continuation of interim relief, which of the nature of *status-quo*. It is to be continued for four weeks.

[SUNIL K. KOTWAL, J.]

[T. V. NALAWADE, J.]

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