IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11753 OF 2016
(Vishnu s/o Daulatrao Pawar Vs. Moh. Nawab Moh.Ibrahim and others)
WITH
WRIT PETITION NO.11877 OF 2016

Mr.K.J.Suryawanshi, learned Advocate for the petitioner.
Mr.A.A.Khande, Advocate for respondent Nos. 1 and 2.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 08/02/2019

PER COURT :

1. In both these identical matters, notice has been issued to respondent No.3/Co-operative Society. Despite service on the said respondent, no appearance has been entered in these matters which are pending hearing for almost 3 years.

2. The petitioner in both these petitions is the same person, who is aggrieved by the impugned judgment and order dated 24/10/2016 (2 judgments) delivered in Appeal Nos.1/2015 and 2/2015, by the Maharashtra State Co-operative Appellate Court vide which the Appellate Court has remitted the original disputes bearing Nos.88/2010 and 145/2011 to the Co-operative Court for considering the application for condonation of delay and for deciding

the disputes afresh.

3. I have considered the strenuous submissions of the learned Advocates for the petitioner and the original disputants.

4. The nucleus of the dispute between the parties is the allotment of plots by the respondent/Housing Society to the disputants and the petitioner. There is no dispute that the plot allotted to the petitioner herein has been developed by him by taking financial assistance from a Bank and has constructed a house over the said plot. The disputants raised an issue as regards the specific allotment of the plots. The society has refrained from appearing before the Co-operative Court, Appellate Court and even before this Court. A say was filed by the society before the S.L.R. Jalna which reveals that plot Nos.97A and 97B were transferred to the present petitioner in view of the cancellation of the membership of the disputants.

5. It is not in dispute that the Co-operative Court contended in both the dispute cases that the limitation u/s 92 of the Maharashtra Co-operative Societies Act for raising such a dispute is 6 years from the date of the passing of the resolution/decision/act or omission etc. It is also not in dispute that the provisions of the Limitation Act,

1963 apply to the proceedings and as such, Section 5 would facilitate a decision on condonation of delay.

6. The Co-operative Court specifically concluded in the first petition that the delay was of 1 year beyond the limitation period of 6 years and was 2 years in the second petition. The petitioner who was arrayed as an opponent since the disputant claims that his plots were allotted to the petitioner, raised the issue of delay. The disputants canvassed before the Co-operative Court that there was no delay and as such, the case could be decided on its merits. The Co-operative Court concluded that both the proceedings suffer from a delay of 1 year and 2 years respectively and as there was no application for condonation of delay filed by the disputants, it declined to consider the aspect of delay. However, despite this situation, the Co-operative Court proceeded to express its view that the disputants had a very good case on merits.

7. The disputants approached the Appellate/Co-operative Court and filed its appeals. Before the appeals could be decided, applications for condonation of delay were filed by the disputants at the penultimate stage. The Appellate Court concluded that as the applications seeking condonation of delay were filed before the

Appellate Court, it would be appropriate for remanding the matter to the Trial Court for a decision on the applications before touching the merits of the case.

8. The petitioner has preferred these petitions contending that the Appellate Court could not have remanded the proceedings to the Co-operative Court in view of Order 41 Rule 23-A of the CPC. The grounds on which the disputes have been restored to the Trial Court, are not sustainable considering the law laid down by the Hon'ble Apex Court in the matter of **J.Balaji Singh Vs. Diwakar Cole and others [2017(14) SCC 207].**

9. Learned Advocate for the disputants submits that the disputants case was presented through an Advocate. It is not disputed that the cancellation of their membership occurred in 2003 and the disputes were filed with the delay of 1 and 2 years respectively. Grievance is that these litigants were unaware about the provisions of Law and the learned Advocate appearing on their behalf should have advised them to file applications for seeking condonation of delay. Such applications were subsequently filed before the Appellate Court. The said applications will have to be

decided either by the Appellate Court or by the Trial Court. In this backdrop, the Appellate Court has rightly remanded the matter with the direction to the Trial Court to decide the condonation of delay applications before touching the merits of the case.

10. I find that two issues in these petitions will have to be dealt with. Firstly, that whether this petitioner, who has already been allotted the plot in 2003 and has constructed a home on the said plot and has settled in his occupation of the said plot for the last 16 years, could be dislodged if it is concluded that the plots of the disputants should not have been allotted to this petitioner. Secondly, that whether the Appellate Court should be directed to decide the application for condonation of delay keeping in view that an appeal under the CPC is a continuation of the suit or whether such an application should be remitted to the Trial Court for adjudication.

11. Before dealing with the said two issues, it needs mention that if the Co-operative Court had concluded that the disputes suffer from delay and the delay could not be dealt with as there was no application for condonation of delay, then it (Court) did not have the jurisdiction to deal with the merits of the dispute and arrive at a

conclusion that the disputants have a good case on merits. Such conclusions were unwarranted.

12. It is obvious from the sequence of events that the disputants have approached the Co-operative Court belatedly. Their conduct should not cause any prejudice to the petitioner herein who is not at fault as it is the decision of the society to allot him the plots. There is no allegation that he has grabbed the plots from the disputants. As such, whatever would be the decision on the merits of the disputes, this petitioner cannot be dislodged or disturbed from the plots allotted to him on which he has constructed his home. If the disputants are held entitled to any plot, on the merits of their cases, the Society would have to arrange for a plot to be allotted to them or will have to compensate them if no plot is available.

13. With regard to the second issue, as to the decision on the application for condonation of delay is concerned, I do find that the disputants/litigants have suffered on account of the ill advise of their lawyer. The application for condonation of delay filed before the Appellate Court in view of Section 5 of the Limitation Act, being applicable, could have been conveniently filed before the Trial Court. On account of misjudgment on the part of an Advocate, these

disputants should not suffer.

14. In this backdrop, if the Appellate Court has deemed it proper to remit the dispute to the Co-operative Court with a direction to deal with the applications for condonation of delay, I do not find that the said view could be termed as being perverse or unsustainable, only because a second view is possible.

15. As such, both these petitions are disposed off. The litigating sides would appear before the Co-operative Court on 12/03/2019 since the said date has already been allocated. The Co-operative Court shall deal with the said applications on their own merits. Only if the delay is condoned and subject to the legal rights of the parties, the Co-operative Court would deal with the merits of the dispute without being influenced by any observations made by it earlier or by the Appellate Court in the judgments delivered in the appeals.

16. It is, however, made clear that if the disputants succeed in making out a case against the Co-operative Housing Society and are entitled for a plot/s, this petitioner shall not be disturbed from his occupation from the plots and the house that he has constructed thereon. Any illegality that may have been caused by the Co-

operative Society in allotting the plot to the petitioner, would make the co-operative society liable for all consequences arising therefrom, save and except, disturbing the possession of the petitioner.

17. Considering that the Society is not co-operating in this litigation, the Co-operative Court would direct service of notice on the said society even by substituted service through paper publication and if the society still thereafter fails to remain present, the verdict of the Court in the said proceedings would be squarely binding upon the said society.

18. Considering the conduct of these disputants in belatedly raising the dispute causing miseries to this petitioner, each of them shall compensate the petitioner by depositing Rs.10,000/- in this Court. This amount of Rs.20,000/- shall be deposited on or before 01/03/2019 and the petitioner would be at liberty to withdraw the said amount as costs without any conditions.

(Ravindra V.Ghuge, J.)