

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5579 OF 2019

MADHUKAR M KUDALE)...PETITIONER

V/s.

SHAIKH FAHMIDA ABDUL RASHID & ORS.)...RESPONDENTS

Shri.Manoj Gadkari, Advocate for the Petitioner.

Shri.Wasim Shaikh, Advocate for the Respondent No.1.

CORAM : A. M. BADAR, J.

DATE : 8th NOVEMBER 2019

P.C. :

1 This is a petition filed by the defendant no.3
challenging the order dated 2nd March 2019 passed by the learned
trial court thereby rejecting the application for framing additional
issue under Order 14 Rule 5(1) of the Code of Civil Procedure
(hereinafter referred to as the CPC for the sake of brevity) moved
by the petitioner/defendant no.3.

2 Heard finally.

3 The learned counsel appearing for the petitioner/
defendant no.3 argued that defendant no.2 Co-operative Society
is proceeded without written statement before the learned trial
court. However, the petitioner/defendant no.3 so also the
defendant no.1 have filed their written statement contesting the
suit and have raised objection to the jurisdiction of the learned
trial court by contending that the suit, as framed and filed, is not
maintainable in view of provisions of Section 163 of the
Maharashtra Co-operative Societies Act. Therefore, the learned
trial court ought to have framed the issue regarding jurisdiction.
However, as that issue was not framed, an application was moved,
which came to be rejected. The impugned order, as such,
according to the learned counsel for the petitioner/defendant
no.3, is totally contrary to the provisions of law.

4 The learned counsel for the plaintiff/respondent no.1
vehemently opposed the petition by contending that the dispute is

not falling under Section 91 of the Maharashtra Co-operative Societies Act and there was no need for issuing statutory notice as envisaged by Section 164 of the said Act. The matter is in respect of sale of common terrace by the builder/defendant no.1 to the petitioner/defendant no.3, and as such, issue of jurisdiction does not arise.

5 I have considered the submissions so advanced and perused the impugned order as well as the material placed on record by the parties. Suit came to be filed by respondent no.1 with a prayer that defendant no.1/builder be directed to cancel the transfer of suit common terrace sold to the petitioner/defendant no.3. It is further prayed that the suit terrace is a common area as per the provisions of the Maharashtra Co-operative Societies Act and defendant nos.2 and 3 be directed by mandatory injunction to open the suit terrace for common use of members of the Society. The Society is arraigned as defendant no.2 in the said suit. It is not in dispute that the said Society was proceeded without written statement.

6 The suit is contested by defendant no.1 and defendant no.3, who happens to be the petitioner, by filing separate written statement. Both these defendants have raised material proposition of law to the effect that suit is barred by law. The petitioner in the opening paragraph of the written statement has contended that the plaintiff is a member of defendant no.2 Society, and therefore, jurisdiction of the Civil Court is barred, as per provisions of the Maharashtra Co-operative Societies Act. It is further averred that the suit is not maintainable in view of provisions of Section 163 of the Maharashtra Co-operative Societies Act, as no Civil Court has jurisdiction to entertain the trial and decide the suit in respect of dispute which can be referred to the Co-operative Court for decision. It is averred that the dispute is related to the business of the Society and the suit is instituted against the Society in respect of the matter touching the affairs of the Society. Similarly, defendant no.1 has raised issue regarding jurisdiction of the Civil Court to try the dispute of the present nature by contending that the plaintiff is a member of defendant no.2 Co-operative Society and therefore, as per

provisions of the Maharashtra Co-operative Societies Act, the plaint is liable to be returned to the plaintiff, as the suit itself is not maintainable.

7 On the basis of rival pleadings, the learned trial court has framed issues. Perusal of issues framed by the learned trial court goes to show that the issue regarding jurisdiction, in the light of pleadings of defendant nos.1 and 3, was not framed. This prompted the petitioner/defendant no.3 to move an application for framing of additional issue. The same came to be rejected primarily for the reason that the Co-operative Society has not raised this contention. In addition, the learned trial court held that the application is belatedly filed and framing of additional issue will revert the proceedings to a back stage causing prejudice to the plaintiff. It is also held that the dispute between the parties is not touching the business of the Co-operative Society as envisaged in Section 91 of the Maharashtra Co-operative Societies Act, and therefore, notice under Section 164 of the said Act is not necessary.

8 In my considered view, the approach of the learned trial court in prejudging the issue is totally erroneous. Written statement of defendant no.1 and defendant no.3 is certainly containing material assertions regarding jurisdiction of the Civil Court to try the suit. In the light of those averments in the written statement of both defendants, it was incumbent on the part of the learned trial court to frame the issue regarding jurisdiction of the Civil Court to try the suit of the present nature. For not framing the said issue, despite averments in the pleadings by defendants, the trial court ought not to have blamed the petitioner/defendant no.3 by asserting that the application is belatedly filed and framing of additional issue would revert back the proceedings, causing prejudice to the plaintiff. It is well settled that the act of the court should not prejudice anybody. In the present case, the learned trial court was oblivious of the assertions made by defendants in the written statement while framing of issues, and as such, it ought not to have blamed the defendant no.3, who had pointed out his assertion in the written statement for claiming framing of the additional issue. Similarly, at the stage of deciding

the application for framing of additional issue, the court is not expected to give its finding on the said issue. The impugned order, as such, cannot be sustained and therefore the order :

ORDER

- i) The petition is allowed.
- ii) The impugned order is quashed and set aside.
- iii) The application at Exhibit 146 moved by the petitioner/defendant no.3 is allowed and the learned trial court is directed to frame the necessary issue, in the light of pleadings in the written statement of the petitioner/defendant no.3 and then to proceed with the suit according to law.

(A. M. BADAR, J.)