

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 229 OF 1994

The Nashik Industrial Co-op. Estate Ltd.,
Satpur, District Nashik

... **Petitioner**

V/s.

Nandlal Nevandram Chhabriya
Since deceased through his legal
heirs and representatives :-
1-A. Smt.Nirmala Nandlal Chhabriya
1-B. Omprakash Nandlal Chhabriya
R/o. 452/53, Shanti Sudha, 15th Road,
Khar, Bombay 400 052.

... **Respondents**

Mr.P.N. Joshi for Petitioner.

Mr.Sunil Gangan i/b. M/s.RMG Law Associates for Respondents.

CORAM : A.S. GADKARI, J.

DATE : 6th June 2019.

ORAL JUDGMENT :-

1] By the present petition under Article 227 of the Constitution of India, the petitioner-Society has taken exception to the Judgment and Order dated 29th September 1993, passed by the learned Incharge

President of Maharashtra State Co-operative Appellate Court, Mumbai, thereby allowing the Appeal No.421 of 1992 preferred by the respondents and dismissing the Appeal No.434 of 1992 preferred by the Appellant-Society seeking damages from the respondents.

2] Heard Mr.Joshi, the learned counsel for the petitioner-Society and Mr.Gangan, the learned counsel for the respondents. Perused the record.

3] The petitioner is a Co-operative Society registered under the provisions of *The Maharashtra Co-operative Societies Act, 1960* [hereinafter referred to as “M.C.S. Act” for the sake of brevity] and the Rules framed thereunder.

The record discloses that the petitioner-Society has taken land on lease basis from the Maharashtra Industrial Development Corporation and the said land was divided into small plots and was allotted to its members for setting up their industrial projects. The predecessor-in-title of the respondents i.e. Mr.Nandlal N. Chhabria was a member of the petitioner-Society and plot bearing No.B-10 was allotted to him. After his demise it was succeeded by the respondents as his legal heirs. It appears that the respondents had established a project of

manufacturing of mosaic tiles and related industrial business on the said plot.

4] It is the case of the petitioner-Society that Mr.Nandlal N. Chhabria unauthorizedly acquired possession and committed encroachment on plot No.B-9 admeasuring 2221 square meters which is adjacent to plot No.B-10. The said plot No.B-9 was never allotted to the respondents. However, the respondents committed encroachment on the said plot by damaging barbed wire compound erected on the said compound in the year 1980. That the respondents despite notice from the petitioner-Society did not restore possession of the said plot of land by vacating it and failed to handover vacant and peaceful possession of the said plot No.B-9 to the petitioner-Society.

5] The petitioner-Society was therefore constrained to file a dispute in the Co-operative Court at Nashik under Section 91 of the M.C.S. Act bearing ABN Case No.1289 of 1986 for recovery of possession and damages to the tune of Rs.92,000/- from the respondents with future interest at the rate of 18% per annum from the year 1980 and for other ancillary reliefs. After receipt of summons, the respondents appeared in the said proceedings and filed their written statement. The

trial Court framed issues in the matter. The petitioner-Society examined two witnesses in support of its case. The respondents did not lead independent evidence by examining their witnesses. The trial Court after recording the evidence and after hearing the parties to the said dispute was pleased to partly allow the same by ordering the respondents to handover quite, vacant and peaceful possession of plot No.B-9 to the petitioner-Society, by its Judgment and Order dated 27th July 1992. The claim of the petitioner-Society for damages was not accepted by the trial Court by holding that, no evidence in that behalf is adduced by the petitioner-Society to accept their claim.

6] The respondents feeling aggrieved by the said Judgment and Order dated 27th July 1992 preferred Appeal No. 421 of 1992 before the Maharashtra State Co-operative Appellate Court, Mumbai. The petitioner-Society also preferred Appeal No.434 of 1992 against rejection of their claim for damages by the trial Court. The Appellate Court heard both the appeals and allowed the Appeal No.421 of 1992 preferred by the respondents and dismissed the Appeal No. 434 of 1992 preferred by the petitioner-Society by its Judgment and Order dated 29th September 1993.

While allowing the appeal of the respondents, the Maharashtra State Co-operative Appellate Court has held that the Co-operative Court will not have jurisdiction under Section 91 of the M.C.S. Act to entertain a dispute between the petitioner-Society and the respondents seeking their eviction with respect to plot No. B-9 of which the respondents are not members. The Appellate Court relied on a decision of this Court in the case of *Kalawati Ramchandra Malani Vs. Shankarrao Patil*, reported in 76 Bombay Law Reporter page 718.

7] Mr. Gangan, learned counsel appearing for the respondents vehemently opposed the petition and submitted that, as the petitioners are not members of plot No. B-9, a dispute under Section 91 of the M.C.S. Act is not maintainable before the Co-operative Court and therefore, the Co-operative Court will not have jurisdiction under Section 91 of the M.C.S. Act to decide the said dispute. He submitted that, the Appellate Court has rightly relied upon the decision in the case of *Kalawati Ramchandra Malani (supra)*. He submitted that, the Judgment and Order passed by the Co-operative Appellate Court need not be disturbed by this Court and the same may be confirmed by dismissing the present Petition.

8] Perusal of record would clearly indicate that, the respondents are members of the petitioner-Society and were allotted plot No. B-10 by the petitioner-Society for conducting their business. It is an admitted fact on record that, the respondents were not allotted plot No. B-9 by the petitioner-Society. It is also admitted fact on record and as established by the petitioner, that the respondents unauthorizedly acquired possession of and committed encroachment on plot No.B-9 which is adjacent to plot No.B-10.

9] It is the well settled position of law that, a person becomes member of the society and then as a consequence thereof gets allotment of a plot/premises/tenement in the society. It is further the settled position of law that, a person becomes member of the society and can be allotted more than one premises/tenement in it. However, he need not be a member qua each tenement acquired by him in the said society. Member's right to possession of the premises in a housing society is the incident of his membership of the society and not based on any contract or lease with it.

10] The Division Bench of this Court in the case of *Contessa Knit Wear Vs. Udyog Mandir Co-operative Housing Society*, reported in 1980

Mh.L.J. 539, in paragraph No.6 has held as under :-

“6. It is, however, well settled that the question of jurisdiction has to be decided by reference to the averments in the plaint or the application raising the dispute in the present case. The Society claims possession of the premises, as its owner, from its member, on the ground of his having let in the petitioner therein, in breach of the Bye-laws. The claim against the petitioner is incidental to the claim against the member because of his being privy to the said breaches. Though the member is loosely referred to as 'tenant', member's right to possession of the premises in such a Housing Society is the incident of his membership of the Society, and not based on any contract of lease with it. These averments, as to the cause of action and status of the parties clearly attract the provisions of Section 91 of the Co-operative Societies Act and the jurisdiction of the Registrar or his nominee thereunder.”

The learned Single Judge of this Court in the case of *Sudhir Co-operative Housing Society Ltd. Vs. State of Maharashtra and Others*, reported in 2010(1) All MR 833, in paragraph No.6 has held as under :-

“6. It cannot be disputed that Co-operative Courts were constituted under the Maharashtra Co-operative Societies Act as a substitute for Civil Courts to deal with the matters pertaining to the Co-operative Societies in relation to its business etc. Section 91 of the Act provides for the jurisdiction of the Co-operative Court

and the matters which the Co-operative Court is entitled to adjudicate. The dispute regarding sale or specific performance of contract or conveyance of title is a dispute purely of civil nature and for deciding the rights of the parties in respect of a property dispute, it is a Civil Court which is the Court of law entitled to adjudication upon such civil rights of the parties in relation to the properties. Since the Co-operative Court has been made a substitute for Civil Courts, it is the Co-operative Court in respect of the Co-operative Societies and its members which performs the job of the Civil Court and it is that Court which will have jurisdiction to decide such dispute between the parties.”

11] In the present case, the respondents being members of the petitioner-Society were allotted and were in possession of plot No. B-10. It is an admitted fact on record that the petitioner-Society never allotted plot No. B-9 owned by it to the respondents. The plot No.B-9 being adjacent plot, the respondents unauthorizedly acquired possession of and committed encroachment on plot No.B-9. As noted earlier, the respondents committed encroachment upon the adjacent plot No.B-9 belonging to the petitioner being members of the petitioner-Society and therefore, it gives rise to dispute between the Society and its members for invoking jurisdiction of the Co-operative Court under Section 91 of

the M.C.S. Act.

12] The record indicates that, the decision relied upon by the Appellate Court in the case of *Kalawati Malani (supra)* deals with a dispute between a member and his licensee with regard to the possession of flat which does not contemplate a dispute under Section 91 of the Maharashtra Co-operative Societies Act and therefore, it has been held therein that, such a dispute is not maintainable. The facts in the case of *Kalawati Malani (supra)* are totally different than the facts in the present case.

13] As noted earlier, in the present case, it is a dispute between the petitioner-Society and its members, i.e. the respondents, pertaining to the encroachment committed by the respondents on the adjoining plot of a land belonging to the petitioner-Society by them. Therefore, the conclusion reached by the Appellate Court is erroneous in view of the facts involved in the present case. The trial Court has categorically recorded a finding that, the respondents have committed encroachment over the property belonging to the petitioner-Society in their capacity as members of the petitioner-Society.

14] In view of the above, the impugned Judgment and Order dated 29th September 1993 is hereby quashed and set-aside and the judgment and order dated 27th July 1992 passed by the Co-operative Court, Nashik in Case No.1289 of 1986 is hereby upheld.

15] The respondents are directed to handover quite, vacant and peaceful possession of plot No.B-9 to the petitioner-Society within a period of four weeks from the date of uploading of the present Order on the High Court website.

16] Petition is allowed in the aforesaid terms.

[A.S. GADKARI, J.]