

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.13495 OF 2017

Kulgaon Sahakari Grihamandal Ltd.,
through its Secretary
Ganesh Mandir, Kulgaon Sahakari
Grihamandal, Kulgaon Badlapur
Tal: Ambarnath Dist. Thane.

.... Petitioner

- Versus -

1. Government of Maharashtra
through Secretary
Town Planning and Development
Department, Mantralaya
Mumbai.

2. Kulgaon Badlapur Nagar Parishad
through Chief Officer
Nagarparishad, Dube Hospital
Building, 1st Floor, Adarsh
Vidya Mandir Road
Badlapur (East)
Tal Ambarnath Dist. Thane.

3. Abhijit R. Khadakban,
residing at Plot No.51
Kulgaon Sahakari Grihamandal
Kulgaon Badlapur
Tal: Ambarnath Dist. Thane.

.... Respondents

WITH

WRIT PETITION NO.13494 OF 2017

Kulgaon Sahakari Grihamandal Ltd.,
through its Secretary
Ganesh Mandir, Kulgaon Sahakari
Grihamandal, Kulgaon Badlapur
Tal: Ambarnath Dist. Thane.

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1. Government of Maharashtra
through Secretary
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2. Kulgaon Badlapur Nagar Parishad
through Chief Officer
Nagarparishad, Dube Hospital
Building, 1st Floor, Adarsh
Vidya Mandir Road
Badlapur (East)
Tal Ambarnath Dist. Thane.
3. Pravin Laxman Jage,
residing at Plot No.54
Kulgaon Sahakari Grihamandal
Kulgaon Badlapur
Tal Ambarnath Dist. Thane.
4. Pranali Pravin Jage
residing at Plot No.54
Kulgaon Sahakari Grihamandal
Kulgaon Badlapur
Tal Ambarnath Dist. Thane.

Mr. Milind M. Godbole with Mr. Aditya Desai for
the Petitioner in both petitions.

Ms M.P. Thakur, Assistant Government Pleader, for
Respondent No.1 in both petitions.

Mr. D.P. Adsule for Respondent No.2 in both petitions.

Mr. B.D. Joshi for Respondent No.3 in WP-13495/2017
and Respondent Nos.3 & 4 in WP-13494/2017.

CORAM: S.C. DHARMADHIKARI &
B.P. COLABAWALLA, JJ.

DATE : MARCH 22, 2019

ORAL ORDER (Per Shri S.C. DHARMADHIKARI, J.):

1. On these petitions, on 5-2-2018, the following order
was passed:-

“1. Mr. Dalvi, the learned counsel for respondent Nos.3 and 4 at the outset submits that the Occupation Certificate is already granted in his clients' favour. In the light of this statement, the learned counsel for the petitioners seeks leave to amend the petition to enable them to challenge Occupation Certificate. Leave is granted as prayed for. Necessary amendment to be carried out within three weeks.

2. In the meanwhile we direct the respondent Nos.2, 3 and 4 to file affidavit in reply.

3. Stand over to 05th March 2018.”

2. To our mind, though there are two petitions, the facts in both are more or less identical and the legal issue

common. They can be conveniently disposed of by this common Order. Heard.

3. We take the facts from Civil Writ Petition No.13495 of 2017.

4. It is apparent that by this petition what the petitioner is challenging is the act of respondent No.3 by which he has allegedly been permitted by the 2nd respondent to put up some construction.

5. According to the petitioner's Advocate, respondent No.3 has obtained a commencement certificate and that is under challenge. If that and the consequential certificates are under challenge, then irrespective of the said respondent being the Member of the petitioner/Society, the petitioner/Society has no remedy other than approaching this Court in its writ jurisdiction.

6. To appreciate these arguments, we will reproduce the prayers (a) to (f) of both the petitions. They read thus:-

Writ Petition No.13495 of 2017

“(a) This Hon'ble Court may be pleased to call the records and documents in respect of the Building permission and commencement certificate dated 19-03-2015 granted by Respondent no.2 to the Respondent no.3 and 4 and to issue appropriate writ of Mandamus, Prohibitory or other Writ and be pleased to quash and set aside Building permission and commencement certificate dated 19-03-2015 granted by Respondent no.2 to the Respondent no.3.

(b) This Hon'ble Court may be pleased to issue appropriate writ of Mandamus, directing the Respondents to grant fresh commencement Certificate and building permission only for the residential use of the Respondent no.3.

(c) This Hon'ble Court may be pleased to direct the Respondent no.3 to stop the construction of the Commercial and Residential premises which is been undertaken on plot No.51 of the Petitioner Society.

(d) This Hon'ble Court may be pleased to issue direction to the Respondent no.2 thereby prohibiting them from granting the completion certificate and/or occupation certificate in respect of plot no.51, lying and being situated on Survey No.35/3 lying and being situate at Kulgaon Tal: Ambarnath, Dist. Thane.

(e) This Hon'ble Court may be pleased to prohibit the Respondent no.3 from using the premises under construction on plot no.51 of the Petitioner Society for commercial purpose, individually or through agents and servants.

(f) This Hon'ble Court be pleased to prohibit the Respondent no.2 from granting any permission to any member of the Petitioner Society for commercial use of the respective plots in the Petitioner Society without proper consent of the society in writing.”

Writ Petition No.13494 of 2017

“(a) This Hon'ble Court may be pleased to call the records and documents in respect of the Building permission and commencement certificate dated 19-03-2015 granted by Respondent no.2 to the Respondent no.3 and 4 and to issue appropriate writ of Mandamus, Prohibitory or any other appropriate Writ and be pleased to quash and set aside Building permission and commencement certificate dated 19-03-2015 granted by Respondent no.2 to the Respondent no.3 and 4.

(b) This Hon'ble Court may be pleased to issue appropriate writ of Mandamus, directing the Respondents to grant fresh commencement Certificate and building permission only for the residential use of the Respondent no.3 and 4.

(c) This Hon'ble Court may be pleased to direct the Respondent no.3 and 4 to stop the construction of the Commercial and Residential premises which they are undertaken in respect of plot no.54, lying and being situated on Survey No.35/3 lying and being situate at Kulgaon Tal: Ambarnath, Dist. Thane.

(d) This Hon'ble Court may be pleased to issue direction to the Respondent no.2 thereby prohibiting them from granting the completion certificate and/or occupation certificate in respect of plot no.54, lying and being situated on Survey No.35/3 lying and being situate at Kulgaon Tal: Ambarnath, Dist. Thane.

(d) This Hon'ble Court may be pleased to issue direction to the Respondent no.2 to quash and set aside the completion certificate and occupation certificate dated 20th April 2017 in respect of plot no.54, lying and being situated on Survey No.35/3 lying and being situate at Kulgaon Tal: Ambarnath, Dist. Thane.

(d1) This Hon'ble Court may be pleased pending hearing and final disposal of the Petition to restrain the Respondent no.3 and 4 from using and utilising the said premises for commercial use in any manner what so ever.

(e) This Hon'ble Court may be pleased to prohibit the Respondent no.3 and 4 from using the premises under construction on plot no.54 of the Petitioner Society for commercial purpose, individually or through agents and servants.

(f) This Hon'ble Court be pleased to prohibit the Respondent no.2 from granting any permission to any member of the Petitioner Society for commercial use of the respective plots in the Petitioner Society without proper consent of the society in writing.”

7. We see nothing else except the case of the petitioner and that is evident from the memo. The first paragraph says that, the petitioner is a Co-operative Housing Society registered under the Maharashtra Co-operative Societies Act, 1960 (“the MCS Act” for short), whereas respondent No.1 is the State and the 2nd respondent is the Kulgaon Badlapur Nagar Parishad. The 3rd respondent is the Member of the petitioner/Co-operative Housing Society. It is claimed that the petitioner was issued a permission on 26-9-1971 by the Gram Panchayat for formation of a Housing Society and thereafter, on 27-9-1971, it was registered.

8. The object is to provide residential accommodation to its Members. It is a tenant-ownership Society.

9. A plot of land, more particularly described in para 4 and Exhibit-C to the petition, is claimed to be owned by the petitioner and how it was acquired has then been narrated in the further paragraphs.

10. It is claimed that a non-agricultural permission was granted on 20-9-1973, copy of which is at Exhibit-E. Then it is stated that the petitioner/Society carried out some welfare activity and enrolled Members. There are 57 small plots which have been allotted to these Members. One of the plots and which is the subject-matter of this petition was earlier belonging to the Joshis. The 3rd respondent made an application for transfer of the Membership and submitted and executed the transfer forms. He also gave an Undertaking under Bye-law 19(IV) categorically stating that no change of user would be made without the previous permission, in-writing, of the Managing Committee of the Society. This Undertaking is dated

25-4-2011, copy of which is at Exhibit-F, based on which he was admitted as a Member of the petitioner/Society.

11. Then it is claimed that the 3rd respondent sought permission for the reconstruction of the bungalow on Plot No.51, allotted to him, and submitted the reconstruction plan. It was informed to him on 9-4-2012 that the permission is granted purely to construct or to build a residential house. It is then claimed that the 3rd respondent somehow managed to by-pass the Undertaking, the binding Resolutions and decisions of the Society as also the specific permission granted vide letter dated 9-4-2012 and made a construction and which construction is based on a commencement certificate dated 19-3-2015. A plot bearing No.54, allotted to one Pravin Jage (3rd respondent in connected Civil Writ Petition No.13494 of 2017), resulted in respondent No.3 (allottee of plot No.51) colluding with each other. A commercial construction was noticed on the plot by the petitioner on 4-5-2016. It then got a copy of the approved plan and realised that contrary to the permission granted, a commercial construction has been carried out. That is how the

Nagar Parishad was requested to take action but it refused.

12. Para 20 onwards, how the efforts made by the petitioner to get rid of that construction have been set out and equally the cancellation of the No Objection Certificate (NOC) granted to the construction, issued in favour of the 3rd respondent, ensued. When the 3rd respondent was not stopping the construction, the petition has been filed.

13. When we enquired from the petitioner's Advocate as to how these petitions can straightaway be filed in this Court, his only contention was that, because the petitioner is impugning a commencement certificate and also the further permissions purportedly granted by respondent No.2/Planning Authority, no Court, including a Civil and a Co-operative Court, will ever entertain this grievance as their jurisdiction is barred. Reliance in this behalf is placed on Section 149 of the Maharashtra Regional and Town Planning Act, 1966 ("the MRTP Act" for short).

14. We cannot presume that the Co-operative Court, if

approached against a Member of the Society and complaining about his illegal acts much less his activity of putting up a commercial construction allegedly in violation and breach of the Bye-laws, the specific No Objection Certificate of 9-4-2012 as also the further issues cropping up therefrom, cannot be made the subject-matter of a dispute under Section 91 of the MCS Act. That the commencement certificate and the other documents are incidental, in the sense that if the petitioner has taken action against the 3rd respondent-Member of cancellation of the NOC and has specifically warned him of the consequence of filing his Undertaking of 25-4-2011, then, qua him the dispute can be resolved by the Co-operative Court. Once the petitioner is armed with an order of the Co-operative Court or a prohibitory direction, then it can approach the 2nd respondent and request it to intervene and take action of recalling the commencement certificate and the other permissions. In the event they do not abide by the orders of the Competent Court in favour of the petitioner/Society, then possibly a grievance can be raised.

15. We are mindful of the fact that there is a bar created

by Section 149 of the MRTP Act. That bar is created so as to discourage the tendency of parties to impugn before the Civil Court the acts and deeds of the authorities under the MRTP Act. However, that by itself will not constitute a bar in every case. Whether such a bar is attracted or not will depend upon the facts and peculiar circumstances of each case. A general rule cannot be laid down. Ultimately, it is the cause of action, the nature of the reliefs which will be determinative. One cannot presume that the bar will straightaway be attracted. It can never be attracted, at least qua respondent No.3 who is claiming to be a Member of the Society and who is dealing with the Society alone. The petitioner can definitely proceed against him.

16. We have not seen such an action emerging against this respondent from the records of this case. Hence, it is difficult to accept the arguments of the petitioner's Advocate.

17. In the event the petitioner impleads respondent No.2 as a party to the dispute, it can of course throw light and assist the Co-operative Court by pointing out as to how it has

proceeded in the matter. If the whole commencement certificate is based on the NOC or permission of the Society and the Undertaking by the 3rd respondent, then of course the 2nd respondent may be directed, and depending upon several other factors, to consider withdrawing the commencement certificate.

18. We are, therefore, not in agreement with the petitioner's Advocate that the petitioner has no alternate or equally efficacious remedy. The dispute in this case is purely factual. Whether the 3rd respondent has indeed violated the Undertaking or the NOC or whether the Society Bye-laws can be interpreted only in terms of the understanding thereof by the petitioner are all matters which will have to be resolved by a Competent Court after it is approached and evidence is led before it by a party on whom the burden rests in law. In such circumstances, we do not think that the writ petitions can be entertained.

19. By clarifying that we have not expressed any opinion on the point of jurisdiction of the Co-operative Court, the

maintainability of the dispute or proceedings before the Competent Civil Court and keeping all contentions of all the parties open, we dispose of these writ petitions.

(B.P. COLABAWALLA, J.)

(S.C. DHARMADHIKARI, J.)