

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.893 OF 2010

Pramod Maganlal Mehta ... Petitioner
Vs.
State of Maharashtra and others ... Respondents

AND
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11974 OF 2016

Good Earth Co-operative Housing Soc. Ltd. ... Petitioner
Vs.
Pramod Maganlal Mehta ... Respondent

Mr. Prosper Dsouza for Petitioner in W.P. No.893 of 2010 and for Respondent in W.P.No.11974 of 2016.

Ms Khushboo Rohra i/b. Mr. Sahil Mahajan for Petitioner in W.P.No.11974 of 2016.

Ms Sandhya Shukla for Respondent No.4 in W.P. No.893 of 2010.

Ms Uma Palsuledesai, AGP for Respondent-State in W.P.No.893/2010.

Mr. N. C. Walimbe, AGP for Respondent-State in W.P.No.11974/16.

CORAM : UJJAL BHUYAN, J.

DATE : JANUARY 13, 2020

P.C. :

This order will dispose of both Writ Petition Nos.893 of 2010 and 11974 of 2016 as issues raised in the two writ petitions are inter-related.

2. Heard Mr. D'souza learned counsel for the petitioner in Writ Petition No.893 of 2010 and for the respondent in Writ Petition No.11974 of 2016; also heard Ms Rohra, learned counsel for the petitioner in Writ Petition No.11974 of 2016 and Ms Shukla, learned counsel for respondent No.4 in Writ Petition No.893 of 2010.

3. For the sake of convenience, it is considered necessary to briefly narrate the facts case wise.

Writ Petition No.893 of 2010

4. In this petition filed under Article 226 of the Constitution of India, petitioner seeks quashing of recovery certificate dated 23.10.2007 issued by respondent No.3 under Section 101 of Maharashtra Co-operative Societies Act, 1960 (briefly 'the Act' hereinafter) as well as order dated 06.01.2010 passed by respondent No.2 dismissing the revision petition filed by the petitioner.

5. Petitioner in this case is Shri Pramod Maganlal Mehta, who is a member of respondent No.4, which is a co-operative housing society registered under the Act. Petitioner is the owner of flat No.2-A/8 on the third floor of the building 2-A of respondent No.4 (referred to hereinafter as the 'suit flat').

6. It is stated that petitioner was regularly paying all the bills of respondent No.4 in respect of the suit flat.

7. The building in question was constructed around the year 1965 and now requires extensive repair works. In fact, major repair works were carried out during the period 1996/97. In this connection, respondent No.4 had collected Rs.63,000.00 from the members as their respective contribution. Petitioner also paid the said amount.

8. When respondent No.4 proposed to do water proofing work in the terrace of the said building, it was objected to by the petitioner on the ground that petitioner's side of the terrace was fitted with marble chips at his own cost; there was no water leakage problem from the ceiling of the suit flat. Notwithstanding such request of the petitioner, respondent No.4 started water proofing work on the terrace.

9. Though the work was stated to have been completed, petitioner found at the time of 'pounding test' that the ceiling of the suit flat was

leaking profusely. He immediately brought this to the notice of the office bearers of respondent No.4, which resulted in a series of correspondence.

10. Ultimately, architect of respondent No.4 issued a certificate dated 04.04.2000 certifying the extent of damage caused by the leakage and seepage and also quantified the amount of loss suffered by the petitioner, advising that the same be recovered from the dues of the contractor. However, no steps were taken to stop leakage or for carrying out the rectification works.

11. Ultimately, following special general body resolution dated 03.03.2003, respondent No.4 issued a letter to the petitioner of even date to do the following:-

- 1) to carry out the repairs and rectification work at its own cost;
- 2) to reimburse the petitioner the damages and loss suffered by him because of previous defective works; and
- 3) till such repairs and rectification works were carried out and till leakage and seepage was stopped completely, petitioner was not liable to pay any outgoings in respect of the suit flat.

12. It is stated that even thereafter respondent No.4 did not carry out the repair and rectification works. Instead respondent No.4 filed an application before respondent No.3 on 08.06.2007 for issuance of recovery certificate against the petitioner under Section 101 of the Act. Petitioner contested the said application of respondent No.4 by filing written statement.

13. After hearing the matter, respondent No.3 granted recovery certificate dated 23.10.2007 in favour of respondent No.4 quantifying the recovery amount at Rs.1,64,298.00 with interest to be recovered from the petitioner.

14. Aggrieved by grant of such recovery certificate, petitioner preferred a revision application before respondent No.2 and as a pre-requisite, deposited 50% of the amount quantified by the recovery certificate i.e., Rs.90,532.00.

15. Respondent No.4 contested the revision application by filing written statement.

16. In the meanwhile, petitioner lodged dispute against respondent No.4 before the co-operative court for not carrying out the necessary repairs and rectification work. Respondent No.3 passed an order on 20.11.2007 under Section 78 of the Act removing the managing committee of respondent No.4.

17. Petitioner sought for amendment of the revision application to bring on record the aforesaid development.

18. Instead of taking a decision on the amendment sought for, respondent No.2 dismissed the revision application vide the impugned order dated 06.01.2010.

19. Aggrieved, present writ petition has been filed.

20. This Court vide order dated 05.05.2010 stayed the consequential attachment notice dated 03.04.2010. Thereafter, vide order dated 08.07.2010, Rule was issued and subsequently vide order dated 06.09.2010 the stay granted on the attachment notice was directed to be continued till hearing and final disposal of the writ petition.

Writ Petition No.11974 of 2016

21. This Petition under Article 227 of the Constitution of India has been filed by respondent No.4 as the writ petitioner. Here, respondent

No.4 has assailed the legality and validity of order dated 03.08.2012 passed by the Co-operative Court as well as order dated 29.01.2016 passed by the Co-operative Appellate Court.

22. As already noticed above, petitioner who has been arrayed as the sole respondent in the present writ petition had lodged dispute against respondent No.4 before the Co-operative Court No.1, Mumbai. The Co-operative Court vide order dated 03.08.2012 directed respondent No.4 to carry out the entire work of stopping leakage, restoration of ceiling of the flat of the petitioner, etc. at its own cost; further directing respondent No.4 to pay a sum of Rs.33,942.00 by way of compensation with interest thereon.

23. Aggrieved by the said order of the Co-operative Court, respondent No.4 preferred appeal before the Maharashtra State Co-operative Appellate Court at Mumbai in Appeal No.60 of 2015. By order dated 29.01.2016, the appellate court dismissed the appeal.

24. Aggrieved, present writ petition has been filed.

25. Submissions made by learned counsel for the parties have been duly considered.

26. It is seen from the order sheet of both the writ petitions that endeavour was made for settlement of the dispute which it appears did not materialize. It is also seen that the principal amount to be paid by the petitioner as per the recovery certificate has been paid; only payment of interest remained.

27. Be that as it may; before the co-operative appellate court, the principal issue framed for consideration was whether the disputant (petitioner) could prove that there was leakage and seepage to his flat due to repair work carried out by respondent No.4 and whether he was

entitled to the relief as claimed.

28. Operative portion of the order dated 29.01.2016 is extracted hereunder:-

“As to point Nos.1 to 5:-

21) It is not disputed that the disputant is the member of the society and the owner of Flat No.2-A/8. His flat is situated on 3rd floor of building No.2-A of the society. It is also admitted that the society's buildings are constructed in the year 1965 and therefore the society has carried out major repair work in 1996-97 with the help of contribution of members and other sources.

22) It is the allegation of the disputant that while carrying out major repairs through the architect and contractor, the society has taken water leakage problem but while doing so, the society's contractors have caused the damage to the ceiling of his flat due to which there was leakage. It totally damaged false ceiling and internal painting of his flat. The said leakages were brought to the notice of the society by issuing various letters. The society has also not denied the letters. But it is the stand in the W.S. of the society that they have carried out repair work as per the instructions and directions of the architect and the contractor. Time to time the architect has certified the work carried out by the contractor and approved the bills of contractor. The disputant has made a false claim in collusion with the architect of the society.

23) The Ld Counsel for the appellant submitted that the source of leakage is not shown by the disputant. The disputant mainly relied on the letter of Architect dated 4/4/2000 (Ex.K). However in the said letter there is no break-up of expenses incurred by him for repairing. Merely the architect has referred an amount of Rs.33,942/- in his letter is not sufficient to hold that the disputant is entitled to get amount of Rs.33,942/-. The disputant was secretary at the relevant time, still he did not mention anything about the damages. The Court has held the damages. However the letter of contractor dated 30/11/1999 (Ex.E) issued to the secretary shows that when the work was inspected the walls and the terrace were totally dry and there is no leakage through the terrace. But the Court has totally ignored the said letter. He contended that the leakage is not from the terrace but from the water tank which is also brought to the notice of the society by letter dated 14/1/2000 (Ex.G). This fact is also not considered by the Ld Co-operative Court. Documents were not proved by the disputant. He has not examined any author of the said documents. The written statement of the society was not at all considered. Architect's letter is not proved and the Ld Co-operative Court has wrongly

held that the disputant is entitled for the damages and compensation and the direction as prayed for.

24) On the other hand the Ld. Counsel for the respondent (original disputant) contended that the society has referred all these certificate and documents made by the disputant in his letter in his written statement. The said certificate of architect dated 4/4/2000 is referred by the society in their resolution dated 2/1/2000. It is not their case that the resolution was reversed in another meeting. The case of the disputant has not been challenged or disapproved in the cross-examination by the society. Further the society has not led any evidence to disprove the case of disputant. No suggestion was given to the disputant that he has obtained letter fraudulently from the architect. On the contrary the society has accepted that the disputant had suffered a loss. Its byelaws No.160-A casts duty on the society to carry out leakages of external damages to the ceiling etc. at the cost of the society. Society has not denied the letters issued by the disputant from time to time and those are filed on record by the disputant along with the dispute. So in such circumstances the dispute was rightly allowed by the Ld lower Court.

25) Keeping in mind the submissions of both the parties, I perused the record which shows that the disputant had filed an application for calling the documents from the society vide letter dated 22/1/2010 which include letter dated 4/4/2000 issued by the society's engineer to the society, minutes of the meeting dated 2/1/2000, letter dated 3/5/2008 issued by B.M.C. to the society, letter dated 17/5/2008 issued by B.M.C. The said notice was accepted by the society but their originals are not filed on record hence the disputant has filed Xerox copies of the documents while leading the evidence. The disputant has issued letter to the society agitating his grievances against the repairs carried out by the society which caused leakage to the flat of the disputant.

26) It is the contention of the appellant society that the society has appointed an architect to assess the repair work. In the society's annual general meeting dated 2/1/2000 it was discussed that the letter received from the society's architect regarding leakage in the disputant's flat from the terrace and in response to it they decided to give time of one month to the contractor to rectify the loss effected. Further they resolved that compensation for Shri Mehta (disputant) will be recovered as per architect letter. Society's own document suggests that the disputant repeatedly brought to the knowledge of the society the leakages of his flat which constrained the society to take the issue for discussion in the meeting of 36th AGM held on 2/1/2000 (Ex.10). It is the allegation of the society that with hand in gloves with the architect the disputant has made a false

claim. Such submission is not acceptable as it is the society's contention that the architect was inspecting the work and finalizing the bills of the contractor. The work is carried out in the year 1997-98. Till 2000 the disputant is suffering and its cognizance is taken by the society itself.

27) The respondent contended that the society's architect issued letter to the society dated 4/4/2000 in which he has stated that total expenditure was Rs.13,961/- for civil work carried out by the flat owner Shri Mehta and Rs.19,981/- for electrical work carried out by the flat owner, totaling Rs.33,942/-. He himself says that the copy of details of expenses were submitted to the society. Therefore, he requested that the society shall do the needful in the said matter, which falsified the claim of the society that how the amount of Rs.33,942/- has been arrived at. The society's architect himself has suggested that the said amount to be recovered from the contractors.

28) The contractors Rep Tech Constructions in their letter dated 14/9/2000 (Ex.G) though contended that he has submitted do's and don'ts before commencing the work and therefore the claim of Shri P. M. Mehta is not applicable to him. However in the said letter he himself stated that the leakage is from the water tank (though the water tank proofing work is pending). Whereas architect letter dated 25/3/2000 says that the water pond testing will confirm whether leakage is completely gone or not. This is the position of year 2000. Even 7 to 8 years thereafter when the appellant made complaint to the B.M.C., the B.M.C. has issued letter dated 3/5/2008 (Ex.X) to the society in response to the leakage and when the flat of the disputant was inspected by their office staff on 29/4/2008 they found that the leakage problem can be ascertained after the onset of monsoon. Therefore they requested to get rectified within 15 days the leakage from the terrace etc. The disputant has also issued notice to that effect which suggests that till 2008 or even society's architect on the date of filing the dispute or even after 2011, the society's contractor Mehul Corporation wrote letter to the society in which they directed the contractor to carry out pond testing on the terrace and that job was started on 8/2/2011 and still the pond testing work is not completed, it is going on. This also shows that there is substance in the allegation of the disputant and the respondent society has not rebutted the said evidence by examining any independent witness.

29) On the contrary the witness examined by the society failed to remain present before the Court. Thereafter the society has not led any evidence. Considering the documents on record the evidence assessed and appreciated by the Ld Co-operative Court is correct, holding that the society still needs direction as

prayed for by the disputant. Further the byelaws of the society also direct the society to carry out the repairs of leakage of water at its own cost.

29) The appellant society contended that the disputant is defaulter and recovery proceedings has been initiated against him. The society has taken proper recourse to recover the dues from the disputant, which has no way caused any hurdle with the claim of damages and the compensation of the disputant in this dispute. The Ld lower Court has considered the evidence after giving sufficient opportunity to the parties and decreed the claim. I find no ground to make any interference in the order. Hence I answer points No.1 to 4 in the affirmative and proceed to pass the following order:

ORDER

1. The appeal stands dismissed.
2. Parties to bear their own costs.
3. R & P of Dispute No.181/2008 be sent to the lower Court forthwith."

29. From the above, it is seen that the co-operative appellate court took the view that there was substance in the allegation of the disputant (petitioner) which could not be rebutted by respondent No.4. Accordingly, finding of the co-operative court was upheld. Thus, there are two concurrent findings on fact which this Court under Article 227 of the Constitution of India is not inclined to interfere.

30. On the other hand, insofar recovery certificate as well as the order passed in revision is concerned, it is seen that though reference was made to the letter of respondent No.4 addressed to the petitioner dated 03.03.2003 but the effect of the said letter or the resolution on the basis of which the aforesaid letter was issued was not taken into consideration.

31. Insofar the letter dated 03.03.2003 is concerned, it has already been noted above that respondent No.4 had acknowledged that it would not only carry out repair and rectification works at its own expenses but would also reimburse the petitioner for the damages suffered by him. Petitioner was also assured that till such repairs or rectification works were carried out, he would not be liable to pay any outgoings in respect

of the suit flat.

32. Petitioner has all along asserted that repair and rectification works were not carried out. This resulted in lodging of dispute before the co-operative court which has answered it in his favour.

33. Scope of enquiry under Section 101 of the Act was examined by a Division Bench of this Court in *Top Ten Vs. State of Maharashtra*, 2012 (2) Bom.C.R. 647. On perusal of Section 101, it was observed that the heading of Section 101 is “recovery of arrears due to certain societies as arrears of land revenue”. Explaining use of the words “arrears and due” appearing in Section 101, the Division Bench held that there is a subtle distinction between the words ‘arrears’ and ‘due’ though both the words may appear to be synonymous. While ‘arrears’ may mean money which has not been paid at the right time, the word ‘due’ would mean immediately enforceable, owing or payable, constituting a debt. The word ‘due’ is not duplication of what is conveyed by the word ‘arrears’. It indicates that amount which is found or determined to be outstanding and hence recoverable. Thus statement of accounts and other facts essential to be disclosed by the concerned society and to be looked into by the Registrar reveal that said amount of arrears has to be ‘due’ i.e., payable. This quasi-judicial exercise does not encompass any factual dispute which would be outside the procedure under Section 101. Thus, either the arrears are already declared due by some authority or they can be ascertained on the basis of the statement of accounts and other materials on record by the Registrar. However, the moment it is demonstrated to the Registrar that a bonafide and genuine defence about such arrears is raised which calls for a finding on disputed facts and the need for cross-examination surfaces, Section 101 ceases to apply.

34. Viewed from the above perspective, in the present case, question of issuing recovery certificate at the first instance itself did not arise because petitioner had raised a serious dispute on facts. This view is

fortified later on when the co-operative court held that an amount of Rs.33,942.00 was required to be paid by respondent No.4 to the petitioner along with interest for the damages suffered by him on account of seepage and leakage of water due to faulty repair works carried out by respondent No.4, which finding has been upheld by the co-operative appellate court. Therefore, the question of holding the petitioner liable to pay any amount to respondent No.4 allegedly as default in payment of dues does not arise. This renders the recovery certificate wholly unsustainable in law as well as on facts.

35. Thus on a thorough consideration of the matter, the recovery certificate dated 23.10.2007 as well as the revisional order dated 06.01.2010 are hereby set aside and quashed; on the other hand, order dated 03.08.2012 passed by the co-operative court as affirmed by order dated 29.01.2016 passed by the co-operative appellate court are hereby sustained.

36. Resultantly, Writ Petition No.893 of 2010 is allowed while Writ Petition No.11974 of 2016 is dismissed.

(UJJAL BHUYAN, J.)

Minal Parab