

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION (ST) NO. 31091 OF 2019

Ashok K. Kuwadia & ors.

...Petitioners

Versus

Ghatkopar Vikas Co-op. Housing Society
Ltd. & ors.

...Respondents

Mr. Vighnesh Kamat, i/b Satish Kamat, for the Petitioners.

Mr. P. P. Pujari, AGP for the State/Respondent no.7.

Mr. Sukand Kulkarni, a/w O. Parab, i/b M/s. Shah &
Sanghvi, for the Respondents.

CORAM: N. J. JAMADAR, J.

DATED : 9th MARCH, 2020

Oral Order :-

1. Heard the learned Counsels for the petitioners.
2. The challenge in this petition is to the order passed by the Co-operative Appellate Court No.II, Mumbai, in Revision Application No.3 of 2019 dated 30th March, 2019, whereby the revision application preferred by the petitioner against an order passed by the Co-operative Court No.II, Mumbai, on an application (Exhibit-90) for recast of issues, dated 30th January, 2019, came to be dismissed.
3. The petitioners sought to review the said order dated 30th March, 2019, by filing a Review Petition, being No.9 of 2019. By an order dated 22nd October, 2019, the learned Member, Co-operative Appellate Court was persuaded to reject the review

application as well, as it was not found to be within the four corners of Section 150 of the Maharashtra Co-operative Societies Act, 1960 ('the Act'). The said order in Review Petition No. 9 of 2019, is also assailed in this petition.

4. The petition arises in the following backdrop:

(a) The petitioners are the original disputants in Dispute No.326 of 2007. In the said dispute the petitioners sought a declaration that execution of letter dated 4th April, 2003, Development Agreement dated 17th June, 2006 and Irrevocable Joint Power of Attorney dated 22nd March, 2006, between the society and developer are illegal and bad in law and consequential declaration that construction of additional 3½ floor of existing old building of the society being illegal was liable to be demolished. The above-numbered dispute came to be dismissed by the Co-operative Court by judgment and order dated 11th June, 2013.

(b) The petitioner carried the matter in appeal before the Appellate Court in Appeal No.128 of 2014. During the pendency of the said appeal the petitioner filed an application seeking permission to lead additional evidence, which came to be allowed. Thereafter the petitioners sought the admission of those documents in evidence by preferring an application

(Exhibit-52 – before the Appellate Court). By an order dated 25th September, 2018, the Appellate Court directed the trial court to record the evidence of the petitioners as regards the proof of the documents which were allowed to be produced by way of additional evidence, in terms of order passed below application (Exhibit-36 – Appeal Court). As the matter thus stood remitted to the trial court, the petitioners preferred an application for recast of issues (Exhibit-90 – trial court).

(c) The learned Judge, Co-operative Court was persuaded to reject the application by order dated 30th January, 2019. The learned Judge was of the view that the remand of the matter to the trial court was for a limited purpose and the remit was recording of evidence as provided in terms of order dated 25th September, 2018. The learned Judge also recorded that such an application ought to have been filed before the appellate court. Since the trial of the dispute was over and the matter was subjudice before the Appellate Court, the trial court was not empowered to again reopen the aspect of framing of issues. Hence, the application came to be rejected.

(d) The aforesaid order was challenged in revision before the Appellate Court being Revision Application No.3 of 2019. The learned Member, Appellate Court, found no fault with the

approach of the trial court as the remand was for a limited purpose i.e. to record evidence as per the directions of the Appellate Court. The learned Member thus dismissed the revision. The petitioners filed an application for review, being Review Application No.9 of 2019. The learned Member, Appellate Court was of the view that no sufficient reason for exercising review jurisdiction was made out. Hence, review application also came to be rejected.

5. Being aggrieved, the petitioners have invoked the writ jurisdiction of this Court.

6. Heard Mr. Kamat, the learned Counsel for the petitioners. The learned Counsel for the petitioners would urge that the learned Member, Appellate Court committed a manifest error in dismissing the revision. The recast of issues is necessary for determination of real question in controversy between the parties. The learned Member having recorded that the issues proposed to be recast, by the petitioners, are totally contrary to the issues already framed and decided by the trial court by the order, which is subjudice before the Appellate Court, should not have refused to delve into the merits of the matter, urged the learned Counsel for the petitioners.

7. In the backdrop of the sequence of the proceedings, adverted to above, an application for recast of issues before the trial court, when the matter was remanded to the trial court for the limited purpose of recording evidence for the purpose of determining admissibility of the documents in evidence, which were allowed to be tendered by way of additional evidence by the Appellate Court, was wholly misconceived. Such an application could not have been made before the trial court, as if the trial court was dealing with the dispute at the first instance. The remit of the trial court was to record evidence and decide the admissibility of the documents in evidence, and no more. Thus, the order passed by the trial court on 30th January, 2019 was absolutely impeccable.

8. The revision against the said order preferred by the petitioners was decided by the Member, Appellate Court on the same line of reasoning. In the circumstances, the view that, even in the event of remand for a limited purpose, the trial court could recast the issues and reopen the trial, is impossible to be taken. Thus, no fault can be found with the order passed by the Appellate Court.

9. An apprehension about the determination of appeal on merit, including a possible prayer for remand, was expressed by

the learned Counsel for the petitioners as the learned Member, Appellate Court expressed an opinion that the proposed issues were contrary to the issues framed and decided by the trial court and thus exercise of power under Rule 25 Order 41 was not warranted.

10. The aforesaid observations are required to be appreciated in the background of the fact that the Appellate Court was considering the justifiability of the order passed by the trial court in the context of the limited remand consequent to the order passed by the Appellate Court dated 22nd August, 2019. Even otherwise, the petitioners are to be blamed for the predicament in each they found themselves. In the backdrop of the limited remand, they ought not to have sought reliefs which were in the nature of reopening of the entire trial.

11. Hence, the petition stands dismissed.

[N. J. JAMADAR, J.]