

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

LETTERS PATENT APPEAL NO.107 OF 2005
IN
WRIT PETITION NO.602 OF 1992

1. Adarsh Gruha Nirman Sahakari
Sanstha Limited, through its Secretary
Siyarao R. Beherkhede, Anant Nagar,
Nagpur

2. Murlidhar s/o Madhavrao Bakade,
Aged about 51 years, Occ. Service,
R/o Anant Nagar, Nagpur

... Appellants

-vs-

~~Dr Keshav s/o Krishna Londhe~~
(Since Deceased) through legal Heirs

(1A) Dr Anil Keshav Londhe,
aged adult, R/o Flat No.1,
Laxmi Vilas Apartments, Rangole Marg,
Khare Town, Dharampeth, Nagpur

(1B) Kamini wd/o Keshav Londhe,
aged about 68 years, Occ. Nil,
R/o 101, Laxmi Vilas Apartments,
Rangole Marg, Khare Town,
Dharampeth, Nagpur

(1C) Smita Anil Bhate,
aged about 50 years, Occ. Household,
R/o 5th Floor, Mayuresh Apartment,
Abhyankar Road, Nagpur

(1D) Chaitali Chandrashekhar Nene,
aged about 47 years, Occ. Household,
R/o 410, Sharad Housing Society,
Shivaji Nagar, Chaturshrungi Road,
Pune

2. K. R. Anantwar,
Aged adult, Occupation Service and
Ex-Secretary of the Adarsh Griha Nirman

Sahakari Sanstha Ltd., R/o Plot No.4,
Anant Nagar, State Bank Colony,
Nagpur

... Respondents

Shri A. M. Gordey, Senior Advocate with Smt R. D. Raskar, Advocate for appellants.

Dr R. S. Sirpurkar, Advocate for respondent Nos.1A to 1D.
Respondent No.2 served.

CORAM : A. S. CHANDURKAR AND G. A. SANAP, JJ.

Arguments were heard on : August 30, 2021

Judgment is pronounced on : September 28, 2021

Judgment : (Per : A. S. Chandurkar, J.)

The challenge raised in this Letters Patent Appeal filed under Clause 15 of the Letters Patent is to the judgment of the learned Single Judge in Writ Petition No.602/1992 dated 04/03/2005. By the said judgment the writ petition preferred by the respondent No.1 herein has been allowed and the order passed by the Co-operative Court in Dispute No.44/1982 in favour of the disputant has been restored.

2. The facts in brief are that the respondent No.1 is the original disputant who claimed to be the member of the appellant No.1-Co-operative Society. It is his case that after purchasing a share worth Rs.50/- and after complying with all necessary requirements, on 14/12/1973 he was issued a share certificate and he was recognised as a member of the said Co-operative Society. Since the disputant was interested in allotment of a plot for constructing a residential house he deposited an amount of Rs.3650/- with

the Society from time to time. Plot No.59 from Khasra No.273 was allotted to the disputant. On 16/09/1980 however the Secretary of the Society informed the disputant that the Society was unable to grant him the plot in question as the disputant had not supplied necessary documents to it. In effect the allotment of plot No.59 in favour of the disputant stood cancelled. This was communicated to the disputant on 15/09/1980 thus giving the cause of action to file dispute under Section 91 of the Maharashtra Co-operative Societies Act, 1960 (for short, the Act of 1960). The disputant prayed for cancellation of the communication dated 16/09/1980 by which the allotment of the plot in favour of the disputant had been cancelled. He sought re-allotment of the said plot along with execution of sale-deed in his favour. Since that plot had been sold to the Appellant No.2/Opponent No.2 the sale-deed in favour of Opponent No.2 was sought to be declared as void *ab initio*. This dispute was filed on 30/08/1982.

3. The Society filed its written statement and admitted the purchase of the share worth Rs.50/- and payment of other amounts as claimed by the disputant. Deposit of Rs.3650/- with the Society from time to time was also admitted. It was further admitted that on 26/08/1990 the Society called upon the disputant to submit an affidavit disclosing his income and the fact that the disputant did not own a plot or house within the limits of the Municipal Corporation. Allotment of plot No.59 to the Opponent No.2 was

pleaded and the non-allotment of that plot in favour of the disputant was sought to be justified on the ground that necessary compliance as required to be done by the disputant was not so done. It was thus prayed that the dispute was liable to be dismissed.

The Opponent No.2 who was the allottee of plot No.59 filed his written statement and opposed the dispute. He pleaded that after obtaining a loan from his employer, he had constructed a house on plot No.59 and had thereafter mortgaged the same with the Bank. He also prayed for dismissal of the dispute.

4. The learned Judge of the Co-operative Court after considering the material on record held that the disputant was a Member of the Society and that the allotment of plot No.59 in his favour was not liable to be cancelled for the alleged non-compliance of various requirements as stated by the Society. It was further held that the allotment of that plot in favour of Opponent No.2 and the subsequent execution of the sale-deed in his favour was not legal and proper. By the judgment dated 25/06/1990 the Co-operative Court declared that the cancellation of allotment of plot No.59 in favour of the disputant was illegal. A further declaration that the re-allotment of plot No.59 in favour of Opponent No.2 to be illegal was also granted. The Society as well as the Opponent No.2 were directed to hand over vacant possession of plot No.59 to the disputant. However the relief of

executing the sale-deed of plot No.59 in favour of the disputant was refused.

5. The Society as well as the Opponent No.2 being aggrieved by the judgment of the Co-operative Court challenged the same before the Co-operative Appellate Court by preferring two separate appeals. By common judgment dated 31/12/1990 the Co-operative Appellate Court allowed both the appeals and set aside the judgment of the Co-operative Court. The Society was directed to execute a lease deed in favour of the Opponent No.2 within a period of three months from the date of its judgment dated 31/12/1990.

6. The disputant being aggrieved by the dismissal of his dispute filed Writ Petition No.602/1992 under Articles 226 and 227 of the Constitution of India. The learned Single Judge by his judgment dated 04/03/2005 was pleased to hold that plot No.59 having been allotted to the disputant, its revocation by the Society was not in accordance with the provisions of Section 6 of the Indian Contract Act, 1872. If the Society desired to cancel the allotment made in favour of the disputant, it ought to have given him a previous notice which admittedly was not given. It was then held that the sale-deed executed by the Society in favour of Opponent No.2 was bad in law and was liable to be cancelled. After holding that the application of mind by the Co-operative Appellate Court was erroneous and perverse its

judgment was set aside. The writ petition was allowed and the Society was directed to execute sale-deed of plot No.59 in favour of the disputant by cancelling the lease deed executed by it in favour of Opponent No.2. The Opponent No.2 was however directed to place the disputant in possession of plot No.59 after a period of six months. This judgment of learned Single Judge is the subject matter of challenge in the present appeal that has been jointly preferred by the Society and Opponent No.2.

7. Shri A. M. Gordey, learned Senior Advocate for the appellants in support of the appeal submitted that the learned Single Judge erred in setting aside the judgment of the Co-operative Appellate Court in the light of the fact that the disputant was not entitled to the allotment of the plot in question as he had not complied with all necessary conditions for acquiring membership of the Society. Referring to the findings arrived at by the Co-operative Appellate Court in that regard it was submitted that since such findings were recorded after re-appreciating the material on record, it was not permissible for the learned Single Judge to have interfered with those findings. According to him there was no application for seeking membership moved by the disputant nor was any resolution passed by the Managing Committee of the Society for admitting the disputant as member. He referred to the provisions of Rule 19 of the Maharashtra Co-operative Societies Rules, 1961 to substantiate his contention and urged that about

fifteen conditions were required to be satisfied before an applicant could be admitted as member of the Society. He further submitted that even if it was assumed that the disputant was entitled for any relief in the dispute, the aspect of equity was not considered by the Co-operative Appellate Court while granting relief to the disputant. He sought to rely upon provisions of Section 20(2)(b) and the explanation thereto of the Specific Relief Act, 1963 in that regard. Since the Opponent No.2 had constructed his house and was residing there it would be greatly inequitable to direct the appellants to hand over vacant possession of plot No.59 to the disputant. This aspect was not considered either by the Co-operative Appellate Court or by the learned Single Judge while granting relief to the disputant. To substantiate his contention the learned Senior Advocate placed reliance on the decision in *Raj Rani and ors. vs. Delhi Administration and ors. AIR 1977 SC 1900*. He therefore submitted that the judgment of the learned Single Judge ought to be set aside and the dispute as filed be dismissed.

8. On the other hand, Smt R. S. Sirpurkar, learned counsel for the respondent No.1-disputant at the outset raised an objection to the maintainability of the Letters Patent Appeal by contending that since the learned Single Judge had entertained the writ petition in exercise of supervisory jurisdiction and in absence of any writ of certiorari being prayed or for being issued, the Letters Patent appeal itself was not maintainable.

In that regard she referred to the prayers made in the writ petition and submitted that the petitioner had merely sought setting aside of the judgment of the Co-operative Appellate Court and had not prayed for issuance of a writ of certiorari. Even if the writ petition was filed as one under Articles 226 and 227 of the Constitution of India, considering the nature of jurisdiction exercised by the learned Single Judge and the relief granted, the Letters Patent Appeal was not maintainable. To substantiate the aforesaid contention the learned counsel placed reliance on following decisions :-

1. *Umaji vs. Radhikabai 1986 (Supp)SC 401*
2. *Jogendrasingh vs. State of Gujrat 2015 (9) SCC 1*
3. *Ashok Jha vs. Garden Silk Mills Ltd. 2009 (10) SCC 584*
4. *Ram Kishan Fauji vs. State of Haryana 2017 (5) SCC 583*
5. *Radhey Shyam and anr. vs. Chabi Nath 2015 (5) SCC 423*
6. *State vs. Vakhatsinghji 1968 (3) SCR 692*
7. *Ahmedabad Manufacturing vs. Ram Ramnand 1972 (1) SCC 898*
8. *Shalini Shetty vs. Rajendra Patil 2010 (8) SCC 329*
9. *Sudhir Co-operative Housing Society Ltd. vs. State of Maharashtra 2010 (1) Mh.L.J. 240*

It was also urged that since the relief sought in the dispute was in the nature of specific performance, the adjudication by the Co-operative Appellate Court was similar to the adjudication by the civil Court and this was one more reason for holding the appeal to be not maintainable. It was

faintly urged that the observations in paragraph 107 of the decision in *Umaji* (supra) ought to be read as conferring a right of appeal only to an unsuccessful petitioner whose writ petition under Articles 226 and 227 has been dismissed and not to the respondent in such writ petition.

Without prejudice to the aforesaid objection the learned counsel submitted that the judgment of the learned Single Judge did not call for any interference. After finding the conclusion recorded by the Co-operative Appellate Court to be perverse and without properly applying the legal provisions, the same was rightly set aside. She referred to the material on record in the form of pleadings and evidence to support her contention. Attention was also invited to the fact that an amendment sought in the written statement by the Society had been refused which order had not been challenged. Moreover the construction undertaken by the Opponent No.2 was at his own risk and hence the aspect of equity being applicable would not arise. It was thus submitted that the Letters Patent Appeal was liable to be dismissed.

9. In reply to the objection on the maintainability of the Letters Patent Appeal the learned Senior Advocate for the appellant submitted that considering the law as laid down in *Jagdish Balwantrao Abhyankar vs. State of Maharashtra and ors. 1993 (1) Mh.L.J. 958*, *Motilal Rokde and ors. vs. Balkrushna Baliram Lokhande, since deceased Through LRs. 2020 (1) All MR 1* and *Jogendra*

Sinhji vs. State of Gujrat AIR 2015 SC 3623 it was clear that the said objection does not deserve acceptance. According to him since the writ petition was filed invoking Articles 226 and 227 of the Constitution of India and further considering the jurisdiction exercised by the learned Single Judge while deciding the same after holding that the entire application of mind by the Co-operative Court was erroneous and perverse, it was clear that the Letters Patent Appeal was maintainable. There was no reason to restrict such right of appeal in the facts of the case. Moreover, the right of appeal could not be restricted to an unsuccessful petitioner whose writ petition has been dismissed as sought to be urged by the learned counsel for the legal heirs of the respondent No.1.

10. We have heard the learned counsel for the parties at length and we have given due consideration to their respective submissions. On the aspect of maintainability of the Letters Patent Appeal we find that the law in that regard is well settled. One of the factors for determining the maintainability of a Letters Patent Appeal is the nature of jurisdiction invoked by the party and the true nature of the principal order passed by the learned Single Judge. As held in *Ashok Jha* (supra) what is important to be ascertained is the true nature of order passed by the learned Single Judge and not the nature of provisions mentioned while exercising such power. It is not necessary to reiterate the legal position in that regard since the same is

fairly well settled. It would be sufficient for the present purpose to refer to a recent decision of the Honourable Supreme Court in ***General Manager, Electrical Rengali Hydro Electric Project, Orissa and ors. vs. Giridhari Sahu and ors.*** (2019) 10 SCC 695 wherein in paragraph 28 it has been observed as under :

“ 28. An error of law which becomes vulnerable to judicial scrutiny by way of certiorari must also be one which is apparent on the face of the record. As held by this Court in Hari Vishnu Kamath vs. Ahmad Ishaque AIR 1955 SC 233, as to what constitutes an error apparent on the face of the record, is a matter to be decided by the Court on the facts of each case. A finding of fact which is not supported by any evidence would be perverse and in fact would constitute an error of law enabling the writ Court to interfere. It is also to be noticed that if the overwhelming weight of the evidence does not support the finding, it would render the decision amenable to certiorari jurisdiction. This would be the same as a finding which is wholly unwarranted by the evidence which is what this Court has laid down in Parry & Co. Ltd. vs. P.C. Pal, AIR 1970 SC 1334.” (emphasis supplied by us).

11. In the light of aforesaid observations if the judgment of the learned Single Judge in the writ petition is perused it is found that in paragraph 23 thereof a finding has been recorded that the entire application of mind by the Co-operative Appellate Court was erroneous and perverse. The letter of allotment at Exhibit-40, the admission in the written statement as well as the letter at Exhibit-55 alongwith which the disputant had forwarded the affidavit to the Society were not evaluated properly by the Co-operative Appellate Court. On that basis it was held that the reasons put

forth by the Co-operative Appellate Court for differing with the findings of the Co-operative Court were misconceived and unsustainable. It is found therefore that the learned Single Judge having noticed as held in ***General Manager, Electrical Rengali Hydro Electric Project, Orissa and ors.*** (supra) that as the overwhelming weight of the evidence did not support the finding of Co-operative Appellate Court, the decision was amenable to certiorari jurisdiction. On the aforesaid premise therefore we are of the clear view that the learned Single Judge was pleased to exercise certiorari jurisdiction and having exercised the same in the writ petition that was filed under Articles 226 and 227 of the Constitution of India, the Letters Patent Appeal is maintainable. The same is therefore liable to be entertained on merits.

12. Coming to the findings recorded by the learned Single Judge while setting aside the judgment of the Co-operative Appellate Court, we find no justifiable reason to interfere with those findings. It has been found that the Co-operative Court at the first instance after considering the evidence on record had held that the disputant was a member of the Society and had paid it the requisite amount for being allotted plot No.59 in the Society. The averments in the written statement of the Society were taken into consideration along with other documentary material. The letter of allotment at Exhibit-40 as well as the letter written by the Secretary to the disputant on 01/03/1977 at Exhibit-51 were also referred to and in the

light of the findings of the Co-operative Court which have been upheld by the learned Single Judge we do not find any reason to take a different view of the matter. All relevant aspects on record have been taken into consideration by the learned Single Judge while restoring the order passed by the Co-operative Court.

13. On the aspect of consideration of equity under Section 20(2)(b) of the Specific Relief Act, 1963 we find that in the written statement filed by the Opponent No.2 no such plea was raised. The defence raised was that the Opponent No.2 was a bonafide purchaser of the property. Though the Co-operative Court initially granted an ad-interim injunction restraining the Opponent No.2 from raising any construction, this ad-interim order was subsequently vacated by observing that it was open for the Opponent No.2 to undertake construction over the plot in question at his own risk. This being the position on record the submission made on behalf of the appellants in that regard does not deserve acceptance.

14. We thus find that the learned Single Judge after considering the material on record and after recording a finding that the entire application of mind by the Co-operative Appellate Court while reversing the judgment passed by the Co-operative Court was erroneous and perverse, restored the judgment of the Co-operative Court. There is no case made out to interfere

in the Letters Patent Appeal. Accordingly the Letters Patent Appeal stands dismissed leaving the parties to bear their own costs. However considering the fact that the appellant No.2 is in possession pursuant to the interim orders operating in the appeal, those interim orders are continued for a period of eight weeks from today and they shall cease to operate automatically on the expiry of that period.

JUDGE

JUDGE