

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 6413 OF 2018**

Shri. John Khushaba D'souza

....**Petitioner**

V/s.

Shri. Francis Jokim D'souza and Ors.

....**Respondents**

Mr. U.B. Nighot a/w. Ms. Ruchi Singh i/by. Mr. Akhilesh Singh, for the Petitioner.

Mr. Vishal C. Ghosalkar, for Respondent No.1.

CORAM : SANDEEP V. MARNE, J.

Resd. On : 7 NOVEMBER 2023.

Pron. On : 10 NOVEMBER 2023.

JUDGMENT :

1. By this petition, Petitioner challenges order dated 28 September 2015 passed by the Co-operative Court in Dispute No.333/2003 as well as the Order dated 21 October 2016 passed by the Co-operative Appellate Court.

2. The dispute amongst the parties relate to Room No.10 owned by late Jokim Bastab D'souza. Respondent No.1-Plaintiff is son of late Jokim Bastab D'souza. He claims that a Will was executed

by his father on 5 February 1990 bequeathing Room No.10 in his name. That his father expired on 16 March 2003, after which the Respondent No.1-Plaintiff approached the Society for transfer of membership in respect of Room No.10. However Petitioner, who is the nephew of late Jokim Bastab D'souza relied on Will dated 26 March 1992 and on that basis, got the membership in respect of Room No.10 transferred in his name in the records of the Society. Respondent No.1 therefore filed Dispute No.333/2003 for recovery of possession of Room No.10 and for injunction. The dispute was allowed by the Co-operative Court by Judgment and Order dated 28 September 2015, directing the Petitioner to handover possession of Room No.10 to Respondent No.1 within three months. Aggrieved by the decision of the Co-operative Court, Petitioner filed Appeal No. 42 of 2016 before the Co-operative Appellate Court. By Judgment and Order dated 21 October 2016, the Appellate Court has proceeded to dismiss the Appeal. The Petitioner has accordingly filed the present Petition challenging the decisions of the Co-operative Court and Co-operative Appellate Court.

3. I have heard Mr. Nighot, the learned counsel appearing for the Petitioner. According to him, the Co-operative Court did not have jurisdiction to decide the dispute seeking prayer for recovery of possession of Room No.10. That the Petitioner did not get opportunity to lead evidence before the Co-operative Court on account of mistake of his Advocate. That Petitioner cannot be made to suffer on account of his Advocate's mistake and in this regard, he

would rely on the judgment of the Apex Court in ***Rafiq V/s. Munshilal*** (1981) 2 SCC 788. He would further submit that Respondent No.1 specifically gave admission in his cross-examination that he was not residing in the suit premises at the time of death of late Jokim D'souza. That non-probated Will produced by the Plaintiff-Respondent No.1 could not have been relied upon. He would therefore pray for setting aside the order passed by the Co-operative Court and Co-operative Appellate Court and the Dispute be remanded to the Co-operative Court for grant of opportunity to the Petitioner to lead evidence.

4. *Per-contra*, Mr. Ghosalkar, the learned counsel appearing for Respondent No.1 would oppose the Petition and support the orders passed by the Co-operative as well as the Appellate Court. He would submit that any dispute relating to membership as well as right, title and interest in property of the Society or touches upon the business of the Society and therefore Dispute under Section 91 of the Maharashtra Co-operative Societies Act, 1960 is maintainable. He would place reliance on the judgment of Single Judge of this Court in **Baswaraj Madolappa Barole vs. Madevi Virbhadrappa Barole (died)** 2020 AIR Online 2020 Bom 761. He would rely upon provisions of Section 213 of the Indian Succession Act, 1925 (**Succession Act, 1925**) under which it is not necessary to probate a Will executed by an Indian Christian. Having failed to lead evidence, Petitioner cannot now blame his Advocate.

5. I have considered the submissions canvassed by the learned counsel for the parties.

6. The main issue raised by Mr. Nighot is about failure to grant opportunity to Petitioner to lead evidence. Perusal of the order passed by the Co-operative Court would indicate that Court has recorded various contentions raised by the Petitioner in Written Statement of Opponent Nos.1 to 6, about the Plaintiff granting NOC for transfer of the room in the name of Opponent No.7 and issuance of public notice by the Society in the newspapers. The Co-operative Court has however refused to accept the said contentions on the ground that the Petitioner failed to lead evidence. If indeed Respondent No.1-Plaintiff had issued NOC for transfer of the Room in favour of the Petitioner (Opponent No.7), the same may change the entire scenario. Because of absence of Petitioner's Advocate during the course of arguments, as well as because of his failure to lead evidence, the Co-operative Court has not taken into consideration various objections that were raised in the Written Statement. The objections relate to maintainability of the Dispute for recovery of possession before the Co-operative Court, acceptance of non-probated Will etc. In such situation, the issue is whether Petitioner needs to be granted an opportunity to lead evidence to prove various contentions raised in his Written Statement.

7. Even the Co-operative Appellate Court has accused the Petitioner of failure to lead evidence to prove possession of the

room. The Petitioner requested the Appellate Court to remand the dispute for leading evidence. The Appellate Court has refused to remand the Dispute to the Co-operative Court by considering grant of sufficient opportunities of leading evidence to the Petitioner by the Co-operative Court. While I do not agree with the said findings recorded by the Co-operative Appellate Court, it must also be borne in mind that the nature of order that is passed by the Co-operative Court would result in dispossession of the Petitioner from the Room in question. It is therefore appropriate that the Petitioner gets an opportunity to prove his case by leading his evidence. For failure on the part of the Petitioner to lead evidence despite grant of several opportunities, exemplary costs can be imposed on the Petitioner. Once the Dispute is remanded for leading evidence by Petitioner, the Co-operative Court will be in a position to decide all the objections relating to jurisdiction, requirement of probate of Will, legality of possession of Petitioner etc. On account of Petitioner's failure to lead evidence, all the objections have remained unanswered. Since the nature of relief granted by the Co-operative Court would entail eviction of the Petitioner from the suit room, it is necessary that he gets proper opportunity to prove his case before the Co-operative Court.

8. True it is that substantial period of time has lapsed since the dispute was filed by the Disputant in the year 2003. However, the ambit of Dispute is not restricted to the issue of membership in the Society, but the Co-operative Court has directed

Petitioner's ouster from the suit room. Thus, if an opportunity is not granted to the Petitioner, he would lose both membership of the Society as well as possession of the room. I am therefore of the view that an opportunity needs to be granted to the Petitioner to prove his case before drastic order entailing his ejection from the room in question is passed. The Petitioner has averred that his Advocate has not guided him properly which has led to failure on his part to lead evidence. Though in ordinary course, an Advocate cannot be blamed to justify defaults committed by a litigant. In the present case, the exact reason for non-filing of evidence by Petitioner is difficult to decipher. Petitioner's Advocate initially remained absent and failed to conduct cross-examination of Disputant, which led to passing of 'No Cross Order'. That order was required to be set aside in the year 2010 when the Disputant was cross-examined. The cross-examination was completed in the year 2013. The Advocate of the Petitioner ought to have immediately filed Affidavit of Evidence of Petitioner. However, for long time of 2 and ½ years between 11 February 2014 to 11 August 2015, Petitioner's Advocate failed to file the Affidavit of Evidence. This led to passing of an order of "No evidence" against the Petitioner. Even for arguments, the Dispute remained pending for two months when Petitioner's advocate continuously remained absent. The question is whether Petitioner can be made to suffer for such lapses committed by his Advocate. In this connection, reliance of Mr. Nighot on the judgment of the apex Court in *Rafiq* (supra) appears to be apposite. The Supreme Court has held in para-3 as under :

3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned Advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A. K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe, we do not know, he is better informed in this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done every- thing in his power expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A. K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs. 200 should be

recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A. K. Sanghi.

9. In the present case though Petitioner is neither a villager nor an illiterate person, but has possibly not realized the effect of failure to lead evidence. Therefore, he cannot be permitted to rely only on lapses on the part of his Advocate for seeking remand. He was expected to change the Advocate who was consistently remaining absent. However, what is required to be taken into consideration is the nature of relief that is granted by the cooperative court. Had the Court restricted the relief only to membership, the parties could have got the issues of title and possession settled in a civil court. However, the Cooperative Court has directed Petitioner to hand over possession of the room to Respondent. On account of Appellate Court's refusal to grant opportunity to him to lead evidence, he is now left remediless.

10. Mr. Ghosalkar has sought to justify the jurisdiction exercised by the Cooperative Court in granting the relief of recovery of possession. He has relied on the judgment of Single Judge of this Court in *Baswaraj Madaloppa Barole* (supra). He has also relied upon provisions of Section 213 of the Succession Act, 1925 in support of his contention that a Will executed by an Indian Christian need not be probated. The issue is whether this Court, in exercise of writ jurisdiction is supposed to examine this issues at the first instance when the Cooperative Court and the Appellate Court have refused to

go into these issues on the ground of failure of Petitioner to lead evidence. These issues need to be first examined by the Cooperative Court. Therefore the issues sought to be raised by Mr. Ghosalkar are something which the Co-operative Court will have to take into consideration while deciding the dispute afresh. No opinion is expressed on the issue of maintainability of dispute for recovery of possession and requirement in law for probate of Will executed by an Indian Christian.

11. In my view, the Cooperative Appellate Court has erred in refusing to remand the Dispute by grant of opportunity to Petitioner to lead evidence. If the Appellate Court was to take timely corrective action, the Dispute would have been decided afresh by the Cooperative Court long ago. Be that as it may. The error committed by the Appellate Court cannot be perpetrated and needs corrective action. I therefore deem it appropriate to remand the Dispute for fresh decision by the Cooperative Court by imposing costs on Petitioner. The loss that would be caused to Respondent in the form of loss of time and incurring of costs can be taken care of by requesting the Cooperative Court to decide the remanded Dispute within time bound manner and by imposing exemplary costs on Petitioner.

12. I accordingly proceed to pass the following Order :

(i) The Judgment and Order dated 28 September 2015 passed by the Co-operative Court in Dispute No.333/2003

and Judgment and Order dated 21 October 2016 passed by the Co-operative Appellate Court in Appeal No.42 of 2016 are set aside.

(ii) Dispute No.333/2003 is restored on the file of the Co-operative Court to be decided afresh by granting an opportunity to the Petitioner to lead evidence.

(iii) The Petitioner shall file Affidavit of Evidence in lieu of examination-in-chief on/or before 31 December 2023.

(iv) The Co-operative Court shall proceed to decide the Dispute No.333/2003, expeditiously, on its own merits without being influenced by any of the observations made in the present order. It is requested to make an endeavor to decide the Dispute within 6 months.

v) Petitioner shall pay to the Respondent costs of Rs. 50,000/- within 4 weeks. Costs to be deposited with the Cooperative Court with liberty to Respondent to withdraw the same.

vi) Parties shall appear before the Co-operative Court on 4 December 2023, bring this Order to its notice and seek further directions.

13. With the above directions, the Writ Petition is **disposed**
of.

SANDEEP V. MARNE, J.

**NEETA
SHAILESH
SAWANT**

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