

(2013) 10 BOM CK 0153

In the Bombay High Court

Case No : Appeal from Order No. 550 of 2012 and Civil Application No. 1217 of 2013 in Appeal from Order No. 550 of 2012

Mr. Samuel Nadvi

APPELLANT

Vs

Umerkhadi Co-Operative Housing Society Limited and Others

RESPONDENT

Date of Decision : 01-10-2013

Acts Referred:

Citation : (2014) 1 BomCR 456

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Prabhanand Sawant, for the Appellant; Avinash Joshi for Respondent No. 1, Mr. S.K. Sonawane for Respondent No. 2-Corporation, Mr. Manek J. Kalyaniwalla, instructed by y M/s. Mulla and Mulla and CBC for Respondent Nos. 4 and 5, for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—This Appeal from Order is filed by the Appellant-Original Plaintiff against order dated 10 February 2012 passed by the learned Judge, City Civil Judge, Greater Bombay. The operative part of the order is as under:-

1. The plaint shall be returned to the plaintiff Mr. Samuel Nadvi as provided under Order VII, Rule 10 of C.P.C. for presentation to proper forum.
2. The plaintiff is present while dictating this order and the decision has been informed to him.
3. When the intimation has been given to the plaintiff under Sub-Rule 1 of Order VII Rule 10-A of C.P.C. He did not make any submissions.
4. As the plaintiff has not specified the Court in which he proposed to present the plaint after its return in terms of Sub Clause 2-A of Rule 10-A of Order VII of C.P.C. the date for the appearance of the parties in the Court as required under Sub-Clause 3(a) of Rule 10-A of Order VII of C.P.C. could not be fixed.

5. However, the plaintiff is directed to give notice well in advance to the defendants before presentation of the plaint before proper forum giving information of the proposed date of presentation of the plaint.

The learned Judge returned the plaint for proper presentation by accepting the case of Respondent Nos. 2 to 5 revolving around Section 91 of the Maharashtra Co-operative Societies Act, 1960 (for short, "the MCS Act").

2. Initially, though the Appellant-Plaintiff sought relief against the Society and its members only, but subsequently by amendment, which was granted, sought prayer against Respondent No. 2 (Assistant Municipal Commissioner) to set aside the permission granted by them to permanently enclose the common passage of third floor of the Society's building treating it to be illegal and bad in law.

3. The Appellant himself gave no objection along with other members to put up collapsible gate in question. The Corporation sanctioned/granted permission by letter dated 21 February 1995 to install the collapsible gate in common passage, as there was no objection from the present Committee/Society and the adjacent tenant.

4. There is no dispute that the Appellant and Respondent Nos. 3, 4 and 5 are the members of Respondent No. 1-Society. Therefore, as there was no objection initially and as Respondent No. 1-Society permitted and as the Municipal Corporation also granted permission, therefore, the collapsible grill gate was installed. But, it is subject to the sanction of Corporation. There is no dispute that the Corporation permitted the same. The permission of Corporation, in my view in the present facts and circumstances, unless set aside and/or revoked by taking appropriate proceedings, the dispute between the members, even if any, resolved and/or settled by the Cooperative Court is of no use as the Co-operative Court for want of jurisdiction, will not be in a position to set aside the permission granted by the Corporation. Section 91 of the MCS Act, nowhere contemplates and/or provides the power and/or authority to the Cooperative Court to set aside and/or withdraw the permission/sanction granted by the Municipal Corporation. No objection of tenant and/or the Society may be the elements for sanction, but if the same is subject to other consideration and well within the purview of Authority and Rules and Regulations, the Co-operative Court is not empowers and/or disturb the same. The Civil Court however, subject to considering the material placed on record including the conduct of the Plaintiff himself, in view of the earlier no objection granted and as the collapsible grills were installed in the year 1995 itself, the issue of alleged encroachment of common passage of third floor at the instance of Appellant by filing Suit in the year 2001, may set aside on the basis of material, as well as, the evidence on record. If the case is made out, the Civil Court only can pass this order as prayed, considering the totality of the matter and not the Co-operative Court as sought to be contended by the learned counsel appearing for Respondent Nos. 1, 4 and 5.

5. The dispute between the members is not the only issue. The Co-operative

Court even if accept the case of the Society and other members than Plaintiff, if not in position to pass the order to set aside the sanction/permission already granted by the Corporation, to say that the alleged plaint attracts the bar of Section 91 of the MCS Act, in my view, is incorrect approach. The question is not only to try the Suit and/or the proceedings, but to pass the final and effective executable operative order by the competent Court. The Co-operative Court if not in position to pass and/or sanction/permission already granted by the Corporation, in my view the return of plaint, as directed, is incorrect and will definitely create complications in the matter rather than solving it and specially at this stage of the proceedings. On the contrary, if the Civil Court proceeds further and pass appropriate order after considering the material placed on record including the evidence so led and the preliminary objections/issues so framed, it would serve the purpose.

6. The Civil Court's power and jurisdiction in a situation where it is difficult to dissect some portion, prayers and/or pleadings and as the Court always required to consider the whole pleadings and documents placed on record including prayers so raised, the return of plaint for a particular issue, as in the present case referring to Section 91 of the MCS Act as the Plaintiff and Respondent Nos. 3 to 5, are the members of Respondent No. 1-Society, is of no consequence.

7. The order of return of plaint by invoking Order VII, Rule 10 and 10-A, is required to be quashed and set aside. However, it is made clear that the learned Judge to re-consider the matter based upon the available evidence, as well as, the material placed on record and the pleadings so filed and after re-considering the matter afresh on all issues, to pass the order in accordance with law.

Resultantly, the following order:-

ORDER

- a) Order dated 10 February 2012 is quashed and set aside.
- b) The matter is remanded back for re-hearing on all preliminary issues based upon the available material and the record.
- c) The Appeal is accordingly allowed.
- d) There shall be no order as to costs.
- e) The Civil Application No. 1217 of 2013 is also disposed of.