
(2002) 06 BOM CK 0074

In the Bombay High Court

Case No : Writ Petition No. 5519 of 1989

Ramchandra Harischandra Vatkar

APPELLANT

Vs

Jawaharnagar Co-operative Housing Society Ltd. and Another

RESPONDENT

Date of Decision : 26-06-2002

Acts Referred:

Citation : (2003) 2 ALLMR 308 : (2003) 2 BOMLR 16 : (2003) 1 MhLj 54

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : A.A. Kumbhakoni, for the Appellant; Varsha Palav, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This writ petition, under Article 227 of the Constitution of India, takes exception to the order passed by the Maharashtra State Co-op. Appellate Court, Bombay dated 23rd June 1989 in Appeal No. 129 of 1987.

2. The petitioner instituted a dispute u/s 91 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the said Act) on the allegation that the respondent No. 1 society was formed to provide residential houses to the members belonging to backward class. According to the petitioner he was the member of the respondent No. 1 society and had complied with all the formalities on account of which he had become entitled for allotment of a constructed house in the respondent No. 1 society, however, the society inducted respondent No. 2 in the said constructed house. The petitioner further alleges that the respondent No. 2 does not belong to backward class community and therefore he was not entitled to become a member of the respondent No. 1 society and was ineligible for allotment of any plot or constructed house. In substance, the grievance of the petitioner is that, the constructed house which ought to have been made over to the petitioner, has been handed over to the respondent No. 2, by the respondent No. 1 society. In this background the petitioner approached the Co-operative Court u/s 91 of the said Act. The Co-

operative Court by order dated 29th December 1986 was pleased to dismiss the dispute essentially on the ground that same was not maintainable u/s 91 of the Act. The matter was carried in appeal before the Maharashtra State Co-operative Appellate Court Bombay being Appeal No. 129 of 1987. The said appeal was also dismissed by impugned judgment and order dated 23rd June 1989. The Appellate Court has affirmed the view taken by the first Court that dispute was not maintainable u/s 91 of the Act, but while doing so has referred to the defence taken by the respondent No. 2 in particular and recorded its opinion in that context. Nonetheless, the Appellate Court was pleased to dismiss the appeal taking the view that the dispute as presented by the petitioner was not maintainable u/s 91 of the Act. It is this concurrent view which is subject matter of challenge in the present writ petition.

3. Although the Courts below have gone into several contentions which were pressed before them by the rival parties, however, in my view, it is wholly unnecessary to rest the decision with reference to the said defence or contentions taken by the parties. It would have been enough for the courts below to conclude that the dispute as presented by the petitioner before the Co-operative Court was not maintainable u/s 91 of the Act having regard to the averments made in the plaint. It is well settled that the allegations made in the plaint would be the basis to determine the jurisdiction of the Court and, not depend upon the defence taken by the defendants in the written statement. This legal position is noted by the Apex Court in *Abdulla Bin Ali and Others Vs. Galappa and Others*, (para 5) as well as *Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others*, (para 24).

4. In this view of the matter it would be apposite to advert to the averments in the dispute as presented before the Co-operative Court. The allegations on the basis of which the petitioner approached the Co-operative Court is that after the suit property was ready for occupation the respondent No. 1 society ought to have handed over possession thereof to the petitioner, whereas the respondent No. 1 Society has inducted respondent No. 2 therein. The petitioner clearly asserts that the respondent No. 2 has not been inducted by the petitioner. The petitioner further asserts that the respondent No. 2 is a trespasser. On these allegations the dispute came to be filed for possession against the respondent No. 1 society as well as the respondent No. 2. The petitioner clearly concedes that the suit property was in possession of the respondent No. 2. The jurisdiction of the Co-operative Court can be invoked only in the circumstances provided for u/s 91 of the Act. Section 91 read thus:--

Section 91. Disputes. -- (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the committee or its officers other than elections of committees of the specified societies including its officer, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated or by a creditor of the society,

to the Co-operative Court if both the parties thereto are one or other of the following :--

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society or the , official Assignee of a de-registered society.

(b) a member, past member of a person claiming through a member, past member of a deceased member of society, or a society which is a member of the society or a person who claims to be a member of the society.

(c) a person other than a member of the society, with whom the society, has any transactions in respect of which any restrictions or regulations have been imposed, made or prescribed u/s 43, 44 or 45, and any person claiming through such person;

(d) a surety of a member, past member or deceased member, or surety of a person other than a member with whom the society has any transactions in respect of which restrictions have been prescribed u/s 45, whether such surety or person is or is not a member of the society;

(e) any other society; or the Liquidator of such a society or de-registered society.

Provided that, an industrial dispute as defined in Clause (k) of Section 2 of the Industrial Disputes Act, 1947, or rejection of nomination paper at the election to a committee of any society other than a notified society u/s 73-1C or a society specified by or u/s 73G, or refusal of admission to membership by a society to any person qualified therefore (or any proceeding for the recovery of the amount as arrear of land revenue on a certificate granted by the Registrar under Sub-section (1) or (2) of Section 101 or Sub-section (1) of Section 137 of the recovery proceeding of the Registrar or any office subordinate to him or an officer of society notified by the State Government, who is empowered by the Registrar under Sub-section (1) of Section 156, shall not be deemed to be dispute for the purpose of this section.

(3) x x x"

5. On plain language of this provision it is seen that the dispute could be maintained only when both parties to the dispute were persons as notified in any of the Clauses (a) to (e) of Sub-section (1) of Section 91. Insofar as the respondent No. 2 is concerned, going by the allegation in the dispute, he does not fit into any of the categories specified in Clauses (a) to (e).

6. The learned Counsel for the petitioner no doubt placed reliance on Clause (b), and submits that the respondent No. 2 would qualify the expression "person claiming through a member". This submission proceeds on the premise that in the dispute as presented before the Co-operative Court, the respondent No. 2

has come With a specific case in his reply that he was inducted in the suit property by the petitioner on tenancy basis. As observed earlier the legal position is no more res integra. The jurisdiction of the Court would not depend on the defence taken by the opposite side in the reply or written say filed before the Court, but the Court will have to address itself strictly on the basis of the plaint or dispute as presented by the plaintiff/ petitioner before the Court. We have already referred to the case made out in the plaint and going by the plaint it is not possible to comprehend that the present dispute would fall u/s 91 of the Act as the respondent No. 2 is not a person specified in any of the Clauses (a) to (e) of Sub-section (1) of Section 91 of the Act.

7. In the circumstances, both the courts below were justified in dismissing the dispute as not maintainable u/s 91 of the Act. No doubt the Courts below have adverted to various other contentions and have also expressed opinion in that behalf. However, to my mind, it was wholly unnecessary for the lower Courts to go into those aspects of the matter instead of confining the enquiry with reference to the maintainability of the dispute as presented by the petitioner. All those observations or finding recorded by the courts below will be of no consequence and the same be deemed to have been effaced from the record.

8. In the circumstances this petition fails and the same is dismissed with costs, but with the above observations.

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9. In view of the dismissal of the writ petition vide order dated 26-6-2002, nothing survives in the present civil application accordingly the same is dismissed.