

(2010) 04 BOM CK 0167

In the Bombay High Court

Case No : Writ Petition No. 147 of 2001

Shri Balwant Peshne (since deceased through his L.Rs. Smt.
Shalini Balwant Peshne and Others) APPELLANT

Vs

Nagpur Co-operative Housing Society Ltd. RESPONDENT

Date of Decision : 23-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 99
Constitution of India, 1950 — Article 226, 227
Maharashtra Co-operative Societies Act, 1960 — Section 91, 92, 92(1), 94, 94(1)
Maharashtra Co-operative Societies Rules, 1961 — Rule 77E, 77F, 78, 79, 80
Transfer of Property Act, 1882 — Section 52

Citation : (2010) 4 BomCR 738

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : N.K. Ambilwade, for the Appellant; R.V. Shah, for the Respondent

Judgement

R.C. Chavan, J.—The petitioner seeks quashing and setting aside of the appellate judgment and order dated 12-8-1999 passed by the learned Member, Co-operative Appellate Court, dismissing petitioner's appeal against the judgment and order dated 2-2-1998 passed by the learned Judge, Co-operative Court, dismissing petitioner's dispute.

2. Facts material for deciding this petition are as under:

The petitioner is a member of the respondent-Society, which had been allotted 13 plots of land at Bajaj Nagar, Nagpur, by the Nagpur Improvement Trust (NIT) for construction of residential bungalows. The petitioner was allotted plot No. 122 out of these plots. The petitioner claimed to have spent substantial amount on the said plot. This allotment in favour of the petitioner was cancelled by the NIT, and the plot was allotted to the respondent-Society itself. The petitioner filed a civil suit numbered as Regular Civil Suit No. 588 of 1971 in the Civil Court against the NIT. The Civil Court, by order dated 3-4-1976, held that it had no jurisdiction to try the suit, observing that the dispute would have to be referred

to the Registrar of the Co-operative Societies.

3. The Society constructed a bungalow on the said plot, which was leased out to one Kailashchandra Agrawal, who was not a member of the respondent-Society at the relevant time. After a decision to sell the property was confirmed at the Annual General Meeting on 19-12-1993, and after issuing an advertisement on 14-11-1994 for sale of the property, the Society sold the property to said Agrawal, admitting him to the membership of Society during the pendency of the proceedings before the Co-operative Court, which were initiated on 30-12-1993. Thereafter, on 13-2-1995, the Co-operative Court had passed an order directing the parties to maintain status quo.

4. The respondent-Society contested the proceedings before the Courts below, pointing out that the allotment of plot in favour of the petitioner was cancelled by the NIT, as he failed to commence construction within stipulated time of three years from the date of commencement of lease, i.e. from 9-10-1962, in spite of the notices and warnings. The respondent submitted that in fact it had supported the petitioner by granting him extension of time to commence construction. Ultimately, it resumed possession on 11-9-1970 after the NIT cancelled the lease on 20-8-1970. It submitted that the petitioner had no legally enforceable rights. After the Civil Court held on 3-4-1976 that it had no jurisdiction, the petitioner kept quiet for 19 years (17 years?), and thus by his conduct had abandoned his claim, if any.

5. The learned Judge, Co-operative Court, held that the dispute was barred by limitation, was bad for non-joinder of NIT as necessary party, that the petitioner was estopped by waiver/acquiescence from raising the dispute and hence dismissed the dispute. The petitioner's appeal to Co-operative Appellate Court was dismissed by the impugned judgment. This is how the petitioner is before this Court.

6. An application by the petitioner to join said Kailashchandra Agrawal as a party to the proceedings before the Co-operative Appellate Court was rejected by the said Court by order dated 6-5-1998.

7. I have heard both the learned Counsel for the petitioner and the respondent, who have also filed written notes/points for arguments.

8. The learned Counsel for the petitioner submitted that the petitioner was one of the earliest members of the Society having become member in the year 1962. On 6-12-1962, plot No. 113 had been allotted to the petitioner. The petitioner had applied for a loan of Rs. 16,500/- on 28-8-1965. On 2-8-1966, the petitioner was asked to start construction. However, the construction could not be started, as one Smt. Pathak applied for exchange of her plot No. 122 with plot No. 113 of the petitioner. On 8-8-1967, this exchange was allowed by the Society. Thereafter on 12-10-1967, the petitioner started construction. But the construction could not be completed because of shortage of steel and cement. It was to be completed before 24-4-1970 as per the extensions granted from time

to time. According to the learned Counsel for the petitioner, by 1971, most of the construction was, however, over. He submitted that the construction could not be completed and the NIT treated whatever construction was made as unauthorized. In 1971 itself, the Improvement Trust re-allotted the plot to the Society. Therefore, according to the learned Counsel for the petitioner, since the petitioner had spent substantial sums in pursuance of the allotment, it was not open to the Society to take over possession. The learned Counsel submitted that the Society itself completed the construction in 1985 and let out the building to Kailashchandra Agrawal. These various dates had to be gathered from the arguments advanced by the learned Counsel and, there are no documents on record to show that the events mentioned occurred on those dates, though substantially, there is no dispute on this count.. The learned Counsel for the petitioner submitted that the Society could not have sold the plot and the building to Kailashchandra Agrawal, who was not even the member of the Society at the relevant time, since Kailashchandra Agrawal became the member on 14-1-1995. According to the learned Counsel, the procedure followed by the learned Judge, Co-operative Court, was not proper and he had not framed the issues after pleadings were complete. He also submitted that the learned Judge, Co-operative Court could not have non-suited the petitioner on the ground of non-joinder of the necessary parties, since u/s 94(3)(c) of the Maharashtra Co-operative Societies Act, 1961 he had the power to have necessary parties joined.

9. The learned Counsel for the respondent submitted that the petitioner's inaction right from 1976 when the plaint was returned till filing of the dispute in the year 1993 speaks volumes and indicates that the petitioner had acquiesced to the actions of the Society during the intervening period. Therefore, there was no question of the petitioner being entitled to re-allotment of the property. He submitted that the Code of Civil Procedure, as it is, does not apply to the proceedings before the Co-operative Court and, therefore there was no question of framing any issue before the trial commenced. The learned Counsel submitted that the bye-laws of the Society permit sale of property to non-members and, therefore, there was no error in the judgments of the Courts below to warrant interference in the concurrent findings recorded by the Courts below.

10. Though the learned Counsel for the petitioner had raised several points in his notes of arguments, eventually in course of his oral arguments, he attacked the findings of the Courts below on the question of (i) failure of Co-operative Court to frame issues, (ii) limitation and accrual of cause of action, (iii) non-examination of the office bearers of the Society before the Co-operative Court to rebut the word of the petitioner, (iv) non-joinder of necessary parties, and (v) on the ground that the property could not have been sold to non-members. I would take up these points one by one.

11. The learned Counsel for the petitioner submitted that the judgments of the Courts below are vitiated because the learned Judge, Co-operative Court did not frame issues and for this purpose, submitted that a dispute before the Co-

operative Court had to be tried in the same manner as a suit is tried before a Civil Court. The procedure for settlement of disputes and powers of Co-operative Court in dealing with disputes are dealt with by Section 94 of the Maharashtra Co-operative Societies Act. The Section reads as under:

94. Procedure for settlement of disputes and power of Co-operative Court:

(1) The Co-operative Court, hearing a dispute under the last preceding section shall hear the dispute in the manner prescribed, and shall have power to summon and enforce attendance of witnesses including the parties interested or any of them and to compel them to give evidence on oath, affirmation or affidavit, and to compel the production of documents by the same means and as far as possible in the same manner, as is provided in the case of a Civil Court by the Code of Civil Procedure, 1908.

(1A) Save as otherwise provided in this Act, every dispute in relation to any election shall be heard and decided by the Co-operative Court as expeditiously as possible and endeavour shall be made to conclude the hearing and decision within six months from the date on which the dispute is filed before it.

(2) Except with the permission of the Co-operative Court no party shall be represented at the hearing of a dispute by a legal practitioner.

(3)(a) If the Co-operative Court is satisfied that a person whether he be a member of the society or not has acquired any interest in the property of a person who is a party to a dispute it may order, that the person who has acquired the interest in the property may join as a party to the dispute; and any decision that may be passed on the reference by the Co-operative Court shall be binding on the party so joined, in the same manner as if he were an original party to the dispute.

(b) Whether a dispute has been instituted in the name of the wrong person, or where all the defendants have not been included, the Co-operative Court may, at any stage of the hearing of the dispute, if satisfied that the mistake was bona fide order any other person to be substituted or added as a plaintiff or a defendant, upon such terms as it thinks just.

(c) The Co-operative Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Co-operative Court, to be just, order that the names of any party improperly joined whether as plaintiff or defendant, be struck out, and the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Co-operative Court, may be necessary in order to enable the Co-operative Court effectually and completely to adjudicate upon and settle all the questions involved in the dispute, be added.

(d) Any person who is a party to the dispute and entitled to more than one relief in respect of the same cause of action may claim all or any of such reliefs; but if he omits to claim for all such reliefs he shall not forward a claim for any relief so

omitted except with the leave of the Co-operative Court.

(3A) In any case in which a dispute is decided by the Co-operative Court ex parte against any person, he may apply to the Court, within thirty days from the date of the decision, to set it aside. If he satisfies the Court that there was sufficient cause for his failure to appear when the dispute was called and heard, the Court shall make an order setting aside the decision as against him, upon such terms as to costs, payment into Court or otherwise, as it thinks fit, and appoint a day for hearing and deciding the dispute so far as it relates to him.

(4) Save as otherwise directed by the State Government in any case or class of cases, every dispute shall be decided in such summary manner as may be prescribed and as expeditiously as possible.

Since the Section recites that the disputes have to be heard in the manner prescribed, it may be useful to find out as to what is prescribed by rules. Chapter VIII of the Maharashtra Co-operative Societies Rules, 1961 provides for disputes and Cooperative Courts. Rule 77-E provides for procedure for hearing and decision of disputes, which reads as under:

77-E. Procedure for hearing and decision of disputes.

(1) The Registrar or the Co-operative Court shall record in English, Marathi or Hindi the evidence of the parties to a dispute and the witnesses who attend. Upon the evidence so recorded and upon consideration of any documentary evidence produced by the parties, a decision shall be given by him or it in writing. Such decision shall be pronounced in open Court, either at once or as soon as may be practicable on some future day, of which due notice shall be given to the parties.

(2) Where neither party appears when the dispute is called on for hearing, the Registrar or the Co-operative Court may make an order that it be dismissed for default.

(3) Where the opponent appears and the disputant does not appear when the dispute is called on for hearing, the Registrar or the Court may make an order that the dispute be dismissed, unless the opponent admits the claim or a part thereof, in which case the Registrar or the Court, as the case may be, may make an order against the opponent upon such admission and whether, part only of the claims is admitted, may dismiss the dispute so far as it relates to the remainder.

(4) Where the disputant appears and the opponent does not appear when the dispute is called for hearing, then, if the Registrar or the Court is satisfied from the record and proceedings that the summons was duly served, the Registrar or the Court may proceed ex parte. Where the summons is served by the officer of the Registrar or the Court, he shall make his report of service on oath.

(5) The Registrar or the Court may not ordinarily grant more than two adjournments to each party to the dispute at its request. The Registrar or the

Court may, however, at his or its discretion grant such further adjournments on payment of such costs to the other side and such fees to the Registrar or the Court as the Registrar or the Court, as the case may be, may direct.

(6) Any party to a dispute may apply for and obtain a certified copy of any order, judgment or award made by the Registrar or the Court on payment of copying fees at the rate of 50 paise per 100 words in such order, judgment or award, whether in English, Marathi or Hindi.

Rule 77F provides for summary procedure for deciding disputes. Rule 78 provides for services of summons, notices and fixing of dates and places of hearing in respect of disputes. Rule 79 provides for investigation of claims and objections against attachment. Rule 80 provides for the custody of property attached u/s 95. Rule 81 provides that the procedure laid down in Rules 80 and 83 shall mutatis mutandis apply for attachment and sale of property. Rule 82 provides for issue of proclamation prohibiting private transfers of property. Rules 83 and 84 provide for execution of awards. Rule 85 covers transfer of property which cannot be sold, and Rule 86 prescribes court fee for entertaining various disputes, applications and documents before the Co-operative Court. It is thus clear that the rules elaborately provide for procedure to be followed by Co-operative Courts. This was obviously done as the framers of rules did not want Co-operative Courts to follow the procedure prescribed under the Civil Procedure Code. None of these provisions provide for framing of issues before a trial of dispute commences.

12. The learned Counsel for the petitioner submitted that Sub-section (1) of Section 94 clearly refers to the CPC and, therefore, for matters, which are not covered by the provisions of the Co-operative Societies Act or the Rules made thereunder, the provisions of the CPC would apply. For this purpose, he submitted that in *A-1 Co-operative Housing Society Ltd. Vs. R. Jaikishan and Co. and Others*, , this Court held that in the absence of a specific provision in Maharashtra Co-operative Societies Act and the Rules made thereunder, the principles of CPC will have to be applied and, therefore, on that analogy, the learned Counsel submitted that if the Rules are silent as to the framing of the issues, the provisions of the Code will have to be applied.

13. I have carefully gone through the judgment. The question in that case pertained to amendment to the pleadings. The Court referred to an earlier judgment of this Court in *Shri Murlidhar Datoba Nimanka, Shri Jotiram Ramchandra Varute, Shri Nitin Gajanan Kamble, Shrikant Sakharam Phatak, Mahesh Sadashiv Satpute, Gajanan Gundapa Kharage, Shrikant Wyankatesh Kabade, Dr. Vilas Shankarrao Khilare, Sou. Malati Mahadev Kamble, Pandit Gajanan Varute, Manohar Shripati Dhavale and Rajendra Maruti Hogade Vs. Shri Harish Balkrushna Latane, Shri Hemant Ulhas Hogade and Shri Choundeshwari Sahakari Soot Girani Ltd.*, . Quoting from para 23 of the judgment in *Murlidhar's* case, the Court observed that merely because Section 91 of the Maharashtra Co-operative Societies Act restricts the applicability of the CPC only in relation to the

enforcement of attendance of witnesses and recording of evidence oral or documentary, it cannot be said that the principles of CPC would not apply even in case where the said Act or the said Rules are totally silent. In Murlidhar's case, in para 23, some illustrative instances of the applicability of the principles of CPC to the proceedings before the Co-operative Court were given, which included power to frame and alter issues in terms of Order XLV (?). The question is whether the enumeration in Murlidhar's case could be taken as a mandate making it necessary for the Cooperative Court to frame issues before a dispute can be taken for trial, when this was not the question before this Court in either Murlidhar or in A-I Co-operative Housing Society Ltd.

14. To support his contention that the provisions of the CPC would apply even in the absence of such express stipulation, the learned Counsel for the petitioner next relied on a judgment of the Supreme Court in Rabindra Singh Vs. Financial Commissioner, Cooproration, Punjab and Others, . In that case, the question was whether a Revenue Court could have recourse to power under Order IX, Rule 13 of the CPC for setting aside an ex parte decree. The Revenue Court had held that such an application was not maintainable. In this context, the Supreme Court observed in para 21 of the judgment as under:

21. What matters for exercise of jurisdiction is the source of power and not the failure to mention the correct provisions of law. Even in the absence of any express provision having regard to the principles of natural justice in such a proceeding, the courts will have ample jurisdiction to set aside an ex parte decree, subject of course to the statutory interdict.

The learned Counsel for the petitioner submitted that it would thus be seen that even in the absence of express provision, the Apex Court had held that recourse could be had to the provisions of the Civil Procedure Code.

15. The learned Counsel for the respondent submitted that such a ratio could not be deduced from the judgment and the Apex Court cannot be said to have held that the provisions of CPC would apply whenever the procedure prescribed for such Tribunals did not contain any express stipulation to cover a procedural aspect. What the Court held was that having regard to the principles of natural justice, the Revenue Court would have ample jurisdiction to set aside the ex parte decree.

16. The learned Counsel for the respondent relied on a judgment of the Supreme Court in Sayeda Akhtar Vs. Abdul Ahad, , which arose out of the proceedings under the M.P. Accommodation Control Act, 1961. The Trial Court had not framed any specific issue about commission of nuisance. But the judgment indicated that the parties had adduced evidence on that question. The Appellate Court had specifically formulated a question as to whether the appellant had created a nuisance in the premises and had given a specific finding. The High Court set aside the findings of the Courts below on the ground that no issue was framed by the Trial Court on the point of nuisance. The Supreme Court held that the High

Court in the Second Appeal could not have, without sufficient and just reasons, interfered with the concurrent findings of fact of the Courts below.

17. In Eknath P. Kamble v. Smt. Janqui Nilu Kamble and Anr. reported at 2009(4) ALL MR 322, arising out of a claim under the Workmen's Compensation Act, 1923, a learned Single Judge of this Court held that simply because issues were not framed, it could not be said that there was no proper trial. The learned judge observed that the object of framing issues was always to focus the attention of the parties to the real controversy and also to indicate burden of proof.

18. In Kunju Kesavan Vs. M.M. Philip I.C.S. and Others, , on which the learned Counsel for the respondent placed reliance, the Supreme Court specifically considered absence of issues and observed in para 17 of the judgment that absence of an issue could not lead to a mis-trial sufficient to vitiate the decision if the parties went to trial fully understanding the central facts.

19. In Alizan Mian v. Naro Dusadh and Ors. reported at (2005) 12 SCC 214, the High Court while entertaining second appeal had framed the following substantial question of law:

(i) Whether the failure on the part of the courts below to frame an issue regarding the surrender of the disputed land by Hari Mian to Nagwa Dusadh resulted in miscarriage of justice?

The High Court then dismissed the appeal on merits after noting that the Courts below had neither failed to take into consideration the relevant evidence on record having material bearing on the facts, which could have resulted in change of decision nor had the Court misread the evidence. This was affirmed by the Supreme Court. The learned Counsel for the respondent, therefore, submitted that failure to frame an issue ipso facto would not warrant a re-trial unless it is shown that the parties were prejudiced by such a course. He submitted that in this case, the petitioner had sufficient notice of the fact that the respondent had questioned the tenability of the dispute after the suit filed by the petitioner had been held to be beyond the jurisdiction of the Civil Court.

20. I have carefully considered these judgments. First, even if the principles underlying the provisions of CPC were to be applied to the proceedings before the Co-operative Court, it would not follow that a Co-operative Court would have a duty to frame issues before a dispute could be tried by it, though, it would definitely have such a power. As observed by the learned Single Judge in Eknath Ramble's case, the object of framing issues is to focus the attention of the parties on what is required to be proved and by whom. In this case, though issues were not framed and points were formulated only while delivering the judgment, that is, without the parties being aware as to what would be the focus of enquiry by the Co-operative Court, the parties cannot deny that they did not have sufficient notice as to what were the parameters of the dispute. The respondent had categorically denied that the cause of action arose on 26-6-1993 or that it continued even prior to 2-12-1989. Though a specific plea of bar of

limitation is not shown to have been raised, it has been stated that the petitioner had filed a civil suit claiming the same reliefs, which had been disposed of on 3-4-1976, and that the said judgment had become final. It was specifically pleaded that the dispute was hit by the doctrine or principle of *res judicata*. True it is, that bar of *res judicata* did not apply and this plea could not be equated to the plea of bar of limitation. Yet it could not be said that the learned Judge was not entitled to raise and decide such a point.

21. The learned Counsel for the respondent submitted that even under the CPC in view of the provisions of Section 99 of the Code, a decree could not be reversed or substantially varied on account of any error not affecting the merits of the case or the jurisdiction of the Court. Therefore, he submitted that the petitioner had the opportunity of raising the question of propriety of dismissal of his dispute on the ground of limitation before the Appellate Court, which he availed. The Appellate Court had specifically considered and decided the question of limitation though a specific point was not framed. The Appellate Court had observed in para 8 of the judgment that the dispute was hopelessly barred by limitation because of the silence of the petitioner for 17 years after the suit was held to be beyond the jurisdiction of the Civil Court. The learned Counsel for the respondent submitted that the judgment of the Supreme Court in *Sayed Akhtar's* case would squarely apply to the present case and it would have to be held that failure to frame the issues by the Co-operative Court did not vitiate the judgment.

22. This takes me to the question whether the learned Judge, Co-operative Court, was justified in holding that the dispute was barred by limitation.

23. The learned Counsel for the respondent submitted that the judgments of the Courts below on the question of limitation is a finding recorded on facts and, therefore, cannot be questioned in jurisdiction of superintendence vested in this Court under Article 227 of the Constitution or even the power to issue a writ of certiorary under Article 226 of the Constitution. For the proposition that the decision of limitation is a finding of fact, the learned Counsel for the respondent-Society placed reliance on the judgment of the Supreme Court in *Dudh Nath Pandey (Dead) by Lrs Vs. Suresh Chandra Bhattasali (Dead) by Lrs*, , which considered the scope of a second appeal, and, in that context, observed that finding on the question of limitation is a finding of fact. On the scope of jurisdiction under Article 227 of the Constitution, the learned Counsel placed reliance on a number of judgments of the Supreme Court.

24. In AIR 1975 1297 (SC) , the Supreme Court held that the power under Article 227 of the Constitution as in the case of certiorary jurisdiction cannot be invoked to correct an error of fact, which only an Appellate Court could do in exercise of its statutory power as Court of Appeal. The High Court cannot convert itself into a Court of appeal, when the Legislature has not conferred any such right of appeal to the High Court.

25. In *Shamshad Ahmad and Others Vs. Tilak Raj Bajaj (Deceased) through LRs. and Others*, , the Supreme Court held as under:

38. Though powers of a High Court under Articles 226 and 227 are very wide and extensive over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction, such powers must be exercised within the limits of law. The power is supervisory in nature. The High Court does not act as a court of appeal or a court of error. It can neither review nor reappreciate, nor reweigh the evidence upon which determination of a subordinate court or inferior tribunal purports to be based or to correct errors of fact even of law and to substitute its own decision for that of the inferior court or tribunal. The power are required to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts and inferior tribunals within the limits of law.

A Division Bench of this Court reiterated these limitations in para 35 of the judgment in *R.P. Sawant and Others Vs. Bajaj Auto Ltd. and Another*, .

26. In *Khimji Vidhu v. Premier High School* reported at AIR 2000 SC 3495, the Supreme Court held that the jurisdiction under Article 227 of the Constitution may be exercised to correct the errors of jurisdiction but not to upset the pure findings of fact, which fall in the domain of the Appellate Court.

27. The learned Counsel for the respondent pointed out that the petitioner had not raised in the petition the ground that the Co-operative Court and the Co-operative Appellate Court erred in recording a finding that the dispute was barred by limitation and, therefore, submitted that the learned Counsel for the petitioner could not raise such a ground in the course of arguments.

28. Rather than shutting out the arguments of the learned Counsel for the petitioner on the question of limitation for the failure to raise such a ground, it would be useful to examine if the Courts below erred in recording such a finding.

29. In the dispute, which was filed before the Co-operative Court, the petitioner had stated in para 10 that the "cause of action arose on 26-6-1993 and 17-8-1993 and it continued even prior to 2-12-1989". The prayer in the dispute is to direct the opponent to execute the sale-deed of plot No. 122, which was in occupation and possession of the Society, and to deliver the possession thereof to the petitioner. As rightly submitted by the learned Counsel for the respondent, the period of limitation for filing dispute before a Co-operative Court is prescribed by Section 92 of the Maharashtra Co-operative Societies Act. Sub-section (2) thereof would be attracted since the dispute is not one covered by Clauses (a) to (d) of Sub-section (1) of the said Section. Therefore, limitation under the provisions of the Limitation Act would be applicable as if the dispute were a suit and Co-operative Court were a Civil Court. Therefore, since the prayers are in the nature of seeking specific relief, the limitation would be three years. In this case, the allotment of the petitioner was cancelled, even according to the petitioner, in the year 1971 or 1972. In fact this was the cause which led the petitioner to file a suit before the Civil Court which was disposed of by order dated 3-4-1976.

Thus the cause of action, if any, for seeking allotment in his name arose in 1971 or 1972, or, latest, on the date when the suit was held to be beyond the jurisdiction of the Civil Court.

30. The learned Counsel for the respondent pointed out that the petitioner had himself admitted in his cross-examination before the Co-operative Court that he had received the letter from the Nagpur Improvement Trust on 11-9-1970 and, therefore, as per that letter he was not in possession of the plot. He denied knowledge as to whether the Nagpur Improvement trust took possession of the plot after fixing a board on the property that it was a Trust property. He had admitted that he came to know that the Nagpur Improvement Trust had cancelled lease of plot No. 122 to him vide order dated 20-8-1970, which order he had not challenged. Therefore, according to the learned Counsel for the respondent, in face of these admissions, it would not be open to the petitioner to claim that it continued to have right over the property and could merrily seek to exercise it years after the cancellation and dispossession occurred.

31. Sub-section (3) of Section 92 of the Maharashtra Co-operative Societies Act would have enabled the petitioner to pray for admission of the dispute even after the expiry of the period of limitation, by satisfying the Co-operative Court that he had a sufficient cause for not referring the dispute within the prescribed period. However, no such prayer was made, nor was any cause shown for not approaching the Co-operative Court. Even before the Co-operative Appellate Court or this Court, there is nothing to show that the petitioner had any good cause for not approaching the Co-operative Court soon after the order of the Civil Court dated 3-4-1976. There is absolutely no reason why the petitioner chose to wait till 30-12-1993 - i.e. for almost 17 years - for filing the dispute. It cannot, therefore, be said that the dispute was not barred by limitation or that the findings of the Courts below were incorrect.

32. The learned Counsel for the petitioner submitted that it would be wrong to compute the period of limitation from the date of cancellation of allotment to the petitioner and that the cause of action should be gathered according to the pleadings of the petitioner. Therefore, according to him, the cause of action must be held to have accrued on 26-6-1993 or 17-8-1993, as stated in para 10 of the dispute, when the petitioner served a notice through his Advocate on the respondent-Society and the respondent-Society gave a reply. If issuance of notice, or receipt of reply, were allowed to be set up as starting point for limitation, or point of time when the cause of action accrues, the Limitation Act itself would be rendered superfluous, since in that case, a party could merrily postpone giving a notice invoking its rights and then claim that the limitation would start from the date it served such a notice. I must hasten to add that there are certainly some dispute where cause of action does accrue from the date of service of notice, or the date of receipt of notice from the opponent, as in the cases of specific performance of contract, where no date for performance is fixed, or time is held to be not of essence. In such cases, limitation may not start

running until the party claims specific performance, and such performance is denied or contract is repudiated by the other side. In this case, there is specific cancellation of the allotment in favour of the petitioner, which admittedly occurred in 1971 or 1972. Therefore, even by the petitioner's own plea in para 10 of his dispute, that the cause of action had accrued even prior to 2-12-1989, the dispute was barred by limitation. At the cost of repetition, it has to be stated that even in the dispute filed before the Co-operative Court, there is no whisper as to why the petitioner chose to maintain a silence for all these years.

33. The learned Counsel for the petitioner next submitted that while the petitioner had examined himself before the Co-operative Court, on behalf of the respondent-Society, no oral evidence was tendered. This aspect has been dealt with by the learned Member, Co-operative Appellate Court. Since there were no facts which were required to be proved by tendering oral evidence, it was rightly held that failure of the respondent to step into the witness box was not material. The learned Counsel for the petitioner could not point out as to which factual aspect of the matter could have turned in his favour had the respondent entered the witness box. The respondent-Society has not disputed that the plot was indeed allotted to the petitioner, but stated that since the petitioner failed to raise the construction thereon, the allotment was cancelled by the NIT. In view of this, the objection of the petitioner on the ground of non-examination of any witness by the respondent, has to be rejected.

34. The learned Counsel for the petitioner submitted that the petitioner could not have been non-suited on the ground of non-joinder of necessary party. The learned Judge, Co-operative Court, had held that the dispute was bad for non-joinder of the Nagpur Improvement Trust as necessary party. Before the Co-operative Appellate Court, the petitioner had filed an application for joining Kailashchandra Agrawal and not the Nagpur Improvement Trust as a respondent. This application was rejected by the learned Member, Co-operative Appellate Court, by his order dated 6-5-1998. It may be seen that what the Trial Court had held was that the petitioner had not joined the Nagpur Improvement Trust as a party-respondent as it was the Nagpur Improvement Trust, which had cancelled the allotment of the plot to the petitioner, and, therefore, was a necessary party. Since the allotment of plot to the petitioner had been cancelled by the Nagpur Improvement Trust, and not by the respondent-Society for failure of the petitioner to comply with the terms of the allotment set out by the Nagpur Improvement Trust, the petitioner ought to have joined the Nagpur Improvement Trust as a party to the dispute, particularly since he had made the Nagpur Improvement Trust a party to the Civil Suit which he had filed. Thus it is not that the petitioner was unaware that the Nagpur Improvement Trust was a necessary party.

35. The learned Counsel for the petitioner submitted that the learned Judge, Co-operative Court, erred in holding that the dispute was bad for non-joinder of the necessary party, since the learned Judge had ignored the provisions of Section

94(3)(c) of the Maharashtra Co-operative Societies Act, which read as under:

(c) The Co-operative Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Co-operative Court, to be just, order that the names of any party improperly joined whether as plaintiff or defendant, be struck out, and the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Co-operative Court, may be necessary in order to enable the Co-operative Court effectually and completely to adjudicate upon and settle all the questions involved in the dispute, be added.

It is true that the learned Judge, Co-operative Court, could have, on his own, ordered joinder of the Nagpur Improvement Trust as a necessary party. The question is whether this absolves the petitioner of the responsibility to join necessary party. It seems that the petitioner is attempting to read in the provisions of Section 94(3)(c) of the Maharashtra Co-operative Societies Act, a duty on the learned Judge to join the Nagpur Improvement Trust as a party, in order to adjudicate upon the matter, forgetting that even after such a deficiency was pointed out, the petitioner himself failed to take any steps to have the Nagpur Improvement Trust impleaded. In any case, since non-joinder of the necessary party is not the only ground on which the dispute has been dismissed, this would not be of any consequence. Had the petitioner so desired, and had there been no other obstacles in the way of the petitioner, the petitioner could have been allowed to seek joinder of the Nagpur Improvement Trust even at the appellate stage, which the petitioner did not do.

36. The learned Counsel for the petitioner lastly submitted that allotment of the property to Kailashchandra Agrawal, when he was not even the member of the Society, was not legal and for this purpose relied on a judgment of this Court in *The Atomica Co-operative Housing Society Ltd., Bombay v. B.R. Ballal and Ors.* reported at 1988 C.T.J. 292. In that case, the question before the Court was whether the cancellation of shares and allotment of the flat to the disputant was valid. The Court observed that the membership of the Co-operative Society and occupation of flat had a nexus and that if a person ceased to be a member, he would cease to hold the flat. In para 16, the Court observed that to suggest that a member whose flat has been taken away may still function as a member by participating in the meetings and managing the affairs of the Society is to ignore the realities of life. The learned Counsel for the petitioner submitted that since the petitioner continued to be member of the Society, he was entitled to the preferential allotment of the house, and, in any case, to revival of the allotment, which has already been made to him, even if it is taken for a while, that if for some reason his allotment has been rightly cancelled by the Improvement Trust. The dispute which has been raised before the Court was about cancellation of allotment. The petitioner is not shown to have sought to purchase the property, which the Society had put to sale. It would have been open for him to seek to purchase the property and in that case, he could have objected to its sale to

Kailashchandra Agrawal in preference to him.

37. The learned Counsel for the respondent submitted that the bye-laws of the Society permitted sale to non-member and reiterated that this sale is not the subject-matter of dispute raised. If the petitioner succeeds in proving that cancellation of allotment to him was bad, all subsequent actions would obviously fail.

38. The learned Counsel for the petitioner submitted that the transfer of property to Kailashchandra Agrawal during the pendency of the lis would not affect his fortunes and this Court could still order conveyance of the property to him and for this purpose relied on a judgment of the Supreme Court in Sanjay Verma and Manik Roy and others, v. Manik Roy and Ors. reported at 2007(2) CLJ 427. In that case, during the pendency of the suit for specific performance of contract for sale, the defendant had sold the land to another person, who sold it to third person, and so on. These transfers were made without obtaining the leave of the Court. The transferees sought impleadment before the Trial Court which prayer the Court rejected. The High Court allowed the transferees to be joined as parties to the suit to meet the ends of justice. The Supreme Court held that the defendants in the suit were prohibited by operation of law in view of the provisions of Section 52 of the Transfer of Property Act to deal with the property, and could not have transferred or otherwise dealt with it in any way affecting the rights of the appellant, except with the order or leave of the Court. The transfers were hit by the doctrine of lis pendens and, therefore, the respondents were neither necessary nor proper parties. If the petitioner knew this, it is not clear as to why the petitioner sought impleadment of Kailashchandra Agrawal at the appellate stage. The learned Counsel for the petitioner submitted that in this case in addition to the provisions of Section 52 of the Transfer of Property Act, there was an order passed by the Trial Court directing the parties to maintain status quo and, therefore, transfer in favour of Kailashchandra Agrawal would not affect the petitioner's right to get an award in his favour.

39. The learned Counsel for the respondent relied on a judgment in Nagubai Ammal and Others Vs. B. Shama Rao and Others, , where too the Court considered the provisions of Section 52 of the Transfer of Property Act and observed in para 24 of the judgment that though the sale was pendente lite the effect of Section 52 of the Transfer of Property Act was not to wipe it out altogether but to subordinate it on the rights based on the decree in the suit. This does not alter the position that if hypothetically the petitioner succeeds, transfer in favour of Kailashchandra Agrawal would be of no avail.

40. To sum up : (i) failure of the Co-operative Court to frame issue of limitation is not shown to have prejudiced the petitioner, (ii) dispute raised was hopelessly barred by limitation, (iii) cancellation of allotment to the petitioner was at the behest of NIT and the petitioner made no attempt to join it as party, and (iv) most importantly, the petitioner failed to show as to how cancellation of allotment to him was bad. In view of this, it cannot be held that the learned

Judge, Co-operative Court erred in dismissing the petitioner's dispute and the learned member, Co-operative Appellate Court erred in dismissing the petitioner's appeal. 41. The petition is, therefore, dismissed.