

(2008) 09 KAR CK 0054

In the Karnataka High Court

Case No : Writ Petition No. 10861 of 2008

Sri Bharathi Warehousing Corporation and Polisetty
Somasundaram (Firm)

APPELLANT

Vs

Shreeshyala Co-operative Industrial Estate Ltd., Smt. Shaila
Hegde, M.S. Rashme Hegde Gopi and Shreeshyala Builders (P)
Ltd.

RESPONDENT

Date of Decision : 17-09-2008

Acts Referred:

Karnataka Co-operative Societies Act, 1959 — Section 125
Specific Relief Act, 1963 — Section 19, 19 (b)

Citation : (2008) 09 KAR CK 0054

Hon'ble Judges : N.K. Patil, J

Bench : Single Bench

**Advocate : Bharath, for Nandi Law Chambers, for the Appellant; Anant Mandgi,
for C/R1-3, for the Respondent**

Judgement

N.K. Patil, J.—Petitioners 1 and 2 in this petition are firms represented by their Power of Attorney Holder. In this petition, petitioners have sought for setting aside the impugned order dated 30th June 2008 made on I.A.IV on the file of the XI Additional City Civil Judge, Bangalore in O.S. No. 40/2007 and to award the costs of this petition and further to grant such other reliefs, as this Court may deem fit to pass, in the circumstances of the case.

2. Brief facts of the case are that, the plaintiffs -petitioners herein are registered partnership firms and defendants - respondents, by falsely representing, assuring and undertaking that they would transfer, convey and invest in the plaintiffs - petitioners a clear and marketable title to property situate at Doddakallasandra village, Uttarahalli Hobli, Bangalore South Taluk, Bangalore induced the two plaintiffs -petitioners to part with a sum of Rs. 01,44,23,500/- (Rupees One Crore Forty Four Lakhs Twenty Three Thousand Five Hundred Only) by Demand Drafts. The respondent - defendant No. 1 had agreed to sell to the petitioner No. 1 - plaintiff No. 1 the suit schedule property. Accordingly, under

the two agreements, the respondent -defendant No. 1 has received a total aggregate sum of Rs. 02,04,97,182/- (Rupees Two Crores Four Lakhs Ninety Seven Thousand One Hundred and Eighty Two only) through seventeen demand drafts in favour of respondent through defendant No. 1 and all the seventeen demand drafts have been en-cashed and credited to the Account of respondent - defendant No 1 on 9th December 2003 for a sum of Rs. 1,44,23,500/- and subsequently, on instructions and on behalf of the respondent - defendant No. 1, a sum of Rs. 60,73,682/- dated 3rd January 2004 to the KIADB. It is the case of petitioners that, despite receiving a total sum of Rs. 02,04,97,182/- under the two agreements, both dated 2nd January 2004, referred above, the respondent - defendant No. 1 did not come forward and execute the sale deeds in favour of the petitioner No. 1 - plaintiff No. 1. Instead, the respondent - defendant No. 1 went ahead, executed and registered a sham sale deed dated 30th May 2005 with respondent - defendant No. 4 viz. M/s Shreeshyla Builders Pvt. Ltd. represented by its Director, Ms. Anisha Gopi, who is the daughter of Respondent - Defendant No. 2. Therefore, petitioners herein, in view of the aforesaid reasons, were constrained to file a original suit in OS. No. 40/2007 before the Court below and respondent - Defendant No. 4 was also arrayed as Defendant No. 4 in the suit in terms of Section 19 of the Specific Relief Act since the said respondent - defendant was the subsequent purchaser having full knowledge of the two agreements, both dated 2nd January 2004 executed by the respondent - defendant No. 1 in favour of the petitioner No. 1 - plaintiff No. 1. Further, before the Court below, as an ancillary prayer, petitioners had also prayed for a declaration that, the registered sale deed dated 30th May 2005 and rectification deed dated 2nd September 2005 in favour of the subsequent purchaser (which was a sham transfer) be declared as null and void and the said prayers were urged as prayers (b) and (c) before the Court below. It is the further case of petitioners that, the said prayers (b) and (c) sought before the Court below were ancillary and, in any event, superfluous u/s 19(b) of the Specific Relief Act.

3. Be that as it may, the Trial Court was pleased to pass an ex-parte interim order on 16th January 2007, restraining the respondents - defendants from transferring or in any way encumbering the suit schedule property and restraining the defendants from changing the nature of the Suit Schedule Property. The respondents - defendant Nos. 1 to 4 entered appearance after service of summons and filed a detailed written statement. Subsequently, the said ex-parte interim order was made absolute by the Trial Court vide its order dated 4th April 2007. Being aggrieved by the said order passed by the Trial Court making the interim order absolute, the respondent - defendant No. 1 filed M.F.A. No. 8078/2007 and respondents - defendants 2 to 4, who were initially arrayed as respondents 3 to 5 in the Miscellaneous Appeal were deleted at the request of respondent - defendant No. 1. The said M.F.A. filed by respondent - defendant No. 1 was disposed of with a direction to the Trial Court to hear and dispose of the said suit pending before it within three months. After disposal of the Miscellaneous First Appeal by this Court, the Trial Court framed necessary issues

on 26th May 2008 and petitioners - plaintiffs led evidence marked exhibits on 5th June 2008. Be that as it may, on 9th June 2008, the respondents - defendants 1 to 3 filed an interim application under Order 7 Rule 11(d) of the Civil Procedure Code, praying that, the suit be rejected as, purportedly, the nature of the relief sought for by plaintiffs - petitioners touches upon the constitution, management and business of the respondent - defendant No. 1 -Society and notice u/s 125 of the Karnataka Co-operative Societies Act, had not been issued nor complied with the mandatory provisions of the said Act.

4. It is the further case of petitioners that, the respondent - defendant No. 1 had never urged the said point either in objections statement/written statement filed before the Trial Court or in the Miscellaneous First Appeal before this Court. After obtaining the order of expedition of the suit from the Division Bench of this Court in the Miscellaneous First Appeal and after leading the evidence on behalf of the petitioner No. 1 - plaintiff No. 1 and issues being framed by the Trial Court, the respondent - defendant No. 1 has filed fraudulent interim application wholly bereft of merits and completely vague without setting out any material particulars or filing of any bye laws by respondent No. 1 -Society. The petitioners filed objections to the said interim application, praying for rejection of the same along with the written statement accompanied with the citations. The respondent - defendant No. 1 filed a copy of the bye laws of respondent No. 1 only during the course of arguments in support of the interim application, relying upon clauses 4(a) and 4(g) of the bye-laws of the respondent No. 1 - Society and Section 125 of the Karnataka Co-operative Societies Act, 1959 and the learned Counsel appearing for respondents also produced copies of some authorities all of which either went against the case of the respondent - defendant No. 1 or were not applicable to the facts of the case. The sum and substance of the case made out by respondent No. 1 before the Trial Court was that, the relief sought for by petitioners - plaintiffs was not only to enforce the performance of the contract but also for declaration of the sale deed dated 30th May 2005, executed by respondent - defendant No. 1 in favour of respondent -defendant No. 4 and the subsequent purchaser as null and void and hence, touches upon the constitution, business and management of the Society. The instant suit filed by petitioners admittedly is one for specific performance on the ground that, in view of Section 19(b) of the Specific Relief Act, 1963 and the innumerable judgments laid down by the Hon"ble Supreme Court as well as the High Courts, prayers (a) to (c) and (e) were maintainable and no notice u/s 125 of the Co-operative Societies Act were required to be issued to institute or maintain the suit for those prayers, as held by the Apex Court in the case reported in *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, . Petitioners have come up before this Court also on the ground that, the Trial Court has also failed to appreciate that, on behalf of the petitioners - plaintiffs, it was contended that, at best assuming without admitting, only prayers (b) and (c) attracted the provisions of Section 125 and hence the said prayer may be struck off and such deletion of prayers (b) and (c) would make no difference to the suit. Having

regard to this background, petitioners herein felt necessitated to present the instant writ petition seeking appropriate reliefs, being aggrieved by the impugned order dated 30th June 2008, having no other equally expedient and efficacious remedy. Further, the Trial Court failed to appreciate that even prayers (b) and (c) itself do not fall within the scope of Section 125 of the Act and there is no material on record whatsoever to even prima facie hold that, respondent - Defendant No. 4 i.e. the subsequent purchaser is a member of the respondent - Defendant No. 1 - Society. On the contrary, all the material available on record would prima facie suggest that, respondent - defendant No. 4 is not a member of the respondent - Defendant No. 1 Society. Further, it is the contention of petitioners that, the Trial Court has failed to appreciate that, when the defendants - respondents admit that the business of the Society is to construct, develop, establish and run an industrial estate with sheds and to lease out the buildings and developed sites to its members or sell them and (i) when the plaintiff is neither a member of the Society; (ii) no industrial estate has been developed by the Society (iii) the property agreed to be sold is not sold for constructing an industrial shed; and (iv) there is no material on record to even prima facie to show that, the subsequent purchaser is a member. Therefore, the suit could not have been dismissed for non issuance of notice u/s 125 of the Co-operative Societies Act. Having regard to the facts and circumstances of the case, as stated above, petitioners herein felt necessitated to present the instant writ petition.

5. The principal submission canvassed by learned Counsel appearing for petitioners is that, the impugned order is clearly violative and in total disregard of the statutory provision of Order 7 Rule 11 of Code of Civil Procedure. It is apparent on the face of the order impugned that, the Trial Court has failed to appreciate that, petitioners are not liable to issue notice u/s 125 of the Karnataka Co-operative Societies Act when all the records, plaint and averments clearly evidence that, the subject matter of the suit does not touch upon the constitution, management or business of the Society. The Trial Court also failed to appreciate that, the averments made in I.A. filed under Order 7 Rule 11 (d) CPC filed by first respondent were never urged either in the objection or in the written statement filed in the Trial Court or in the Miscellaneous First Appeal before this Court. After obtaining an order of expedition of the suit from this Court, and after evidence has been led on behalf of the petitioner No. 1, and issues are framed by the Trial Court, at that stage, the first respondent has filed fraudulent interim application wholly bereft of merits and completely vague, without setting out any material particulars or the bye laws of the respondent No. 1 - Society. Further, it is submitted that, the Trial Court has failed to appreciate that, the sum and substance of the case made out by first respondent is that, the relief sought for by petitioners was not only to enforce the performance of the contract but also the relief of declaration of the sale deed dated 30th May 2005 and the Rectification deed dated 2nd September 2005 executed by the first respondent in favour of fourth respondent, the subsequent

purchaser as null and void and hence, prayers (b) and (c) touch upon the constitution, business and management of the Society. The Trial Court further committed a grave error in as much as it has failed to appreciate that, the instant suit admittedly is one for specific performance and in view of Section 19(b) of the Specific Reliefs Act, 1963, and innumerable judgments laid down by the Hon''ble Supreme Court as well as the High Court, prayers (a) to (c) and (e) were maintainable and no notice u/s 125 of the Karnataka Co-operative Societies Act was required to be issued to institute or maintain the suit for those prayers.

6. Further, learned Counsel appearing for petitioners submitted that, the Trial Court has also committed a grave error, resulting in serious miscarriage of justice in as much as it has failed to appreciate that, on behalf of petitioners, it was specifically contended that, at best assuming without admitting, only prayers (b) and (c) attracted the provisions of Section 125 of the Act and hence the said prayers may be struck down and such deletion of prayers (b) and (c) would also make no difference to the suit. Further, he submitted that, the Trial Court having come to a conclusion that, the suit is not only to enforce specific performance of the contract but also (albeit incorrect) touches the acts of management and business of the Society, has opined that, it was incumbent upon the petitioners to issue statutory notice u/s 125 of the Karnataka Co-operative Societies Act at paragraph 27 page 19 of the impugned order dated 30th June 2008. Accordingly, the Trial Court, despite the binding decision of the Apex Court reported in *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, has wholly rejected the plaint instead of rejecting the relevant portion of the prayer, which the Trial Court deems as touching the constitution, management and business of the Society.

7. Further, he vehemently submitted that, the Trial Court has failed notice that, prayers (b) and (c) itself do not fall within the scope of Section 125 of the Cooperative Societies Act as apart from an oral submission during the course of reply and there is no material on record whatsoever to prima facie hold that, the respondent No. 4 , viz. the subsequent purchaser is a member of the first respondent - Society, but, on the contrary, the material available on record would prima facie show that, the fourth respondent is not a member of the first respondent - Society in as much as in the sham sale deed dated 30th May 2005 as well as the rectification deed dated 2nd September 2005, both do not disclose that, the fourth respondent who is a subsequent purchaser is a member of the first respondent - Society. The Trial Court also failed to appreciate that, even otherwise the judgments cited and relied upon by first respondent not only take the case of the first respondent anywhere, but, on the contrary, further the case of petitioners. Further, the Trial Court committed an error in not appreciating the judgments of the Hon''ble Supreme Court as well as High Court, relied upon by petitioners. Therefore, he submitted that, the order impugned is not sustainable and hence, the same is liable to be set aside at the threshold itself.

8. Further, it is the contention of petitioners that, the case laws cited by the

petitioners before the Trial Court were not considered properly, whereas, the cases cited by learned Counsel for respondents have been considered by the Trial Court and proceeded to reject the plaint in whole. To substantiate the said submission, he placed reliance on several judgments of this Court and the Apex Court reported in 1961 (1) Mys.LJ. 397 - Head note 1, para 1 @ Pg. 397 : 1971 1 Mys.LJ. 302 : ILR 1973 Mys. 235 : ILR 1973 Kar. 1098 : Mahadevaiah Vs. Sales Officer, : Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, : Achutananda Baidya Vs. Prafulla Kumar Gayen and others, : M.G. Abrol Vs. Shantilal Chhotlal and Co., : V. Vellaswamy Vs. Inspector General of Police, Tamil Nadu, Madras and Another, : Collector of Customs and Excise, Cochin and Others Vs. A.S. Bava, : State of Rajasthan Vs. Ganeshi Lal, and submitted that, in view of the well settled law laid down by the Apex Court in the aforesaid judgments, it is held and declared that, whenever the parties have got constitutional right as envisaged under Article 227 of the Constitution of India, the Court has got vast power under the said provision to entertain and interfere in perverse orders, which are erroneous and illegal, on the face of it, resulting in serious miscarriage of justice. In the instant case, the Trial Court has travelled beyond the scope and ambit of the statutory provisions and without understanding the meaning and purpose for which the litigants are redressing their grievances by invoking the relevant provisions of the Act and Rules. Further, the Trial Court has overlooked the basic distinction between the facts disclosing the cause of action and the relief sought for, for the reason that, the relief sought for did not constitute the cause of action, but, on the contrary, they constitute pleading of facts. What is required in law is not the piecemeal reading of the plaint, but in its entirety. Whether the reliefs would be granted on the pleaded facts and the evidence adduced is totally different from the relief claimed. All the reliefs claimed may not be allowed to a party on the pleadings and the evidence adduced. Whether part of the relief cannot be granted by the Civil Court is a different matter from saying that, because of a combined claim of reliefs the jurisdiction is ousted or no cause of action is disclosed. Considering the reliefs claimed vis-a-vis the pleadings would not mean compartmentalization or segregation. This aspect of the matter has been specifically urged and apprised before the Trial Court placing reliance on the judgment of the Apex Court in the case of Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others, . Further, it was specifically pointed out that, when the respondent has not taken any stand in his written statement and objections to the interim prayer sought, there was no mandatory requirement for issuing statutory notice u/s 125 of the Karnataka Co-operative Societies Act, having regard to the scope and nature of relief sought for in the suit. When that is upheld, on the face of the order, this Court has got wide power to entertain the instant petition under Article 227 of the Constitution of India. Further, he submitted that, as held by the Apex Court in the case of State of West Bengal reported in 1971 SCC 309 normally, before a petition under Article 226 is entertained, there should be recourse to statutory authorities which have power to give relief. But, that is a rule of practice and not of jurisdiction. Therefore, a High Court is competent to

entertain a petition, even where the aggrieved party has not exhausted the remedies available under the statute, before the departmental authorities. Further, he relied upon the judgment of the Apex Court in the case of Achutananda Baidya v. Prafulla Kumar Gayen and Ors. reported in 1997 SC 2077 and drew my attention to paragraph 10 of the said judgment which reads thus:

10. The power of superintendence of the High Court under Article 227 of the Constitution is not confined to administrative superintendence only but such power includes within its sweep the power of judicial review. The power and duty of the High Court under Article 227 is essentially to ensure that the Courts and Tribunals, inferior to High Court, have done what they were required to do. Law is well settled by various decision of this Court that the High Court can interfere under Article 227 of the Constitution in cases of erroneous assumption or acting beyond its jurisdiction, refusal to exercise jurisdiction, error of law apparent on record as distinguished from a mere mistake of law, arbitrary or capricious exercise of authority or discretion, a patent error in procedure, arriving a finding which is perverse or based on no material, or resulting in manifest injustice. As regards finding of fact of the inferior Court, the High Court should not quash the judgment of the subordinate Court merely on the ground that its finding of fact was erroneous but it will be open to the High Court in exercise of the powers under Article 227 to interfere with the finding of fact if the subordinate Court came to the conclusion without any evidence or upon manifest misreading of the evidence thereby indulging in improper exercise of jurisdiction or if its conclusions are perverse.

9. Further he submitted that, as held in the very same judgment, if the evidences on record in respect of a question of fact is not at all taken into consideration and without reference to such evidence, the finding of fact is arrived at by inferior Court or Tribunal, such finding must be held to be perverse and lacking in factual basis. In such circumstances, in exercise of the jurisdiction under Article 227, the High Court will be competent to quash such perverse finding of fact. Therefore, he submitted that, in view of the well settled principles of law laid down by the Apex Court in the case of Achuthananda Baidya (referred above), the order impugned passed by Trial Court cannot be sustained and the same is liable to be set aside as perverse, capricious and erroneous and that, petitioners should not be compelled to redress their grievance under the statutory provisions of Section 96 of the CPC and also that, it is not a fit case to direct the litigant to redress their grievance before the appellate Court just because there is a constitutional provision to redress their grievance which is inexpensive, speedy and effective remedy.

10. Further, learned Counsel appearing for petitioners fairly submitted that, he does not dispute regarding the fact that, there is a provision for statutory appeal as envisaged u/s 96 of the Civil Procedure Code. In fact, if petitioners have sought for staying the operation and execution of the order passed by the Trial

Court, it does not mean or prohibit the petitioners to invoke the extra ordinary jurisdiction as envisaged under the constitutional provision. Therefore, there is no bar for this Court to entertain the instant writ petition as this Court has got wide and exclusive powers to entertain and interfere in the order passed by the Court below. Therefore, he prayed that, the order impugned is liable to be set aside with exemplary costs.

11. Further, in reply to the submission made by learned Counsel appearing for respondents and the case law reported in *Shamsher Singh Vs. Rajinder Prashad and Others*, , relied upon by him, learned Counsel appearing for petitioners submitted that, the said judgment cited merely states that, an order of rejection of a plaint under Order VII Rule 11 is appealable u/s 96 of the CPC and it does not in any manner lay down any proposition that, because an Appeal u/s 96 of the CPC lies, no Writ lies. With regard to the judgment reported in AIR 1974 Kar 51 relied upon by respondents, he submitted that, the said judgment is on Section 115 of the CPC vis-a-vis Appeal u/s 96 of the CPC and Section 115 of the CPC cannot be equated to Articles 226 and 227 which are basic features of the Constitution. In reply to the reliance placed by learned Counsel for respondents on the judgment reported in (Full Bench), learned Counsel appearing for petitioners submitted that, as per the said judgment, notice u/s 125 is necessary only if the act, legal or illegal, of the Society or Officer of the Society or both relates to the constitution, management or the business of the society and in the instant case, the conclusion arrived at paragraph 38 of the impugned order by the Trial Court that, the plaint touches acts of the society is erroneous. Further, he submitted that, the decision reported in *The Arogyanagar Co-operative Housing Society Ltd. and Another Vs. Fakiragouda and Another*, is not relevant to the case on hand and the same has been wrongly cited by the counsel for respondents.

12. Further, learned Counsel for petitioners submitted that, the decisions reported in I.L.R.1973 Mys. 235 and I.L.R. 1973 Mys. 1098, which are direct on the point and have not been overruled till date, have not been considered by the Trial Court. Therefore, finally he submitted that, the impugned order passed by Trial Court is patently erroneous, perverse, flagrant, violative and in total disregard of the statutory provisions of Order 7 Rule 11 CPC and that, the impugned order is passed based only upon an unwarranted assumption and presumption that, respondent No. 4 is a co-member of first respondent. The Trial Court was under an erroneous assumption that, fourth respondent is a member and accordingly committed a grave error in concluding that, prayers (b) and (c) to the plaint touch upon the constitution, management, business of the Society. Even assuming prayers (b) and (c) touch upon the constitution, management and business of the Society, the Trial Court ought to have struck off prayers (b) and (c) as laid down by the Apex Court in *Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*, and thereafter decided the matter. Hence, keeping in view all these factors, the order impugned cannot be sustained and it is liable to be set aside at the threshold.

13. Per contra, learned Counsel appearing for first respondent, inter alia, contended and substantiated stating that, the order impugned passed by the Trial Court is in accordance with the relevant mandatory provisions of the CPC and that, prayers (b) and (c) touch upon the constitution, management and business of the respondent. Therefore, the Trial Court has rightly considered the well settled principles of law laid down by this Court, and after appreciation of the relevant material available on file and after careful perusal of the averments made by petitioners in the petition and the objections filed by respondents, has rightly allowed I. A. IV and consequently rejected the plaint. However, learned Counsel appearing for respondents, at the outset, raised a preliminary objection regarding the maintainability of the writ petition before this Court. He submitted that, the writ petition is liable to be rejected at the threshold itself, holding that petition is not maintainable for the reason that, petitioners, without exhausting the statutory appeal remedy, which lies against the order impugned passed by the Trial Court, as provided u/s 96 of the Code of Civil Procedure, have approached this Court. Secondly, he submitted that petitioners, knowing fully well, have failed to comply with the statutory compliance of Section 125 of the Karnataka Co-operative Societies Act. Petitioners have a statutory remedy of assailing the order impugned passed by the Trial Court by filing an appeal to the High Court itself and they cannot bypass the said remedy and take recourse to the proceedings under Article 227 of the Constitution of India. Such a course of action may enable a litigant to defeat all the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount or fulfillment of some other conditions for entertaining the appeal. To substantiate the said submission, he placed heavy reliance on the judgment of the Apex Court reported in Seth Chand Ratan Vs. Pandit Durga Prasad (D) by Lrs. and Others, and drew my specific attention to paragraph 13 of the said judgment and submitted that, when a party had statutory remedy of assailing the order passed by the District Court by filing an appeal to the High Court itself, petitioners cannot by-pass the said remedy and take recourse to proceedings under Articles 226 and 227 of the Constitution of India. Such a recourse may enable a litigant to defeat the provisions of the statute which may provide for certain conditions for filing the appeal, like limitation, payment of court fee or deposit of some amount or fulfillment of some other conditions for entertaining the appeal. In the instant case, petitioners are liable to pay huge court fee if once they opt to file an appeal. In order to avoid payment of court fee, they have chosen to present the instant writ petition. Therefore, the writ petition filed by petitioners is liable to be rejected.

14. Further, he placed reliance on the judgment of the Supreme Court reported in Shamsher Singh Vs. Rajinder Prashad and Others, and submitted that, an order rejecting a plaint under Order 7 Rule 11 CPC, for non-payment of the additional court fee demanded is appealable as a decree and when the order is reversed in appeal by the High Court a second appeal would lie u/s 100 CPC on the ground that, the decision of the first appellate Court on the interpretation of

Section 7(iv)(c) is a question of law.

15. Further, learned Counsel appearing for respondents placed heavy reliance on the judgment of this Court in the case of *Albert D'souza* reported in 1974 (2) Kar.LJ. 51 wherein it is held that, rejection of a plaint on the ground that the Civil Court has no jurisdiction amounts to a decree and is appealable u/s 96 of CPC. Accordingly, relying upon the judgment reported in *Major S.S. Khanna Vs. Brig. F.J. Dillon*, it was held that, the High Court cannot exercise its power u/s 115 CPC. Further, it is extracted in *Albert D'souza's* case that, " If an appeal lies against the adjudication directly to the High Court, or to another Court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction but, where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the Court would not be deemed excluded." Therefore, it was held by Apex Court that, if an appeal lies to a subordinate Court and the decision of such subordinate Court is appealable to the High Court, the High Court has no power to exercise its revisional jurisdiction.

16. Further, he has taken me through the reasoning recorded by the Trial Court regarding the application filed for staying the operation and execution of the impugned order, wherein learned Counsel for plaintiffs - petitioners herein has himself has vehemently argued that, the Trial Court has passed the orders on I.A.IV on 30th June 2008 and allowing the said I.A.IV filed under Order 7 Rule 11 (d) CPC and consequently, rejecting the plaint itself amounts to a decree. Therefore, it is an appealable decree. Hence, it was submitted that, during the pendency of the suit, the order of injunction was operative against the respondents and therefore, petitioners - plaintiffs were desirous of challenging the order dated 30th June 2008. Hence, if the injunction order was not continued, great and irreparable loss would be caused to the plaintiffs petitioners. Therefore, he submitted that, when the learned Counsel for petitioners - plaintiffs himself has categorically stated on oath and submitted that, the order impugned passed rejecting the plaint amounts to a decree and it is an appealable decree, then, this very admission by the counsel for petitioners itself would suffice for this Court to reject the writ petition filed by petitioners as not maintainable on the ground of availability of appeal remedy.

17. So far as the second point raised by learned Counsel for petitioners regarding non compliance of the statutory provision of Section 125 of the Karnataka Cooperative Societies Act is concerned, learned Counsel appearing for respondents placed reliance on the judgment of this Court reported in *The Arogyanagar Co-operative Housing Society Ltd. and Another Vs. Fakiragouda and Another*, wherein it is held that, the provision of Section 125 of the Co-operative Societies Act are attracted since the relief sought for by the plaintiffs against the Society relates to the businesses of the Society and any person seeking a relief against the society which touches the business of the society, such person being a member or no member is of no relevance.

18. Further, placing reliance on the Full Bench decision of this Court reported in : ILR1992KAR3587 (Krishi Mattu Ksheera Utpadaka Vividhoddessa Sahakari Sangh Niyamit v. Sohanlal), learned Counsel for respondents submitted that, "Notice u/s 125 is mandatory where Act in Question with reference to Society or Officer or both and relates to constitution, management or business of the Society."

19. Regarding non maintainability of the writ petition, learned Counsel for respondent placed reliance on the judgment in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, and submitted that, "At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge."

20. Having heard learned Counsel for petitioners and learned Counsel for respondents for considerable length of time on 13th August 2008, 19th August 2008 and 20th August 2008 and after critical evaluation of the relevant material available on file and the rival submission made by learned Counsel appearing for the parties, as stated supra, the following points arise for consideration:

I] WHETHER the writ petition filed by petitioners is maintainable under Article 227 of the Constitution of India ?

II] WHETHER the statutory notice u/s 125 of the Karnataka Cooperative Societies Act is mandatory ? and

III] WHETHER petitioners are justified in invoking Article 227 by filing the instant writ petition when they have a statutory remedy of assailing the order by filing the appeal to the High Court itself ?

Since the subject matter involved in points [I] and [III] are identical and inter dependent, for the sake of convenience, they are clubbed and answered together.

Reg. Point Nos. [I] and [III]:

After careful perusal of the order impugned, it is crystal clear u/s 2(2) of the CPC that, a " decree " means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include - (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default.

21. After careful perusal of the order impugned passed by the Trial Court, it is manifest on the face of the said order that, there is no error of law or material irregularity or illegality as such committed by the Trial Court nor the Trial Court has travelled beyond the scope and ambit of the provisions of the statute nor there is any perversity or flagrant violation or disregard of the statutory provision of Order 7 Rule 11 (d) and Section 125 of the Karnataka Co-operative Societies

Act. When petitioners have statutory remedy of assailing the order impugned passed by the Trial Court by filing the appeal to the High Court itself, petitioners cannot by-pass the said remedy and take recourse to the proceedings envisaged under Article 227 of the Constitution of India. Further, it has been settled by catena of decisions that, when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. Further, it is held that, this Court in exceptional cases, can issue writ of certiorari where there is complete lack of jurisdiction for the officer or the authority or the Tribunal to take action or there being a contravention of fundamental rights and there has been a violation of rules of natural justice and the competent authorities, quasi judicial authorities, Tribunals acted under the provision of law, which ultra vires, then, notwithstanding the existence of an alternative remedy this Court can exercise its jurisdiction to grant relief. In the present case on hand, it is significant to note that, petitioners have filed the application seeking stay of the operation and execution of the impugned order passed by the Trial Court, wherein learned Counsel for petitioners vehemently argued before the Trial Court and precisely recorded by the Trial Court that, the order on I.A.IV passed in O.S. No. 40/2007 on the file of the XI Additional City Civil Judge, Bangalore City allowing the said I.A.IV under Order 7 Rule 11 (d) of CPC and rejecting the plaint amounts to a decree and it is an appealable decree and specifically submitted by counsel for plaintiffs that, during the pendency of the suit, an order of injunction was operating against the defendants-respondents and therefore, plaintiffs - petitioners are desirous of challenging the order passed by the Trial Court. This unequivocal categorical vehement submission made by learned Counsel for plaintiffs before the Trial Court clearly indicates and implies and proves beyond all reasonable doubts that, plaintiffs - petitioners are well aware of this fact and this fact is not disputed by learned Counsel for petitioners during the course of submission. Further, the submission of the learned Counsel for petitioners that, they can invoke the extraordinary jurisdiction under Article 227 of the Constitution of India on the ground that, the order impugned is flagrant, violative and in total disregard of statutory provisions and cannot be accepted for the reason that, the petitioners, in order to by-pass the statutory remedy available under the relevant provisions of the Statute and to elude payment of court fee has taken recourse to Article 227 of the Constitution of India. In the instant case, as rightly pointed out by learned Counsel for respondents, petitioners just to by-pass the liability for payment of court fee, have chosen to present the instant writ petition by raising untenable and unsustainable grounds. Knowing fully well, petitioners through their counsel before the Trial Court, have put in writing that, they want to assail the correctness of the order impugned by way of filing the appeal before the High Court. Such being the case, now, at this juncture, it is not justifiable on the part of petitioners to invoke the extra ordinary jurisdiction of this Court under Article 227 of the Constitution of India. It is worthwhile to refer to the relevant portion of the judgment of the Apex Court in the case of Seth

Chand Ratan v. Pandit Durga Prasad reported in AIR 2003 Supreme Court P.2736. Paragraph 13 of the said judgment reads thus:

13. Even otherwise, the view taken by the Division Bench of the High Court for repelling the objection of the appellant regarding the maintainability of the writ petition, that an alternative remedy does not divest the High Court of its powers to entertain petition under Articles 226 and 227 of the Constitution, has hardly any application on the facts of the present case. It has been settled by a long catena of decision that when a right or liability is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before seeking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is no doubt a rule of policy, convenience and discretion and the Court in be exceptional cases issue a discretionary writ of certiorari. Where there is complete lack of jurisdiction for the Officer or authority or Tribunal to take the action or there has been a contravention of fundamental rights or there has been a violation of rules of natural justice or where the tribunal acted under a provision of law, which is ultra vires, then notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant the relief. In the present case, the alternative remedy of challenging the judgment of the Court was not before some other forum or Tribunal. On the contrary, by virtue of Sub-section (3) of Section 27 of the Act the order passed by the Court amounted to a decree against which an appeal lay to the High Court. When the party had statutory remedy of assailing the order passed by the District Court by filing an appeal to the High Court itself, he could not bypass the said remedy and take recourse to proceedings under Articles 226 and 227 of the Constitution. Such a course of action may enable a litigant to defeat the provisions of the Statute which may provide for certain conditions for filing the appeal like limitation, payment of court fee or deposit of some amount of fulfillment of some other conditions for entertaining the appeal.

(emphasis supplied)

If the ratio of the well settled principles of law laid down by the Apex Court in the aforesaid case is taken into consideration, the same is directly applicable to the facts and circumstances of the case on hand.

22. Further, in another judgment of the Apex Court in the case of Sadhana Lodh Vs. National Insurance Company Ltd. and Another, , it is held that, where a statute provides a right to file an appeal on limited grounds, the said grounds of challenge cannot be enlarged by filing a writ petition under Articles 226 and 227 of the Constitution of India. Further, it is held, where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution of India even if where a remedy by way of an appeal has not been filed provided for against the order and judgment of a District Judge. Further, it is also held that, the supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see

whether an inferior Court or Tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record much less of an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate Court or a tribunal. It is also not permissible to the High Court on a petition filed under Article 227 of the Constitution to review or reweigh the evidence upon which the inferior Court or Tribunal purports to have passed the order or to correct errors of law in the decision. Further, this Court, in the case of Albert D" Souza, (referred above), has specifically referred that, " But, by now this controversy has been settled by the Supreme Court in S.S. Khanna v. F.J. Dillon (3). The Supreme Court has, after considering the decisions rendered by the Privy Council council, Allahabad High Court and the Rajasthan High Court, found as follows:

if an appeal lies against the adjudication directly to the High Court, or to another Court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction but, where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the Court would not be deemed excluded.

(emphasis supplied)

Therefore, it is clear that, if from the decisions aforesaid, an appeal lies to a subordinate Court and the decision of such subordinate Court is appealable to the High Court, the High Court has no power to exercise its jurisdiction. As rightly pointed out by learned Counsel for respondents, undoubtedly, the right of appeal to the High Court u/s 96 of the CPC is available to the petitioners. Being well aware of the same, petitioners have invoked the extra ordinary jurisdiction of this Court under Article 227 of the Constitution of India. Therefore, having regard to the facts and circumstances of the case and the law being laid down by the Apex Court, in hosts of judgments, referred above, this Court cannot exercise its jurisdiction under Article 227 of the Constitution of India, more so, when petitioners have got remedy u/s 96 of the CPC to the High Court itself. Further, in Surya Dev Rai's case (as referred supra), it is held by the Apex Court that, the High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character. In order to safeguard against a mere appellate or revisional jurisdiction being exercised in the garb of exercise of supervisory jurisdiction under Article 227 of the Constitution, the Courts have devised self-imposed rules of discipline on their power, Supervisory jurisdiction may be refused to be exercised when an alternative efficacious remedy by way of appeal or revision is available to the person aggrieved.

23. Therefore, I am of the considered view that, when petitioners have got alternative remedy of filing the appeal against the order impugned passed by the Trial Court, I do not find any justifiable ground as such made out by petitioners to entertain the instant writ petition. Taking into consideration all these relevant

factors and having regard to the facts and legal aspects of the matter, I do not find any merit to interfere in the order impugned passed by the Trial Court and the writ petition filed by petitioners is liable to be dismissed as not maintainable. Hence, interference by this Court is uncalled for.

Re.point II] : Learned Counsel appearing for petitioners vehemently submitted relying on the decisions of the Full Bench reported in and the learned single Judge reported in The Arogyanagar Co-operative Housing Society Ltd. and Another Vs. Fakiragouda and Another, (already referred above) that, since the tenability of the suit depends on the issuing of a notice u/s 125 of the Act, the need arises to ascertain the circumstances in which a notice becomes mandatory and has to be insisted upon as a necessary prelude. Whatever be the act, be it legal or illegal, if it relates to the constitution, management or business of the Society, a notice u/s 125 becomes a forerunner in the absence of which the suit would be deemed. The said submission of the learned Counsel for petitioners cannot be accepted for the reason that, it is crystal clear as held by this Court in the case of The Arogyanagar Cooperative Housing Society Ltd. and Anr. v. Fakiragouda and Anr. (already referred above) that, provision of Section 125 of the Act are attracted since the relief sought for by the plaintiffs against the Society relates to the businesses of the society. Any person seeking a relief against the society which touches the business of the society, such person being a member or no member is of no relevance.

(emphasis supplied)

24. Therefore, I do not find any merit in the contentions urged by learned Counsel for petitioners on the ground that, notwithstanding the fact, whether the plaintiffs- petitioners are members or non members of the Society, if they are seeking the relief against the order which touches upon the business, constitution or management of the Society, then, notice u/s 125 of the Act is a must. It is significant to note that, the Trial Court after carefully going through the judgments relied upon by petitioners and after analyzing each one of the judgment, has opined at paragraphs 35, 36 37 and 38 that, it is amply clear that, without issuing the statutory notice u/s 125 of the Karnataka Cooperative Societies Act and absence of pleadings regarding service of notice u/s 125 is fatal to the case of plaintiffs-petitioners. Therefore, the Trial Court came to the conclusion that, the plaintiffs-petitioners have filed the suit, which touches the "acts" of the Co-operative Society with reference to its constitution or business of the Society. Accordingly, the Trial Court allowed the I.A. No. IV filed by respondents defendants and consequently, rejected the plaint filed by plaintiffs-petitioners. The reasoning given by the Trial Court for allowing the application and rejecting the plaint filed by plaintiffs - petitioners, is after careful consideration of the judgments relied by the petitioners and further also has referred specifically as to how the acts of plaintiffs touch upon the constitution and business of the Society in as much as the plaintiffs have sought for the relief of declaration regarding the sale deed and the rectification deed executed by the

defendants 1 and 2 in favour of the fourth defendant and also the execution of the sale deed as null and void and all these acts definitely touch the constitution, management and business of the Society. Therefore, issuance of notice u/s 125 of the Co-operative Societies Act was a must before instituting the suit. In my view, the Trial Court has rightly come to the said conclusion and upheld the same after critical canalization of the relevant provision of the Act and the judgments cited by learned Counsel for the parties.

25. With regard to the several decisions cited by learned Counsel for petitioners, as stated supra, I am of the considered view that, there is no dispute or second opinion or any quarrel regarding the well settled proposition of law laid down by the Apex Court and this Court in series of cases cited by petitioners. But, unfortunately, the facts and circumstances of those cases are entirely different to the facts and circumstances of the case on hand and that, the same cannot be made applicable to the case of petitioners. The direct reliance placed by learned Counsel for petitioners and the submission made by him have been appropriately and exhaustively considered as referred in preceding paragraphs both by this Court as well as the Trial Court. Further, there is no dispute regarding the wide power that this Court has got under Article 227 of the Constitution of India. The point here is, as to whether this is a fit case for interference by this Court and in my view, the same depends upon the facts and circumstances of each case. In the instant case, having regard to the facts and circumstances of the case, interference is uncalled for. Therefore, the reliance placed by petitioners on the settled proposition of law laid down by the Apex Court and this Court is of no help to him in the case on hand.

26. Having regard to the facts and circumstances of the case, taking into consideration the factual and legal aspects of the matter, as stated supra, I do not find any merit or good grounds as such made out by petitioners to interfere in the order impugned passed by the Trial Court. Hence, I decline to entertain the instant writ petition and the same is liable to be dismissed as not maintainable, especially, when petitioners have an effective, alternative and efficacious remedy of appeal provided u/s 96 of the CPC and is also clear from the definition of Section 2(2) of the CPC that, a decree shall also include rejection of the plaint.

27. In the instant case, the application filed by defendants - respondents has been allowed and consequently, the plaint filed by plaintiffs petitioners has been rejected. In such a situation, the only remedy open for petitioners is to redress their grievance as provided under the statute. Taking into consideration all these relevant factors set out in preceding paragraphs, the writ petition filed by petitioners is liable to be dismissed as not maintainable.

28. Accordingly, it is dismissed.