

2008(5) Mh.L.J.] S. I. C. CORPN. LTD. vs. B. J. V. & ASSOCIATES 803

Appeal No. 281/86 by IIIrd Additional District Judge, Aurangabad on 20-12-1990 stand quashed and set aside. The suit instituted by the plaintiffs is decreed. The order passed by the Tahsildar/Special Officer in File No. 75 MAG on 23-7-1976 directing the plaintiffs to handover the possession of the house bearing Municipal No. 1822 situated at Kannad is declared as invalid, illegal and in excess of jurisdiction and the same shall not bind the interest of the plaintiffs. The defendants are restrained permanently from taking possession of the suit house in execution of the order passed by the Tahsildar as referred to above. In the facts and circumstances of the case, there shall be no order as to costs.

Appeal allowed.

MAHARASHTRA CO-OPERATIVE SOCIETIES ACT, SECTION 164 :
NECESSITY OF NOTICE BEFORE INSTITUTION OF SUIT

(A. P. Deshpande, J.)

SAHARA INDIA COMMERCIAL CORPORATION LTD. *Plaintiff.*

vs.

B. JEEJEEBHOY VAKHARIA AND ASSOCIATES

and others

Defendants.

Maharashtra Co-operative Societies Act (24 of 1961), S. 164 and Civil Procedure Code, S. 151 — *Suit against registered society — Section 164 is mandatory in nature — Suit cannot be instituted without prior issuing a notice under section 164 — Suit as filed without issuing notice to the society not tenable.*

The suit against the society came to be filed without issuing a notice as contemplated by section 164. At a later point of time, by way of an abundant precaution, the Chamber Summons was taken out with a view to delete the defendant No. 4/Co-operative Society and a further prayer was made to permit addition of the said society. The obvious purpose for seeking the said amendment which relate to deletion of defendant No. 4 in the first instance and then addition thereafter is aimed at circumventing the provisions of section 164 of the Co-operative Societies Act which postulates a notice prior to the institution of the suit. If notice under section 164 had to be issued but had not in fact been so issued, the suit would not be maintainable. Section 164 is mandatory in nature. The Court is expected to seek compliance of the said provision and the Court cannot have recourse to the inherent power for circumventing section 164. If a thing cannot be done directly, it cannot be permitted to be done indirectly. Thus as the suit cannot be instituted without prior issuing a notice under section 164, by allowing the present Chamber Summons, the suit cannot be made tenable. (Para 3)

For plaintiff : *Gaurav Joshi with J. Rais* instructed by *Satyam Vora and Ms. Tanvi Gandhi*

For defendants No. 1 to 3, 5, 6 and 8 : *Mohammed Akram* instructed by *Harilal Thakar and Co.*

For defendant No. 4 : *Vivek Kantawala with Ms. Armin Saheed* instructed by *Vivek Kantawala and Co.*

For defendant Nos. 7 and 11 : *K. P. Jain* instructed by *Tushar Garodia and Bhavik Manek*

Chamber Summons No. 587 of 2007 in Suit No. 3376 of 2005 decided on 24-6-2008. (O.O.C.J., Bombay)

804 S. I. C. CORPN. LTD. vs. B. J. V. & ASSOCIATES [2008(5) Mh.L.J.]

List of cases referred :

1. *Gurudev Developers vs. Kurla Konkan Niwas Co-operative Housing Society, 2000(3) Mh.L.J. 131* (Para 3)
2. *Suprabhat Co-operative Housing Society Ltd. and anr. vs. Span Builders and anr., 2002(3) Mh.L.J. 837* (Para 3)
3. *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527* (Para 3)

P. C. :— By this Chamber Summons the plaintiff is seeking amendment of the plaint. The proposed amendment is very unusual inasmuch as what is prayed is deletion of the name of the defendant No. 4 and simultaneously a prayer is also made to permit addition of defendant No. 4 in the suit. The obvious purpose for seeking the said amendment which relate to deletion of defendant No. 4 in the first instance and then addition thereafter is aimed at circumventing the provisions of section 164 of the Co-operative Societies Act which postulates a notice prior to the institution of the suit.

2. The defendant No. 4 is a society registered under the Maharashtra Co-operative Societies Act. Without issuing a notice as contemplated by section 164, the suit came to be filed. In para 62 of the plaint, there is a categorical assertion made that notice under section 164 of the Maharashtra Co-operative Societies Act is not necessary, so far as the defendant No. 4 is concerned. Thus it is obvious that the suit came to be filed under an assumption that no notice as required by section 164 is necessary to be served before filing of the suit. At a later point of time, it is the submission of the learned counsel for the plaintiff, by way of an abundant precaution, the present Chamber Summons has been taken out with a view to delete the defendant No. 4/Co-operative Society and a further prayer is made to permit addition of the said society. By this method, the plaintiff seeks to avoid compliance of section 164 of the Act to the detriment of the interest of the plaintiff.

3. It is not being disputed that this Court had held that section 164 is mandatory and the non-compliance thereof would non-suit the plaintiff, provided the suit is covered by section 164. The learned counsel for the defendant has placed reliance on the judgment of this Court in the case of *Gurudev Developers vs. Kurla Konkan Niwas Co-operative Housing Society*, reported in 2000(3) Mh.L.J. 131 and a judgment in *Suprabhat Co-operative Housing Society Ltd. and anr. vs. Span Builders and anr.*, reported in 2002(3) Mh.L.J. 837. Section 164 of the Act, provides that no suit can be instituted against a society or any of its officers in respect of any act touching the business of the society until the expiration of two months next after the notice in writing has been delivered to the Registrar stating the cause of action and other particulars. In the present case, the suit has been filed without issuing a prior notice as is contemplated by section 164 and thus in the facts of the case, if notice under section 164 had to be issued but had not in fact been so issued, the suit would not be maintainable. According to the plaintiff, at a latter point of time a notice came to be served on 8-2-2007 to the Registrar of the Co-operative Society, with a view to contend that the suit has been filed after a valid notice on the Registrar of the Co-operative Societies. Deletion of defendant No. 4 is asked for with simultaneous prayer for its addition as a party defendant thereafter. In view of the fact that section 164 is mandatory in nature, the Court is expected to seek compliance of the said provision, and the

2008(5) Mh.L.J.] NICHOLAS P. I. LTD. vs. NICHOLAS E. UNION 805

Court cannot have recourse to the inherent power, as suggested by the learned counsel for the plaintiff for circumventing the section 164. It is a settled position of law, that if a thing cannot be done directly, it cannot be permitted to be done indirectly. Thus as the suit cannot be instituted without prior issuing a notice under section 164, by allowing the present Chamber Summons, the suit cannot be made tenable. The learned counsel for the plaintiff has placed reliance on the judgment of the Apex Court in *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal*, reported in *AIR 1962 SC 527* to contend that as the situation emerging in the present suit is not regulated by any other provision of the Code of Civil Procedure, recourse need to be taken to section 151 of Civil Procedure Code, so that the plaintiff does not suffer irreparable loss and hardship. Inherent powers can be resorted to in furtherance of cause of justice and there cannot be any doubt about that. However, if the prayer made in the Chamber Summons is to be granted, the same in my view, would go to circumvent the mandatory provision contained in section 164 of the Maharashtra Co-operative Societies Act, and allowing the prayer would not be in furtherance of cause of justice. In the result, the Chamber Summons is rejected.

Order accordingly.

TRANSFER : VALIDITY

(J. P. Devadhar, J.)

NICHOLAS PIRAMAL INDIA LIMITED, MUMBAI

Petitioner.

vs.

NICHOLAS EMPLOYEES UNION, MUMBAI

Respondent.

(a) Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act (1 of 1972), Sch. IV, Item 3 — *Transfer of three lady employees who had put in more than 35 years of service to the new establishment — Validity — Fact that the three lady employees have put in more than 35 years of service, cannot be a ground to stay their transfer — Nowhere, in the service conditions of these employees it was stated that they would not be transferred on completion of 35 years of service — Moreover, nothing to show that the type of difficulties faced by the three lady members which could be said to be exceptional — As per the service conditions, it was not obligatory on the part of the company to provide accommodation at the transferred place — The transfer could not have been stayed on the ground that the Company has not provided guaranteed accommodation. (Para 31)*

(b) Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act (1 of 1972), Sch. IV, Item 3 — *Transfer of three employees to the new establishment who are said to be heart patients — Validity — Direction by Industrial Court to the Company to absorb them in other establishments without discussing the type of their sickness and without recording any finding as to why they could not be transferred — In the absence of any finding that it was not medically feasible to transfer these three employees the decision of the Industrial Court cannot be sustained. (Para 32)*

(c) Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act (1 of 1972), Sch. IV, Item 3 — *Transfer of*

W. P. No. 3505 of 2008 with W. P. No. 1304 of 2008 (O.S.) decided on 3-7-2008. (Bombay)