

(2003) 08 BOM CK 0087

In the Bombay High Court

Case No : Appeal No. 630 of 2003 in Writ Petition No. 1332 of 2001 with Appeal No. 631 of 2003 in Writ Petition Lodging No. 1665 of 2003

Arti Nirmal Kumar Jain and Others

APPELLANT

Vs

Bharat Villa CHS Ltd. and Others

RESPONDENT

Date of Decision : 14-08-2003

Acts Referred:

Specific Relief Act, 1963 — Section 21(2), 5

Citation : (2004) 1 BomCR 69

Hon'ble Judges : R.S. Mohite, J;H.L. Gokhale, J

Bench : Division Bench

Advocate : Y.S. Jahagirdar, Bhadrashete, instructed by K.V. Aiyar and Associates, for the Appellant; G.E. Vahanvati, Gen. Advocate, Rajni Iyer, instructed by Mehta and Girdharlal, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Gokhale, J.—Both these appeals seek to challenge the order passed by a learned Single Judge on Writ Petition No. 1332 of 2002 and Writ Petition Lodging No. 1665 of 2003. The learned Single Judge has dismissed both these petitions summarily by a common order passed on 1-7-2003.

2. These two petitions sought to challenge the common order passed by the Co-operative Appellate Court in Appeal Nos. 32 of 2001 and 37 of 2001 dated 13-12-2001. That order had allowed those two appeals and set aside the judgment and order passed by the Co-operative Court No. 2, Mumbai on 20-1-2001. This order passed by the Co-operative Court in Case No. 209 of 1993 had allowed that dispute filed by the appellants herein. By virtue of the order passed by the Appellate Court the dispute had come to be dismissed and that order has been confirmed by the learned Single Judge.

3. The short facts leading to these appeals are as follows:

(a) The appellants claim to be members of the first respondent Co-operative

Housing Society which has its building on City Survey No. 351 of Malabhar and Cumbala Hill Division, Mumbai. It is their case that they became the members of this society by applying for the same on 3-7-1980. The application for membership was made by the appellant No. 1 Arti Jain. Thereafter, the other three appellants along with the first appellant applied for associate membership. That application is also dated 3-7-1980. The application stated that they had proposed to take flat No. 11 in the proposed building.

(b) Prior to this, what had happened was that there was a litigation pending in this Court being Suit No. 194 of 1966 between one Kantilal Champaklal Kothari and Anr v. Subhadra Mohanlal and Ors. One Mr. L.C. Shah and Mr. C.M. Shah (being respondent No. 8 herein) decided to purchase the suit property and accordingly consent arrangement was arrived at and order was passed by the High Court in terms of the consent terms arrived at. The respondent No. 1 society, thereafter, became the owner of the concerned plot of land by virtue of the minutes dated 1-5-1980 and the decree in terms thereof. The society was subsequently registered and as stated above on 3-7-1980, the first appellant made application for membership and the other appellants for becoming associate members.

(c) Thereafter, it is the case of the appellants that they paid the share certificate amount and the requisite amounts from time to time. As per the balance-sheet of the first respondent-society the amount of Rs. 4,90,000/- was stated to be paid by the appellants as on 30-6-1985.

(d) Another development is required to be noted viz. that on 21-7-1980 in a Special General Body Meeting the allotment of the flats in the building to be constructed took place and the appellants are stated to have been allotted flat No. 14 in the proposed building. It is also material to note that there is specific allotment letter dated 1-8-1980 issued by the first respondent society to the appellants allotting the flat No. 14.

(e) Thereafter, it so happened that there was some difficulty about the F.S.I. available for the building since it was falling in the C.R.Z. and Municipal Corporation did not permit the construction beyond 13 floors. A writ petition was filed in this Court earlier by a third party being Writ Petition No. 1183 of 1983 challenging this proposed construction. That petition came to be dismissed. However, the Corporation itself later on issued a stop work notice on 5-1-1984. A writ petition was filed by the respondent No. 1 society against the Municipal Corporation. That petition was withdrawn before a Single Judge of this Court. However, subsequently the society agreed at confine to 13 floors and moved a review petition which was allowed as per the order passed on 15-12-1987.

(f) It is material to note that in the mean while construction of the building of the society started in 1981 and the building consisting of 13 floors only was completed in the year 1987.

4. It was the grievance of the appellants that they were not allotted flat No. 14

which was supposed to come up on the 14th floor and therefore, they filed the above referred dispute in the Co-operative Court at Mumbai. The prayers in the dispute were for possession and the allotment of the flat No. 14. Alternatively, a declaration was sought that the disputants were entitled to damages which were quantified in prayer Clause (d) at Rs. 5,89,56,000/-. In the dispute, there is a specific reference in respect of flat No. 14 at various places as the one to which the disputants were entitled. In para 2, it is stated that the disputant had paid amount of Rs. 4,90,000/- and there is an averment in para 4 that the disputants are ready and willing to perform their part of contract, and their membership was subsisting. The learned Judge of the Co-operative Court came to the conclusion that the appellants had made out a case for allotment of the particular flat. However, since all the flats had already been allotted and since there was no flat available to be allotted on the 14th floor, (since there could not be any construction on the 14th floor), the learned Judge directed the respondent No. 1 society to pay the costs of the flat admeasuring 3468 sq.ft. minus balance contribution of Rs. 10,95,000/-, by way of damages.

5. As stated above the disputant No. 1 society and one Pawankumar Agarwal challenged that order by way of two appeals before the Co-operative Appellate Court. The learned President of the Co-operative Court held that the kind of order the learned Judge had passed could not be made in the facts and circumstances of the case and therefore, allowed those two appeals and set aside the impugned order. Consequently, he dismissed the dispute.

6. Being aggrieved by this order, two writ petitions were filed by the appellants herein and as stated above both of them came to be dismissed by the order passed by the learned Single Judge. The learned Single Judge has principally dismissed the petitions on three grounds. Firstly that the appellant No. 4 herein was not even born on 1-8-1980 the date on which the allotment was made. The application for membership is dated 3-7-1980. Secondly, the learned Judge noted that there was manipulation and over writing in the resolution of the allotment of flat No. 14 and thirdly, that the dispute was barred by limitation. The learned Single Judge also observed that the petitioners had not approached the Court with clean hands and therefore, they were not entitled to the relief as sought for.

7. Mr. Jahagirdar, learned Counsel appearing for the appellants submitted that as far as question of limitation is concerned, the learned Single Judge has erred inasmuch as u/s 92(1)(b) of the Maharashtra Co-operative Societies Act, period of six years was available for raising the dispute from the date on which act or omission with respect of which the dispute had arisen took place. In the instant case, his submission was that the appellants continued to be the members of the society and even the balance-sheet for the year 1990-91 shows that an amount of Rs. 4,90,000/- had been paid by them, the appellants were entitled to the allotment of the flat by virtue of the allotment letter and by virtue of the fact that they had made part of the required payments. He therefore, submitted that the

dispute for possession and in the alternative for damages filed in the year 1993 could not be said to be barred by limitation. Mr. Vahanvati, learned Advocate General was fair enough to accept that this point could not be pressed beyond a limit in the facts and circumstances of the present case.

8. As far as the over writing aspect is concerned, Mr. Jahagirdar drew out attention to the minutes of meeting dated 21-7-1990, wherein the figures 11 and 14 written against the names of one Mr. Mehta and the appellants (respectively) appear to be written in a little different ink. Mr. Vahanvati placed for our perusal the original minutes book. It was submitted on behalf of the respondent No. 1 society that the appellants were party to the over-writing and/or alteration in the minutes where these figures are written. Mr. Jahagirdar, learned Counsel appearing for the appellants on the other hand submitted that there was no need for the appellants to do any of these things and in any case, subsequent to these minutes, the allotment letter had been issued for flat No. 14 in favour of the appellants. In our view nothing much turns on this aspect inasmuch as the appellants all throughout contended that they were entitled to flat No. 14 and it is this flat No. 14 which has not been constructed and is not available for allotment. In our view, in absence of exact evidence one cannot presume that somebody has done this alteration.

9. The third submission of Mr. Jahagirdar was that as far as the grievance made with respect to the appellant No. 4 that he was not born at the relevant time is concerned, what one has to note is that the original membership application dated 3rd July, 1980 is filed by Arti Jain and the application that of the same date is filed by Arti Jain alongwith three others for the associate membership. The name of the fourth appellant Kartik Jain figures therein as the fourth associate member. Undoubtedly, Kartik Jain was not born on that day and therefore, it is submitted on behalf of the respondents that the said fact was within the knowledge of the appellants. Thus, the appellants sought membership in the name of un born person and such allotment could not have been made. Thus, some kind of deception has been played by the appellants on the society and on this ground also their dispute ought to fail. Mr. Jahagirdar on the other hand submitted that assuming that Kartik Jain was not born on the relevant date, Smt. Arti Jain was very much there as the member by virtue of her application and assuming that there is any wrong in the associate membership of Kartik, the membership of Arti Jain cannot be disturbed on that ground. As far as this point is concerned for the reasons which we are stating hereinafter, it is not necessary for us to go into this controversy.

10. Mr. Vahanvati, learned Advocate General appearing on behalf of the respondents submitted that this dispute is essentially for the specific performance and the prayer will be governed by section 16(c) of the Specific Relief Act, 1963. Section 16(c) bars the grant of relief of specific performance in favour of a person who has failed to plead and prove that he has performed and has always been ready and willing to perform essential terms of the contract

which are to be performed by him. Now, in a contract of allotment of the flat between the society and the member, the essential term of the contract to be performed by the appellants was to make payment as expected from them towards the flat. In the dispute filed by them, they have clearly averred that they have paid an amount of Rs. 4,90,000/- only. Now if one sees the allotment letter on the basis of which this dispute is filed, it clearly states in para 1 that the society had agreed to allot flat No. 14 to the appellants subject to following terms and conditions:---(a) Rs. 3,00,000/- paid/payable by as earnest on or before.... (b) Rs. 6,95,000/- by such numbers of installments as the number of slabs in new building and each of such installments shall be paid on the casting of each slab in the new building, and (c) the balance of Rs. 5,000/- on possession of the said flat to be delivered to you.

11. Admittedly the appellants have paid Rs. 4,90,000/- only. Thus, even as per the allotment letter, they were in default by Rs. 5,05,000/-. Even the learned Co-operative Judge who decided the dispute in favour of the appellants in terms held that they had not paid an amount of Rs. 10,95,000/- towards the balance consideration of the costs of the flat. The learned Advocate General submitted that the appellants have failed to prima facie prove that they had performed essential term of the contract. The appellants had made the payments of various amounts and after adjusting the payments made by them from time to time as on 30-6-1985, it is seen that the amount of Rs. 4,90,000/- had been paid by them. Even from the record of the society, amount paid by them is Rs. 4,90,000/- The construction of the building was started in 1981 onwards and the building was completed in 1987. The learned Advocate General also drew our attention to the evidence on record. The second appellant Nirmal Kumar Jain stepped into box on behalf of the appellants. He has stated therein as follows. "I have not received any deemed (sic demand) from the society towards the further balance. I was always ready and willing to pay the balance amount if demand is made." However, in his cross-examination, he has stated as follows:

"In all I have paid Rs. 4,90,000/-. It is true that as per the allotment letter Exhibit D-4, I was bound to pay Rs. 6,95,000/- as per the casting of the slab. It is true that I was knowing exactly when the slabs were cast. I had not offered personally further payment as per the casting of the slab."

12. The learned Advocate General therefore, submitted that since the payment of the requisite amount was obviously an essential term of the contract and since the appellants had failed to perform this essential term, the specific performance could not have been granted. Mr. Jahagirdar, learned Counsel appearing for the appellants stated that as per the aforesaid evidence, there was no such letter of demand from the society. However, at the same time the statement of Nirmal Jain clearly remains on record wherein he has stated that he knew when the slabs were cast and obviously there was liability to make payment from time to time. Mr. Jahagirdar accepts that there was no letter from the disputant offering amount to the society as per the allotment letter. This being the position, in our

view the appellants could not have been granted specific performance for allotment of the concerned flat No. 14. They had failed to make out the case and on that ground itself the dispute ought to have been dismissed. The learned Co-operative Judge at the end of his finding on Issue No. 9 has observed that it seems that the disputants are ready and willing to perform their obligation under the allotment letter. However, as pointed out above the finding is contrary to the record and could not have been arrived.

13. The alternative prayer which was granted by the Co-operative Court was for the damages. This was obviously on the footing that there was a breach on the part of the society in not allotting the flat. As far as this aspect is concerned, the learned Advocate General has drawn our attention to section 21(2) of the Specific Relief Act which provides for award of compensation in certain cases. Section 21(2) provides that if in case the Court decides that the specific performance ought not to be granted but where the contract is broken by the defendant then in that case the plaintiff would be entitled to the compensation for the breach thereof.

In the present case from the facts narrated above, it could not be said that there was any breach on the part of the society in not allotting the flat No. 14 to the appellants. Firstly, it could not have been allotted to the appellants as there was no flat No. 14 which could be constructed and which was not permitted by the Municipal Corporation and that was accepted by the society in the earlier referred review petition in this Court. Apart from that reason, no such F.S.I. was permissible. Besides if the appellants were to pay the requisite amount from time to time, it would have been a different situation. The appellants have not paid the requisite amount and that being so, the appellants were in breach of the contract and therefore, could not insist for specific performance or compensation in lieu thereof by the respondent No. 1. We must as well note that Mr. Jahagirdar has submitted that when the allotment was done in favour of the appellants there were some others who also become members alongwith the appellants and they were all allotted their flats. It is however, not in dispute that all those persons have made requisite payments from time to time. Mr. Jahagirdar has relied upon the judgment of another Single Judge in Writ Petition No. 2933 of 2002 where an order in the nature which is sought herein was granted by the Single Judge. However that was a case where there were strong equities in favour of the petitioners. The petitioner therein had not failed in performance of their obligation and they were situated equally with all others in the facts of that case. The facts are contrary in the present matter and therefore, the judgment cannot be pressed into service.

14. Before we conclude, we would like to record a fair offer which was made by the respondent No. 1 society. It was made with prejudice that they are still prepared to return the amount of Rs. 4,90,000/- to the appellant with the simple rate of interest which could be decided by this Court, (say 18%) so that the entire dispute is settled once for all and the appellants will receive the amount

which they claim to have paid to the first respondent-society with appropriate interest. The appellants have refused to accept this offer.

15. For the reasons stated above, appeals cannot be entertained and stand dismissed.