
(1997) 09 BOM CK 0062
In the Bombay High Court
Case No : First Appeal No. 869 of 1992

Bharat Builders Pvt. Ltd.

APPELLANT

Vs

Parijat Flat Owners Co-op. Hsg. Society Ltd.

RESPONDENT

Date of Decision : 11-09-1997

Acts Referred:

Bombay Buildings Repairs and Reconstruction Board Act, 1969 — Section 28(1), 29(2)
Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 10
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 2

Citation : (1998) 1 ALLMR 229 : (1998) 3 BomCR 188

Hon'ble Judges : T.K. Chandrashekhara Das, J;A.A. Desai, J

Bench : Division Bench

Advocate : S.H. Doctor and Ms. Rajani Iyyer, instructed by Law Charter, for the Appellant; N.K. Mudnaney and K.K. Dave, for the Respondent

Judgement

T. K. Chandrashekhara Das, J.—The defendant who were unsuccessful before the Bombay City Civil Court in Suit No. 1557 of 1971 are the appellants herein. Plaintiff-respondent also file cross-objections seeking certain modifications in the reliefs granted by the Court below. They challenge the judgment and decree passed by the Court below on 6th July, 1992 whereby the Court has issued certain declaration against them.

2. This case had chequered history. It was originated by a suit filed by Shri Karsandas Mulji Kapadia and Bhogilal Manila! Amin both are residents at 95 "Parijat" Marine Drive, Bombay in the High Court of Judicature at Bombay on its Ordinary Original Civil Jurisdiction on 14-10-1964 being Suit No. 495 of 1964. Subsequently, by order of the High Court dated 11 -2-1971, the said suit was transferred and filed in City Civil Court and re-numbered as Suit No. 1557/71. During the pendency of the suit, defendant No. 2 expired and defendants 2(a), 2(b) and 2(c) were impleaded as legal representatives. Though the plaintiff No. 2 expired, the suit abated against him as no legal representatives were brought on

record. However, sole surviving heir of the plaintiff Karasandas Mulji Kapadia was allowed to be substituted by the present plaintiff viz., Parijat Flat Owners Co-operative Housing Society Limited (Body registered as Co-operative Housing Society under the provisions of the Maharashtra Cooperative Societies Act, 1960). According to the plaintiff, persons mentioned at Annexure "A" to the plaint had purchased flats and garages on ownership basis in building "Parijat" on Plot No. 95, Marine Drive, Bombay. An association was formed of 28 persons as shown at annexure "B" to the plaint. The building was constructed by the 1st defendant and the flat were completed for occupation on 19th November, 1953. Before the said flats were constructed, the 1st defendant issued a circular Exh. A notifying that the flat are offered for sale and board was also exhibited on the building by the 1st defendant indicating flats are available in the said building on ownership basis. Defendants 2 (a), 2(b) and 2(c) are directors of the 1st defendant-company. It is the case of the plaintiff, that original plaintiff No. 1 had entered into an agreement of sale by a letter dated 15th September, 1952 with the defendant company in respect of flat No. 1 on sixth floor of building at price of Rs. 45,000/-. A formal agreement was executed thereafter on 15-11-1961. In the agreement original plaintiff No. 1 had also agreed to join Co-Operative Housing Society as a member to be formed on the said building. Similarly, original plaintiff No. 2 has taken Flat No. 30 on first floor for price of Rs-40,000/- on 16-10-1954. It is the case of the plaintiff that all other remaining flat owners had purchased the flat on the basis of the identical agreement executed between them and the defendants on similar terms and conditions which contained in the agreement entered into between the original 1st plaintiff and defendant. It is further averred in the plaint that though the flats were purchased by them the agreement purporting to be lease was executed as certain disputes and differences arose between the flat owners and the defendant. This document was so executed on the clear understanding between the parties that what was transacted under the agreement was sale of flats. The plaintiff contend that under the relevant provision of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer), Act 1963, the 1st defendant being the promoter is under the statutory obligation to transfer their right, title and interest to the Co-operative Society of flat owners. Thus the Association formed by the flat takers by their letter 24-4-1964 was addressed to the 1st defendant, calling upon him to take necessary steps for formation of a Co-operative Housing Society consisting of the flat takers and transfer the flats in its name. The 1st defendant by his letter dated 15-5-1964 denied this liability on the ground that the flats were taken on leases as the documents executed between the flat takers and the defendants are only lease and not a sale. This according to the plaintiff is quite illegal and against the understanding between the parties. It is in these circumstances that the plaintiff-Society sought mandatory injunction compelling the defendants to discharge their obligation under the Maharashtra Ownership Flats Act and convey the title and interest to the plaintiff-Society. The plaintiff also prayed in the suit other consequential reliefs such as interim injunction etc.

3. The 1st defendant resisted the suit mainly denying, as pointed out earlier, that they are still owners of the building and the plaintiffs who represent the flat takers is only lessee and no ownership has been transferred in favour of the members of the plaintiff. No relief therefore could be obtained by the plaintiff in the suit. The defendant also challenged the clause in the agreement obliging the defendant to form a Cooperative Society of the flats takers and transfer the title. It is contended by defendant that the 1st plaintiff Karasandas Mulji Kapadia had taken a blank stamped paper from deceased A.V. Deshpande who is the original 2nd defendant and brought the agreement engrossed unauthorisedly with inserting a provision therein regarding formation of Co-operative Housing Society of all flat holders. It is further the case of the defendant in that context Mr. Kapadia had assured that he would execute fresh agreement whenever called upon to do so similar to the other agreements executed by other flat holders. In fact according to the defendant, the 1st plaintiff had executed another agreement dated 11-11-1953 in substitution for the agreement he had executed dated 15-9-1952. In short, the obligation of forming the Co-operative Society and transfer the title of flats to it is totally denied by the defendants.

4. Therefore the question to be decided in this present appeal is that whether the defendants were under an obligation to form a Co-operative Society and to transfer the ownership of the flats in the name of the plaintiff-Society under the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, sale, Management and Transfer) Act, 1963 (hereinafter called the "the said Act").

5. The learned Counsel for the appellant Mr. S.H. Doctor, therefore contended that there has been no out right sale of flats in favour of the members of the Society. The relationship between flat takers and the defendants are of lessee and lessor. Right and liabilities enumerates from the lease deed executed between them and the said documents viz. indenture of lease dated 15-11-1962 evidenced Ex. E. He contended that similar other indentures executed with the other flat takers. Going by the recital of the document, it cannot construe of agreement of sale of flats. On the other hand the said documents are only lease and therefore, the ownership of the building as such, cannot be transferred in favour of the plaintiff-Society. Mr. Doctor, appearing for appellant has strenuously argued that by true construction of documents Exh. (E) is a indenture of lease and it cannot be treated as sale. He criticised that the tower Court was in gross error in reading down those documents as evidencing a in out right agreement for sale by relying the anterior correspondence between the parties. He submits the anterior correspondence and conduct of the parties cannot be made use of in interpreting a document. There may be many offer, counter offer, negotiations and discussions but all these negotiations and discussions and correspondence cannot be brought in aid for finding the intention of the parties in executing the final documents. He also cited decisions in support of his contention, in Vol. XXXI, Bombay Law Reporter page 259 in the case of Bomanji Ardeshir Wadia v. The Secretary of State for India, Their Lordships held "Nothing is better settled

than that when parties have entered into a formal contract that contract must be construed according to its own terms and not be explained or interpreted by the antecedent communication which led up to it. This is especially true of a conveyance."

6. This was followed by the Calcutta High Court in the case of Nawabjada K. Atikuila and others v. Md. Mobarak Hussein, reported in A.I.R.1949 Cal 174. He also brought to our notice the decision of the Supreme Court in the case of Provash Chandra Dalui and Another Vs. Biswanath Banerjee and Another, , There Lordships held :

" "Ex precedent bus at consequentibus optima iit interpretation." The best interpretation is made from the context. Every contract is to be construed with reference to its object and the whole of its terms. The whole context must be considered to ascertain the intention of the parties. It is an accepted principle of construction that the sense and meaning of the parties in any particular part of instrument may be collected "ex precedent bus at consequentibus: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that is possible."

7. He also cited another decision of the Supreme Court in Delhi Development Authority Vs. Durga Chand Kaushish, . Relying upon these decisions, the learned Counsel for the appellants took us through the various clauses in Exh. (E). He pointed out that even title and the preamble of the deed where it has been used words "lessor and lessee" which go to show the documents as lease. Stipulation as to lump sum payment of Rs. 45,000/- will go to show as premium, which is also indicative of a lease, according to Counsel. He also brought our attention to the that fact in all process of sale and purchase has been termed as lessee and lessor. Our attention was drawn by the Counsel for the appellants to various clauses such as clauses No. 9, 14, 15, 17, 18, III (2), (3). (5). Clause 17: relating to not to assign or underlet the demised premises or any part thereof without the written consent of the lessor, such consent however not to be unreasonably withheld by the lessors. Clause 18 : stipulates for payment of ground rent and for insurance. Clause 19 : in case of any default of any payment stipulated in the provisions in the deed defaulted payment attract interest at the rate of 8 annas per cent per month. Clause III :the lessors covenant has been incorporated necessary repairs of the building structures, lifts, garages, drains, sewers, roads, pavements and garden should be relationship of tenant-lessee. They are also supposed to maintain keep in good condition the electric lift for use of the lessee and occupants of the said building and to keep in proper repairs the said lift. Clause III sub-clause (5) stipulates that the lessee's covenants shall peacefully hold and enjoy the demised premises during the terms without any interruption by the lessors are any person rightfully claiming under or in trust for him. The learned Counsel for appellant has strongly contended that under any stretch of imagination, the Exh, (E) document could not be construed as agreement for sale of immovable property, but on the other hand the documents

are in favour of the lessee. He also points out the use of the words "demise is strong indication of lease.

8. Therefore, he contended that the approach of the Court below was totally wrong in interpreting the documents Exh, "E". He also drew our attention to the several other decisions of the Supreme Court and Privy Council to substantiate his case, which we do not think it necessary in this case to discuss about elaborately.

9. The learned Counsel for the respondents Mr. Mudnaney argued and cited several decisions of the Supreme Court to substantiate his argument, that the document at Exh. "E" is not a lease deed. He also relied upon the several decisions of the Supreme Court.

10. There cannot be any quarrel for the proposition that the documents are to be construed according to the wording if words in documents are clear and unambiguous. The Court will have to give effect to those words as it appears. But when the words or clause of the documents are ambiguous and not in consistent with the context to which it applies then Court will have to take up the task of finding out the intention of the parties. Intention of the parties are if clear, then the Court will have to give effect to the documents consistent with the intention of the parties ignoring grammatical meaning of the word appearing in the documents. But here we find a strange situation that has arisen. Here both the parties do not want to divulge their intention, when the documents were made. In other words, we find that a concerted efforts were made by the parties to the document to withhold their intention which is capable of being inferred. It appears that both parties, were in ad-idem in suppressing their intention while executing the documents. P.W. 1 made a disclosure, when he says in his cross examination thus :

" thereafter when documents were negotiated I read Exh. A circular carefully. When I entered into agreement Ex. E, I knew that I had to execute lease as per Ex. A. Therefore, ultimately, I had executed indenture of lease Exh. E."

Ex. A circular that P.W. 1 referred to is the brochure published by the appellant offering that flats are available for sale in this regard. From the statement of P.W. 1 that he understood Exh. A that the offer made therein was for out right sale of flats; but after discussion he had to execute the agreement of lease deed taking into account peculiar circumstances. He actually wanted to conceal as to what actually transpired by giving the document a camouflage of a lease. Therefore, while interpreting the document Exh. E normal rule of construction which have been discussed in the above decisions cannot be followed. In this case that both the parties did not want to disclose their actual intention while entering into documents of the agreement. This has become amply clear from the judgment of this Court in Misc. Petition No. 581 of 1977 in their petition filed under Article 226 by the appellant and the some of the members of the respondent Society. The said petition arises from demand made by the Municipal Corporation u/s 29

(2) of the Bombay Building Repair and Reconstruction Board Act, 1969 on the assumption that the appellant are lessor of the " Parijat Flats " and occupier of the flats are lessees under them. The appellants in this case took a stand in that case that no relationship between lessor and lessee exists between the appellants and flat takers and they are occupying the flats as owners of the flat. Therefore, appellant company was entitled for exemption for payment by virtue of section 28(1)(h) and (I) of the Act, the appellant claimed for exemption from the demand made by the Collector for sum of Rs. 1,44,481.65. Both the appellants and the members of the plaintiff Society as the flat owners jointly filed the above petition, challenging the demand made by the authorities. Strangely enough, all the contentions raised by the plaintiff-respondent herein has been jointly raised by the appellant and the respondent in the said petition to substantiate and establish before this Court that documents executed between the appellant and the respondent, similar to Exhibit (E) was agreement for sale and not lease. The appellant alongwith respondent could succeed in establishing before the Court that the documents Exh. E and those similar to its and executed between appellant and members respondent Society were really a sale not a lease. All the argument put-forth by the appellant with regard to the character of document Exh. (E) has been taken by the Corporation in this case. The learned Single Judge of this Court has rightly rejected those contentions and held the documents executed by the appellants and member of the respondent society are only an agreement to sale and not a lease. It is relevant to note, certain observations made by the learned Single Judge of this Court about Exh. E in para 20 of the judgment read thus :

" The relationship of the parties must be gathered from the intention of the parties. Reading the documents as a whole, the result is inescapable that the parties never intended any relationship of landlord and tenant nor can any such relationship be spelt out from the terms and conditions contained in the document, regardless of the word "rent" used in this sub-clause. The "rent" in this sub-clause is patently a misnomer, for the amounts paid to the company by the flat-holders are their proportionate contributions towards general expenses, maintenance and repairs, insurance, ground rent and so forth."

11. In the aforesaid judgment every Clause of the indenture of the lease has been examined by the learned Single Judge. As observed earlier, by the learned Judge has found that the appellant and members of respondent society are only camouflage of a lease and it is really a sale. After this judgment, the appellant could not have raised the same contention in this appeal because though it does not amount to estoppel, the said petition was filed jointly by the appellant and the members of the respondent and submitted to this Court those documents though look like a lease was not really a lease. The real intention of the appellant and members of the respondents was to create an agreement for a sale instead of lease. Therefore, in the light of joint submission made before this Court, in earlier occasion it is sheer impropriety on the part of the appellant to argue and contest the matter once again to establish just opposite to what has been

contended earlier before this Court. We also examined the documents very closely. Every evidence has been scrutinised by us. We have no doubt that every efforts have been made by both the parties to conceal their intention in executing of documents. The very preamble of the documents was made as ambiguous as possible. Therefore as we observed in the earlier part of the judgment, though words are ambiguous, the intention of the parties were also tried to be made more ambiguous. Parties deliberately tried to suppress their intention to be divulged and therefore normal rule of interpretation cannot be possible to apply in the present case. The learned Counsel for the appellant has strenuously argued that the conclusion arrived at by the learned Single Judge in the earlier writ petition cannot be relied upon. For the purpose of this appeal, it is not necessary to rely upon the judgement. This cannot be accepted. It is to be noted that this Court was approached by the appellant and members of the Society with a joint plea that the document is a sale and not a lease. Therefore, the mere pleading contained in the writ petition will be sufficient for us to come to the conclusion of the clauses contained in the document Exh. E is an agreement for a sale. In view of this, we do not find any fault in the Court below decreeing the suit of the respondents. In the result, appeal fails and is dismissed.

12. The respondent in cross-objection has not raised any serious contention. Objection has been raised only with regard to the reliefs granted in the decree. On perusal, we also find that reliefs are ambiguous. Reliefs were granted without considering the subsequent development. Therefore, we feel that the relief portion of the judgment requires modification as hereunder. We order the following modification in the decree :

13. The suit is decreed in favour of the plaintiff society in the following terms:

a) It is hereby declared that the provisions of Maharashtra Ownership Flats Act (Regulation and the Promotion of construction, sale management, and Transfer) Act, Maharashtra Act No. XLV of 1963 are applicable to the suit building.

b) It is further declared that first defendant company is a "promoter" within the meaning of section 2 (c) and was under obligation to take steps for the formation of a Co-operative Housing Society or a company of owners of flats and garages according to law and to do all such acts and things as are necessary for the said purposes.

c) It is declared that first defendant is therefore under statutory obligation to take all necessary steps to complete their title to the suit land and building and to convey their right title and interest in the suit land and building in favour of the plaintiffs society.

d) The defendants, their servants and agents are hereby restrained by order of injunction from doing any act or thing or causing or permitting any act or thing to be done which would in any manner affect or prejudice right, title and interest of the owners of flats and garages in the suit building as the case may be.

e) It is further ordered that the 1st defendant company shall execute conveyance of suit land and suit building in favour of the plaintiff Co-operative Society within one month and there shall be an accounting regarding outstanding items like ground rents, service charges payable to first defendant company in respect of suit land and suit building and plaintiff society shall collect all arrears thereof from its members and other Hat holders until to-day and pay all the arrears due to the first defendant company and obtain acknowledgment within two month, thereafter.

f) After conveyance is executed and transfer is effected of the suit land and building in favour of the plaintiff society, it will get every flat owner who are not participating in this suit but who is occupying a flat or garage in the suit building to join as member and thereafter said society shall look after management of the suit building on being paid service charges by each of the members of the society.

With this modification the decree passed by the trial Court is confirmed and the appeal is dismissed and cross-objection to the extent of modification shown above is allowed. Parties to bear their own costs.

14. Appeal dismissed.