
(1934) 08 BOM CK 0010

In the Bombay High Court

Case No : First Appeal No's. 67 and 66 of 1934

Cooverjee H. Plumber

APPELLANT

Vs

Vasant Theosophical Co-Operative Housing Society, Ltd.

RESPONDENT

Date of Decision : 02-08-1934

Acts Referred:

Bombay Co-operative Societies Act, 1925 — Section 54, 57
Civil Procedure Code, 1908 (CPC) — Section 9
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1935 Bom 91 : (1934) 36 BOMLR 1245

Hon'ble Judges : Sen, J;Murphy, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Mruphy, J.—These two appeals, by Mr. Cooverji H. Plumber and Miss Khorshed F. Aria, arise out of their membership of a Society, known as the "Vasant Theosophical Co-operative Housing Society, Ltd.," which had a scheme for building bungalows at Juhu. The Society's plan was to acquire a large area of land to be converted into building sites, for the erection of houses, to be inhabited by the members of the Society and to form a Theosophical Colony. The Society issued a prospectus specifying its terms and the class of bungalows which it intended to erect for its prospective members, and their estimated cost. The idea from the beginning appears to have been, not to sell any of the plots outright, but to have a system of tenant-proprietorship, but persons applying for a site could either pay for the building and the site down, or in certain cases borrow some money from the Society to be repaid by instalments. Both Mr. Plumber and Miss Aria became members of the Society by buying the requisite number of shares, and they were granted plots of land and had houses erected on them. Mr. Plumber held sixty shares and Miss Aria seventy-seven shares. Mr. Plumber was a member of the Society's Managing Committee for some time.

2. In August, 1928, differences first began to appear. The facts in the case of Mr.

Plumber and in that of Miss Aria were parallel. It seems that in addition to the sums originally contemplated between the parties, and for a variety of reasons, the Society claimed a further Rs. 9,400 from Mr. Plumber and Rs. 7,950 from Miss Aria by equated monthly :. instalments spread over a period of twenty-five years. Both Mr. Plumber and Miss Aria refused to pay these amounts, and the Society proceeded to invoke arbitration in terms of the Co-operative Societies Act. It obtained awards before the board of arbitrators and the plaintiffs were directed to pay?Mr. Plumber Rs. 7,516 and Miss Aria Rs. 4,109-8-0?and the costs of the references. Both the appellants took part in these proceedings before the board of arbitrators in their respective cases. Later, the Society attempted to execute the awards, partly through the Collector and partly personally against the members, and finally, having failed to recover the equated payments in these ways, the Society passed a resolution, on June 17, 1932, determining the agreements with the two-appellants and declaring that all the instalments and other monies paid by the appellants to the Society, as well as the two bungalows which had been erected at their cost on the Society's plots, were forfeited. There followed some correspondence between the Society and the plaintiffs, and the Society again went to arbitration, awards being made on this occasion" by the Registrar's " nominee" as he is called under the Act. The awards were mainly in respect of the propriety, or otherwise, of the Society's resolution forfeiting the tenants" plots. The grounds of forfeiture in each case were the equated monthly instalments in arrears, as well as the amounts due on the original awards, which had not been paid by the appellants. The appellants refused to attend the proceedings before the arbitrator on the second occasion, and the awards were made ex parte against them in each case. The plaintiffs then filed the suits from the decisions of which the present appeals arise, in the Court of the First Class Subordinate Judge, Thana.

3. The learned Subordinate Judge was of opinion that he had no jurisdiction to try the matter of the suits before him, since this was barred by the provisions of the Co-operative Societies Act, and, on the merits, he held, after assuming that he had jurisdiction, that there was no substance in the plaintiffs" case. The same points have been raised before us by Mr. Rule W. Desai for the two appellants. Both the cases were decided after a joint hearing and are governed by the same judgment. Mr. Desai said that there was some slight difference between the two cases, but we think that they are substantially similar and can be dealt with together.

4. The learned Subordinate Judge has rightly stated that u/s 9 of the Civil Procedure Code, civil Courts can try all suits of civil nature excepting such suits as are barred, either expressly or impliedly, by statutory provisions. The defendants" contention was that cognisance of these cases was barred by Section 57 of the Bombay Co-operative Societies Act. The provisions relating to arbitration in that Act are in Sections 54, 56, 57, 64 and 70. Section 54 provides for arbitration in all disputes between the Society and one of its members. Section 56 provides for an appeal being made against an award of the

Registrar's nominee. Section 57 runs thus:

An order passed in appeal u/s 56 shall be final and conclusive. The award of the arbitrators or a decision by the Registrar or his nominee u/s 54 shall not be liable to be called in question in any civil or revenue court.

Section 64 provides for appeals and revision, and Section 70, that no suit can be brought without two months' notice to the Registrar by a person proposing to sue a Society. These are all the relevant provisions. Section 57 has not itself been interpreted by the Courts. But it is approximately in the language of Rule 33, made u/s 43 of the Co-operative Societies Act (II of 1912) and on that rule we have a decision of a division bench of this Court in *Bharmakka v. Mallappa* 1925) 28 Bom. L.R. 598, wherein it was decided that the civil Courts have no jurisdiction to set aside an award made by arbitrators appointed under the Co-operative Societies Act. Rule 33 runs:

An award of the arbitrator or a decision of the Registrar under Rule 31, if not appealed against within one month, and an order of the Registrar or the Local Government in appeal under Rule 32, shall, as between the parties to the dispute, not be liable to be called in question in any Civil or Revenue Court and shall be in all respects final and conclusive.

There being this decision of a bench of this Court on a rule which substantially is in the language of the later Section 57, it seems to us *prima facie* that these suits were barred by the Bombay Co-operative Societies Act, 1925, and that the persons aggrieved should have appealed u/s 64 in the case of the first award, and u/s 64-A in the case of the second, which was by the Registrar's nominee made u/s 54.

5. Mr. Desai has argued that he is not challenging the awards as they stand, but the second pair of awards ordering forfeiture of the holdings. These, he says, were *ultra vires* and made without jurisdiction, because, what they refer to is the enforcement of the orders of forfeiture made by the Society, while what really have been enforced are the first pair of awards by means of the second pair upholding the forfeiture of the plaintiffs' holdings under Clause 10 of the agreement of lease, and by which the rules of the Society have been held to bind the plaintiffs even though they have not signed leases. We think that this contention is not well founded. At the time when the Society forfeited the plaintiffs' holdings, the plaintiffs were in arrears, not only for the amounts due under the first pair of awards, but also, it appears, for what are called further monthly instalments of equated payments. We are informed by Mr. Jayakar that the further amount in the case of Mr. Plumber is Rs. 2,973-8-5. This being so, we think that though the arbitrator's second awards are not very clear the forfeitures by the Society were for the amounts accruing due after the date of the first awards, as well as for the amounts due under the first awards, and, if so, the second awards were within the terms of the references.

6. The next ground of objection taken by the learned advocate was that some of

the amounts claimed had fallen due subsequent to the references. Both the plaintiffs were members of the Society and by its rules were bound by the bye-laws for the time being in force, and the demand made upon the appellants, whatever may have been the implied promises in the original prospectus, were within the terms of the bye-laws as they then stood, which bound the appellants, and we think, on the facts into which we have gone at some length, that neither of the awards was ultra vires in the sense in which Mr. Desai has argued.

7. Mr. Desai also relied on the doctrine of part performance. It has been pointed out by the other side that Section 53A of the Transfer of Property Act as now amended came into force in 1930, and can have no application to the present appeals, the facts of which happened before that date. It also has no retrospective effect. Mr. Jayakar has argued that in the case of *G.F.C. Ariff Vs. Rai Jadunath Majumdar Bahadur*, . it has been held by the Privy Council that the doctrine of part performance is not applicable to India so as to override the terms of the statute. We think that the rule of part performance has no application to the present case. What Mr. Desai's clients could claim at the most was an agreement to lease them, more or less permanently, certain areas of the Society's land for a specified sum, on their becoming members of the Society, and thereby being subject to its rules and bye-laws. They were never, as they claim, promised conveyances of the land, for the scheme contemplated was one of tenant-proprietorship and not a freehold, and all payments were made on this basis. We think that the doctrine of part performance does, not help the plaintiffs-appellants.

8. Lastly, Mr. Desai has argued that the language of Section 57 of the Bombay Co-operative Societies Act barring suits designed to dispute an award is different from that of Section 51 of the Bombay Co-operative Societies Act, which forbids challenging liquidation proceedings by means of civil suits. We think that the difference of language is immaterial, for the idea underlying both the sections is, we believe, the same.

9. We confirm the decree of the lower Court and dismiss the appeals with costs. The amounts deposited by the appellants may be withdrawn by the Society in part-payment of the sums due from the appellants with interest, under the awards.

Sen, J.

10. I agree. Mr. Desai's arguments can be summarised as under:

(1) That the plaintiffs are not tenants of the Society and that Clause 10 of the agreement (which is at pages 50 to 55 of the paper book in appeal No. 66 of 1934) is not applicable; (2) That the Society, having got an award u/s 54 of the Co-operative Societies Act, cannot now rely on the terms of Clause 10 of the agreement; (3) that no new matter was at issue at the time of the second decision, that therefore no nomination by the Registrar u/s 54 was necessary, as the first award could be executed u/s 59 of the Act, and that the decision of the

nominee was ultra vires; (4) that Section 53A of the Transfer of Property Act applies and the plaintiffs could not be evicted ; and (5) that Section 57 of the Bombay Co-operative Societies Act is not applicable, its language being different from that used in Section 51, and that the jurisdiction of the civil Courts is not barred u/s 57.

11. We do not think that there is any substance in any of these arguments. To take the point about Section 53A of the Transfer of Property Act first, this point has now been raised for the first time in this Court; it is not mentioned in the memorandum of appeal. There is no writing in this case signed by the contracting parties from which the terms of the transfer can be ascertained. Besides, the plaintiffs, to my mind, have not established their contention that they have throughout been willing to " perform their part of the contract. It has also been pointed out by Mr. Jayakar that the receipts in the case show that the amounts were paid by the appellants between the years 1924 and 1927, while the new Section 53A of the Transfer of Property Act came into, operation on April 1, 1930, so that the alleged part performance took place before the section came into operation. Apart from all these considerations, this section would not, of course, apply if the jurisdiction of the civil Courts be held to be barred.

12. The plaintiffs were undoubtedly members of the Society, and, therefore, were bound by its bye-laws. Regulation 10 of form B attached to the bye-laws is to the following effect:?

In the event of a member paying for his house by instalments he shall until the execution of the lease be bound by the covenants, agreements and provisions contained in the form of lease to be granted to him in the same manner and to the same extent as if he had actually executed the lease.

The plaintiffs were certainly not the purchasers of the suit properties by any legal documents. There are no sale-deeds and it is undoubted that the plaintiffs have been required to pay the Society for the plots as well as the bungalows thereon, which have been constructed for them, by regular monthly instalments. The first award, which is not now challenged by Mr. Desai, is based on the Society's demands wherein one item was made up of past instalments due from the plaintiffs, and in the reasons for that award the monthly instalment is stated to be Rs. 105-10-0. The plaintiffs' agreement with the Society has been produced (pages 50 to 55 in the paper book in First Appeal No. 66 of 1934), and the evidence shows that the Society adopted this agreement as a part of its bye-laws. This agreement speaks of tenant-ownership system and refers to "the tenant," throughout. There can be no doubt that under the bye-laws of the Society the plaintiffs became their tenants, and they were entitled to regular leases after all the dues to the Society were paid off, as stated in the last clause of the preamble to the agreement. Clause 8 of the agreement provides:

Provided nevertheless that from the date hereof until the execution of the said lease the tenant shall be bound and will perform and observe the covenants,

agreements and provisions on his part contained in the said form of lease as if the same had been actually executed by him.

The Managing Committee's resolution dated June 17, 1932, was based on Clause 10 of the agreement. The award of October 14, 1932, no doubt, states that the Managing Committee's resolution was passed on account of the plaintiffs' failure "to pay instalments of the amount under the (first) award passed "against them. But even supposing that subsequent instalments were not considered by the Managing Committee, the award does not alter the character of the dues from the plaintiffs to the Society. They were partly in respect of equated instalments due from the plaintiffs and partly in respect of other sums payable under the agreement. The Society cannot be said to have relinquished the power it had under Clause 10 of the agreement simply because the matter had been first referred to arbitration. They could undoubtedly have proceeded u/s 59. of the Bombay Co-operative Societies Act to execute the first award, but I find no reason for holding that their action under Clause 10 of the agreement was ultra vires. In passing the resolution of June 17, 1932, they do appear, however, to have considered new facts, such as those stated in the Secretary's report of June 8, 1932, particularly the question of the plaintiffs' persistent default. In the statement of the case against Mr. Plumber submitted to the Assistant Registrar by the Secretary of the Society (which is at page 67 of the paper-book) it is stated:

As he took up an obstructive attitude and persistently failed to pay even the subsequent equated instalments and the other dues of the Society in contravention of the bye-laws of the Society, the Managing Committee by its resolution passed at its meeting held on the 17th June 1932 terminated the agreement to lease under Clause 10 of the said agreement to lease.

The Society evidently wanted to take the more drastic steps which they have taken on account of the conduct of the plaintiffs, and in order to make their resolution capable of execution an application had to be made u/s 54 of the Bombay Co-operative Societies Act. It cannot, therefore, be said that there was no ground for reference to the Registrar.

13. The nominee was appointed by the Registrar in accordance with the resolution passed by the Managing Committee, and it cannot be said that his action in so doing was in any sense ultra vires. The appellants did not appeal against the order appointing the nominee or against the second award, u/s 64 or Section 56. Nor have they moved the Registrar or Government to interfere with any order under powers vested in them u/s 64-A. It, therefore, seems that Section 57 of the Co-operative Societies Act is a bar to civil Court's jurisdiction in this matter. This section has been interpreted in *Bharmakka v. Mallappa* (1925) 28 Bom. L.R. 598 and it has been held therein that civil Courts have no jurisdiction to set aside an award made under the Co-operative Societies Act. At the time of this decision the Act in force was the Co-operative Societies Act II of 1912, and this decision was based on Rule 33 made u/s 43 of that Act, which is

now substantially the same as Section 57 of the present Act. I, therefore, agree with the finding of the lower Court that u/s 57 of the Cooperative Societies Act and Section 9 of the CPC the jurisdiction of civil Courts is barred. The appeals must, accordingly, be dismissed.