
(1974) 02 BOM CK 0005

In the Bombay High Court

Case No : Criminal Revision Application No. 164 of 1973

Godrej P. Joshi

APPELLANT

Vs

M.V. Bhatia

RESPONDENT

Date of Decision : 06-02-1974

Acts Referred:

Penal Code, 1860 (IPC) — Section 403, 420

Citation : (1974) 76 BOMLR 609

Hon'ble Judges : Bhole, J

Bench : Single Bench

Judgement

Bhole, J.—These two revision applications are by the original accused except accused No. 4 who is dead because they are aggrieved by the order passed by the learned Presidency Magistrate, Girgaum, Bombay on their preliminary objection. The preliminary objection, which was raised on behalf of the accused, was that a registered cooperative housing society was excluded from the operation of the provisions of Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963, hereinafter referred to as the "Flats Act", as the word "promoter" as defined in the said Act did not include a registered cooperative housing society. Complainant Bhatia, who is a purchaser of Flat No. 16 D on the 16th floor of the building known as "Shanaz", Napean Sea Road, Bombay has filed a complaint against eight accused charging them with offences punishable under Sections 4, 5, 9, 10 read with Section 14 and 14(7)(2)(a) of the Flats Act, 1963 as well as under Sections 420 and 403 of the Indian Penal Code. Accused No. 1 was the Chief Promoter as well as the Chairman of the said Society; accused No. 2 was its Honorary Secretary; accused No. 3, an employee of M/s. Vegetable Vitamins Food Co. (Pvt.) Ltd., of which accused No. 1 was the managing director, was treasurer of the said Society. Accused No. 4 is sister of accused No. 1 and also a member of the managing committee. Accused No. 5 is wife of accused No. 1 and is also a member of the managing committee of the Society. Accused Nos. 5 and 7 are also employees of the said Vegetable Vitamins Food Co. (Pvt.) Ltd. and are

also members of the managing committee of the said Society. The complainant alleges that all the accused held shares in the Society but did not have any flats in their names. Accused No. 8 is the registered Society.

2. The complaint of the complainant is that the accused have created a charge by way of mortgage on the land after execution of an agreement to sell the flat to the complainant, without his previous consent and thereby violated provisions of Section 9 of the Flats Act. Another charge is that the complainant is not made a member of the said Society although they represented to him in writing that they would do so. Yet another charge is that the accused have misappropriated the moneys paid by the complainant towards the cost of shares in payment of the mortgage and have not appropriated the moneys towards the share capital and in this way have committed an offence punishable u/s 5 of the said Flats Act. The last complaint is that the accused have neither entered into an agreement in accordance with Section 4 of the Flats Act nor have they annexed any document as specified in Rule 7.

3. It appears that the preliminary objection was raised orally and therefore the learned Magistrate has asked for grounds on which the objection was raised by the accused to be submitted in writing. Therefore the arguments were submitted in writing. The learned Magistrate after considering Section 2(c) of the Flats Act as well as after considering Sections 10, 11 and 14 of the Flats Act found that the Flats Act applied to a cooperative housing society and also held that a registered cooperative housing society is included in the definition of the word "promoter" as given in the Flats Act. He, therefore, came to the conclusion that a registered cooperative housing society is not excluded from the operation of the said Flats Act. It is this order that is now challenged here by the original accused.

4. The point, therefore, that arises here for consideration is whether the word "promoter" occurring in Section 2(c) of the said Flats Act will include or will not include a registered cooperative housing society.

5. Dr. Naik, who appears for the petitioner, contends here that "promoter" as defined in Section 2(c) of the Flats Act has to fulfil three tests: he must first be a person; secondly, he must be one who constructs or causes to be constructed a flat or a building of flats and, thirdly, the construction should be for the purpose of selling the same to other persons or to a Company, cooperative society or other association of persons. Dr. Naik concedes that a cooperative housing society is a body corporate by virtue of Section 36 of the Maharashtra Cooperative Societies Act. He further concedes that a cooperative society is a person by virtue of Section 3(55) of the Bombay General Clauses Act. He, however, contends that the ingredient in the third important test viz. the element of the selling for the purpose of selling to other persons, is not there in so far as this Society is concerned. The legal position according to Dr. Naik is that a Society cannot sell flats and in fact the Society is not constituted with the object of selling flats, and it is his case that the accused Society has not sold flats. If that is so, then the Society constituted by the accused cannot be said to be a

"promoter" u/s 2(c) of the Flats Act. Dr. Naik relies on a Full Bench decision of this Court: Manohar Ramchandra Sarfare Vs. The Konkan Co-operative Housing Society Ltd. and Others, . and also upon the judgment in Harsukh Jadhavji v. Ramesh (1972) 75 Bom. L.R. 649 by Vaidya J. as well as upon the judgment of the- Division Bench consisting of myself and Mukhi J. in Ramesh Himmatlal v. Harsukh (1973) 76 Bom. L.R. 375. That judgment was delivered by me and my learned brother Mukhi J. had also given a concurring judgment. Vaidya J. has held that an auction purchaser of the interest of a member of a Society cannot attach the flat of the member of the Society because he has no saleable interest or disposing power in respect of the flat without the consent of the Society. The judgment of the Division Bench consisting of myself and my learned brother Mukhi J. was in the appeal against the judgment of Vaidya J. That was a case in which the decree-holder had taken out a warrant of attachment of the flat belonging to the Society registered under the Societies Act. After attaching it, the decree-holder applied for the sale of the said flat. The sale also took place after proclamation and the flat was sold to the auction-purchaser though the sale was not confirmed, The judgment-debtor then filed a Chamber Summons praying for dismissal of the execution petition filed by the decree-holder and for setting aside the sale on the ground that the flat being a flat in a cooperative housing society, was not liable to be attached and sold. It was also stated that there was no saleable interest of the judgment-debtor in the said property and that therefore the property was not liable to be attached. We have held that the view taken by Vaidya J. was correct. In the circumstances of that kind of Society, therefore, we held that the judgment-debtor had no saleable interest in the flat which could be purchased by the auction-purchaser. Dr. Naik, therefore, argues here that the legal position is that the Society does not sell flats and also cannot sell them and if that is so, then according to Dr. Naik, the third test in the definition of the word "promoter" viz. that the construction has to be for the purpose of selling to other persons, is not satisfied in our case.

6. Now so far as the element of selling is concerned, it is still to be decided after the evidence is led by the parties. In fact the stage at which the preliminary objection was taken by the accused appears to me to be premature. After all for the purpose of finding out whether all the accused were members of the managing committee and whether the Society was "promoter", the complainant has to establish not only the first ingredient viz. that the promoter should be the person who constructed the flats but has also to establish that that person built them for the purpose of selling some or all of them to persons or to a cooperative housing society or to a company. Unless and until all these ingredients are established beyond reasonable doubt, the accused Society cannot be established to be a promoter. The charge levelled against the accused by the complainant can be said to have been established only when he establishes that the accused Society was the promoter and as promoter the Society committed the alleged offences. If he discharges this burden, then only he succeeds.

7. The question whether the accused Society is promoter or is not promoter will,

therefore, depend upon the kind of Society that was formed by the accused. Under Rule 10 of the Maharashtra Co-operative Societies Rules, 1961, a housing society can be of three kinds: one is tenant-ownership housing society, where the land is sold either on lease-hold or free-hold basis by the society and houses are owned or are to be owned by members; the second kind of society is tenant-cum-partnership housing society, which owns both lands and buildings either on lease-hold or free-hold basis and allot them to their members and the third kind of society is a kind of house mortgage society and house construction society. We do not yet know whether the society formed by the accused was a cooperative housing society and if it was a cooperative housing society, of what kind it was. Until and unless, therefore, evidence is led by the complainant on all points which are in dispute, one will not be at this stage able to say whether the Society formed by the accused belonged to one or other category and whether the Society is covered by our decision in *Ramesh Himmatlal v. Harsukh*. Until and unless, therefore, one knows what kind of society it was, it will be difficult to say whether the society can fit in within the definition of the word "promoter" under the Flats Act.

8. The decision on the preliminary objection by the trial Court that a registered cooperative housing society is not excluded from the operation of the Flats Act because the word "promoter" as defined in the said Act does include a registered cooperative society at this stage of the proceeding is premature. A preliminary issue which raises a mixed question of fact and law cannot be decided unless we know what the finding of fact is. If it is a pure question of law, one will decide that issue when raised but not other questions. For that purpose one has to find out whether the instant Society formed by accused Nos. 1 to 7 is or is not a registered cooperative housing society and that if it is a registered cooperative housing society, what kind of society it was. Without therefore any evidence having been led on this fact, one would not be able to decide whether the society with which we are concerned can or cannot be excluded from the operation of the Maharashtra Ownership Flats Act. Therefore, the finding of the learned Magistrate that a registered cooperative society cannot be excluded from the definition of the word "promoter" as given in the Flats Act will be a finding which may or may not fit in with the kind of society with which we are concerned. That finding being premature, therefore, will have to be set aside.

9. I, therefore, set aside the order passed by the learned Magistrate, direct that record and proceedings¹ be sent back to him and that he shall keep the question as regards "promoter" open until and unless all the evidence is led. He shall then dispose of the case according to law. Rule discharged. Stay vacated.