

(1972) 12 BOM CK 0005
In the Bombay High Court
Case No : Appeal No. 305 of 1972

Harsukh Jadhavji Joshi

APPELLANT

Vs

Ramesh Himatlal Shah

RESPONDENT

Date of Decision : 04-12-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60

Citation : AIR 1974 Bom 87 : (1973) 75 BOMLR 649 : (1973) MhLj 975

Hon'ble Judges : Vaidya, J

Bench : Single Bench

Advocate : R.W. Adik and M.C. shah, for D.K. Jha, for the Appellant; Naresh R. Dalal, for the Respondent

Judgement

1. An important point of law arises in this appeal under the Maharashtra co-operative Societies Act, 1960. The appellant is the judgment-debtor in suit No.8639 of 1969 in the city Civil Court at Bombay. the respondent is the plaintiff. On March 31, 1970, an ex parte money decree was passed in the said suit in the sum of Rs. 20.041/- and interest against this judgment-debtor. The plaintiff-decree-holder took out a warrant of attachment of flat No. 9 in a building belonging to Paresh co-operative Housing Society Ltd., a housing society registered under the Maharashtra co-operative societies Act, 1960 and situated in Plot No. 41-A, Podar Road, Santacruz (West), Bombay 54. On august 8, 1970 the flat was attached. The warrant of attachment was served on the judgment debtor while he was in jail at Rajkot. A copy thereof was pasted on the doors of the said flat. A warrant of sale was issued on October 16, 1970. A copy to it was served on the judgment-debtor when he was in jail, and a copy thereof was pasted on the doors of the flat.

2. In the meanwhile the judgment-debtor's brother, one Hasmukh J. Joshi, took out a Chamber summons challenging the execution on the ground that the flat did not belong to the judgment-debtor and praying that the attachment should be raised. The Chamber Summons was made absolute. The Decree-holder

appealed against the order. This court set aside the order and remanded the matter for re-hearing. The chamber Summons was dismissed finally on September 30, 1970. The judgment debtor came out of jail on October 21, 1970. He filed a suit No.2011 of 1972 and took out a Notice of Motion dated February 28, 1972 to stay the execution proceeding. The sale in execution had been ordered to take place on March 1, 1972. The Notice of Motion was ultimately dismissed on March 14, 1972 with the following observations:-

"The plaintiff (i.e. the Defendant herein) was no longer in prison after 21st October, 1970. He had remedies open to him. Firstly, he could have applied for setting aside the ex parte decree in view of the circumstances in which he was unable to appear and defend the suit. he could also have preferred an appeal against the ex parte Decree. He has not adopted any of these proceedings but has chosen to institute this suit after his brother and wife failed in their attempt to prevent the execution."

In the meanwhile the flat was auctioned at the scheduled time and was sold to one Bhupendra N. shah for Rs. 34,000/-. His suit is pending in the city Civil court, The judgment-debtor filed a chamber Summons on March 28, 1972, without prejudice to the suit. In the said chamber summons he prayed for dismissal of the execution application made by the decree holder and for setting aside the warrant of attachment and proclamation of sale issued by the Court, in respect of the flat, on the ground that the flat, being a flat in a co-operative housing society was not liable to be attached and sold by court. The chamber Summons was opposed by the decree-holder on the ground of delay on the part of the judgment-debtor in moving the court and also on the ground that the flat was liable to be sold in execution of the money decree against the judgment-debtor.

3. The learned Judge of the City Civil Court by his order dated April 24, 1972, dismissed the said chamber Summons on the ground that the basis of the chamber summons on the ground that the basis of the chamber summons was a judgment of Vimadalal, J., in O.O.C.J. Suit No. 507 of 1964, D/- 11-9-1971 (bom) and the present case was distinguishable because the judgment-debtor did not refer to any bye-laws in the course of the affidavit in support of the Chamber Summons or at the hearing, analogous to the bye-laws, in the basis of which Vimadalal, J., had decided that a member of a co-operative Housing society had only a right to occupy the flat and such right was incapable of being sold in a court auction. The decision of the learned judge of the city civil court, Bombay, is challenged in the above appeal.

4. Mr. Adik the learned counsel for the appellant submitted that the learned judge of the City Civil Court ignored the provisions of Section 29 of the Maharashtra co-operative societies Act, 1960 and the relevant bye-laws of the co-operative Housing Society registered under the Maharashtra co-operative Housing Societies Act and wrongly distinguished the present case from the one which was decided by Vimadalal, J. Mr. Dalal the learned counsel for the decree-

holder submitted that even though the flat was a flat in a housing society, the judgment debtor had sufficient saleable interest which belonged to him as a member of the Housing Society under the Act and the bye-laws. Mr. Dalal further raised two preliminary points against the maintainability of the appeal. The first point which he urged was that the appellant had no locus-standi as it was his case on merits that the flat belonged to his brother and not to himself and the brother had not challenged the sale after his chamber summons was dismissed. The second point which he urged was that the judgment-debtor had no right to challenge the auction sale having allowed the sale to proceed in execution of the decree against him even after he was released from the jail having regard to the ratio in Mahadeo sunder V. Khanderao Sitaram 41 Bom LR 1166: AIR 1939 Bom 526

5. There is no substance in either of these two preliminary points. The chamber Summons raises a question relating to the execution of the decree. the order u/s 47 of the Civil Procedure code. It is an order passed against the judgment-debtor. The judgment-debtor has every right to file an appeal against that order as an order passed u/s 47 is included in the definition of "decree" in Section 2(2) of the civil Procedure Code; and u/s 96 of the Civil Procedure code, an appeal lies against every decree including an order u/s 47 as in this case. The ratio in Mahadeo sunder's case 41 Bom LR 1166: AIR 1939 Bom 526 also cannot help the decree-holder because it was held in that case that when a judgment-debtor has allowed the execution to proceed when he could have filed an appeal it was not open to him subsequently to put forward a contention which he ought to have put forward a contention which he ought to have put forward when the notice under Order 21, Rule 66, was issued. the contention which was raised in that case was not a contention based on a statute but on a question of fact with regard to his status as an agriculturist. the ratio in that case cannot apply to the facts of the present case where it is undisputed that the flat which is sought to be sold in auction is a flat in a co-operative Housing Society governed by its bye-laws registered under the Maharashtra co-operative societies Act.

6. Turning therefore to the merits of the case, apart from the judgment of Vimadalal, J. with which I respectfully agree, it is clear from the provisions of Section 29(2) of the Maharashtra co-operative societies Act. 1960, that there is an absolute prohibition on a member of a co-operative Housing Society from selling a flat in the co-operative Society to any person other than a person whose application for membership has been accepted by the Society. The prohibition is as follows-

"..... A member shall not transfer any share held by him or his interest in the capital or property of any society, or any part thereof, unless-

(a) he has held such share or interest for not less than one year;

(b) the transfer is made to a member of the society or to a person whose application for membership has been accepted by the Society....."

7. the prohibition is enacted in the interest of a co-operative Housing Society which means u/s 2(16) a society the object of which is providing its members with dwelling houses. The object of the society is not to construct houses to be sold in auction privately or by court auction to anybody and everybody. The Housing Society is registered as a Housing Society under the Maharashtra co-operative societies Act, 1960. a society is registered as a Housing Society only if the bye-laws of the society correspond more or less to the model bye-laws framed by the co-operative Department of the Government of Maharashtra for housing societies contained in leaflet U. Section 4 of the Maharashtra co-operative societies Act lays down that it is only when the society has as its objects the promotion of the economic interests or general welfare of its members, or of the public, in accordance with co-operative principles that it can be registered under the Act. the learned Judge of the Society merely because the bye-laws were not produce at the hearing or not referred to in the affidavit in support of the chamber Summons. There can never be a co-operative society without its bye-laws registered under the Act. The rights which a member qua a member ;has in a co-operative housing society are determined by the provisions of the Maharashtra co-operative societies Act, 1960, the Rules made thereunder and the Bye-laws registered thereunder and contracts and resolutions, if any, consistent with the said Act, Rules and Bye-laws, which bind the members. The bye-laws relevant to the tenancy are Bye-laws 71 to 74 and the Tenancy Regulations in Form A. o far as the present case is concerned it is enough to set out Bye-laws Nos. 71-D and 72 of the Bye-laws of the Paresh co-operative Housing society Limited. They are-

"71D. A member to whom a tenement is allotted shall occupy it himself and shall not assign, underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing committee subject to prior written permission from the Registering Authority".

"72 No dwelling offered on lease shall be taken by persons who are not members of the society unless no member is willing to take it".

8. Bye-law No. 51 (1) confers powers on the committee of the society to make, revoke and alter from time to time and at all times relating to the tenants of the society conditions relating to the tenants of the society and the property of the society and the letting (including restrictions as to subletting) and sale thereof (including the making and guaranteeing advances to members) as the committee think fit provided that all such regulations, terms and conditions and any alternations thereof or addition thereto shall be previously approved in writing by the registrar and shall not be acted on, until so approved.

9. The approved tenancy regulation are in Form A annexed to the bye-laws. Regulations 3,4 and 20 are the relevant regulations for the purpose of deciding the question involved in this case. They are as follows:-

"3. Each tenancy shall subject to the regulations for the time being of the Society

continue so long as the tenant or his successor in all respects observes and performs such regulations.

4. No tenant shall assign, underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the General Body of the Society.

20. If the said rents or any of them or any part thereof shall be unpaid for 14 days after becoming payable (whether formally demanded or not) or if any of the agreements on the tenant's part contained in these regulations shall not be performed or observed or if at any time the tenement or any part of any interest therein becomes occupied by or vested in any person who is not a member of the Society or the heir of legal representation or the nominee of a member under the Bye-laws of the Society, the Society may by giving to the tenant or leaving on the tenement one calendar month's previous notice in writing to that effect determine the tenancy and on the expiration of such notice the tenancy shall forthwith determine." (Underlining mine.)

It is, therefore, clear from Section 29, the above mentioned bye-laws and the regulations of the society that the tenant cannot part with the flat way of sale or otherwise without the consent of the society.

10. Mr. Dalal, the learned counsel for the decree-holder, however, submitted that even though Section 29 requires a member to sell the flat only to another member and the regulations prohibit the member from parting with the possession to a non-member it cannot be said that a member has no saleable interest within the meaning of Section 60 of the CPC in the flat belonging to the member. He argued that whatever the interest the member has as a member of the society could be attached and sold by the Court u/s 60 and the other provisions of the Civil Procedure code. He submitted that the view taken by Vimadalal, J. was so taken on a rather erroneous application of the ratio in a Full Bench decision Manohar Ramchandra Sarfare Vs. The Konkan Co-operative Housing Society Ltd. and Others, . Mr. Dalal submitted that the Full Bench case was only a case which dealt with the scope and object of Section 54 of the Bombay co-operative Societies Act, 1925 and Section 28 of the Bombay rents, Hotel and Lodging House rates control Act, 1947, and it did not deal with the question as to whether a member qua a member of a co-operative Housing Society has a saleable interest within the meaning of section 60 of the Civil Procedure code.

11. Now, it is true that the word "saleable property" in section 60 of the CPC is interpreted in some of the cases as meaning saleable by court auction at a compulsory sale. But this necessarily implies that the property must in law be capable of being transferred. The property cannot be saleable unless it is transferable. The property in which the judgment-debtor has no legally transferable interest or the transfer of which is prohibited by any law for the time being in force cannot be sold at court auction and will not be saleable property .

Thus in *Vyankatraya V. Shivrambhat* ILR (1883) 7 Bom 256 in the case of mulgent lease or a permanent tenure, where there was a clause which prohibited the tenant from alienating it by mortgage, sale or lease and further stipulated that the tenant was not to let it be sold, or attached and sold in satisfaction of judgment debts, and that, if he did, the landlord might take away the land and give it to others for cultivation and the lower courts had held that the clause was invalid both because such a restriction on alienation was repugnant to mulgent tenure as contemplated in law, and because, occurring in a lease which was virtually, in perpetuity, it would make the land for ever inalienable, and was, therefore, against public policy, Sergeant C.J. and Melvill, J. held that the clause was not invalid on either ground and observed.

"In the present case it is true that there would not, strictly speaking, be a breach of the clause and a right of reentry until the land was both attached and sold; but as the attachment by itself can be of no use to the creditor, the debtor being already by his lease prevented from alienating, and as it would be necessary, even if the attachment were allowed, to forbid the sale by a concurrent order, the attachment, which under these circumstances would be futile, should not, we think, be permitted."

12. Again, in *Diwali V. Apaji Ganesh* ILR (1886) 10 Bom 342, Sargent, C.J. and Nanabhai Haridas, J. held, where by a deed of assignment the usufruct of certain land was given to a Hindu widow for her maintenance, the deed expressly stipulating that the same was not to be in any way alienated, that the usufructuary interest in the land assigned to the widow was one over which she had no power of disposal, and, consequently, could not be attached and sold in execution of a money decree against her, observing at page 345 as follows:-

"The assignment of the usufruct in the present case contains a proviso that the appellant "should not mortgage, make a gift of, sell or assign the said land in any way to any person"; and we think that the very general terms in which it is couched, coupled with the special object for which the appellant was to be put in possession of the field, show as intention to prevent the appellant's doing any act by which any stranger might acquire a right of any description over the land, and it is plain that by a transfer of her own interest the transferee would acquire the right to enter on the land. The usufructuary interest intended to be assigned to the appellant was, therefore, one over which she had no power of disposal, and, consequently, could not be attached and sold in execution of a money decree."

13. Even in the present case having regard to the provisions of Section 29 of the Maharashtra Co-operative Societies Act, the bye-laws and the tenancy regulations of the Co-operative Society referred to above, the auction-purchaser cannot get any right or interest whatsoever of the judgment-debtor as a member of the Co-operative Housing Society. The tenancy regulations describe the interest of the tenant in the flat as "tenancy to be granted by the society to members in respect of houses held by the society" in Form A annexed to the bye-

laws. This means that the member is a tenant and his tenancy is subject to the regulations and bye-laws. He has, therefore no saleable interest or disposing power in respect of the flat without the consent of the society.

14. The learned Judge in the City Civil Court was, therefore, in error in holding that the present case is distinguishable from the case decided by Vimadalal, J., who in terms held, with respect rightly, after considering the bye-laws of the Co-operative Housing Society Ltd., and also with reference to the decision of the Full Bench in Manohar Ramchandra Sarfare Vs. The Konkan Co-operative Housing Society Ltd. and Others, as follows :-

"..... The said society has adopted with certain minor modifications, the model bye-laws framed by the Co-operative Department which are very similar to bye-laws with which the Court was concerned in 63 Borm LR 1001 : AIR 1962 Born LR 154 which was decided by a Full Bench of this Court. After a careful consideration of the relevant bye-laws, it was held in the said case (at p. 1006) that, even though a member to whom tenement is given for occupation is described in the bye-laws and regulations as a tenant, he is not a tenant in the sense in which the term is used in the Transfer of Property Act. Nor is the Society the landlord, but the relationship is of a special type under the Co-operative Societies Act and the Rules, Bye-laws and regulation made thereunder. From the judgment it appears that, though a member is called a tenant in the bye-laws he has merely a right of occupation of that tenement allotted to him. It is also clear from Bye-law No. 64 (which corresponds to what was bye-law no. 66 in Dr. Manohar's case) that no member can occupy any tenement of the society unless he holds at least 5 shares. It is, therefore, clear that the right which the second defendant had to occupy flat No. 2 in the present case was not only not an interest in immovable property, but the second defendant had no proprietary interest of any sort in that flat. Moreover, as the second defendant's right of occupation of the said flat was not capable of being sold so long as the second defendant himself continued to be the owner of the 280 shares in the Shri Hanuman co-operative Housing society Ltd., which owned the building in which that flat was located, the second defendant's right in the said flat cannot be said to be "saleable" property within the terms of section 60 of Civil Procedure and was, therefore, not property liable to attachment under the provisions of the section".

14. The same principles would apply to the facts of the present case in view of the bye-laws which are already quoted. Section 31 of the Maharashtra co-operative Societies Act, 1960 in terms lays down that the interest of the member in the share capital of the society or in the loan stock issued by a housing society, or in the funds raised by a society from its members by way of savings deposit, shall not be liable to attachment or sale under any decree or order of a court for or in respect of any debt or liability incurred by the member. Even the official Assignee under the presidency Towns Insolvency Act, 1909, and the

Receiver under the Provincial Insolvency act, 1920, and any such person or authority under any corresponding law for the time being in force, are not entitled to have any claim on such share or interest. It seems that the policy underlying these provisions under the co-operative societies Act is not to burden a co-operative housing society with dwellers not wanted by the society and its members. A co-operative housing society requires a harmonious interplay of human interests among members who come together to live together by building and making houses by their mutual assistance or effort. No persons will be admitted to membership unless they are duly qualified under the bye-laws. The society has power to refuse membership even to persons who are qualified if there is sufficient cause. u/s 23 of the Maharashtra co-operative Society Act, the society is prohibited from refusing membership to duly qualified persons if there is no sufficient cause and an appeal is provided to the Registrar against such decision. This does not, however, empower the court to interfere by its process of attachment and sale with the internal autonomy, peace and harmony of a co-operative Housing Society by destroying the fundamental voluntary and mutual basis of the membership of a Co-operative Housing Society, in which, according to the policy of the co-operative law, co-operative principles are paramount though monetary contributions from members are necessary.

15. In the result, the order passed by the Judge of the City Civil Court of Bombay dated April 24, 1972, on the Chamber Summons of the judgment debtor-appellant is set aside. The summons is made absolute partly in terms of prayer (a) by directing that the attachment and sale of the flat referred to above in the co-operative Housing society being illegal are set aside. This however, will not prevent the decree holder from executing the decree in any other manner in accordance with law. The appeal is allowed. In the circumstances of the case, there will be no order as to costs.

16. Appeal allowed.