
(1979) 09 GUJ CK 0018

In the Gujarat High Court

Case No : Civil Revision Application No. 526 of 1976

Mulshanker Kunverji Gor and Others

APPELLANT

Vs

Juvansinhji Shivubha Jadeja

RESPONDENT

Date of Decision : 18-09-1979

Acts Referred:

Registration Act, 1908 — Section 17, 17(1), 17(2)

Citation : AIR 1980 Guj 62 : (1979) GLR 878

Hon'ble Judges : S.H. Sheth, J;N.H. Bhatt, J;A.N. Surti, J

Bench : Full Bench

Advocate : V.P. Shah, for N.R. Oza, for the Appellant; K.S. Nanavati and R.A. Mehta, for the Respondent

Judgement

S.H. Sheth, J.—In order to appreciate the question which has been referred to the Full Bench, it is necessary to state a few facts. Plot No. 8 was allotted by Santosh Co-operative Housing Society to one Girish Morarji Mehta. The society constructed houses and the house constructed on plot No. 8 was allotted. by the society to Girish. On 16th December, 1965, Girish applied to the society for transfer of his shares to Juvansinh Shivubha Jadeja - the plaintiff. The society accepted the transfer of the shares and admitted Juvansinh Shivubha Jadeja to its membership. When "Girish was occupying the house in question, he had let it out to the defendants. Upon transfer of shares by Girish to Juvansinh the plaintiff, the latter claimed to recover from the defendants rent in respect of the suit premises. The defendants did not accept Juvansinh's title as a result of which rent remained unpaid from 1st January, 1966"to 31st October 1967. Notice of demand was served upon the defendants rent also remained in arrears thereafter. Thereupon the plaintiff filed against the defendants the present suit for recovery of possession of the suit premises on the ground of arrears of rent and also claimed decree in respect of arrears of rent The learned trial Judge upheld the defence raised by the defendants and dismissed the suit. The plaintiff appealed to the District Court. The learned Appellate Judge reversed the finding recorded by the learned trial Judge, allowed the appeal, set aside the decree of

dismissal passed by the learned trial Judge and passed in favour of the plaintiff decree for possession. It is that decree which is challenged by defendants In this civil revision application.

2. This civil revision application was in the first instance placed before me. It appeared that it raised an important question as to the validity of transfer of the suit premises from Girish to the plaintiff. It was therefore referred to a Division Bench. It came up before the Division Bench consisting of my learned brethren A. N. Surti and M. K. Shah, JL who felt that the question which the civil revision application raised was a question of considerable importance affecting a fairly good section of our society. Therefore they referred to the Full Bench the following question:-

"Whether any registered document is necessary in favour of any transferee for transferring the super-structure standing on the land allotted by any co-operative society in favour of any of its members?"

It is under these circumstances that this civil revision application has been placed before the Full Bench for answering the question referred to it.

3. It is not in dispute that Girish was the original allottee from Santosh Cooperative Housing Society Ltd., of the super-structure standing on plot No. 8. and that Girish, in his turn, had transferred his shares in the society along with the suit premises to the plaintiff with the approval of the society. It is not in dispute before us that this transaction was not effected by a registered instrument such as one contemplated by Section 54 of the Transfer of Property Act Obviously, therefore, the provisions of Section 17 of the Registration Act, 1908, were not satisfied. The question therefore which we are required to answer is whether an immovable property allotted by a co-operative housing society to its member can be transferred by the member with the approval of the society to another person without a registered instrument of transfer. In order to examine the contention which has been raised before us, it is necessary to refer to certain provisions of the Gujarat Cooperative Societies Act, 1961. Section 30 specifies restrictions on transfer of shares or interest. It provides as follows:

"30(1) Subject to the provisions of Section 29 and sub-section (2) a transfer of, or charge on, the share or interest of a member in the capital of a society shall be subject to such - conditions as may be prescribed.

(2) 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 or charge is made to the society, or to a member of the society, or to a person whose application for membership has been accepted by the society-, and

(c) the committee has approved such transfer."

Section 30 makes it abundantly clear that a member of a co-operative housing society to whom the society has allotted a house is not an absolutely free agent to transfer the property allotted to him. In order to enable himself to transfer to another person a house allotted to him, it is, inter alia necessary that he must have held the share or " interest in the " capital or property of "the society for not less than one year and that, with the approval of the committee of "the society, such transfer is sought to be made to a member of the society or to a person - if he is initially an outsider - whose application for membership has been accepted by the society. Section 37 is required to be noted for the purpose of discovering that the society is a body corporate with perpetual succession and a common seal and has the power to acquire, hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all such things as are necessary for the purpose for which it is constituted. It is clear, therefore, that a co-operative housing society upon its registration becomes a legal person which is distinct from its members. We now turn to Section 42 which is a very much material section and which clinches the issue. It provides as follows

"42. Nothing in clauses (b) and (c) of sub-section (1) of Section 17 of the Indian Registration Act, 1908, shall apply -

(a) to any instrument relating to shares in a society, notwithstanding that the assets of the society consist in whole or in part of immovable property; or

(b) to any debenture issued by any society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein to trustees upon trust for the benefit of the holders of such debentures: or

(c) to any endorsement upon, or transfer of, any debenture issued by any society."

Clauses (b) and (c) are not relevant for the purpose of this case. So far as clause (a) is concerned, it carves out an exception to the rule enunciated in clauses (b) and (c) of Section 17 of the Registration Act, 1908. In order to appreciate the full import of the exception carved out by Section 42, it is necessary to turn to cls. (b) and (c) of sub-section (1) of Section 17 of the, Registration Act, 1909. They read as follows:-

"17. (1) The following documents shall be registered, if the property to which they relate, is situate, in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely-

(a)

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future,- any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest;

Clauses (b) and (c) in terms require compulsory registration of non-testamentary instruments specified therein. An instrument by which interest in immovable property is transferred by one person to another will certainly fall either under clause (b) or clause (c) of sub-section (1) of Section 17 provided the consideration for such transfer is of the value of one hundred rupees or upwards. But for Section 42 of Gujarat Co-operative Societies Act, 1961, Girish could not have transferred the house in question to the plaintiff except under a registered sale deed. That is the combined effect of Section 54 of the Transfer of Property Act read with Section 17(1) (b) and (c) of the Registration Act, 1908. Sub-section (2) of Section 17 itself carves out a limited exception to the rule specified in clause (b) and clause (c) of sub-section 17(1) of Section 17. It provides as follows:-

"(2) Nothing in clauses (b) and (c) of sub-section (1) applies to -

(I) any composition-deed; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property:".

Clause (ii) of sub-section (2) of Section 17 therefore exempts from compulsory registration instruments relating to shares in a joint stock company notwithstanding that the shares of a joint, stock company consist in whole or in, part of immovable property. This exemption is limited to transfer of shares in a joint stock company and does not extend to transfer of shares in a cooperative society. It is by clause (a) of Section 42 of Gujarat Co-operative Societies Act, 1961 that the exemption -from compulsory registration has been extended to transfer of shares in a co-operative society notwithstanding that the assets of the society consist wholly or in part of immovable property. When we read clause (ii) of sub-section (2) of Section 17 with clause (a) of Section 42 of Gujarat Cooperative Societies Act, 1961, we find that the language, used in both is in pari materia. It is clear therefore that the intention of the Legislature in enacting clause (a) of Section 42 of Gujarat Co-operative Societies Act, 1961, is to extend to co-operative societies the exemption from compulsory registration extended by clause (ii) of sub-section (2) of Section 17 of the Registration Act, 1908 to joint stock companies.

4. Before we further proceed to examine the argument raised by Miss Shah, it is

necessary to make a brief reference to S. 43 it confers upon the State Government power to remit stamp duty, even taxes, otherwise payable, in case of co-operative societies. Section 48 provides for recovery of prior claims of a society. Section 49 provides for charge on immovable property of members borrowing from certain societies. It inter alia provides that no member shall alienate the whole or any part of the land or interest therein specified in the declaration made under clause (a) or (b) until the whole amount borrowed by the member together with interest thereon is repaid in full. It also provides that ,alienation made in contravention of the provisions of clause (d) shall be void. Rule 18 of Gujarat Co-operative Societies Rules, 1965, lays down the procedure for transfer of shares. 11. provides:

"18. (1) No transfer of shares shall be effective, unless -

(a) it is made in accordance with the provisions of the bye-laws;

(b) a clear fifteen days" notice in writing is given to the society indicating therein the name of the proposed transferee, his consent, his application for membership, where necessary, and the value proposed to be paid by the transferee;

(c) all liabilities of the transferor due to the society are discharged- and

(d) the transfer is registered in the books of the society.

(2) Any charge in favour of the society on the share so transferred will continue unless discharged otherwise."

5. We have no doubt in our minds that Section 42 of the Gujarat Co-operative Societies Act, 1961, inter alia, exempts from compulsory registration instruments relating to shares in a society notwithstanding that the assets of such society consist wholly or in part of immovable property. Shares in a co-operative housing society have a necessary relation to the immovable properties which the society constructs and which are allotted by the society to its members. It is necessary, therefore, to find out what an instrument of transfer relating to "shares in a society" conveys to the transferee. It has been argued that there are two types of co-operative housing societies. One type is called "tenant co-partnership society". Another is called "tenant ownership society" A "tenant co-partnership, society" is a society where the land is owned by the society and upon which houses are constructed by the society for the benefit of its members. It is the co-operative venture of all the members of a co-operative housing society which brings into being the houses which the members in their turn may occupy. They are constructed out of its own assets and out of the moneys borrowed by it. The debt is discharged by the society by collecting periodical contributions from them in specified amounts. In such a society, it is the society in which the land and the buildings in the eye of law vest. The learned District Judge has on facts found in the instant case that the society in question is a tenant co-partnership society. Therefore, when a member of such .

a co-operative housing society transfers his shares to another with the approval of the society, he not only transfers the shares but also, as a necessary incident thereof, transfers his interest in the immovable property which has been allotted to him. What Section 42, clause (a), therefore, exempt" from the rule of compulsory registration Is an instrument relating to "shares in a society" which carry with them, as a necessary incident, member"s interest in the immovable property occupied by him. We say so because both the land on which the house has been constructed by the society and the house itself vest in the society in the eye of law. It is therefore difficult to uphold the argument raised by Miss Shah that with the transfer of "shares in such a society", what are transferred are merely the shares in the society and not the right to occupy the house which necessarily flows from the allotment of the houses by the society to its members. In case of a "tenant co-partnership society", "shares in a society" which a member holds appear to us to be inseverable from his interest in the immovable property which has been allotted to him for his occupation and enjoyment. Now, it is necessary for us to make it clear that the expression "shares in a society" used in clause (a) of Section 42 connotes shares in the assets of the society which include the immovable properties of the society which the society has allotted to its members for enjoyment and occupation. Looking at it from another angle, we find that since the immovable property - the land and the house - vest in the society, no title is transferred to the purchaser with the transfer of shares. Title continues to remain with the society. Right to occupy and enjoy it is transferred by the transfer of his shares by one member to another. This expression does and cannot therefore embrace within its sweep any personal interest, independent of the society, which a member may have in the immovable property which he occupies. Such a situation arises in case of "a. tenant ownership society". It has been argued that in tenant ownership society". the land belongs to the society and the superstructure thereupon is constructed, not by the society out of its funds but, by the member out of his personal funds. In such a case, when by an instrument a member transfers his "shares in the society" to another person, he not only transfers his shares but also his right to occupy and enjoy the land belonging to the society and the super-structure which he has constructed out of his personal funds and which belongs to him personally. The transfer of such a superstructure cannot be effected except under a . registered conveyance because clause (a) of Section 42 does not exempt from compulsory registration the transfer of a member"s personal immovable property - not belonging to the society - to another. It is therefore clear that in case of "a tenant co-partnership society", the transfer of shares necessarily carries with it the transfer of member"s interest in the immovable property allotted to him and that such transfer can be brought about without registered instrument because clause (a) of Section 42 carves out an exception to the rule enunciated in sub-section (1) of Section 17 of the Registration Act, 1908, in case of "a tenant ownership society", shares carrying with it, as necessary incident, the member"s interest in the land which belongs to the society can be transferred without a registered instrument but the super-structure cannot be

transferred except under a registered instrument contemplated by sub-s. (1) of Section 17 of the Registration Act, 1908 read with Sec. 54 of the Transfer of Property Act because the expression "shares in a society" used in Section 42(a) of the Gujarat Co-operative Societies Act, 1961 casts its net upon land which belongs to the society but does not reach the super-structure which exclusively belongs to the member and which has nothing to do with the member's. "shares in a society."

6. Our attention has been invited by Miss Shah to three decisions. The first decision is in *Sakarchand Chhaganlal Vs. Controller of Estate Duty, Gujarat*, . In that case, the deceased was a share-holder in a co-operative housing society of the "tenant ownership type". This Court examined the scheme of bye-laws of the society and held that, unlike the English law, the law in India recognizes dual ownership, the land belonging to one person and the structure upon it belonging to another. Therefore, this Court held that though the land of the plot was owned by the society, the super structure upon it belonged to the deceased. It was held that the deceased could not have gifted "the super-structure except under a registered instrument. It could not have been done only by transferring the shares. The principle laid down in that decision has no application to the instant case because, in that case, the Court was concerned with analysing the concept of "tenant ownership societies" and not that of "tenant co-partnership societies".

7. The next case is *Ramesh Himmatlal Shah Vs. Harsukh Jhadavji Joshi*, . It is not necessary for us to make a detailed reference to this decision of the Bombay High Court because it has been reversed by the Supreme Court. The judgment of the Supreme Court is reported in *Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi*, . It was a case of tenant co-partnership society and the question which arose was whether a flat allotted to a member in such a society could be attached in sale in execution, of a decree against the member to whom it was allotted. The Supreme Court held that the member's interest in the flat allotted to him in such a society could be sold and attached. Relying upon this decision, Miss Shah has argued that the Supreme Court has made a clear distinction between the assets of the society and the right to occupy which a member enjoys upon allotment of the property to him by the society. The Supreme Court in that case was not concerned with the question of compulsory registrability or otherwise of the transfer of right to occupy which a member enjoys upon allotment of the immovable property to him by a "tenant co-partnership society". Such a right of occupation conferred upon the member by the tenant co-partnership society can indeed be attached and sold as held by the Supreme Court. It, however, does not mean that it can be transferred only under a registered instrument. The facts of the case and the principle laid down by the Supreme Court therein have, in our opinion, no application to the facts of this case. We are therefore of the opinion that, as found by the learned District Judge in the instant case, the Santosh Co-operative Housing Society Ltd. is a "tenant co-partnership society" and since the land and the superstructure constructed thereon belong in the eye of law to the society, in the matter of

transfer of shares relating to them, compulsory registration is not necessary on account of exemption enacted by the State Legislature in clause (a) of Section 42. We are therefore of the opinion that the transfer of the property in question from Girish to plaintiff was a valid transfer. Our answer to the question referred to us is in the affirmative if the land and the super-structure belong in the eye of law to the co-operative housing society and is in the negative if they or any one of them belongs to the member personally. It appears to us that there are several other contentions which have been raised in this civil revision application. It is necessary, therefore, to send the matter back to the learned single Judge for finally deciding this civil revision application in light of the answer which we have given to the question referred to us.

8. Answered accordingly.