

(1999) 07 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No. 4577 of 1985

Ramagauri Keshvlal Virani

APPELLANT

Vs

Walkeshwar Triveni Co-Operative Housing Society Ltd. and
others

RESPONDENT

Date of Decision : 05-07-1999

Acts Referred:

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 2, 4(1A)(a)(iii)

Citation : AIR 1999 Bom 385 : (2000) 2 BomCR 687 : (1999) 3 MhLj 145

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : B.R. Naik and Y.R. Naik, for the Appellant; Deodhar, for the Respondent

Judgement

D.G. Deshpande, J.—Heard Mr. Naik for the petitioner and Mr. Deodhar for the respondent No. 1 society.

2. The society-respondent No. 1 filed a dispute against the present petitioner in respect of the terrace on the 7th floor of the building in Wing "A". That dispute came to be decided in favour of the society against which the petitioner filed an appeal, but the same was also dismissed. Hence, this petition.

3. It was contended by Mr. Naik that the petitioner has purchased from the original builder two bedroom flat on the 7th floor having an area of about 1000 sq.ft. and more along with a terrace appertaining to the said flat admeasuring about 1700 sq.ft. According to him the flat along with the terrace was purchased by the petitioner on 20-6-1966. He contended that the petitioner had proved the title to the said flat along with the terrace and since the flat had two doors opening into the terrace, the ownership of the terrace was required to be accepted in favour of the petitioner for the purpose of the security of her flat.

4. It was also contended by Mr. Naik that the dispute tiled by the society against

the petitioner did not fall within the ambit of section 91 of the Maharashtra Co-operative Societies Act, 1960 as it was not a dispute between the society and its member because according to Mr. Naik the petitioner has purchased the flat in 1966 and he became a member of the society in 1968, therefore on the date of purchase of the flat the petitioner was not a member of the society and consequently, the dispute was not tenable before the Cooperative Court. He relied upon a judgment of the Supreme Court reported in Deccan Merchants Co-operative Bank Ltd. Vs. Dalichand Jugraj Jain and Others, , in support of his contention. It was also contended by him that as per the provisions of the Maharashtra Ownership Flat and Apartments Act, 1963, the builder had power to dispose of the terrace and as such there was no illegality in purchasing of the terrace by the petitioner. Lastly, it was also contended by him that the society could not prove its ownership over the terrace because the document of transfer executed by the builder in favour of the society was not registered.

5. On the other hand it was contended by Mr. Deodhar for the society respondent No. 1 that from the sale deed, Exhibit "A", of the petition itself it was clear that the sale deed was only in respect of the flat initially but subsequently as an afterthought the same was included to cover the terrace. He also contended that all objections to the tenability of the dispute u/s 91 of the Maharashtra Co-operative Societies Act, 1960 is concerned, the same was rightly rejected by both the courts below.

6. So far as the first objection relating to maintainability of the dispute is concerned, the society was registered in 1962, the builder-promoter executed conveyance in favour of the society on 8-2-1963, the petitioner purchased the flat on 20-6-1966, she became member of the society in 1968 and the dispute was filed by the society in 1973.

7. Section 91 of the Maharashtra Co-operative Societies Act requires that the dispute should be there between the society and its members. It therefore means that the membership of the parties to the dispute has to be considered on the date of filing of the dispute. Earlier, when the petitioner purchased the property in 1966, she may not be a member but she became a member in 1968 and continued to be a member in 1973 when the dispute was filed and therefore whether the petitioner was a member in 1966 or not will be of no consequence and that factor cannot be of any help to the petitioner regarding her objection. Further, the society has filed the dispute in assertion of its right over the terrace. Admittedly, such a dispute is filed for protection of the interest of all its members. It is one of the objective of the formation of the co-operative society to protect the property of the society and to refute all claims and contentions which are against the interest of the society. Therefore, it was well within the business of the society to protect its own interest and that of its members and to file the present dispute to negate the claim and contentions of the opponent. Therefore, both the objections of the petitioner-opponent in this regard are required to be rejected and they were rightly rejected by the courts below.

8. Mr. Naik relied upon a judgment of the Supreme Court reported in Deccan Merchants Co-operative Bank Ltd. Vs. Dalichand Jugraj Jain and Others, in support of the aforesaid objection. My attention was drawn in particular by him to paragraphs 25 and 26 of the judgment wherein it has been held that even though if a member enter into a transaction with the society not as a member but as a stranger, then he must be covered, if at all, by the provisions of section 91(1)(a) or (c). Mr. Naik tried to clarify that para 26 of the said judgment of the Supreme Court has to be considered in the light of the objections raised by him wherein the Supreme Court has referred to judgment of Justice Chagla in Shyam Co-operative Housing Society Ltd. Vs. Ramibai Bhagwansing Advani and Others, and according to Mr. Naik "The dispute must be between the society and the member as a member or qua a member". According to him therefore since the petitioner has purchased the property in 1966 i.e. before becoming member of the society the dispute u/s 91 would not lie. This contention cannot at all be accepted because as observed by me earlier on the date of the dispute in 1973, the petitioner was a member of the society.

9. Secondly, it was contended by Mr. Naik that the provisions of section 4(1-A)(a) (iii), (viii) or (x) and provisions of section 2 and section 10(1) of the Maharashtra Ownership Flats Act, 1963, recognises the right of the builder to sell even the terrace and therefore there is no illegality in the builder's selling the terrace to the petitioner.

10. Section 4(1-A)(a)(iii) authorises a builder to sell carpet area of the flat including the area of balconies. Section 4(1-A)(a)(viii) authorises the builder to sell a percentage of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold and section 4(1-A)(a)(x) provides that percentage of undivided interest in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold. Section 10(1) commences with the words Nothing in this section shall affect the right of the promoter to dispose of the remaining flats in accordance with the provisions of this Act."

11. In fact none of the provisions individually or collectively authorise the builder to sell a terrace of the building. The words such as common areas, facilities, carpet area do not include "the terrace" and therefore none of the aforesaid provisions can be interpreted to mean that a builder or promoter can dispose of the terrace to one of the purchaser of flat. Similarly, the definition of the word flat as given in section 2 does not include in its ambit the terrace of the building nor the protection is given u/s 10(1) in the last sentence of that section authorise the builder or promoter to sell the terrace of the building. In view of this legal position, the contentions raised by Mr. Naik cannot be accepted.

12. It is therefore clear that there is no statutory provision authorising a builder to sell terrace to the petitioner. Apart from this, even Exhibit "A", will show, as rightly pointed out by Mr. Deodhar, that initially the intention of the builder was to sell flat No. A-16 on the 7th floor. This will be clear from the following excerpts of Exhibit "A":--

"AND WHEREAS flat No. A-16 on the 7th floor on one of the said buildings being building "A" was not disposed of by the vendors and the vendors are the absolute owners of the said flat competent to deal with and dispose of the same AND WHEREAS the vendors have agreed to sell to the purchaser the said flat No. A-16 at or for the price and on the terms and conditions hereinafter appearing....."

13. This part of Exhibit "A" which is document of sale and purchase between the petitioner and the builder will itself show that the intention of the builder was to sell the flat on 7th floor. It might be that in the subsequent portion of Exhibit "A" the terrace is also included by the builder for which he received Rs. 25,000/- more from the petitioner. However, if the intention of the builder along with statutory provisions referred to above is to be taken into consideration then the case of the petitioner is required to be rejected.

14. Alternatively, even if this argument is accepted and the sale deed is taken as it is, the said document will not and cannot cloth the petitioner with rights of ownership over the terrace for want of legal sanctity or authority in the builder and considering the rights of the society.

15. It was contended by Mr. Naik lastly that society could not prove the ownership of terrace for want of registration of the document. Admittedly, the society was formed in 1962 the document by the builder was executed in favour of the society in 1963 and from the evidence that has come on record it is an admitted fact that the said document of conveyance has been lodged for registration in 1963 itself. Even if for the sake of argument, it is accepted that society did not have a registered document in its favour in 1973, the burden would heavily lie on the petitioner to prove his exclusive right of ownership over the terrace. Since, however, the statutory provision of the Maharashtra Ownership Flats Act, do not empower the builder to sell the terrace in the circumstances of the present case and since the document, Exhibit "A", mainly appears to have been executed for the purpose of selling flat No. A-16 on the 7th floor, the absence of registration of document cannot be considered as a circumstance to reject the claim of the disputant society.

16. For all these reasons, I have no alternative but to hold that judgments of the trial Court as well as Appellate Court do not require any interference. Lastly, it was argued by Mr. Naik that since two bedrooms have the opening on the terrace, security of the flat of the petitioner should be maintained. Mr. Deodhar appearing for the respondent No. 1 has given an assurance that nothing will be done by the society to endanger the security of the flat of the petitioner. This will, however, not prevent the society in exercising its right over the terrace. Hence, petition dismissed. Rule discharged. Stay vacated. No order as to costs. Prayer for stay of operation of this order is rejected.

17. Petition dismissed.