

(1998) 09 BOM CK 0084

In the Bombay High Court

Case No : Criminal Writ Petition No. 1379 of 1996

S. Irani (Sorkhab)

APPELLANT

Vs

Dinshaw and Dinshaw and Others

RESPONDENT

Date of Decision : 11-09-1998

Acts Referred:

Companies Act, 1956 — Section 630
Criminal Procedure Code, 1973 (CrPC) — Section 468, 472
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 — Section 10, 11, 13, 4, 7
Penal Code, 1860 (IPC) — Section 323
Registration Act, 1908 — Section 32

Citation : (1999) CriLJ 240

Hon'ble Judges : N.J. Pandya, J

Bench : Single Bench

Advocate : P.S. Dani, S.R. Shinde, app, for the Appellant; G.M. Khambete and H.A. Cazi for Respondent 1, for the Respondent

Final Decision : Allowed

Judgement

N.J. Pandya, J.—It is an admitted position that the alleged offence is punishable for a period of three years and if the provisions u/s 468, Cr. P.C. are taken into consideration as it is, the period of limitation shall be three years only. The complaint thus having been filed on 18th April, 1992 is hopelessly time barred.

2. It is for this reason that in the Courts below submissions were made that it be treated as continuing offence. The point has not found favour with either of the two Courts. The result was that the learned Magistrate dismissed the complaint on the ground of limitation by his order dated 7-3-1995, page 15. Same was the outcome of the Criminal Revision Application No. 412 of 1995 when the learned Additional Sessions Judge, Pune by order dated 20-9-1996 dismissed the revision. In short, both the Courts below have come to a conclusion that the period of limitation has started to run from the date when the offence was committed i.e. 10-10-1983 and the period being three years on and after

10-10-1986 they will be barred of statute of limitation.

3. If the said reasoning is accepted, obviously the order has to be confirmed. In this regard on behalf of the petitioner original complainant, it was very strenuously urged that the matter has to be treated u/s 472 of the Code of Criminal Procedure where provision is made for a continuing offence.

4. The learned advocate for the petitioner Shri Dani therefore referred to the Preamble of the Act where the legislature has indicated the reason for enacting the particular Act i.e. Maharashtra Ownership Flat Acts, 1963 hereinafter referred to as the said Act. The very first paragraph of objects and reasons which may be called preamble is to the effect that on the State Government noticing the consequence of acute shortage of housing in several areas, sundry abuses, malpractices and difficulties relating to the permission of the construction and the sale management and transfer of flat taken on ownership basis, legislative measures were called for and the result is the said Act. The provisions are the result of the efforts put in by a committee which was constituted by GR dated 20-5-1960. Considering the said report and to provide for the shortage of housing and to "regulate the permission of construction, sale and management and transfer of flats, the provisions are made in the Act.

5. In this background, my attention was drawn to Section 4 which cast several obligations on the promoters and that an agreement has to be entered into and got registered u/s 32 of the Indian Registration Act. Likewise, there is a provision that whatever the plans that are submitted to the concerned Building Plan Sanctioning Authority, there shall be no alteration into it unilaterally by the builder or promoter and unless therefore it has been so sanctioned by the concerned authority the scheme as sanctioned shall be fully implemented. With regard to the alteration of plan, reference may be made u/s 7 of the said Act.

6. One of the duties cast on the promoter or the builder is to get a co-operative society or the company formed or incorporated as per Section 10 and as per Section 11 the title is to be conveyed.

7. As Section 11 directly governs the present matter, in order to appreciate the impute of rival submissions and in order to give true interpretation to it in accordance with the submissions made at the bar. It is quoted hereunder:

A promoter shall take all necessary steps to complete his title and convey to the organisation or persons, who take flats, which is registered either as a co-operative society or as a company as aforesaid, or to an association of flat taker (or apartment owner) his right, title and interest in the land and building, and execute all relevant documents therefore in accordance with the agreement executed u/s 4 and if no period for the execution of the conveyance is agreed upon, he shall execute the conveyance within the prescribed period and also deliver all documents of title relating to the property which may be in his possession or power.

8. Rule 9 of the said Act is one of the Rules framed under the Act which prescribes the time limits for executing the conveyance deed when no time limit is fixed by an agreement between the parties. The time is that of four months as noted above.

9. Section 13 of the said Act is a penal provision for the breach that might have been committed with regard to the obligation cast on the promoter u/s 11 quoted above.

10. The accepted position is that till the date of filing of complaint, no conveyance deed was executed. Today also as I understand from the learned advocate for the Respondent No. 1 that it is not possible to execute the document because of certain difficulties of practical nature.

11. Despite the obligation thus cast on the builder promoter u/s 11, the fact is that till today that obligation is not fulfilled and the duty cast on the promoter or builder is not discharged.

12. Ordinarily the relations between the parties are governed by the provisions of Indian Contract Act 1872 whenever there is a transaction inter vivoce. However, according to the peculiar circumstances governing a particular transaction, if statutory provisions are required to be made and accordingly to meet with those requirements and the facts and situation, if statutorily certain obligations are to be cast on the contracting parties a special statute is generally brought about and by statutory provision thus made in the special circumstances and relation between the parties in connection thereto are governed by such provision.

13. In my view if one turns to the said Act, the memory strikes that its very existence is for the purpose of meeting with the acute shortage and the difficulties and the abuses noted by the legislature in the first paragraph of its objects and reasons.

14. The legislature, therefore, it can be said has accepted the unequal nature of the position of the two contracting parties. On one hand there is a builder or promoter and on the other hand there is a solitary individual. How to Buy a flat so that he can have a roof over his head for the use of his family is a burning problem for any householder. By very nature, therefore, the purchaser in this case happens to be in a weak position to bargain and correspondingly the seller is in a strong position either to drive the bargain or to flout the agreement and behave in the manner that he likes. This is one aspect of the matter and in this connection repeated expression used by the Apex Court namely a contractual relationship of lion and lamb can be kept in mind. This phrase describes the position of two unequally situated contracting parties.

15. Again turning to the provisions of S. 11 quoted above, it is not merely a matter of signing a document or executing a conveyance deed. I agree with the submission of the learned advocate Shri Dani that correspondingly there is a fact of builder or promoter divested of his ownership and in place of ownership which

was till then held by the promoter or builder may be an individual, partnership or a company, it will thereafter vest into group of individual who have formed themselves as society or company as the case may be.

16. It is not difficult to appreciate and understand the importance of this transaction. By the very nature when there is an acute shortage of land and residential houses it may not be possible for one individual to buy land and build a tenement over it. They can manage to jointly own a society and run the same and therefore it is of prime importance that the duty cast on the promoter or the builder is strictly enforced and is made to adhere to the statutory time limit described.

17. In order to understand what is the continuing offence, we have got two authorities of the Hon''ble Supreme Court. One is Bhagirath Kanoria and Others Vs. State of M. P., where after referring to English-decision and after extensively referring to the earlier decision of the .Supreme Court reported State of Bihar Vs. Deokaran Nenshi and Another, , it has been clearly indicated that while accepting the difficulty of choosing the concept of continuing offence their Lordships have held that what is to be seen is the nature of the offence and its impact on the persons who are to suffer if the offence is committed. In the English decision there were references to buildings having been constructed without permission, mill being run without there being fencing and so on.

18. After referring the decision as well as the provisions of the aforesaid Act,: in, my mind in order to understand the concept of continuing offence the test that can be evolved is to examine the fact and situation every day and ask a question whether the statutory requirement is fulfilled or not. If answer turns out to be in the negative, the breach of statutory duty would amount to an offence and as long as such breach continues, the offence has to be held to be continuing.

19. In order to understand this situation, a striking example can be drawn from any of the ordinary offences covered by Indian Penal Code. Take the simple example of offence u/s 323, I.P.C. The offence is committed on a given day at a given point of time. Thereafter if one asks a question to the accused whether he has committed any offence u/s 323, the answer will be except the one which is alleged against him, there is no offence. Obviously, this can never be a continuing offence. As against that in contrast if the like in the instant case the question is asked whether breach of the provisions of Section 11 of the said Act is committed on and after the expiry of four months'' statutory period for executing the conveyance deed, the answer till today will be yes the breach is committed.

20. Obviously, therefore, it has to be considered to be a continuing offence. A similar situation of course in the background of Section 630 of the Companies Act arose before this Court in the matter of National Textile Corporation case reported in 1990 Mad 664 (sic) and this Court had no difficulty in holding that till the property of the company is retained by the ex-employee of the company, the

said employee can be said to have committed offence every day ;and therefore it is a continuing offence. In the instant case also it can be said that every day and after exhaustion of the said period of four months under in Rule 9 of the said Act, the builder or promoter has committed breach of Section 11 of the said Act and as long as he continues to do so, it would amount to continuing offence and therefore the provisions of Section 472, Cr.P.C. will be attracted.

21. I have, therefore, no hesitation in holding that the offence complained of is a continuing offence and the trial Court shall therefore proceed with the complaint on that basis in accordance with law. .

22. On behalf of the respondent, it was urged that this is not an only building which is constructed or yet to be constructed. There are one or more buildings to be constructed and therefore the entire plot of land cannot be transferred and hence there is no statutory duty on the petitioner to execute the conveyance deed. This may be a defence which could be urged before the trial Court but that in my opinion has no relevance so far as controversy in the present application is concerned namely if there is an offence u/s 11 of the said Act whether it is a continuing one or not. It being a continuing offence, the aforesaid practical difficulty in my opinion loses all its significance from the point of applicability of period of limitation u/s 468, Cr.P.C. and 472, Cr.P.C.

23. As that is the only controversy before me. I do not make any observation to the aforesaid submission to the practical difficulty felt by the respondent.

24. The net result, therefore, is that the petition succeeds. The decisions of the Courts below are set aside. The complaint being Criminal Case No. 23/92 filed in the Court of J.M.F.C. Pune stands revived at the stage where it was for being conducted and disposed of on its own merits and in accordance with law. Rule made Absolute accordingly.

25. This being the case of 1992, the, trial Court is directed to give priority to the case and to see that it is disposed of as early as possible , in any case not later than 31st May, 1999.