
(1989) 12 BOM CK 0001
In the Bombay High Court
Case No : Arbitration Petition No. 5 of 1989

Usha Arvind Dongre

APPELLANT

Vs

Suresh Raghunath Kotwal

RESPONDENT

Date of Decision : 11-12-1989

Acts Referred:

Registration Act, 1908 — Section 17(1)

Citation : (1990) 3 BomCR 389 : (1989) 91 BOMLR 233

Hon'ble Judges : Sujata Manohar, J

Bench : Single Bench

Advocate : Girish Desai, instructed by Gordhandas and Fozdar, for the Appellant; V.V. Tulzapurkar and Uday Bobde Advs., instructed by Chitnis Vaithy and Co., for the Respondent

Final Decision : Dismissed

Judgement

Sujata Manohar, J.—This is a petition to set aside the Arbitration Award No. 94 of 1988 which is dated 30th June, 1988 and is filed in this Court. The petitioner and the respondent are sister and brothers. The father of the petitioner and the respondent expired at Bombay on or about 26th March, 1970 leaving behind his last Will and testament dated 10th December, 1964. Under this Will the deceased bequeathed his entire estate including Flat No. G-3, in Dadar Co-operative Housing Society, Bhavani Shankar Road, Dadar, Bombay-400 028 in equal shares to his widow and his two children, viz. the petitioner and the respondent.

2. The mother of the petitioner and the respondent Pramilabai R. Kotwal died on or about 13th December, 1961, leaving behind the petitioner and the respondent as her only heirs and legal representatives under the provisions of Hindu law by which the parties are governed. Thereafter disputes and differences arose between the petitioner and the respondent relating to the distribution of the estate of their deceased parents.

3. Under an agreement of reference dated 5th August, 1987 executed by both

the parties the disputes were referred to the joint arbitration of Mr. M.K. Kotwal and Mr. S.K. Kotwal, both of them close relatives of the parties. The recital to the agreement of reference which is at Exhibit "C" sets out that the property left by the deceased persons mainly consists of Flat No. G-3, in Sharda Ashram at Bhavani Shankar Road, Dadar, Bombay-28 some ornaments, shares, fixed deposits of companies and bank accounts. Under the terms of the agreement of reference the arbitrators were inter alia, required to ascertain the estate belonging to both the deceased persons and divide that same as suitably and conveniently as possible between the parties in equal shares in such manner as the arbitrators think fit.

4. The statements of claim were filed by both the parties as also replies to each other's claims. By an award dated 30th June, 1988 the arbitrators have given detailed direction relating to the division of the estate. They have inter alia declared and directed that the absolute title, interest, possession, occupancy and enjoyment of the furnished Flat Block No. G/3 in the Dadar Co-operative Housing Society Ltd., Bhavani Shankar Road, Dadar, Bombay-400 028 alongwith the furniture and fixtures, crockeries, utensils, clothing etc. are awarded in favour of the party of the First Part Shri Suresh Raghunath Kotwal who is already in possession of the same.....

"We hereby declare and direct that the lumpsum of Rs. 1,50,000/- (Rupees one lakh fifty thousand only) is awarded in favour of the party of the second part Mrs. Usha Arvind Dongre as the value in exchange for her share in the said furnished Flat and other movables."

....."As we have awarded the title and ownership of the Flat in favour of the party of the first part Shri Suresh R. Kotwal, we hereby declare and authorise him as entitled to apply for the transfer of membership, shares and other interests in the said Flat to the Dadar Housing Co-operative Society Limited, but not before 15th November, 1988."

....."We hereby declare that the letter dated 21st June, 1984 written by the party of the second part Mrs. Usha A. Dongre to the Dadar Co-operative Housing Society Limited, taking objection for any transfer in favour of the party of the First part Shri Suresh R. Kotwal has now become obsolete, inoperative and null and void".

"Therefore, we request the Dadar Housing Co-operative Society Limited, and its Managing Committee to sanction the application for transfer made by the party of the First part made after 15th November, 1988 and insert the name of Shri Suresh Raghunath Kotwal in place of late Smt. Pramila Bai Raghunath Kotwal as the member and share-holder of the Society in respect of the said Flat."

The other directions in report pertain to distribution of ornaments and other moveable properties and the mode of payment by instalments as prescribed in the award.

5. According to Mr. G.J. Desai, learned Counsel for the petitioner the award is bad in law and cannot be looked at by the Court because, according to him, the award requires registration u/s 17(1)(b) of the Registration Act, 1908. Since the award has not been so registered the award is bad in law and can confer no right on the parties. A decree in terms of the award cannot, therefore, be passed

6. u/s 17(1)(b) of the Registration Act a non-testamentary instruction which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, of the value of one hundred rupees and upwards, to or in immovable property requires compulsory registration as provided in the Registration Act. The petitioner contends that the present award declares an interest in Flat No. G-3, Dadar Co-operative Housing Society, Bhavani Shankar Road, Dadar and/or it confers the ownership of this flat on the respondent and extinguishes the petitioner's right therein on payment of Rs. 1,50,000/- as set out in the award. Hence it is covered by section 17(1)(b) of the Registration Act. See in this connection Ratan Lal Sharma Vs. Purshottam Harit, .

7. In order to examine this contention it is necessary to look at the nature of right which the deceased persons had in the flat. The land and the building in which this flat is situated belong to the Dadar Co-operative Housing Society Ltd. this is a Co-operative Housing Society registered under the Maharashtra Co-operative Societies Act, 1960. It is a tenant co-partnership housing society. The land and the building belong to the Society. The flats are allotted for occupation to the members of the Society.

8. Rule 10 of the Maharashtra Co-operative Societies Rules, 1961 describes various types of Co-operative Societies. The Housing Societies are divided into three categories, (a) Tenant Ownership Housing Societies, where the land is held either on leasehold or free hold basis by the societies and houses are owned or are to be owned by the members, (b) Tenant Co-partnership Housing Societies which hold both land and buildings either on lease-hold or free-hold basis and allot them to their members and (c) other Housing Societies, such as House Mortgage Society and House Construction Society. The present society falls in category (b). The entire building belongs to the Housing Society. The deceased member was entitled to occupy this flat by virtue of his membership and holding of shares in the said Society. The arbitration was in respect of the ownership of shares in the society and the consequent right to occupy the flat which arises as a result of the holding of shares in the said Society. The arbitrators by their award held that the membership in the said Society should be transferred to the respondent. In fact in the award they have given directions relating to applying to the society for transfer of shares as set out earlier. The award therefore does not deal with any declaration or creation of rights in an immovable property. It deals with the transfer of shares in the said society. Section 17(1)(b) of the Registration Act therefore, cannot have any application to such an award.

9. In fact u/s 41 of the Maharashtra Co-operative Societies Act, 1960 it is

provided as follows :

41. Exemption from compulsory registration of instruments relating to shares and debentures of society.---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 debentures 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 of 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 debentures issued by any society.

The arbitration pertains to shares in the said society and the award gives a declaration in respect of these shares. Therefore section 17(1)(b) does not apply to such an award.

10. In the case of Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi, the Supreme Court has held that a flat in a tenant co-partnership housing society under the Maharashtra Co-operative Societies Act can be attached and sold in execution of a decree against the allottee. This judgment however, does not deal with the question whether an interest in such a flat can be considered as an interest in immovable property which requires registration u/s 17 of the Registration Act. In fact the Supreme Court has pointed out that the attachment and sale in such a case is only of the right to occupy the flat and of the right to obtain a transfer of shares. It has been observed that it will be for the auction purchaser first to obtain membership of the society and that the Court, before confirmation of the sale, will insist upon his membership of the society which, it would not be unreasonable to assume, will be granted by the society in the ordinary course unless there are cogent and relevant reasons for not doing so. This judgment therefore does not pertain to the question before me.

11. It was submitted by Mr. Desai that "an interest in immovable property" in section 17(1)(b) is wide enough to cover a right which arises by virtue of the ownership of shares in the Co-operative Society, to occupy a flat. In my view section 17 of the Registration Act which requires compulsory registration of certain documents, failing which documents cannot be looked at, requires to be strictly construed. Looking to section 41 of the Maharashtra Co-operative Societies Act, 1960 the intention was clearly to exclude transfer of shares in a Co-operative Society from the provisions of section 17 of the Registration Act. In the case of a tenant co-partnership housing society the title to the flat remains in the society and is not affected by the transfer of shares in the society. Only the right

to occupy a flat flows from the ownership of share in such a co-operative society. The shares, thereby do not become Immovable property. A transfer of such shares does not require registration u/s 17(1)(b). Even if the transfer of such shares is considered as a transfer of interest in an immovable property, section 41 of the Maharashtra Co-operative Societies Act exempts the document affecting transfer of such shares from the ambit of section 17(1)(b) of the Registration Act.

12. In a Full Bench decision of the Gujarat High Court in the case of Mulshanker Kunverji Gor and Others Vs. Juvansinhji Shivubha Jadeja, the Gujarat High Court considered section 42 of the Gujarat Co-operative Societies Act, 1962 which is similar to section 41 of the Maharashtra Co-operative Societies Act, 1960. The Gujarat High Court said that a tenant co-partnership society is a society where the land is owned by the society upon which houses are constructed by the society for the benefit of its members. When a member of the Co-operative Society transfers his share 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. The Gujarat High Court has held that such a transfer of shares by one person to another can be brought about without a registered instrument because section 42 (a) carves out an exception to the Rule enunciated in sub-section (1) of section 17 of the Registration Act.

13. In the present case therefore the award which deals with transfer of shares in the said flat in a Tenant Co-partnership Society does not require registration u/s 17(1)(b) of the Registration Act.

14. Mr. Desai has drawn my attention to the decision of the Supreme Court in the case of Lachhman Dass Vs. Ram Lal and Another, in which the Supreme Court has said that where a party to an arbitration proceeding claims that half share in the disputed Immovable property is held by the opposite party as benamidar for him and that he is the real owner of the entire property and the arbitrator passes an award accordingly, the award does create, declare or assign a right, title and interest in the Immovable property. Section 17 requires registration in such a case if the value of the Immovable property is Rs. 100/- or upwards. He also relied upon a decision of the Supreme Court in the case of Capt. (Now Major) Ashok Kshyap Vs. Sudha Vasisht and Another, . In that case the disputes relating to a flat between a brother and sisters were referred to arbitration. The arbitrators published an award under which the brother was required to pay an amount of Rs. 40,800/- to one of his sisters in lieu of her share in the house and the sister was given a right to occupy the house until the full amount of Rs. 40,800/- was paid to her. The arbitrators also said that on payment of this amount she will have no interest left in the house. The Supreme Court considered this award as not falling u/s 17(1)(b) of the Registration Act on the ground that the award itself did not create, extinguish or declare any right in an Immovable property. The document itself merely created a right to obtain a

payment of Rs. 40,800/-. It was on receipt of this payment that the interest in the property was to get extinguished. The Court therefore said that such a document did not require registration u/s 17(1)(b).

15. Neither of these two decisions deals with the right to reside in a flat belonging to a Co-operative Housing Society of the kind as in the present case. These decision therefore, do not directly apply to the present case. It is true that the award does mention that the title to the flat in question is awarded to the respondent. But this has to be under-stood in the context of the fact that the flat is owned by a co-operative housing society which is a tenant co-partnership co-operative housing society. The arbitrators were themselves conscious of this fact and have given detailed directions relating to the transfer of membership in the housing society. The objection therefore, relating to non registration of the award fails.

16. It is next submitted by the petitioner that the arbitrators have misconducted themselves and acted beyond their jurisdiction because they have directed that various amounts as set out in the award have to be paid by instalments specified by them in the award. It is submitted by the petitioner that under the terms of reference the arbitrators have no power to award payment of amounts in question by instalments. This objection does not have any substance. The arbitrators who are required to determine the rights of various parties and to award amounts to be paid by them to one another have an implied power to prescribe the manner in which the amounts awarded by them shall be paid.

17. In Russel on Arbitration 20th Edition, page 323, it is stated "An Arbitrator may in general fix the time at which payment is to be made.He may direct payment to be made by instalments, and that if the sum awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty; or when the payment is to be made by instalments, that if one be overdue the whole amount shall be payable at once."

18. In the case of J. Kaikabad v. F. Khambatta and another, reported in AIR 1930 Lah 26 the Court has observed that in adjudging the amount payable by one party to another, an arbitrator has full power to direct payment by instalments. The directions as to the number, amount, mode and time of payment of these instalments are, therefore, matters within the discretion of the arbitrator and from essential parts of an award which a Court has no more power to modify than it has to enhance or reduce the total sum found payable by the arbitrator. Even if the order fixing the instalments is erroneous, harsh or oppressive, the error is one of substance in the adjudication of the dispute, and not of from which could be amended without affecting the decision. In these circumstances this objection also does not have any substance. It is not for me to decide whether the award is right or wrong and whether the instalments granted are reasonable or not.

In the premises the petition is dismissed. There will however, be no order as to

costs in the circumstances of the case.