

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 4457 OF 2014
WITH
CIVIL APPLICATION No. 2589 OF 2015 IN W.P. No. 4457 OF 2014

Alankar Sahkari Griha Rachana Sanstha
Maryadit, through Chairman S.K. ... Petitioner/Applicant
Vs.
Atul Mahadev Bhagat & Anr. ... Respondents

WITH
CIVIL APPLICATION No. 1478 OF 2017 IN W.P. No. 4457 OF 2014

Atul Mahadev Bhagat & Anr. ... Applicants
Vs.
Alankar Sahkari Griha Rachana Sanstha
Maryadit, through Chairman S.K. ... Respondent

Mr. Nitin P. Deshpande, Advocate for the petitioners.
Mr. Sandesh Shukla a/w. Mr. Amit Singh I/b. Santosh Sawant,
Advocate for the respondents and applicants in CAW/1478/2017.

CORAM : MRS.MRIDULA BHATKAR, J.
RESERVED ON : 16th August, 2018.
PRONOUNCED ON : 31st August, 2018.

JUDGMENT:

In this Writ Petition, the order dated 12th December, 2013 passed by the Member, Maharashtra State Cooperative Appellate Court, Mumbai Bench at Pune thereby directing the respondents to pay an amount of Rs.4,75,000/- with interest is challenged.

2. Respondent nos. 1 and 2 have filed Dispute No. 398 of 2005 before the Cooperative Court, Pune for recovery of amount of Rs.6,98,740/- alongwith interest, which the disputants have paid to the petitioner-Housing Society. The Cooperative Court has passed an order dated 1st October, 2007 directing the petitioner-Society to pay the disputant amount of Rs.5,00,000/- along with interest @ 11% from 29th December, 2005 till the realization of claim. The petitioner-Society challenged the said order by filing Appeal No. 02 of 2008 before the Maharashtra State Cooperative Appellate Court, Mumbai Bench at Pune, which was partly allowed and the Society was directed to pay Rs.4,75,000/-, instead of Rs.5,00,000/-, with 11% interest from 29th December, 2005 till realization of the amount. The said order is challenged by the petitioner-Housing Society. The respondents/original disputants were allotted plot No. 59 during the membership. Due to some violation of the conditions, the Society threatened to dispossess so the respondents filed Dispute No. 223 of 2000, which was compromised by filing consent terms and they agreed to deposit Rs.50000/- by way of security for completion of construction of the bungalow within three years. Thereafter, the respondents were in dire need of the money and therefore, they decided to sell the flat to third party and for the sale, they agreed to

pay transfer fees of Rs.25,000/- to the Society. However, they alleged that the Society demanded Rs.5,00,000/- for regularizing the transfer. Therefore, the respondents, under pressure, paid Rs.5,00,000/- by issuing two demand drafts of Rs.2,50,000/- each on 27th April, 2005. After selling the plot, they sent a letter of demand on 4th July, 2005 which was replied denying such liability of payment and so the respondents filed the dispute before the Cooperative Court on 29th December, 2005.

3. The learned counsel for the petitioner-Society has submitted that both the Cooperative Court and the Appellate Court have not properly assessed the evidence of the respondents wherein they have given admission that they paid Rs.5,00,000/- towards donation to the petitioner-Society. He pointed out that besides this admission, the respondents have admitted that they sent a letter to the Society on 9th December, 2004 where they offered to pay transfer charges @Rs.25/- per sq.ft. (D-14). The learned counsel has submitted that the respondents have admitted that they could not produce any evidence that the Society made demand of Rs.5,00,000/- towards the transfer charges. The learned counsel has submitted that if at all the member of the Housing Society voluntarily agrees to pay money to

the Society, then it is not to be covered as a restriction under the bye-laws. In support of his submissions, the learned counsel relied on the judgment of Single Judge of Bombay High Court in Writ Petition No. 1094 of 2004 in the case of ***Bharatiya Bhavan Cooperative Housing Society Ltd. & Anr. vs. Smt. Krishna H. Bajaj & Ors., pronounced on 17th February, 2010.***

4. Per contra, the learned counsel for the respondents has submitted that the Society cannot demand any transfer fees more than Rs.25,000/- which is fixed as per the bye-laws No. 38 and section 38(e)(ix) of the Cooperative Housing Society, i.e., Notice of transfer of shares and interest in the capital/property of the Society . He also relied on the Circular issued on 9th August, 2001 by the Government in respect of transfer fee by which the transfer fee of the immovable property within the Corporation limit is fixed as Rs.25,000/- and the said circular is still in force. The learned counsel has submitted that the respondents were in need of money and they have stated so in the evidence, therefore, the respondents sold the plot to third party. Under such circumstances, there is no question of payment of donation of Rs.5,00,000/- voluntarily by the respondents. On the point of illegality of charging fees by the Housing Society, the learned counsel relied on the observation made by the Division

Bench of the Bombay High Court in the case of ***Sind Cooperative Housing Society vs. Income-tax Officer, reported in (2009) 317 ITR 47.***

5. It is made clear that the amount which is accepted above the permissible limit towards the transfer fee is illegal or taxable. In the case of ***Sind Cooperative Housing Society (supra)***, the Division Bench has held that -

“Firstly, whether it is voluntary or not would make no difference to the principle of mutuality. Secondly, payments are made under the bye-laws which constitute a contract between the society and its members which is voluntarily entered into and voluntarily conducted as a matter of convenience and discipline for running of the society. If it is the case that the amounts more than permissible under the notification had been received under pressure or coercion or contrary to the Government directions, then considering section 72 of the Contract Act, that amount will have to be refunded. At any rate if the society retains the amount in excess of the binding Government notification or the bye-laws that amount will be exigible to tax as it has an element of profiteering.”

6. In the present case, the question is whether the amount of Rs.5,00,000/- was paid voluntarily towards donation. While deciding

this, one has to see who is in advantageous or dominant position.

7. In the case of ***Bharatiya Bhavan Cooperative Housing Society Ltd.*** (*supra*), similar issue of payment to the Society by the member was before the Single Judge of this Court. However, in the said matter, the member and Society have entered into written agreement and the Judge has held that the member cannot fall within the protective umbrella of Section 72 of Contract Act if the party with knowledge enters into void agreement for some illegal act, then she would not get protection under section 72 of the Contract Act but the party will fall within the mischief under section 23 of the Contract Act. The facts of this case are different than the facts of the present case. I respectfully state that I am not in agreement with the finding given by the Hon'ble Single Judge of this Court and I am supported by the judgment of the Hon'ble Supreme Court wherein the Supreme Court though did not interfere with the said judgment and order passed by the High Court, however expressed that they did not agree with the reasoning given by the learned Judge of the High Court in the case of ***Bharatiya Bhavan Cooperative Housing Society Ltd.***

8. There is a history of dispute between the Society and the

respondents in respect of completion of the construction of the bungalow within stipulated period of three years but the parties compromised the matter wherein the respondents agreed to deposit Rs.50,000/- by way of security. After its construction, the respondents were in need of money and therefore they decided to sell their bungalow. On the background of these facts, the issue of donation of Rs.5,00,000/- is required to be appreciated. A person facing financial crises will not donate amount of Rs.5,00,000/- to the Housing Society. There is a ceiling of Rs.25,000/- for transfer fees. Therefore, different ways are invented by the Society to earn more money other than legally permissible like the maintenance charges or transfer fees under the bye-laws. The incoming and outgoing member both are having a subordinate position and the Society enjoys a dominant status in transfer of the premises. The incoming member somehow wants the possession of the premises and share certificate to be transferred in his name without any hassle. So also outgoing member, who is in need of money, wants to get rid of further complications and is interested in smooth transaction. For this reason, the consent of Managing Body by passing necessary resolution to that effect is required. Under such circumstances, it cannot be inferred that the outgoing/incoming member has paid the

donation voluntarily. In the present case, though the respondents have given admission that they paid Rs.5,00,000/- towards donation to the petitioner-Society, it cannot be further read that it was paid voluntarily without any pressure.

9. When the persons come together with common object of housing, after formation of a Cooperative Society, they are governed under rules and bye-laws of Maharashtra Cooperative Societies Act. So far as the members are concerned, the Cooperative Housing Society can collect or increase its funds only by legally permissible charges or fees. The Society is not expected to indulge into profiteering business from the members and if such amount is earned, then it is taxable under the law. There is no bar for any member to pay donation to the Society, however, it should be voluntary without any compulsion and coercion. No manner the transfer fees can be charged under the pretext of donation.

10. The respondents have admitted the letter sent to Society on 9th December, 2004 where they have offered to pay transfer charges Rs.25/- per sq.ft. , still it hardly comes upto Rs.85,000/- to 90,000/- and the donation amount of Rs.5,00,000/- is much higher. It is

necessary to see the time factor and the sequence of the payment of so called donation and the challenge given to the said payment by the respondent by filing Dispute No. 398 of 2005 before the Cooperative Court. The respondents sent letter to Society on 9th December, 2004 wherein the respondents have expressed that they are ready to pay Rs.25,000/-. They expressed their willingness to pay Rs.25/- per sq.ft. after adjusting the deposit amount of Rs.50,000/- which was paid to the Society earlier by way of compromise. The payment was made by two demand drafts of Rs.2,50,000/- each on 27th April, 2005 and the said payment was challenged on 29th December, 2005 by filing Dispute No. 398 of 2005 before the Cooperative Court on the ground that it was paid under coercion. Thus, from this conduct of taking immediate steps against the Society and challenging the said transaction, it can be safely concluded that the amount was not a donation but money was a transfer fee paid out of compulsion and it was not voluntary payment.

11. This Writ Petition is dismissed, however, with following modification in the rate of interest:

“The amount of Rs.4,75,000/- is to be returned to the respondents with simple interest @ 8% p.a. from 29th December,

2005 till realization of the amount. The remaining order of the Maharashtra State Cooperative Appellate Court is maintained.

12. In view of dismissal of Writ Petition, Civil Applications do not survive and the same are disposed of accordingly.

(MRIDULA BHATKAR, J.)

Vidya
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