

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1374 OF 2008

Sea Face Park Co-operative Housing Societies	...	Petitioner
Versus		
State of Maharashtra Through Government Pleader, High Court, Mumbai and Others	...	Respondents

.....

Ms. Soma Singh a/w Mr Shubro Dey, Mr. Aditya Bhat I/b M/s Sanjay Udeshi & Co. for the Petitioner.

Mr. Sujit Bhattacharya a/w Mr Nitin G. Raut for Respondent No.3.

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CORAM : S.C.GUPTE, J.

DATE : 2 APRIL 2018

ORAL JUDGMENT :

. Heard learned Counsel for the parties.

2 This writ petition challenges orders passed by the Co-operative Court in a dispute under Section 91 of the Maharashtra Co-operative Society Act, 1960 ("Act") and by the Co-operative Appellate Court in an appeal. The dispute pertains to a sum of Rs.15,75,000/- paid by Respondent No.3 herein as an admission fee of the society, when he applied and was admitted as a member of the society.

3 It is the case of Respondent No.3 that this payment demanded from Respondent No.3 as an admission fee was illegal. He called upon the society to refund this amount; the society refused to do so; and as a result, on 8 April 1999, a dispute was filed by him before the Co-operative Court, Mumbai, praying for an award of Rs.31,93,669/-, which comprises of principal amount of Rs.15,75,000/- and interest at the rate of 18 per cent per annum. By the impugned order, the Co-operative Court declared the resolution of the society passed on 17 January 1993, deciding to charge admission fees in the sum of 5 per cent of the sale price for the purpose of admitting new members, as null and void and ordered the society to refund the amount to the disputant with simple interest at the rate of 6 per cent per annum from the date of filing of the dispute and till realization. This order was upheld by the Co-operative Appellate Court. Being aggrieved, the Petitioner society has filed the present writ petition.

4 Ms. Singh, learned Counsel for the Petitioners, makes three submissions in support of the challenge. Learned Counsel, firstly, submits that the present dispute was barred by the law of limitation. It is submitted that the dispute falls within the residuary clause of Sub-section (2) of Section 92 of the Act, and the period of limitation is accordingly regulated by the provisions of the Limitation Act, 1963. It is submitted that for recovery of an amount wrongly paid, limitation is three years from the date of such payment. It is submitted that in the present case, the purported payment was made to the society on 24 July 1993 and the dispute having been filed on 8 April 1999, the same is barred by the law of limitation.

5 Section 92 of the Act provides for special rules concerning limitation

in respect of the disputes mentioned therein. It begins with a non-obstante clause. Notwithstanding anything in Limitation Act, 1963, but subject to the specific provisions made in the Act, the period of limitation in the case of disputes referred to the Co-operative Court under Section 91 of the Act, is covered by specific provisions contained in clauses (a) to (d) of Sub-section (1) of Section 92. Then there is a residuary clause contained in Sub-section (2) of Section 92, which provides for period of limitation in case of any other disputes, that is to say, disputes other than those mentioned in Sub-Section (1) of Section 92. In the case of these other disputes, period of limitation is to be regulated by the provisions of Limitation Act, 1963. Sub-section (3) of Section 92 contains a clause permitting disputes to be entertained after expiry of the limitation period upon being satisfied as to sufficient cause. Amongst clauses (a) to (d) of Sub-Section (1) of Section 92, clause (b) provides for limitation *inter alia* for a dispute between a society and its member relating to any act or omission on the part of either of the parties to the dispute. For such dispute, the period of limitation is six years from the date on which the act or omission with reference to which the dispute arose took place. The Co-operative and Appellate Courts held the present dispute, which concerns wrongful recovery of admission fees by the society from Respondent No.3, its member, to be a dispute covered under clause (b) of Sub-section (1) of Section 92. The Courts were of the view that this dispute related to an act or omission on the part of the society and the period of limitation was six years from the date on which such act or omission took place. Learned Counsel for the Petitioner submits that this dispute is not covered under clause (b) of Sub-Section (1) of Section 92, but falls under Sub-clause (2) of Section 92. It is submitted that dispute relates to recovery of any sum

due to a member from a society and such dispute must be reckoned as other dispute within the meaning of Sub-section (2) of Section 92. Learned Counsel submits that clause (b) must be contrasted with clause (a) of Sub-section (1) of Section 92. Learned Counsel submits that if disputes between the society and its member falling under clause (b) were to include recovery of any sum due from either of the parties to the dispute, there was no reason for making a specific provision in respect of recovery of a sum due to the society by a member in clause (a) of Sub-section (1) of Section 92. I am afraid that is not a correct reading or analysis of Section 92. Clause (b) covers all disputes between a society and its member. Such disputes may relate to any act or omission on the part of either of the parties to the disputes. Even a dispute relating to recovery of a sum, which is due to a society from its member and which is refused by the latter, falls within clause (b) of Sub-section (1) of Section 92. It is a another matter that it also falls under clause (a) of Sub-section (1) of Section 92. Because it falls under clause (b) of Sub-section (1) of Section 92, the period of limitation is six years and because it falls under clause (a) of Sub-Section (1) of Section 92, such period must be reckoned from the date on which the member from whom dues are owed to the society dies or ceases to be a member of the society.

6 Section 91 of the Act covers various disputes between a society and individuals mentioned therein. It includes *inter alia* a dispute between a society, and a person other than a member of the society with whom the society has any transaction concerning which any restriction or regulation has been imposed or prescribed under sections 43, 44 or 45 of the Act. So also, it includes a dispute between a society and a surety of any past or

deceased member. It is these other disputes, which amongst others are covered by Sub-section (2) of Section 92, and the period of limitation in their case is regulated by the provisions of the Limitation Act. Insofar as clauses (a) to (d) of Sub-section (1) of Section 92 are concerned, particular provisions of these clauses cover the issue of limitation so far as regards the disputes mentioned therein.

7 On this view of the law, the Courts below have correctly analyzed the transaction and applied the rule of limitation under Section 92 of the Act. No interference is called for with the impugned orders on this ground.

8 Learned Counsel for the Petitioner, secondly, submits that the demand made in the dispute is not legal. It is submitted that the original contribution of 5 per cent of the transfer price was submitted by the past member (transferor of Respondent No.3) willingly. It is submitted that Respondent No.3 himself has thereafter stood by this payment and has even been benefited by the various steps taken by the society in pursuance of the payment. First of all, it is important to bear in mind that the demand of admission fees in the sum of 5 per cent of the sale price for the purpose of admitting a new member against purchase of a flat, has no legal sanction or propriety under the scheme of the Act, Rules and bye-laws to be framed thereunder. Membership of a co-operative society is an open membership. It is not possible to put any restriction on such membership save and except as may be provided under the Act, Rules, bye-laws made consistently with the Act and Rules. Sub-section (1) of Section 23 of the Act prohibits any society from refusing admission to any person duly qualified under the provisions of the Act, Rules and bye-laws of the society for such

membership without sufficient cause. If any person were to be refused admission on account of non-payment of a certain fee or charge, such fee or charge must be legally justified so as to give rise to such sufficient cause. Non-payment of such fee or charge, in other words, so as to amount a sufficient cause, must have a sanction of law. The particular resolution of the society dated 7 January 1993, which authorizes the society to charge a sum of 5 per cent of the sale price as admission fee for the purpose of admitting a new member against purchase of a flat in the society, has no such sanction. There is no provision in the Act or the Rules or indeed in the bye-laws of the society in the present case, which enables the society to pass such resolution. Learned Counsel for the Petitioner submits that in terms of the explanatory note of the particular resolution, forming part of the notice of the agenda, such charge is justified, since it protects the members' interests against the sharp increase in monthly maintenance as a result of general inflation and increase in government levies and insurance premia, etc. That may at best be a psychological justification for passing of such resolution, but it still is no legal justification. In law, it must be shown that the society, which is a creature of statute, has the power to take the particular action complained of within the framework of such statute or otherwise under law. As far as the present case is concerned, I see no such power having the sanction of law.

9 Learned Counsel for the Petitioner, thirdly, submits that this payment was made to the Petitioner-society by its ex-member, who was the transferor of Respondent No.3. Learned Counsel relies on a letter of 24 July 1993 addressed by the past member/transferor, Shailesh P. Mahadevia, to the society. Through this letter, Shailesh P. Mahadevia

enclosed a cheque representing the value of 5 per cent of the sale price issued by Respondent No.3 to the society “as per terms of the Sale Agreement”. Based on this letter, it is submitted that this payment came from the transferor or ex-member of the society and not Respondent No.3. What is important in law is not the identity of the person, who actually makes a payment, but the identity of the person on whose behalf the payment is made. It is very clear from the resolution of the society that this payment is in the nature of “admission fee for the purpose of admitting new members against purchase of a flat in the society”. In other words, it is a charge to be levied on the new member. It is immaterial who makes this payment. So long as the payment is to the account of the new member, it is to be treated as payment by the new member. As I have noted above, such payment is not having any sanction of law and is, accordingly, wrongly recovered from the new member, namely, Respondent No.3. It is wholly immaterial as to whether Respondent No.3 has made this payment willingly or under protest. As long as it is money wrongly paid, it can be recovered by the payer from the payee within the period of limitation.

10 There is nothing to suggest that Respondent No.3 has taken any advantage of this payment. That Respondent No.3 has stood by this payment or made use of facilities given to him by the society in pursuance of the payment recovered from him, is mere ipse dixit of Counsel. It has no basis in the record of the case. Besides, no such argument is advanced before the Courts below.

11 Learned Counsel for the Petitioner relies on a judgement of our Court in the case of **Bhartiya Bhavan Co-operative Housing Society Ltd**

Vs. Kishna H. Bajaj¹. In that case, the amount was treated as a valid donation voluntarily given by the member, who was a disputant before the Co-operative Court, to the society. The member later on denied that such payment was voluntarily made and demanded refund of the amount. The facts of this case are clearly distinguishable. In the present case, nobody has been referring to this payment as a voluntary donation made by Respondent No.3, or for that matter, by the erstwhile member of the society.

12 Accordingly, there is no merit in the petition. The petition is dismissed. In the facts of the case, there will be no order as to costs.

13 When this petition was admitted, the Petitioner-society was asked to deposit 50 per cent of the award amount in the Court. Respondent No.3 was permitted to withdraw this amount against furnishing of a bank guarantee. The Petitioner, for its part, had given a bank guarantee to the Court for payment of the balance 50 per cent. Respondent No.3 has since withdrawn the amount deposited by the Petitioner-society against the bank guarantee. That bank guarantee will have to be discharged. So also, the bank guarantee given by the Petitioner-society will have to be honored to the extent of 50 per cent of the balance amount. It is ordered accordingly.

14 Learned Counsel for the Petitioner prays for stay of this order. Since the guarantee furnished by Respondent No.3 is valid till 20 December 2018, no separate order needs to be passed for keeping that bank guarantee alive. As for the guarantee given by the society, no coercive steps shall be taken against it for payment of balance 50 per cent of the

1 2010(2) Bom. C.R. 587

awarded amount with interest in pursuance of that guarantee for a period of five weeks from today.

(S.C. GUPTE, J.)