



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

EXECUTION APPLICATION NO. 1801/2018

WITH

INTERIM APPLICATION NO. 2545/2025

IN

EXECUTION APPLICATION NO. 1801/2018

THE ZOROASTRIAN RADIH SOCIETY AND 5 ORS ..APPLICANTS

VERSUS

**BEHRAMSHAH SHROFF BUILDING
NO. 1 (YAZAD) CO-OPERATIVE
HOUSING SOCIETY LTD.**

..RESPONDENTS

WITH

CHAMBER SUMMONS NO.1/2025

IN

EXECUTION APPLICATION NO. 1801/2018

THE ZOROASTRIAN RADIH SOCIETY

..APPLICANT

VERSUS

**BEHRAMSHAH SHROFF BUILDING
NO. 1 (YAZAD) CO-OPERATIVE
HOUSING SOCIETY LTD.**

..RESPONDENTS

WITH

NOTICE NO. 212/2018

IN

EXECUTION APPLICATION NO. 1801/2018

THE ZOROASTRIAN RADIH SOCIETY

..APPLICANT

VERSUS

**BEHRAMSHAH SHROFF BUILDING
NO. 1 (YAZAD) CO-OPERATIVE
HOUSING SOCIETY LTD.**

..RESPONDENTS

1) The execution applications have been filed by both the parties. Execution Application No.694 of 2019 has been filed by the Behramshah Shroff Bldg. No.1 (Yazad) Co-operative Housing Society Ltd. (for short '**society**') and Execution Application No.1801 of 2018 has been filed by the Zoroastrian Radih Society (for short '**Trust**').

1.1) Both the parties are seeking execution of the Lease Agreement. However, a dispute has arisen between them with regards to the terms of the Lease Agreement, and more particularly on the question of whether the flat purchasers would be liable to pay a 10% differential amount on every subsequent sale of a flat after the first sale.

1.2) In the present execution applications, by an order dated 4 December 2024, a Single Judge of this Court (Coram : Abhay Ahuja, J.) passed direction that both parties have agreed in order to abide by the order of the Supreme Court, that the execution of the lease deed would be finalized within two weeks. The said order dated 4 December 2024 reads as under:-

1. Pursuant to earlier orders of this Court, today the matter has been heard extensively.
2. Both the learned Counsel have submitted that in order to abide by the order of the Hon'ble Supreme Court dated 27 March, 2018 directing execution of the Lease Deed, the Lease Deed would be finalized within a period of two weeks, keeping in mind, the order dated 18 May, 1999 passed by the Charity Commissioner of the State of Maharashtra, whereby application for according sanction to Development-cum-Lease-cum-Sale Agreement was allowed by the Charity Commissioner under Section 36 of the Bombay Public Trusts Act, 1950 (now Maharashtra Public Trusts Act, 1950).
3. List for compliance on 18 December, 2024.

(Emphasis supplied)

2) I have heard learned counsel for both sides and with their assistance I have perused the documents on record.

3) The Charity Commissioner of the Maharashtra State, Mumbai, passed order dated 18 May 1999, in the application preferred under

Section 36 of the Bombay Public Trusts Act, by the Trust. It was observed that the trust was not disposing of the land, but was granting the land on lease to prospective housing societies of flats meant for poor Parsees. The trust was to take Rs.20,000/- and Rs.25,000/- respectively as deposit from each flat owner, depending upon the dimension of the flat, as agreed in the terms of the agreement. This deposit was to be interest-free and the trust would deposit this amount in bank and as noted in paragraph no.8, the interest on such deposit would be utilised by the Trust by way of rent of the land, yielding about Rs.2,400/- to Rs.3,000/- per year per flat. Further it was noted in paragraph no. 10 that it was of the opinion that agreements were not contrary to the interest of the trust and were well-balanced.

4) The Trust constructed fifty-six (56) flats in two buildings and allotted the flats to needy members of the Parsee community, in the month of March 1995, at a cost of Rs.850/- per sq. ft. The said act was done by the Trust as they were the owner of land admeasuring 1,34,007.50 sq.yds. at Oshiwara, Jogeshwari, Mumbai. The said land was encroached upon by slums and the MHADA sought to take over the said land. Consequently, a writ petition was filed before this Court. In the said Writ Petition, consent terms came to be entered into

between the parties, pursuant to which, out of the total land admeasuring 1,34,007.50 sq.yds., the Trust retained 30,146 sq.yds. upon which the subject buildings were constructed. As per the operative part of the order, point no.10, it was mentioned that

“10. The purchaser of the flat shall not be entitled to sell the same for the period of 10 years from the date of the allotment and shall also liable to pay 10% of the price difference in case, he sells it after 10 years, to the applicant-trust”.

5) Hence, the Trust has received the entire construction cost of the flats from the prospective purchasers of the flats. As far as the land beneath the flats is concerned, the Trust has procured an amount of Rs.20,000/- and Rs.25,000/- respectively from the flat purchasers, depending upon the area of the flat, as interest free deposits. It is recorded in the order of the Charity Commissioner that, the Trust, by taking such interest free deposits from the flat purchasers, would earn around Rs.2,400/- to Rs.3,000/- per flat per year.

5.1) The flats are not sold free of cost, since the construction cost has been recovered @ Rs.850/- per sq.ft. for each flat. The restriction “not to sell” the flat was imposed for a period of ten (10) years. There is no dispute that the flat purchasers are ready to comply with the said condition, and are also ready to adhere to the condition of paying 10% of the price difference to the Trust in case of first sale of their respective flat.

5.2) The dispute, however, is whether the Trust is entitled to recover 10% of the price difference on every subsequent sale, whenever there is second sale or third sale or any sale thereafter ?

6) At this stage, it will be important to note the recent amendment to the Maharashtra Co-operative Societies Act and the issuance of Notification in the year 2014, wherein it has been resolved that while selling the flat, in housing society the seller being a member of the society need not take permission of the society to sell his flat. The Model By-Laws of the Co-operative Housing society, Clause 38 (d) reads as under :

“38(d) “No Objection Certificate” of the Society is not required to transfer the shares and interest of the transferor to transferee. However in case such a certificate is required by the transferor or transferee, he shall apply to the Society and Committee of the Society may consider such application on merit, within one month.”

(Emphasis supplied)

7) Hence, by virtue of the aforesaid, recent amendment, even the Model by-laws of the Maharashtra Co-operative Societies has acknowledged that on every sale of the flat, the seller is not required to take permission of the society. In the present proceedings, admittedly the purchasers have become owners of the flats and are governed by Maharashtra Co-operative Societies Act. There is a restriction of ten (10) years imposed on them, during which period the flat cannot be sold. However, after the expiry of ten (10) years, in

case the flat is sold, a charge of 10% of the price difference is payable to the trust.

8) As there was dispute between the parties mainly on the issue whether the flat owner should also be liable to pay 10% on every subsequent sale of flat, the society invoked arbitration clause. Before the Sole Arbitrator both the parties entered into the consent terms dated 21 November 2015. As per the consent terms, the disputes and differences stood settled and learned arbitrator had finalized the draft Deed of Assignment to be executed by the Trust in favour of the Housing Society. The said finalized draft Deed of Assignment was annexed to the consent terms which was to be executed within a period of two months, on the execution of the consent terms by passing an award. Paragraph Nos.4 and 5 of the said consent terms read as under:-

4. Agreed and declared that the above deed of Assignment would be executed on the basis of the orders so far passed by the office of the Hon'ble Charity Commissioner. The further deed of Rectification of the said deed executed shall be executed on the basis of the order that may be passed on. Misc. Application No. 238 of 2015 dated 22-06-2015 pending as on date before the office of Charity Commissioner Mumbai.

5. The Claimant shall be at liberty to make their representation before the Charity commissioner in the said Misc. Application No. 238 of 2015, at the discretion of the Charity Commissioner. The Claimants shall within a period of 30 days from execution of the aforesaid Deed of Assignment take all necessary steps to amend their bye laws to bring them in consensus with the terms of Deed of Assignment. The Claimant shall also subsequently amend the bye laws subject to the decision of the Charity Commissioner.

(Emphasis supplied)

9) Based on the consent terms, the sole arbitrator passed the consent award. In paragraph no.4 of the said consent award, it was recorded as under :-

4. Accordingly there shall be an Award in terms of the consent terms executed by the parties, which are taken on record and marked "X" for identification. The undertakings given in the consent terms are accepted."

10) Therefore, it was made clear by the Trust that the housing society would be at liberty to make a representation before the Charity Commissioner in the said Misc. Application No.238 of 2015. It was also made to believe that Misc. Application No.238 of 2015 filed on 22 June 2015, was pending as on the date of the execution of the consent terms i.e. on 21 November 2015.

11) By way of Misc. Application No.238 of 2015, the Trust had sought reliefs seeking inclusion of additional clauses in the lease agreement by way of seeking modification to the order dated 18 May 1999 passed by the Charity Commissioner. The prayer clauses (a) to (g) read as under:-

a) Prior approval or NOC from the Society (Trust) is mandatory before the sale of any Flat whether first sale or any subsequent sale thereof.

b) The Society (Trust) to have a prerogative for Right Preemption should it find that there is monetary suppression in which event the Trust will offer to pay 10% more than the price indicated and will be prepared to buy back the flat.

c) The Co-operative Housing Society of the respective buildings should not transfer the Flat in the name of the new Purchaser, no transfer the Share certificate in the name of the new Purchaser without prior approval of the Society.

d) *The Seller as well as the buyer all the future buyer, their successors and assigns shall abide by the Charity Commissioner's order and that the said new buyer, their successors and assigns being aware that the said land on which the said flat exists being leased land shall be exclusively used for residential and in any case the said new buyer, their successors and assigns shall give a Declaration cum Indemnity for the same.*

e) *Every sale transaction, either Original Allottee of the flat or any subsequent sale thereof the purchasers should abide by the 10% Clause as mentioned in the aforesaid order no.J/4158/97 dated 18.05.99 sanctioned by the Hon'ble Authority.*

f) *Every subsequent Sale Agreement between the Vendors and the Buyer will be in accordance with the Agreement for sale made by the Society (Trust), with the initial Buyer of the Flat.*

g) *In order to ensure that the rights and privileges of the Society (Trust), who has released the land for period of 60 years, the Society (Trust) must have say in the managing the affairs of each of the Co-operative Housing Society so that the interest of the Society (Trust) is protected and the Cooperative Societies is not run with any prejudicial interest against the Society (Trust), it is necessary that the Co-operative Housing Society shall appoint two nominee of the Society (Trust) as the members of the Managing Committee of each such Co-operative Housing Society till their nomination is cancelled by the Trust and or they resign and such case the Society (Trust), shall be entitled to cancel the nomination of persons nominated earlier and appoint/ nominate any other person in his place from time to time.*

(Emphasis supplied)

12) A plain reading of the above prayers makes it clear that the trust sought modification of the Lease Agreement so as to incorporate additional clause requiring payment of 10% of the price difference on every subsequent sale transaction. Thus, what was sought by the trust was that despite the flat purchaser having paid the full cost of construction of the flat and had also deposited an interest free amount of Rs.20,000/- or Rs.25,000/-, depending upon the area of the flat, and despite, the trust earning approximately Rs.2400/- to Rs.3000/-

per flat per year as per finding of the Charity Commissioner. The flat purchaser though governed by the provisions of Maharashtra Co-operative Societies Act and Rules, they would still be required to additionally pay 10% on every subsequent transaction of sale to the trust.

13) It would be pertinent to note that although as per the consent terms, the consent award was passed on 14 December 2015, which referred to Misc. Application No.238 of 2015, when, in fact, it was already been withdrawn by the Trust. By an order dated 4 November 2015, passed pursuant to a pursis filed by the Trust dated 3 November 2015, Misc. Application No.238 of 2015 stood withdrawn. While withdrawing the said Misc. Application No.238 of 2015, the housing society was not informed, and were not represented before the Charity Commissioner. This crucial fact of withdrawal of Misc. Application No.238 of 2015 was neither disclosed to the sole arbitrator, who disposed of the arbitration proceedings by way of his consent award, nor did the trustees of the Trust thought it appropriate to point out the said fact to the members of the housing society while the consent terms were signed on 21 November 2015. It appears from the records that the said consent terms were signed by one Mr. H.H. Santoke, as trustee of the trust, who is present before this Court and I have been

informed that even today he continues to be trustee of the Trust.

14) I have also been shown the order dated 26 October 2015 passed by the Charity Commissioner in Misc. Application No.238 of 2015. It is pertinent to note that the said order passed by the Charity Commissioner which reads as under :-

“Heard, trustees are seeking some change in the earlier order of this authority dated 18.05.1999. It appears that the trust has sold its properties subject to the conditions in the said order. If such conditions are to be modified the purchasers may be prejudiced. Further a question may arise whether contract between such purchasers and trust can be modified by this authority. In other words whether this authority has jurisdiction to decide this issue. Trust to demonstrate and answer. Accordingly fixed for hearing of this preliminary issue.”

(Emphasis supplied)

15) Therefore, even the Charity Commissioner expressed its view that once the trust had sold the flats to the buyers, they cannot modify the terms of the lease as an order was passed by the Charity Commissioner on 18 May 1999 and the question was whether the Charity Commissioner has such jurisdiction to decide the issue of modification.

16) The said consent award was subsequently challenged by the housing society under Section 34 and thereafter, under Section 37 of the Arbitration and Conciliation Act, 1996. However, both the applications of the housing society were rejected.

16.1) The housing society thereafter, preferred an Special Leave Petition before Supreme Court. While disposing of the S.L.P. by its

order dated 27 March 2018, the Supreme Court specifically recorded that transfer be finalised without there be any additional conditions contained in the Charity Commissioner application dated 28 April 2015 and also directed execution of the lease deed within a period of three months from that date. The said order of the Supreme Court reads as under:-

ORDER

Heard learned counsel for the parties.

The dispute between the parties relating to terms on which the land and building was to be transferred was the subject matter of arbitration.

The arbitration was decided on the basis of the consent terms dated 21.11.2015 but approval of the Charity Commissioner was to be sought.

It is now agreed that the parties are bound by the said terms. There will be no modification in the consent terms. The transfer be finalized without any the additional conditions contained in the Application dated 28.04.2015 filed before the Charity Commissioner, Maharashtra State, Mumbai, which stands withdrawn.

Let the Lease Deed be now executed within a period of three months from today.

The special leave petition is, accordingly, disposed of.

Pending application(s), if any, shall also stand disposed of.

(Emphasis supplied)

17) For sake of repetition, I would like to make it clear that the Supreme Court referred to the application dated 28 April 2015 filed before the Charity Commissioner, Mumbai, which was Misc. Application No. 238 of 2015. It appears that, for some reason best known to the Trust, the Trust chose to stress the fact that Misc. Application No. 238 of 2015 filed before the Charity Commissioner was unconditionally withdrawn by them by way of pursis dated 3

November 2015 and the same was disposed of by the Charity Commissioner by the order dated 4 November 2015.

18) I had pertinently put up a question to learned advocate Mr. Balsara appearing for the Trust, as to why the fact about withdrawal of Misc. Application No. 238 of 2015 on 3 November 2015 was not disclosed to the arbitrator who passed the consent award, and to the housing society. As there was no satisfactory answer from learned advocate appearing for the Trust, I further enquired whether such non-disclosure was a mere mistake or whether it amounted to fraud committed by the Trustees of the trust on the housing society and on the Court. Learned counsel replied that he would not be able to answer to the said question offhand.

18.1) Mr. Balsara, learned counsel appearing on behalf of the Trust, submitted that the Supreme Court was fully aware about the execution of the consent terms and the draft lease annexed to the consent terms. He further submitted that, since the parties are bound by the consent terms and the application before the Charity Commissioner was withdrawn, the transfer ought to have been finalized, which means condition what has been specified in the consent terms.

19) According to me, there is no merit in Mr. Balsara's submission,

as the order of Supreme Court is clear and unequivocal and there cannot be any other interpretation of Supreme Court's order dated 27 March 2018.

20) Both the parties have filed execution application in the year 2018 seeking execution of the lease deed. However, there is a dispute arisen between them about the clauses of the lease deed and in particular whether there should be additional clauses in the lease deed from the draft which was agreed initially.

20.1) In my view, there cannot be any additional clauses, being added to the draft Lease Agreement, as the Trust had sought to amend/modify the order dated 18 May 1999 passed by the Charity Commissioner, by adding few more clauses in the lease deed prominent of which was clause which made mandatory before sale of any flat, prior approval or NOC from the trust to be obtained.

20.2) The said Misc. Application No. 238 of 2015 was withdrawn, only after the Charity Commissioner had raised an objection about maintainability of such application before it. The said fact was not brought to the notice of the sole arbitrator who passed the consent award neither the members of Housing Society were put to notice that the Misc. Application preferred before the Charity Commissioner was withdrawn.

20.3) After Supreme Court making it clear in its order dated 27/3/2018, according to me, there cannot be any additional clauses being entered into the said lease agreement.

20.4) From records, it also appears that even earlier Bench (Coram :Abhay Ahuja, J.) by order dated 4 December 2024, had already observed that the parties were supposed to enter into the lease agreement as per direction of the Supreme Court. The Supreme Court in its order dated 27 March 2018, had clearly mentioned that - “The transfer be finalized without any reference to the additional conditions contained in the Application dated 28.04.2015 filed before the Charity Commissioner, Maharashtra State, Mumbai, which stands withdrawn.”

20.5) Hence, the facts are quite clear, therefore, the execution application filed by the housing society needs to be allowed and the objections raised by the trust, the application preferred by the trust needs to be rejected. Hence, the following order:-

ORDER

(I) Execution Application No.694/2019 filed by Behramshah Shroff Building No.1 (Yazad) Co-operative Housing Society Ltd. stands **allowed.**

(II) Notice No. 163/2019, filed under Order XXI, Rule 22 in Execution Application No. 694/2019 also stand **allowed.**

(III) **Execution Application No.1801/2018** filed by the Trust (The Zoroastrian Radih Society) stands **dismissed**.

(IV) In sequel, the interim applications preferred by the Trust (The Zoroastrian Radih Society) in Execution Application No.1801/2018 also stands disposed of, with the society being directed that in case of transfer of flat for the first time, they would be required to pay 10% of the difference between the sale price. This exercise can be done as soon as the lease deed is executed by the trust within a period of eight weeks thereafter.

[RAJESH S. PATIL, J.]