

Ramesh Himmatlal Shah

Vs

Harsukh Jadhavji Joshi

Civil Appeal No. 1539 of 1974

(A. Alagiriswami, P. K. Goswami, P. N. Bhagwati JJ)

25.04.1975

JUDGMENT

GOSWAMI, J. –

1. This appeal in forma pauperis raises an important question of law : Is a flat in a tenant co-partnership housing society under the Maharashtra Co-operative Societies Act, 1960 liable to attachment and sale in execution of a decree against a member in whose favour or for whose benefit the same has been allotted by the Society ?

2. We may briefly note the facts : The appellant is the decree-holder. He obtained a money decree against the respondent judgment debtor and took a warrant of attachment of Flat No. 9 of Paresh Co-operative Housing Society Limited at Santacruz, Bombay. This flat (described as ownership flat in common parlance) was attached on August 8, 1970 and a warrant of attachment was served on the judgment-debtor while he was in jail in Rajkot. In due course a sale proclamation was also issued in respect of the flat while the judgment-debtor was yet in jail. At this stage of the proceedings, the judgment-debtor's brother, Hasmukh J. Joshi (for brevity Hasmukh) took out a chamber summons challenging the execution on the ground that the flat did not belong to the judgment-debtor but belonged to him and to the judgment-debtor's wife and that the attachment should be raised. His chamber summons was made absolute but in appeal the order was set aside and the matter was remanded. The aforesaid chamber summons was, however, finally dismissed on September 30, 1971. Hasmukh did not take any further action against the rejection of his claim to the property. After coming out of the jail, the judgment-debtor filed a suit sometime in 1972 to set aside the decree. He, however, could not secure an order for injunction to prevent the execution of the decree and the suit is pending. The flat was offered for sale and was purchased in auction by one Bhupendra N. Shah for a sum of Rs. 24,000. The sale, however, is not yet confirmed. Subsequently a new plea was taken by the judgment-debtor. This time he filed a chamber summons on March 28, 1972, praying for the dismissal of the execution petition filed by the decree-holder and for setting aside the warrant of attachment and proclamation of sale on the ground that the flat being a flat in a co-operative housing society was not liable to attachment and sale. It was also stated that he had no saleable interest in the said property under Section 60, Civil Procedure Code, and therefore, it was not liable to attachment. The Judge City Civil Court, Bombay, dismissed the chamber summons. The learned Single Judge, Bombay High Court, however, in appeal allowed the claim and made the summons absolute by directing that the attachment and sale of the flat being illegal be set aside. The appellant preferred a Letters Patent appeal before the Bombay High Court without success and the decision of the learned Single Judge was affirmed. Hence this appeal by special leave.

3. The flat in question is admittedly owned by the Paresh Co-operative Housing Society Limited

(briefly the Society). Originally this flat stood in the name of one Ramesh Hariram Chande and his wife. It is not disputed before us and it has been so held by the Court in the claim case by the judgment-debtor's brother that the respondent purchased the flat benami in the name of this brother Hasmukh and his wife Shashikala. Although, therefore, the respondent is not a registered holder of the flat, it is clear that the flat is held by his brother and his wife on behalf of the respondent. This is to be noted as Section 60, Civil Procedure Code, reaches a benami holding. It may also be noted that the respondent is now fighting the case on the basis that the right to occupy the flat in question is his property which is not liable to attachment and sale. We should also note here that after the High Court invalidated the attachment and sale, the flat was purchased by one Suryakant N. Sangani (briefly Suryakant) having acquired the shares in the Society from Hasmukh and Shashikala. It is said that on the joint application of Shashikala and Suryakant, the shares were transferred to latter on or about May 15, 1974.

4. The appeal came up for hearing earlier and when it was found that the respondent was not represented the Court issued notice to the purchaser, Suryakant, and also directed for appointment of an amicus curiae. Mr. Chatterjee has now appeared before us as amicus curiae and the purchaser has also entered appearance through Mr. Sanghi. Ultimately, however, we did not hear Mr. Sanghi, as we are concerned in this appeal only with the question of attachability and saleability which is a condition prior to the purchase of the property by Bhupendra N. Shah. Mr. Sanghi, therefore, had to retire from the appeal.

5. The point that arises for consideration in this appeal, as stated earlier, is whether the right of the judgment-debtor, who claims the right to occupation of Flat No. 9 is liable to attachment and sale in execution of a decree. Before we proceed further it is necessary to go through the relevant provisions of the Maharashtra Co-operative Societies Act, 1960 (briefly the Act), the Maharashtra Co-operative Societies Rules, 1961 (briefly described as the Rules) and the Bye-laws of the Society. The Act was passed in the year 1961 to consolidate and amend the law relating to co-operative societies in the State of Maharashtra.

6. Section 2 of the Act contains the definitions. By Section 2(5) "by-laws" means by-laws registered under this Act and for the time being in force, and includes registered amendments of such by-laws". By Section 2(11) "dividend" means the amount paid, out of the profits of a society, to a member in proportion to the shares held by him." By Section 2(16) "housing society" means a society the object of which is providing its members with dwelling houses." By Section 2(19)

'member' means a person joining in an application for the registration of a co-operative society which is subsequently registered, or a person duly admitted to membership of society after registration, and includes a nominal, associate or sympathiser member.

By Section 2(19)(b) "associate member" means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate." By Section 2(19) (c) "nominal member" means a person admitted to membership as such after registration in accordance with by-laws." By section 2(21) "prescribed" means prescribed by rules." By Section 2(31) "working capital" means funds at the disposal of a society inclusive of paid-up share capital, funds built out of profits, and money raised by borrowing and by other means."

7. By Section 4

a society, which has as its objects the promotion of the economic interests or a society, which of its members, or of the public, in accordance with co-operative principles, or a society established with the object of facilitating the operations of any such society, may be registered under this Act :

Provided that, no society shall be registered if it is likely to be economically unsound, or the registration of which may have an adverse effect on development of the co-operative movement.

8. Chapter III of the Act deals with members and their rights and liabilities. Section 22 with Which this chapter opens provides how a person may become a member. For example by Section 22(1A) subject to the provisions of Section 24, an individual competent contract under the Indian Contract Act may be admitted as a member. By Section 23(1) :

No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act and its by-laws.

By sub-section (2), "Any person aggrieved by the decision of a society, refusing him admission to its membership, may appeal to the Registrar" and the decision of the Registrar under Sub-section (3) shall be final. By Section 25

a person shall cease to be a member of a society on his resignation from the membership thereof being accepted, or on the transfer of the whole of his share or interest in the society to another member, or on his death, or removal or expulsion from the society.

By Section 26,

no person shall exercise the right of a member of a society, until he has made such payment to the society in respect of membership, or acquired such interest in the society, as may be prescribed by the rules, or the by-laws of such society.

Section 28 contains certain restriction on holding shares. Two of the material sub-section of Section 29 which are important and with which we are concerned may be set out :

29. (1) Subject to the provisions of the last preceding section as to the maximum holding of shares and to any rules made in this behalf, a transfer of, or charge on, the share or interest of a member in the share capital of a society shall be subject to such conditions as may be prescribed.

(2) A member shall not transfer any share held by him or his interest in the capital of property of any society, or any part thereof, unless -

(a) he has held such share or interest for not less than one year;

(b) the transfer is made to a member of the society or to a person whose application for membership has been accepted.

Section 31 may also be set out :

The share or interest of a member in the capital of society, or in the loan-stock issued by a housing society, or in the funds raised by a society from its members by way of

savings deposit, shall not be liable to attachment or sale under any decree or order of a Court for or in respect of any debt or liability incurred by the member : and accordingly, neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, not a Receiver under the Provincial; Insolvency Act, 1920, not any such person or authority under any corresponding law for the time being in force, shall be entitled to, or have any claim on such share or interest.

9. Section 47 so far as material for our purpose may be quoted :

47. (1) Notwithstanding anything in any other law for the time being in force, but subject to any prior claim of Government in respect of land revenue or any money recoverable as land revenue and to the provisions of Section 60 and 61 of the Code of Civil Procedure, 1908,

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(b) any outstanding demands or dues payable to a society by any member or past member or deceased member, in respect of rent, shares, loans or purchase money or any other right or amounts payable to such society, shall be a first charge upon his interest in the immovable property of the society.

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(2) No property or interest in property which is subject to a charge under the foregoing sub-section, shall be transferred in any manner without the previous permission of the society : and such transfer shall be subject to such conditions, if any, as the society may impose.

(3) Any transfer made in contravention of sub-section (2) shall be void.

10. Section 165 contains the rule-making power. The last Section 167 provides that for the removal of doubt, it is hereby declared that the provisions of the Companies Act, 1956, shall not apply to societies registered or deemed to be registered, under this Act.

11. We may now turn to the relevant Rules. By Rule 9 "when a society has been registered the by-laws of the society as approved and registered by the Registrar shall be by-laws of the society". Rule 10 contains classification and sub-classification of societies and we are concerned with the fifth class mentioned therein, namely the 'Housing Society' which again is sub-divided into three categories and we are concerned in this appeal with the second category, namely, 'Tenant Co-partnership Housing Society', which is described therein as an example of "Housing Societies which hold both lands and buildings either on leasehold or freehold basis and allot them to their members".

12. Chapter III of the Rules deals with members and their rights and liabilities. Rule 19 contains conditions to be complied with for admission for membership. Rule 24 provides for the procedure for transfer of shares. Rule 28 provides for expulsion of member and expulsion from membership may involve forfeiture of shares held by the member.

13. We may now notice some of the material bye-laws of the Society :

Bye-law 6. - All persons permanently residing in Bombay city and suburban area and

who have signed the application for registration, are original members. Other members may be admitted by the General Body. Every person on applying for membership shall deposit Re. 1 as entrance fee and the value of at least five shares for which he shall receive a copy of the Bye-laws. In case where an application is refused, the deposit shall ordinarily be returned.

6. (1) The General Body may admit any new members others than the promoters subject to the applications satisfying the qualifications for membership as prescribed under the bye-laws.

(2) The General Body shall not admit members exceeding the number of tenements or plots available for allotment.

(3) The General Body alone shall be competent to allot tenements to the members on the basis of policy framed by it for such allotment.

7. (a) A person may be admitted as a nominal member on payment of Re. 1 only as entrance fee for the purposes of occupying a shop/garage in society. A nominal member shall not exercise any right of membership or receive any advantage, or benefit or dividend, etc.

7. (b) A sublettee, a licensee or a caretaker may also be admitted as a nominal member of the Society on payment of Re. 1 as entrance fee. Such member shall not exercise any right of membership or receive any advantage or benefit or dividend, etc.

8. (a) No person shall be admitted as a member of the Society who already owns a house, a plot or a flat in Bombay city and suburban area, in his own name or in the name of any of his dependents or of his family members, such as wife/husband, children, etc. and whose need of a house, a plot or a flat in the opinion of the general Body are no considered pressing or deserving ....

10. No person shall exercise the rights of a member of the Society until he is admitted as such as laid down in Bye-law No. 6 and holds not less than five fully paid shares in the Society and his name has been entered in the Register of Members.

14. Chapter VII of the Bye-laws provides for transmission of interest. Bye-law 14 contains how a nomination has to be made, how a member may nominate a person to whom his share or interest in the society or so much thereof as is specified in such nomination shall be transferred at his decease, etc. Bye law 15(1) provides that

on receiving satisfactory proof of the death of a member, that General Body may transfer the share or the interest of the member to the person or persons nominated or if there is no person so nominated to such person as may appear to the General Body to be the heir or the legal representative of the member or to pay such a sum representing the value of such nominator's share or interest as determined in accordance with the Rule 23 of the M.C.S. Rules, 1961, deducting all sums due to the Society from the nominator ....

Under Bye-laws 15(4) where a share or shares were issued to a member by virtue of his being a tenant or lessee what would happen on the death of such a member is provided for.

15. Chapter XX deals with tenants. Bye-laws 71 with which it opens says

no member shall be a tenant of the Society unless he subscribes to such number of shares as the Managing Committee prescribes.

71A. Whenever a member to whom a dwelling house/tenement or flat has been allotted by the society does not require it for his own use for any particular period, he may hand it over to the society from using the same in such manner as it may consider best.

71B. The Society may offer the dwelling house/tenements or flats falling vacant in its possession in terms of the provisions of bye-law No. 71(A) above, to any person in its discretion for temporary occupation for the period indicated by the original allottee on such clear understanding provided that :

(i) It shall give preference to such person as has already been enrolled as member of the society in terms of the provisions in bye-laws but who could not be allotted a dwelling house/tenement or flat by it.

(ii) It shall enroll the person to whom the dwelling house/tenement or flat it proposed to be allotted as a nominal member if he is not already a member of the society.

(iii) The payments received for such temporary occupation shall be credited to the account of the original allottee and be apportioned towards satisfaction of dues and the demands of the society outstanding against him under these Bye-laws and the tenancy regulations.

71D. A member to whom a tenement is allotted shall occupy it himself and shall not assign, underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing Committee.

72. No dwelling house offered on lease shall be taken by person who are not members of the Society unless no member is willing to take it.

16. Form A to the Bye-laws contains "regulations relating to tenancies to be granted by the Society to members in respect of houses held by the Society."

17. From a review of the foregoing provisions the position with reference to the particular Society is as follows.

18. There is no absolute prohibition in the Act or in the Rules or in the Bye-laws against transfer of interest of a member in the property belonging to the Society. The only transfer which is void under the Act is one made in contravention of sub-section (2) of Section 47 [see Section 47(3)]. We have not been able to find any other provision anywhere to the same effect. In the scheme of the provisions a dichotomy is seen between share or interest in the capital and interest in property of the Society. While section 29(2) refers to transfer of a member's share or his interest in the capital or property of any society, Section 31 in contrast speaks of "the share or interest of a member in the capital of a society." The Act, therefore, makes a clear distinction between the share or interest in the capital and share or interest in property of the Society. We have also noticed that the Act does recognise interest in the immovable property of the Society as well [see Section 47(1)(b)]. We have

seen the qualifications for membership. There is no reason to suppose that if the qualifications under the bye-laws are fulfilled an application for membership may be rejected. It is admitted that the flat is owned by the Society and the judgment-debtor has a right or interest to occupy the same.

19. This right or interest to occupy is a species of property. We have to consider whether this right to the particular property is attachable and saleable in execution of the decree against the judgment-debtor. It is contended by Mr. Chatterjee, amicus curiae, that Section 31 of the Act completely bars attachment and sale of the said property in execution of the decree. We have already pointed out the difference in language between Section 29 and Section 31 and also made reference to Section 47(1)(b) in that connection. There is nothing in the language of Section 31 to indicate that the right to occupation which is the right to be sold in auction is not attachable in execution of the decree. There is nothing in Section 31 to even remotely include a prohibition against attachment or sale of the aforesaid right to occupation of the flat. Once section 31 is out of the way, we are left with Section 29 wherein we do not find even a provision of prior consent for transfer of share or interest in such property. The only restrictions under Section 29(2) are that the member may not transfer his interest in the property prior to one year and the transfer is made to an existing member of the Society or to a person whose application for membership has been accepted by the Society. It is true that Bye-law 71D says that a member to whom a tenement is allotted shall not assign or underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing Committee, but there is nothing to show that contravention of this bye-laws makes the assignment void under the Act unlike in the case of a transfer being void under Section 47(3). There is no impediment to ratification of the assignment by the Committee particularly in view of the legal position arising out of the conjoint effect of Section 29, Rule 24 and Bye-law 9. Section 29 read with Rule 24 shows that there is no prohibition as such against transfer of a share to a member or even to a non-member if he consents to be a member and makes an application for membership by purchasing five shares as provided under Bye-law 9. Reading the aforesaid provisions there is no reason to think that there is any question of refusal of membership of the Society to a non-member if he is qualified otherwise and makes an appropriate application in which case the transfer of shares will be operative and thus the assignment of the right to occupation will hold good. Further it is significant that under Section 146(a) of the Act contravention of sub-section (2) of Section 47 is punishable under Section 147 of the Act. Contravention of any bye-law is, however, no offence. We, therefore, unhesitatingly come to the conclusion that this species of property, namely the right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property in this case in execution of the decree are valid under the law.

20. Multi-storeyed ownership flats on co-operative basis in cities and big towns have come to stay because of dire necessity and are in the process of rapid expansion for manifold reasons. Some of these are : ever growing needs of an urban community necessitating its accommodation in proximity of cities and towns, lack of availability of land in urban areas, rise in price of building material, restrictions under various rent legislations, disincentive generated by tax laws and other laws for embarking upon housing construction on individual basis, security of possess in depending upon fulfilment of the conditions of membership of a society which are none too irksome. In absence of clear and unambiguous legal provision to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the Legislature, must be in express terms. We have failed to find one.

21. The phenomenon of ownership of flats as contra-distinguished from personal house has been in

vogue in England as well as in the European Continent. Ownership rights over separate parts of a building are mentioned in Coke on Littleton and such "super-imposed freeholds" have existed in England in various places for a long time (see International and Comparative Law Quarterly, Volume VII, January, 1958, pages 36-37).

22. With regard to a flat-owner right to dispose of his rights, it is pointed out that "the flat-owner may" in the words of a leading French commentator "sell, donate, leave by will, let or hypothecate" his right. The right are regulated by statutes in the Continent. The German Statute, for example allows the flat owner's right to dispose of his property to be made subject to the consent of other flat-owners, but such consent may be refused only "for a very important reason" [Article 12(1), (2)] and the statute gives the aggrieved flat-owner easy access to the Court if a violation of this provision is alleged (see *ibid.*, page 39). Thus the trend is toward recognition of these rights.

23. Now that attachment and sale have been held to be valid, it will be for the auction-purchase first to obtain membership of the society and 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. The fact that at the time of auction-sale the purchase was not a member of the Society would not in law affect the saleability or prior attachment of the property in execution of the valid decree.

24. The judgment-debtor has a valid decree against him. Ordinarily he has to discharge his liability under the decree. He can pay the decretal amount straightaway or suffer his property to be attached and sold in execution of the decree. As an honest debtor the liability under the decree has to be discharged. Here the Society is not objecting to the attachment and sale of the property, but the judgment-debtor is. We have here is no absolute prohibition against transfer of a right to occupation of the flat or even to transfer a share. The auction purchaser is presumed to know the limitations under which he has purchased the right to occupy the flat in court auction. If ultimately the Society turns down his application for membership (which of course cannot be done except for valid reasons) it is upto him to take such course of action as available under the law. Such a remote contingency, *per se*, will not make the particular right of the judgment-debtor in the flat non attachable or non-saleable.

25. It is contended by Mr. Chatterjee that Section 60, Civil Procedure Code, does not specify that this species of property is liable to attachment. The argument, however, fails to take note of Section 60 being not exhaustive as such. It refers also to any other saleable property, movable or immovable, whether the same be held in the name of the judgment-debtor or by another person on his behalf. We have held that the right to occupation of a flat is property both attachable and saleable. Specific non-inclusion of a particular species of property under Section 60 is, therefore, not of any consequence if it is saleable otherwise. In the result the judgment of the High Court is set aside and the judgment-debtor's chamber summons dated March 28, 1972, stand dismissed. The appeal is allowed, but there will be no order as to costs except that the court-fee will be payable by the appellants.

26. We record our appreciation of the assistance rendered by Mr. Chatterjee as *amicus curiae* and also by Mr. Zaiwala, Counsel for the appellants.

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