

The Zoroastrian Radih Society Vs Mrs. Pervin Nariman Jogina and Another

Court: Bombay High Court

Date of Decision: Jan. 19, 2001

Acts Referred: Constitution of India, 1950 " Article 25(2), 26, 29

Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 " Section 10

Citation: (2001) 2 ALLMR 675 : (2001) 2 BomCR 621 : (2001) 2 BOMLR 399 : (2001) 3 MhLj 450

Hon'ble Judges: H. L. Gokhale, J

Bench: Single Bench

Advocate: Mr. E.P. Bharucha, Mr. M.P.S. Rao and Mr. Rumi H. Mirza, for the Appellant; Mr. M.P. Vashi and Mr. Vasu, instructed by M.P. Vashi and Associates, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

H. L. Gokhale, J.

Heard Mr. Bharucha in support of these two Notice of Motions which are taken out by the plaintiff and Mr. Vashi

appears for the defendants.

2. The plaintiff is a Society registered under the Societies Registration Act, 1860, and amongst others its alms and objects are to undertake,

organize and perform beneficial acts In the Interest of Parsi Zoroastrians meaning thereby persons who are Parsi by birth being born of Parsi

parents and also professing Zoroastrian religion. This plaintiff Society is a owner of land situated at Oshlwara, Jogeshwari (West), Mumbai known

as ""Behram Baug"". Over the years, it has developed a residential colony meant for the Parsi Zoroastrians on that land. The persons who are

interested in staying In that residential colony had to be Parsi Zoroastrians as stated above and had to sign necessary declarations for that purpose.

3. The case of the plaintiff-Society is that husband of defendant No. 1, one Narlman Gusta Jogina hailing from Agra, wanted to settle down in

Mumbai and, therefore, sought a flat in this residential colony. He gave a declaration in the necessary form on 9th of May. 1995 and. therefore, the

plaintiff, by its letter dated 20th July, 1995 agreed to allot the flat to him. Subsequently, an agreement of sale was signed with Nariman Jogina on

22nd of April, 1996. This Nariman Jogina expired on 16th October, 1996 before being put In possession leaving behind him his wife (defendant

No. 1) and son (defendant No. 2). Defendant Nos. 1 and 2 gave a declaration on 13th February, 1997 that they will not allow any non-

Zoroastrian to use the flat. Thereafter defendant Nos. 1 and 2 were put in possession of the flat. Later on a Co-operative Housing Society

governed under the Maharashtra Co-operative Societies Act, 1960 was formed known as Behramshah Shroff Co-operative Housing Society Ltd.

to take care of this housing colony.

4. It so transpired that later this defendant No. 2 married defendant No. 3 on 24th of August, 2000. Defendant No. 3 happens to be a non-Parsi

lady. The plaintiff was aware that such a marriage was in the offing and on 23rd August, 2000 this suit has been filed seeking a decree against the

defendants to hand over the possession of their flat bearing No. 102 in building No. 1 situated in this Housing Society. At the time when the suit

was filed, defendant No. 3 was not Joined as a party defendant. She has been subsequently joined by amendment. Before joining defendant No.

3, a Motion was taken out against defendant Nos. 1 and 2 on 23rd August, 2000 (bearing Notice of Motion of 2000 In Suit Lodging No. 3500 of

2000) praying that defendant Nos. 1 and 2 be restrained by an injunction from inducting or allowing residence of non-Zoroastrian in the suit

premises. The defendants have filed a reply thereto. That Motion is still not numbered. The plaintiff will get it numbered within two weeks from

today. Subsequent to the amendment, the second Motion has been taken out bearing No. 3525 of 2000. Mr. Vashi, learned Counsel appearing

for the defendants, states that the reply filed by the earlier Motion may be treated in substance as the reply to the Motion No. 3525 of 2000. Both

the learned Counsel submit that these two Motions be heard and decided" together. Accordingly, the same are being heard and decided.

5. Mr. Bharucha, learned Counsel appearing for the plaintiff, advanced the following submissions In support of these prayers.

(a) That the alleged wrongful act on the part of the defendants was ultra vires the objects of the Trust constituting the plaintiff-Society and,

therefore, defendant No. 3 could not be permitted to continue to stay in the housing colony. Mr. Bharucha in this behalf relied upon an unreported

judgment of a Single Judge of this Court (Davar, J.) delivered on 27th November, 1908 wherein in the case of Sir Dinsha Maneckji Petit v. Sir

Jamsetji Jeejeebhoy, the learned Judge held that merely because a person is married to a Zoroastrian ""or he is converted into a Zoroastrian faith by

his or her performing Navjot he cannot claim to belong to Parsi community. Mr. Bharucha"s submission is that the occupant concerned has to be

both Zoroastrian as well as Parsi The further submission of Mr. Bharucha in this behalf is that the religious beliefs of a community have to be

honoured by a secular judge and he relied upon a judgment, again of Justice Davar in the case of Jamshedji Cursetjee Tarachand v. Soonabai,

which is subsequently quoted "with approval by the Apex Court in the case Ratilal Panachand Gandhi v. State of Bombay,.

(b) The second submission of Mr. Bharucha was that such restrictive covenants were protected by Articles 25, 26 and 29 of the Constitution. He

relied upon a judgment of the Apex Court in the case of Sardar Syedna Taher Saifuddin Saheb v. State of Bombay," wherein by a majority

judgment of the Constitution Bench, the right of excommunication was upheld as valid under the Bombay Prevention of Excommunication Act in-

so far as it destroys the right of excommunication was held to be void for being in violation of Article 26(b) of the Constitution of India. Mr.

Bharucha then relied upon a judgment of the Apex Court in the case of Bramchari Sidheswar Shai v. State of West Bengal, and that of this Court

in the case of Laxminarayan Temple v. L. M. Chandore, wherein it has been held that right to own and acquire movable and immovable properties

governed under Article 26(c) of the Constitution is a part of the freedom to manage religious affairs.

(c) The third submission of Mr. Bharucha was that Late Nariman Jogina as also defendant Nos. 1 and 2 had agreed to abide by the terms required

by the plaintiff Society. They having acted to the contrary, the agreement under which they were put in possession is voidable at the option of the

party whose consent is obtained by misrepresentation. He relied upon a judgment in the case of Shrisht Dhawan (Smt) v. M/s. Shaw Brothers, in

this behalf as also one in the case of S.P.Chegal Varaya Naidu (dead) by Lrs. v. Jagannath (dead) by Lrs., to submit that fraud vitiates all

transactions.

(d) The fourth submission of Mr. Bharucha is that the defendants had committed a breach of the agreement and in the premises the defendants

ought to be directed to hand over the vacant possession of the flat.

(e) Lastly, it was submitted by Mr. Bharucha that although an arbitration clause was provided in the agreement viz. Clause 36, it was not

applicable since the 2nd and 3rd defendants were not party to the agreement.

6. Mr. Vashi, learned Counsel appearing for the defendants, on the other hand, submitted that as far as the settlement of the Trust and the

responsibility case on the plaintiff-Society are concerned, these developments are prior to the agreement being entered into between the plaintiff

and Late Shri Nariman Jogina. He submits that u/s 10 of the Maharashtra Ownership Flats Act, 1963, the promoter of a housing complex is duty

bound to take steps to form a Cooperative Housing Society or a Company. The Society now formed is going to control the affairs of the .housing

complex and its activities are controlled under the Maharashtra Co-operative Societies Act. 1960. u/s 22(J){a) of the said Act, every individual

who is competent to contract under the Indian Contract Act is eligible to become a member and u/s 23, a Society cannot refuse admission to

membership to any person duly qualified except without sufficient reason. Mr. Vashi further submitted in this behalf that a model agreement as

prescribed under the Act is binding on the parties and the agreement which was sought from the defendants was contrary thereto. This submission

is made in view of the submission of Mr, Bharucha that clause 11 of the agreement for sale laid down that the flat purchaser had agreed that at all

times the flat will be used only for the residence of Parsi/Irani Zoroastrians and will not be sold or let to a person other than Parsi Zoroastrians. The

submissions of Mr. Vashi is that the particular clause and all such provisions of the agreement are contrary to the model agreement as also the

provisions of sections 22 and 23 of the Maharashtra Co-operative Societies Act. Mr. Vashi relies upon a judgment of a learned Single Judge of

this Court (A.V. Savant. J. as he then was in this Court) in the case of The Talmakiwadi Co-operative Housing Society Ltd. v. The Divisional Joint

Registrar, Co-operative Societies,". In that case also the relevant bye-law No. 7 of the Society provided that all members have to belong to the

Kanara Saraswat community. The Divisional Joint Registrar had directed the Society to amend the bye-laws to bring them in consonance with the

model bye-laws. That direction was challenged by the Society. Amongst others, the validity of the bye-law of the Society was considered by the

learned Judge on the touch-stone of sections 22 and 23 of the Maharashtra Cooperative Societies Act, 1960 and thereafter the learned Judge held

that the said bye-law was liable to be struck down as ultra vires the above-referred provisions of the Statute. The learned Judge relied upon a large

number of judgments in support of the conclusion arrived at including a detailed judgment of a learned Single Judge of Gujarat High Court (M. S.

Parikh, J.) in the case of Zoroastrian Co-operative Housing Society Ltd. u. District Registrar, Co-op. Societies (Urban), 2.

7. A similar matter had come before me In the case of Kantibhai D. Patel v. Sudhir M. Mitra,. In that matter also there was a bye-law which

provided that non-patidars could not become members of the concerned Society. In the teeth of that bye-law, a learned Judge of the City Civil

Court had granted injunction in favour of the respondents who are non-patidars . and who were occupants in a flat in that Society. The appeal had

been preferred against that order and the learned Counsel appearing for the respondents had relied upon the judgment in the case of The

Talmakiwadi Co-op. Hsg. Sty. (supra). In Para 7 of my order I have referred to it and I have accepted the submission made in that behalf. The

appeal was accordingly dismissed by my order passed on that A. O. on 18th June, 1999. An appeal was preferred from that order to the Apex

Court being Special Leave to Appeal (Civil) No. 9818 of 1999 and the same came to be dismissed by a one line order ""The SLP is dismissed

passed on 6th August. 1999. Mr. Vashi has lastly relied upon a judgment of another Single Judge of this Court (Dr. D. Y. Chandrachud, J.). in the

case of St. Anthony's Co-operative Society Limited v. The Secretary (Cooperation & Textile Department). wherein the learned Judge has also

taken a similar view in the context of a Co-operative Society meant for Christians only.

8. I have carefully considered the rival submissions. The statutory provisions of the Maharashtra Ownership Flats Act, 1963 and the Maharashtra

Co-operative Societies Act, 1960 are binding on the Society concerned and any bye-law or restriction to the contrary would be hit by those

provisions. The reliance by Mr. Bharucha on the Apex Court's Judgment in the case of Sardar Syedna Taher Saifuddin Saheb (supra) is, in my

view, misplaced. In that matter, the Court was concerned with the validity of the concerned Act regarding excommunication and the Act was held

to be void for being in violation of Article 26(b) of the Constitution. It is very relevant to note that in the majority judgments (Per Das Gupta, J.) in

Para 44 there is a specific reference to Article 25(2) of the Constitution which provides in sub-clause (a) thereof that nothing in the particular article

providing for freedom of conscience shall affect the operation of any existing law or prevent the State from making any law regulating or restricting

any economic, financial, political or other secular activity which may be associated with the religious parties. Thereafter it is observed in Para 44

that ""Quite clearly, the impugned Act cannot be regarded as a law regulating or restricting any economic, financial, political or other secular

activity"". In the present case, these two Acts are Acts regulating the secular activity of ownership of flats and formation of Co-operative Societies

and they lay down the requirements in that behalf. It is not disputed that the concerned Society is governed under these two Acts. That being so,

any restriction which is contrary to the provisions of these Statutes cannot be defended. In fact, such provisions would be protected under Article

25(2)(a) of the Constitution and would not be hit by Article 26(c) on which a reliance was placed by Mr. Bharucha by contending that the religious

denominations have the freedom to manage their own affairs and own and acquire movable and immovable properties. When an agreement is

contrary to the statutory provisions it is the statutory provision which will prevail and one cannot insist on enforcement of the clauses of the

agreement contending that how the agreement has become voidable by relying upon the clause thereof which is contrary and violative of the

statutory provision. The submission of Mr. Vashi has been that it is true that the necessary agreement was signed by Late Narlman Jogina and

necessary declarations were given by defendant Nos. 1 and 2. That was in 1997, but this is a subsequent development namely the marriage which

took place in August, 2000 and in his submission, the plaintiff Society cannot be granted injunction which is sought since it would be violative of

the provisions of the two Statutes as also the protection which is granted to such Statutes under the Constitution. In my view, the submission of Mr.

Vashi is well taken.

9. For the reasons stated above, the injunction as sought by the plaintiff cannot be granted. Both the Motions are dismissed. Detailed reasons, as

recorded above, have been given since Mr. Bharucha submitted that the suit will take a number of years to come up for hearing. Hence the

submissions canvassed have been dealt with in details.

10. Certified copy expedited. Authenticated copy of this order be made available to the parties.