

Samruddhi Co Operative Housing Society ... vs Mumbai Mahalaxmi Construction Pvt. ... on 11 January, 2022

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Bench: As Bopanna, Dhananjaya Y Chandrachud

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No 4000 of 2019

Samruddhi Co-operative Housing Society Ltd.

... Appellant

Versus

Mumbai Mahalaxmi Construction Pvt. Ltd.

...Respondent

JUDGMENT Dr Dhananjaya Y Chandrachud, J A Factual Background 3 B Submissions of Counsel 6 C Analysis 9 D Conclusion 17 PART A A Factual Background 1 The appeal arises from a judgment and order of the National Consumer Disputes Redressal Commission 1 dated 3 December 2018. The complaint was filed by the appellant for refund of the excess taxes and charges paid the appellant to the municipal authorities, due to the alleged deficiency of service of the respondent. By the impugned order, the NCDRC dismissed the complaint on the ground that it was barred by limitation and that it was not maintainable since it was in the nature of a recovery proceeding and not a consumer dispute. 2 The appellant is a co-operative housing society. The respondent constructed Wings 'A' and 'B' and entered into agreements to sell flats with individual purchasers in accordance with the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963 2. The members of the appellant booked the flats in 1993 and were granted possession in 1997. According to the appellant, the respondent failed to take steps to obtain the occupation certificate from the municipal authorities. In the absence of the occupation certificate, individual flat owners were not eligible for electricity and water connections. Due to the efforts of the appellant, temporary water and electricity connections were granted by the authorities. However, the members of the appellant had to pay property tax at a rate 25% higher than the normal rate and water charges at a rate which was 50% higher than the normal charge.

“NCDRC” “MOFA” PART A 3 On 8 July 1998, the appellant instituted a consumer complaint before the State Consumer Disputes Redressal Commission Mumbai 3 seeking a direction to the respondent to obtain the occupation certificate. On 7 April 2014, the respondent made an offer of a one-time settlement to the appellant, which the appellant refused by a letter dated 18 April 2014 as it was allegedly lower than the amount owed by the respondent. By its judgment and order dated 20 August 2014, the SCDRC directed the respondent to obtain an occupancy certificate within four months. The SCDRC also directed the respondent to pay, inter alia Rs. 1,00,000/- towards reimbursement of extra water charges paid. 4 On 28 December 2015, the appellant sent a legal notice to the respondent demanding the payment of outstanding dues in an amount of Rs. 3,56,42,257/- . The respondent failed to comply with the demand. Thereafter, the appellant filed an application for execution of the order of the SCDRC dated 20 August 2014. The appellant also filed a complaint 4 before the NCDRC seeking payment of Rs. 2,60,73,475/- as reimbursement of excess charges and tax paid by the members of the appellant due to the deficiency in service of the respondent and Rs. 20,00,000/- towards the mental agony and inconvenience caused to the members of the appellant.

5 Before the NCDRC, the appellant claimed that the complaint was not barred by limitation as the payment of excess water usage charges and the non- issuance of occupancy certificate is a continuing cause of action. Even otherwise, the cause of action was stated to have arisen on 7 April 2014, when the “SCDRC” PART A respondent allegedly acknowledged its liability and agreed to pay an amount of Rs. 1 crore in settlement. The cause of action was also alleged to have arisen on 15 December 2015, when the respondent failed to pay the amount demanded by the appellant. Thus, the complaint was, according to the appellant, filed within the prescribed period of limitation under Section 24A of the Consumer Protection Act 1986.

6 By the impugned order, the NCDRC held that the complaint was barred by limitation as:

- (i) The members of the appellant booked the flats in 1993 and obtained possession in 1997, which they have continued to enjoy since then. The possession was obtained against the law as no occupancy certificate had been provided by the respondent-builder;
- (ii) The cause of action arose at the time when the appellant made efforts to obtain individual water and electricity connections and the municipal authorities ordered the members to pay higher charges. The complaint should have been filed within two years of the accrual of the cause of action;
- (iii) Since the cause of action arose on the date when the municipal authorities demanded payment of higher taxes and charges, the period of limitation also commenced from this date and cannot be extended by the communication between parties;
- (iv) With respect to the claim that there was a continuing cause of action due to non-availability of the occupancy certificate, no relief was sought by the appellant in

their complaint regarding the obtaining of an occupancy PART B certificate. The only relief which was sought is a refund of Rs. 2.60 crores for payment of higher taxes.

7 On the merits of the dispute, the NCDRC observed that the complaint was filed for refund of the excess amount paid by the appellant to the authorities. In essence, the complaint was filed for recovery of this excess amount from the respondent. The NCDRC held that the respondent was not the service provider of the services for which the property tax or water charges were levied. Since these services were provided by the municipal authorities, the NCDRC held that the appellant would not fall under the definition of 'consumer' under Section 2(1)(d) of the Consumer Protection Act 1986. Thus, the NCDRC dismissed the complaint as being barred by limitation and as being not maintainable under the Consumer Protection Act 1986.

B Submissions of Counsel

8 Mr Sunil Fernandes, counsel for the appellant, urged the following submissions:

(i) There is a continuing cause of action in the present case as the

respondent has failed to provide the occupancy certificate;

(ii) Due to the failure of the respondent to obtain the occupancy certificate, the members of the appellant have had to pay a 25% higher amount on account of the property tax and an additional 50% towards the water charges;

PART B

(iii) Under Section 6 of the MOFA, it is the duty of the builder to provide the occupancy certificate to the society, which the respondent has failed to fulfil;

(iv) Prior to the order of the SCDRC, the respondent offered to pay an amount of Rs. 1 crore as a one-time settlement amount towards payment of the extra charges or penalty incurred by the appellant for the increased property tax and water charges;

(v) The offer of a one-time settlement had no relation to the complaint pending before the SCDRC as the relief claimed before the SCDRC was for the grant of an occupancy certificate and payment of penalty to the appellant for excess charges and deficiencies;

(vi) When the residents started residing in the society's premises, they had to incur increased amount towards the property tax and water charges. These charges were levied on an annual basis and continue to be raised due to the failure of the respondent to obtain an occupancy certificate;

(vii) The conduct of the respondent has been improper. The respondent has not obtained the occupancy certificate even twenty four years after giving possession and has not complied with the order of the SCDRC dated 20 August 2014. Due to the failure of the respondent to comply with the order of the SCDRC, non-bailable warrants have been issued against the respondent; and

(viii) Under the MOFA and the agreement to sell with the members of the appellant, the respondent has an obligation to obtain the occupancy certificate. Due to the deficiency in service, the members of the appellant PART B have had to make excess payment. Thus, the appellant is a consumer under the Consumer Protection Act 1986.

9 Opposing these submissions, Mr Atul Babasaheb Dakh, appearing on behalf of the respondent submitted that:

(i) When the construction of the project was completed in 1997, the respondent applied for an occupancy certificate. However, the respondent did not offer possession to the flat-purchasers;

(ii) The members of the appellant society took possession of their flats to refurbish the interiors and to make suitable arrangements till the occupancy certificate was issued. Instead, they started occupying the premises and made arrangements for water and electricity by paying additional charges;

(iii) The members of the appellant made unauthorized constructions due to which there was a delay in obtaining the occupancy certificate;

(iv) The proposal for one-time settlement in 2014 did not pertain to the additional property tax and water charges;

(v) In the consumer complaint filed by the appellant in 1998, the appellant had raised the issue of excessive water charges and the SCDRC had directed payment of Rs. 1,00,000/- to them. On 2 May 2016, the appellant society received an amount of Rs. 11,55,885/- in the proceedings for execution of the order dated 20 August 2014 of the SCDRC;

PART C

(vi) The complaint is barred by limitation as the cause of action arose in 1997 and the complaint was filed 18 years later;

(vii) The appellant's failure to incorporate their present grievances in the prior complaint before the SCDRC indicates relinquishment of their grievances;

(viii) Under Section 6 of the MOFA, the builder is entitled to pay all outgoing charges till the grant of possession. The members of the appellant received possession in 1997 and there is no claim for an

amount due till 1997;

(ix) Section 12 of the MOFA provides that it is the liability of the flat purchasers to pay municipal taxes and water and electricity charges;

(x) The respondent is not a service provider of water supply and has not received any payment for water and property tax. Thus, the appellant is not a consumer under the Consumer Protection Act 1986 and the complaint is not maintainable; and

(xi) There is no privity of contract between the parties for payment of extra charges in the absence of an occupancy certificate.

C Analysis

10 The crux of the appeal revolves around the maintainability of the complaint

and whether it is barred by limitation. The NCDRC held that the cause of action arose when the municipal authorities asked the appellant to pay higher charges in the first instance and thus, a complaint should have been filed within two years of the accrual of the cause of action. The appellant however, has argued that the cause of action is of a continuing nature, since members of the appellant have PART C continued paying higher charges as the respondent failed to provide the occupancy certificate.

11 Section 24A of the Consumer Protection Act 1986 provides for the period of limitation period for lodging a complaint. A complaint to a consumer forum has to be filed within two years of the date on which the cause of action has arisen. In the instant case, the appellant has submitted that since the cause of action is founded on a continuing wrong, the complaint is within limitation. 12 Section 22 of the Limitation Act 1963 5 provides for the computation of limitation in the case of a continuing breach of contract or tort. It provides that in case of a continuing breach of contract, a fresh period of limitation begins to run at every moment of time during which the breach continues. This Court in Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan⁶ elaborated on when a continuous cause of action arises. Speaking for the three-judge Bench, Justice PB Gajendragadkar (as the learned Chief Justice then was) observed that “31. [...] Does the conduct of the trustees amount to a continuing wrong under Section 23? That is the question which this contention raises for our decision. In other words, did the cause of action arise de die in diem as claimed by the appellants? In dealing with this argument it is necessary to bear in mind that Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a “22. Continuing breaches and torts.—In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues.” AIR

1959 SC 798 PART C continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked.” (emphasis supplied) The Court held that the act of the trustees to deny the rights of Guravs as hereditary worshippers and dispossessing them through a decree of the court was not a continuing wrong. Although the continued dispossession caused damage to the appellants, the injury to their rights was complete when they were evicted.

13 In CWT v. Suresh Seth 7, a two-judge Bench of this Court dealt with the question of whether a default in filing a return under the Wealth Tax Act amounted to a continuing wrong. Justice ES Venkataramiah (as the learned Chief Justice then was) observed that:

“11. [...] The distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the legislature. In the instant case whenever the question of levying penalty arises what has to be first considered is whether the assessee has failed without reasonable cause of file the return as required by law and if it is held that he has failed to do so then penalty has to be levied in accordance with the measure provided in the Act. When the default is the filing of delayed return the penalty may be correlated to the time-lag between the last day for filing it without penalty and the day on which it is filed and the quantum of tax or wealth involved in the case for purposes of determining the quantum (1981) 2 SCC 790 PART C of penalty but the default however is only one which takes place on the expiry of the last day for filing the return without penalty and not a continuing one. The default in question does not, however, give rise to a fresh cause of action every day. Explaining the expression “a continuing cause of action” Lord Lindley in *Hole v. Chard Union* [(1894) 1 Ch D 293 : 63 LJ Ch 469 : 70 LT 52] observed:

“What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.” (emphasis supplied) The Court further provided illustrations of continuous wrongs:

“17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that act. Breach of a covenant to keep the premises in good repair, breach of a continuing guarantee, obstruction to a right of way, obstruction to the right of a person to the unobstructed flow of water, refusal by

a man to maintain his wife and children whom he is bound to maintain under law and the carrying on of mining operations or the running of a factory without complying with the measures intended for the safety and well-being of workmen may be illustrations of continuing breaches or wrongs giving rise to civil or criminal liability, as the case may be, *de die in diem*.”

14 In *M. Siddiq v. Suresh Das* 8, a Constitution Bench of this Court (of which one of us (Justice DY Chandrachud) was a part) examined the precedents with regards to a continuing wrong. The Court observed that:

“343. The submission of *Nirmohi Akhara* is based on the principle of continuing wrong as a defence to a plea of limitation. In assessing the submission, a distinction must be made between the source of a legal injury and the effect of the injury. The source of a legal injury is founded in a breach of an obligation. A continuing wrong arises where there is an obligation imposed by law, (2020) 1 SCC 1 PART C agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner.

The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature. [...] Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may enure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation.” (emphasis supplied) 15 A continuing wrong occurs when a party continuously breaches an obligation imposed by law or agreement. Section 3 of the MOFA imposes certain general obligations on a promoter. These obligations *inter alia* include making disclosures on the nature of title to the land, encumbrances on the land, fixtures, fittings and amenities to be provided, and to not grant possession of a flat until a completion certificate is given by the local authority. The responsibility to obtain the occupancy certificate from the local authority has also been imposed under PART C the agreement to sell between the members of the appellant and the respondent on the latter.

16 Section 6 of the MOFA make the promoter responsible for payments of outgoings till the property is transferred. Section 6 reads as follows:

“A promoter shall, while he is in possession and where he collects from persons who have taken over flats or are to take over flats sums for the payment of outgoings even thereafter, pay all outgoings (including ground rent, municipal or other local taxes, on income taxes, water charges, electricity charges, revenue assessment, interest on any mortgage or other encumbrances, if any), until he transfers the property to the persons taking over the flats, or to the organisation of any such persons, [where any promoter fails to pay all or any of the outgoings collected by him from the persons who have taken over flats or are to take over flats, before transferring the property to the persons taking over the flats or to the organisation of any such persons, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges (if any) to the authority or person to whom they are payable and to be responsible for any legal proceedings which may be taken therefor by such authority or persons.]” (emphasis supplied)

17 Sections 3 and 6 of the MOFA indicate that the promoter has an obligation to provide the occupancy certificate to the flat owners. Apart from this, the promoter must make payments of outgoings such as ground rent, municipal taxes, water charges and electricity charges till the time the property is transferred to the flat-owners. Where the promoter fails to pay such charges, the promoter is liable even after the transfer of property . PART C 18 Based on these provisions, it is evident that there was an obligation on the respondent to provide the occupancy certificate and pay for the relevant charges till the certificate has been provided. The respondent has time and again failed to provide the occupancy certificate to the appellant society. For this reason, a complaint was instituted in 1998 by the appellant against the respondent. The NCDRC on 20 August 2014 directed the respondent to obtain the certificate within a period of four months. Further, the NCDRC also imposed a penalty for any the delay in obtaining the occupancy certificate beyond these 4 months. Since 2014 till date, the respondent has failed to provide the occupancy certificate. Owing to the failure of the respondent to obtain the certificate, there has been a direct impact on the members of the appellant in terms of the payment of higher taxes and water charges to the municipal authority. This continuous failure to obtain an occupancy certificate is a breach of the obligations imposed on the respondent under the MOFA and amounts to a continuing wrong. The appellants therefore, are entitled to damages arising out of this continuing wrong and their complaint is not barred by limitation. 19 The NCDRC in its impugned order has held that the cause of action arose when the municipal authorities ordered the payment of higher taxes in the first instance. Further, the impugned order also states that the present complaint is barred by limitation as there is no prayer for supply of occupancy certificate. We are unable to subscribe to the view of the NCDRC on both counts. Undoubtedly, the continuing wrong in the present case is the failure to obtain the occupancy certificate. Against this act of the respondent, the appellant society has taken appropriate action by filing a complaint before the consumer forum. The appellant PART C is currently pursuing the execution of the order of the SCDRC arising from that complaint. However, that itself does not preclude it from claiming compensation for the consequences which have arisen out of this continuing wrong. The failure to obtain the occupancy certificate has resulted in the levy of higher

taxes on the members of the appellant society repeatedly by the municipal authorities. Despite the order of 20 August 2014, the respondent has failed to obtain the occupancy certificate. This has resulted in a situation where the appellant, despite having followed the correct course of litigation in demanding the furnishing of an occupancy certificate, will continue to suffer the injury inflicted by the respondent merely due to the delay in the execution of the order against the respondent. Rejecting the complaint as being barred by limitation, when the demand for higher taxes is made repeatedly due to the lack of an occupancy certificate, is a narrow view which is not consonance with the welfare objective of the Consumer Protection Act 1986.

20 We shall now briefly advert to the finding of the NCDRC on the merits of the dispute. The NCDRC has held that the appellant is not a ‘consumer’ under the provisions of the Consumer Protection Act as they have claimed the recovery of higher charges paid to the municipal authorities from the respondent. Extending this further, the NCDRC has observed that the respondent is not the service provider for water or electricity and thus, the complaint is not maintainable.

21 Section 2(1)(d) of the Consumer Protection Act defines a ‘consumer’ as a person that avails of any service for a consideration. A ‘deficiency’ is defined under Section 2(1)(g) as the shortcoming or inadequacy in the quality of service PART D that is required to be maintained by law. In its decisions in Wing Commander Arifur Rahman Khan & Others v. DLF Southern Homes Private Limited & Others 9 and Pioneer Urban Land Infrastructure Limited v. Govindan Raghavan 10, this Court has held that the failure to obtain an occupancy certificate or abide by contractual obligations amounts to a deficiency in service. In Treaty Construction v. Ruby Tower Cooperative Housing Society Ltd. 11, the Court also considered the question of awarding compensation for not obtaining the certificate. In that case, the Court declined to award damages as there was no cogent basis for holding the appellant liable for compensation, and assessing the quantum of compensation or assessing the loss to the members of the respondent society.

22 In the present case, the respondent was responsible for transferring the title to the flats to the society along with the occupancy certificate. The failure of the respondent to obtain the occupation certificate is a deficiency in service for which the respondent is liable. Thus, the members of the appellant society are well within their rights as ‘consumers’ to pray for compensation as a recompense for the consequent liability (such as payment of higher taxes and water charges by the owners) arising from the lack of an occupancy certificate.

D Conclusion

23 For the above reasons, we allow the appeal against the order of the

NCDRC dated 3 December 2018 and hold that the complaint is maintainable. We direct the NCDRC to decide the merits of the dispute having regard to the (2020) 16 SCC 512 (2019) 5 SCC 725 (2019) 8 SCC 157 PART D observations contained in the present judgment and dispose the complaint within a period of three months from the date of this judgment. 24 Pending applications, if any, shall stand dismissed.

.....J. [Dr Dhananjaya Y Chandrachud]
.....J. [AS Bopanna] New Delhi;

January 11, 2022