

(2022) 04 CAL CK 0072
In the Calcutta High Court
Case No : W.P.A. No. 4425 Of 2022

Amar Kumar Malick

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 19-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 226
Code Of Civil Procedure, 1908 — Order 14 Rule 2
West Bengal Co-Operative Societies Rules, 2011 — Rule 131(5), 132, 133
West Bengal Co-Operative Societies Act, 2006 — Section 63(4), 87(1)(e), 88(a), 92, 92(3), 92(6), 102, 157(4)

Citation : (2022) 04 CAL CK 0072

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Milon Bhattacharjee, Sulagna Bhattacharjee, Ashim Kumar Ganguly, Bellal Shaikh, P.K. Roy, Biplob Das, Jayanta Mitra, Deep Nath Ray

Final Decision : Dismissed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner Amar Kumar Malick and his sister Pratima Bar were joint allottees of the Metropolitan Co-operative Housing Society Limited (for short, "the Society"). On January 12, 1984, a registered deed of conveyance of a plot of land was executed by the Society in favour of the said joint allottees. On November 23, 2004, the Society issued a 'no objection' certificate in favour of the petitioner and his said sister for grant of mutation of the land in their name by the Kolkata Municipal Corporation (KMC). On December 8, 2006, a share certificate for twenty shares of the Society was issued in favour of the petitioner and Pratima.

2. The petitioner's sister Pratima, vide registered gift deed dated July 6, 2012, donated her fifty per cent share in the property to the petitioner.

3. Subsequently on March 16, 2020, a show cause notice was issued by the

Society to the petitioner and his sister alleging violation of the West Bengal Co-operative Societies Act, 2006 (hereinafter referred to as "the 2006 Act") for failure to settle. In the show cause notice, it was alleged, inter alia, that the plot of land was jointly allotted to the petitioner and Pratima on July 3, 1967, which was admitted by the petitioner in his reply to the show cause notice dated May 15, 2020.

4. Thereafter the petitioner, on March 21, 2020, wrote a letter to the Society for the latter to co-operate in the matter of a building sanction plan which had been submitted "at present" (at that point of time) by the petitioner before the KMC.

5. However, vide a written notice dated June 23, 2020, the Society rejected the petitioner's reply dated March 21, 2020 and asked the petitioner to take steps for surrender of membership within seven days from receipt of the notice, indicating further that the Society would be at liberty to allot and/or transfer the plot as per law to a new member without further notice to the petitioner and/or his sister.

6. The present writ petitioner has been filed challenging the show cause notice dated March 16, 2020 and the notice to surrender dated June 23, 2020.

7. Learned counsel for the petitioner argues that the petitioner and his sister were admittedly joint allottees and members of the Society, which is illustrated by several documents like the registered deed of conveyance dated January 12, 1984 by the Society in favour of the petitioner and Pratima, the 'no objection' certificate dated November 23, 2004 issued by the Society for mutation in their name, the share certificate dated December 8, 2006, etc. Such joint membership of shares of a co-operative Society, it is contended, is recognized in Section 63 (4) of the 2006 Act.

8. On July 6, 2012, a registered gift deed of Pratima's fifty per cent share was executed in favour of the petitioner. Section 92 of the 2006 Act permits such transfer without any special permission from the Society, it is contended. Hence, the petitioner became a member of the Society and allottee in respect of the whole plot of land.

9. The petitioner, who is a fish vendor by occupation, allegedly could not construct a house on the plot of land so long due to financial constraints but thereafter has applied for a sanction plan from the KMC, which indicates his bona fide intention to start construction on the plot of land. However, due to the Society's laches in not providing documents necessary for obtaining sanction plan, the grant of sanction for construction has been delayed inordinately. The share certificate was issued only on December 8, 2006. Prior to such issuance, the membership of the petitioner had not been complete in all respects to enable the petitioner to obtain sanction from the KMC for constructing on the plot of land allotted to him. Thus, there has been no fault on the part of the petitioner in delaying construction on the plot of land allotted to him, the petitioner contends.

10. Hence, the show cause notice and subsequent notice to surrender were

without jurisdiction and de hors the law, it is argued.

11. Secondly, learned counsel argues, in view of the subsequent notice to surrender dated June 23, 2020, the deemed termination of the petitioner's membership due to non-commencement of construction on the plot of land, even if any, was waived.

12. Learned counsel for the petitioner next submits that, pursuant to the power conferred by Section 157 (4) of the 2006 Act, the State Legislature has framed the West Bengal Co-operative Societies Rules, 2011 (hereinafter referred to as "the 2011 Rules"). The specific procedure stipulated in Rule 133 of the 2011 Rules regarding expulsion of members has not been resorted to in the present case, nor has the requisite approval of the Registrar been obtained, it is argued.

13. Rule 132 of the 2011 Rules, pertaining to cessation of membership, is also not attracted in the petitioner's case, learned counsel argues. Thus, under no circumstances, the petitioner's membership could be terminated or the petitioner asked to surrender, it is submitted.

14. The learned Senior Advocate appearing for the Society argues that since the present dispute is to be referred for resolution before the Registrar of Co-operative Societies under Section 102 of the 2006 Act, the present writ petition is not maintainable in law.

15. Moreover, in view of the inordinate delay on the part of the petitioner and/or his sister to settle on the plot of land and/or start construction thereon, they have miserably failed to satisfy the eligibility criterion stipulated in Section 87(1) (e) of the 2006 Act, which contemplates that to be eligible for membership of a co-operating housing Society, a person has to have a genuine need for housing or additional accommodation from such co-operative Society.

16. Section 88 (a) of the Act envisages construction of houses either on their (members') own or through the co-operative society.

17. The first proviso thereof provides that members opting for construction on their own must undertake construction within 3 years from the date of possession, failing which they shall surrender the plot of land in favour of the co-operative Society.

18. The second proviso says that if the concerned member does not surrender, it shall be deemed to have been surrendered by him and the price may be refunded to him by the co-operative Society, which may then re-allot the plot to some new member.

19. As such, the impugned show cause notice dated March 16, 2020 and the subsequent steps asking the petitioner to surrender, dated June 23, 2020, were both valid in law and ought not to be disturbed under Article 226 of the Constitution of India.

20. Clause 7 (b) of the Bye-laws of the Society also provides that a member

must settle on the plot within 5 years from allotment, subject to extension by the Managing Committee with approval of the Registrar. Here, the said period of 5 years elapsed long back, without any attempt by the petitioner or his sister to settle, start construction or ask for extension of the time to do so. The consequential measures would follow, which was precisely what happened in the instant case, it is argued.

21. Hence, the Society's impugned actions ought not to be interfered with, it is submitted.

22. Learned counsel for the respondent no. 2, that is, the Registrar of Co-operative Societies, West Bengal also reiterates the objection as to maintainability of the writ petition in view of the equally effective alternative remedy before the Registrar under Section 102 of the 2006 Act.

23. Upon hearing learned counsel, the court decides as follows:

24. Section 102 of the 2006 Act is, in general circumstances, available to the petitioner as an equally efficacious alternative remedy to the petitioner, since the petitioner claims to be a member of the Society and the dispute is between the two.

25. However, the petitioner has raised the question as to whether the impugned acts of the Society were exercised beyond authority and there was mala fide and arbitrary action on the part of the Society, inviting interference under Article 226 of the Constitution of India.

26. That apart, since the Society has taken a point of deemed automatic surrender of membership of the petitioner by operation of the second proviso to Section 88 (a) of the 2006 Act, a legitimate issue arises as to whether the petitioner was no longer a member of the Society on the day when the writ petition was affirmed, that is, March 9, 2021. If held in the positive, such question might also take the dispute outside the ambit of Section 102 of the 2006 Act.

27. Thus, in the instant case, the question of bar to the exercise of power under Article 226 of the Constitution of India is not a pure question of law, which would entitle the court to decide the writ on the said issue only, but a mixed question of law and fact.

28. Hence, all the issues involved are being taken up together for adjudication, by adhering to the principles embodied in Order XIV Rule 2 of the Code of Civil Procedure.

29. In the show-cause notice dated March 16, 2020, the Society categorically alleged that the plot of land-in-question was jointly allotted to the petitioner and his sister Pramila on July 3, 1967. In the reply of the petitioner thereto, dated May 15, 2020, the petitioner specifically admitted and reiterated the same. Hence, although not mentioned separately in the pleadings of the writ petition,

such date can be proceeded on as the date of allotment.

30. Admittedly, a registered deed of conveyance was executed by the Society in respect of the plot to the petitioner and his sister Pramila Bar on January 12, 1984. Subsequently, a no-objection certificate for the purpose of mutation was issued by the Society in favour of the said joint members on November 23, 2004. Share certificate in respect of twenty shares of the Society was issued to the joint members on December 8, 2006. Pramila transferred her half share in the plot to the petitioner vide registered gift deed dated July 6, 2012.

31. However, only from the petitioner's letter dated March 21, 2020 it transpires that, at that point of time, a building sanction plan had been submitted by the petitioner before the KMC for making construction on the plot.

32. Thus, the first (and only) disclosed endeavour of the petitioner and/or his erstwhile joint member Pramila to settle on the land by constructing thereon was in the month of March 21, 2020.

33. Section 88 (a) of the 2006 Act gives an option to the member to construct on his own, which was exercised in the present case by the petitioner by applying for sanction and not asking the co-operative Society to make such construction on his behalf at any point of time. Therefore, as per the first proviso to Section 88 (a), the petitioner and/or Pramila 'must' have undertaken construction within three years from the date of possession, failing which they had to surrender the plot of land in favour of the co-operative Society.

34. The first date of allotment, as admitted in the letter of the petitioner dated May 15, 2020, was July 3, 1967, which ought to be taken as the date of possession. The period of 3 years thereafter expired on July 2, 1970.

35. The registered deed of conveyance in favour of the petitioner and his sister was executed on January 12, 1984 and on November 23, 2004 the Society granted a 'no objection' certificate for the petitioner and his sister to mutate the property in their own name. There is absolutely nothing on record or in the pleadings to indicate that the petitioner and/or Pramila took any step throughout the period to expedite the groundwork for the purpose of starting construction within 3 years. Even taking the best case scenario for the petitioner, the last impediment which could have stood in the way of the petitioner and/or Pramila commencing construction stood removed on November 23, 2004 when the Society issued a 'no objection' certificate in favour of the petitioner and Pramila to mutate the property in their own name.

36. Even the registered deed of gift was executed by Pramila on July 6, 2012, which was permissible under Section 92 (3) of the 2006 Act, which contemplates that such a plot constitutes a transferable immovable property. Upon such execution, the petitioner became the sole allottee of the plot. Although it does not make much of a difference, since the petitioner was all along liable as a joint member, even before the execution of the gift deed, to undertake construction on

the allotted plot of land, the first endeavour even to obtain sanctioned plan was undertaken by the petitioner only in or about March, 2020, which is eight years after the execution of the gift deed.

37. Thus, the petitioner squarely violated the first proviso to Section 88 (a) of the 2006 Act by not undertaking construction within 3 years from the date of possession, which mandates the petitioner to surrender the plot of land in favour of the co-operative Society. In default, as in the present case, the second proviso is pressed into operation and it is deemed that the plot has been surrendered by the petitioner and the plot may be re-allotted by the Society to a new member.

38. The Society has merely invoked the above legal provisions in its show cause notice dated March 16, 2020 and the subsequent notice dated June 23, 2020, both of which have been challenged in the present writ petition.

39. Secondly, Clause 7 (b) of the Bye-laws of the Society, which has the force of law and the legality/ vires of which has never been challenged by the petitioners before any legal forum, stipulates that a member 'must' settle on the allotted plot within 5 years from allotment, subject to extension by the Managing Committee with the approval of the Registrar. The petitioner and/or Pramila never made any attempt to so settle and/or to request for extension of the time therefor at any point of time.

40. On failure to do so, as per the provisions of Clause 7 (b) of the Bye-laws of the Society, the petitioner and/or Pramila stood excluded from membership and were liable to forfeiture of the share money by way of compensation and, subject to approval of a General Meeting, the Society was entitled to take back the land allotted to the petitioner and his sister and return the price paid by them, less any contribution assessed or expenses incurred for purposes as mentioned in Clause 7 (c). On the occurrence of such event, the matter has to be brought to the notice of the Registrar, immediately after the General Meeting, for his opinion which shall be final and conclusive.

41. In the present case, however, the stage of taking back the land from the petitioner and Pramila and/or the petitioner exclusively has not arisen yet, since the impugned notices merely intimated the petitioner about the legal consequences of their actions and omissions. It is always open to the Society to take such subsequent steps of retrieving the plot in accordance with the latter portion of Clause 7 (b) later on, which cannot be prematurely precluded at this juncture.

42. Even apart from Clause 7 (b) of the Bye-laws and Section 88 (a) of the 2006 Act and its provisos, Section 87(1)(e) of the Act stipulates, as one of the eligibility criteria for membership of a housing co-operative Society, that the member has to have "genuine need for housing or additional accommodation from such co-operative Society". Since the petitioner and/or Pramila did not care to undertake construction or take steps in that regard till decades after allotment and acquisition of possession of the plot, such criterion is not satisfied in the case

of the petitioner and/or Pramila, thereby denuding them from the eligibility for membership of the Society.

43. Over and above all the above factors, sub-section (6) of Section 92 of the 2006 Act, which enumerates the rights of members, provides that the cost of work of maintenance, repair, replacement of common areas and facilities (including additions and improvements) in accordance with the bye-laws of the co-operating housing Society and building rules of the concerned municipality/ notified area authority/ other competent authority, as prescribed, shall be apportioned amongst members of the Society in the prescribed manner.

44. Admittedly, the present writ petitioner was a defaulter in payment of maintenance charges as claimed by the Society. The flimsy pretext pleaded in the writ petition, that the petitioner had not constructed and has not been living in the disputed plot, is utterly irrelevant for the purpose of Section 92 (6) of the 2006 Act. Thus, the petitioner shirked his liability on the score of making payments for maintenance charges as well.

45. As such, even without invoking Rules 132 and 133 of the 2011 Rules, which envisage cessation of membership and expulsion of members respectively, the impugned notices of the Society to the petitioner were well within the limits of their authority and valid in the eye of law, in the circumstances of the case.

46. The membership eligibility criterion in Section 87(1)(e) of the 2006 Act is echoed in Rule 131 (5) of the 2011 Rules. While the former stipulates, as a necessary eligibility criterion for membership, genuine need of the member for housing or additional accommodation from the co-operative Society, the latter goes a step further by providing that no person shall be admitted as a member of a co-operative housing Society who is not considered by a board thereof as one having genuine need for housing or additional accommodation from such Society.

47. The present writ petitioner has miserably failed to satisfy such yardstick, rather, acted to the contrary by sitting tight over his allotment of the plot of land and membership for several years after the stipulated statutory period before even taking preliminary steps leading to undertaking construction, let alone actually undertake construction on the disputed plot.

48. The apparent step of submitting a sanction plan was also disclosed by the writ petitioner only in his letter dated May 15, 2020, in reply to the show cause notice dated March 16, 2020 issued by the Society. Such delay betrays genuine absence of need for housing or alternative accommodation rather than the obverse.

49. Additionally, the writ petitioner has not come with clean hands before court. The impugned notices were issued respectively on March 16, 2020 and June 23, 2020, whereas the writ petition was affirmed only on March 9, 2021. The delay itself betrays the absence of need of housing or alternative accommodation of

the petitioner, which is a pre-requisite for membership to a housing co-operative Society.

50. Hence, there is no ground or scope of interference with the impugned notices and, accordingly, the writ petition fails.

51. WPA 4425 of 2022 is, thus, dismissed on contest without any costs.

52. Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.