

(1994) 03 CAL CK 0026
In the Calcutta High Court
Case No : F.M.A. No. 1448 of 1993

Arun Kumar Mukherjee and Another	APPELLANT
Vs	
Bokaro Steel Employees (Calcutta) and Others	RESPONDENT

Date of Decision : 09-03-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 14 Rule 2(2), Order 39 Rule 1
West Bengal Co-operative Societies Act, 1983 — Section 13, 13(4), 15, 2(13), 2(18)
West Bengal Co-operative Societies Rules, 1987 — Rule 130, 131, 132

Citation : (1994) 2 CALLT 147

Hon'ble Judges : Susanta Chatterji, J; Nripendra Kumar Bhattacharyya, J

Bench : Division Bench

Advocate : Tapan Kumar Mitra, for the Appellant; Shyama Prasanna Roychowdhury and Narayan Chandra Bhattacharyya, for the Respondent

Judgement

Susanta Chatterji, J.—An application for stay of operation of the order appealed against being order dated 17th August, 1993, made by the learned Assistant District Judge, Seventh Court at Alipore, in Title Suit No. 107 of 1993 came up for hearing before this Court. As suggested and agreed, the application and the first miscellaneous appeal itself are taken up for disposal. Filing of formal paper books is dispensed with.,

2. Having heard Mr. Tapan Kumar Mitra, learned Advocate for the defendants-petitioners-appellants and Mr. Shyama Prasanna Roychowdhury with Mr. Narayan Chandra Bhattacharyya, learned Advocates for the plaintiffs-opposite parties-respondents, it transpires that a comprehensive title suit being Title Suit No. 107 of 1993 has been filed before the learned Assistant District Judge, 7th Court at Alipore for specific performance of contract relating to the properties consisting of 3.21 acres of land situated at Mouza Paschim Barisa.

3. Having heard Mr. Tapan Kumar Mitra, learned Advocate for the defendants-petitioners-appellants and Mr. Shyama Prasanna Roychowdhury with Mr. Narayan

Chandra Bhattacharyya, learned Advocates for the plaintiffs-opposite parties-respondents, it transpires that a comprehensive title suit being Title Suit No. 101 of 1993 has been filed before the learned Assistant District Judge, 7th Court at Alipore for specific performance of contract relating to the properties consisting of 3.21 acres of land situated at Mouza Paschim Barisa as fully described in Schedule "A" to the plaint and alternatively for a decree for recovery of a sum of Rs. 4,96,750 as described in Schedule "B" to the plaint. It is stated in the plaint that the plaintiff No. 1, Bokaro Steel Employees (Calcutta) Co-operative Housing Society, a proposed unregistered co-operative Society having its office at 13, Camac Street, P.S. Park Street, Calcutta, which is represented by the Chief Promoter, viz. plaintiff No. 2, Manish Chandra Mitra, entered into an agreement for sale with the defendant Arun Kumar Mukherjee, defendant No. 1 on or about 4th day of November, 1988, on payment of Rs. 2,50,000/- as earnest money. Since there is allegation of failure to perform the part of contract, the suit has been filed by the aforesaid proposed unregistered co-operative society along with 9 persons described as all promoters including the Chief Promoter Manish Chandra Mitra as plaintiff No. 2, In the aforesaid title suit an application for temporary injunction has been filed and the learned trial judge by the impugned order dated 17th August, 1993, has allowed the application under Order 39 Rule 1 and 2 read with Section 151 of the CPC restraining the defendants from transferring and/or changing nature and character of the suit property till the disposal of the suit.

4. Being aggrieved by and dissatisfied with the said order, the defendants have come to this court in appeal and also filed an application for stay of operation of the aforesaid order till the disposal of the first miscellaneous appeal.

5. Mr. Mitra, learned Advocate appearing in support of the application for stay and the appeal, has argued, inter alia, that the suit, as prayed for, is not maintainable inasmuch as the plaintiffs-respondents have not been able to raise a fair question before this Court and the order of injunction passed by the learned trial judge is highly prejudicial to interests of the defendants and such an order ought not to have been made without considering framing of the suit and the nature of the claim, as indicated above. Mr. Mitra has developed his argument further that the suit has been brought by a proposed co-operative Housing Society represented by the promoters and the framing of such suit is obviously defective. He has laid emphasis upon the fact that the unregistered society is not a body corporate and neither it can sue nor sued upon.

6. Our attention has been drawn to Section 2(13) as to the definition of "Co-operative Society" meaning a co-operative society registered or deemed to be registered under the West Bengal Co-operative Societies Act, 1983. Section 2(18) defines "Co-operative Housing Society" meaning a co-operative society, the object of which is to provide a person with dwelling house, apartments, or lands for construction of dwelling houses or apartments, and maintenance of common services in connection therewith, and includes a federation of such

societies. Our further attention has been drawn to Section 13 of the aforesaid West Bengal Co-operative Societies Act, 1983, relating to application for registration. For better appreciation, Section 13 of the Act is quoted hereinbelow :-

"(1) An application for registration of a co-operative society and its by-laws shall be made to the Registrar in the prescribed manner with one copy of the District co-operative Union in the case of a Co-operative society within a district and to State Co-operative Union in the case of a State level society. The application shall be accompanied by two copies of the proposed by-laws of the co-operative society. The persons by whom or on whose behalf the application, is made shall furnish such information in regard to the co-operative society as the Registrar may require.

(2) Where an application for registration of a co-operative society and its by-laws is made by individuals, the number of applicants shall not be less than ten, each of whom shall belong to a different family.

(3) The State Government may prescribe the extent to which a cooperative society shall limit the number of its members.

(4) (a) The Registrar shall dispose of an application for registration of a co-operative society other than a co-operative housing society or an industrial co-operative society not entirely composed of rural artisans and its by-laws within three months from the date of its receipt by him.

(4) (b) An application for registration of a co-operative housing society or an industrial co-operative society not entirely composed of rural artisans and its by-laws shall be disposed of by the Registrar within four months from the date of its receipt by him.

(5) If the registration of a co-operative society and its by-laws is refused or the application for such registration is not disposed of by the Registrar within the period mentioned in Clause (a) or Clause (b), as the case may be, of Sub-section (4), the Registrar shall transfer, the application to the co-operative Registration council referred to in Sub-section (7) with his comments, and shall inform, in writing, the applicant or the chief promoter of the application of such transfer, within one month of expiry of the aforesaid period. The Registration Council shall decide the matter within two months from the date of receipt of the application.

(6) If the applicant or the chief promoter of the application does not receive any information from the registrar under Sub-section (5) within the period mentioned in that sub-section, he shall have the right to appeal to the co-operative Registration Council within one month from the date of expiry of the said period.

(7) (a) The State Government shall constitute a council to be called the co-operative Registration Council consisting of a Chairman and two other members. The Chairman of the Co-operative Tribunal or the Chairman of the principle co-operative Tribunal, as the case may be, referred to in Section 135 shall be the

Chairman of the Co-operative Registration. Council. Of the two other members, one shall be nominated by the State Government and the other shall be nominated by the State Co-operative Union.

(7) (b) The Co-operative Registration Council shall have jurisdiction throughout West Bengal and shall function in such manner as may be prescribed."

7. Mr. Mitra has laid much emphasis upon Section 13(1)(b). He has strongly emphasised that the agreement for alleged sale was executed in 1988 and the suit filed, in 1993 and even till date there is no registration of the proposed society. There is a reference to Section 15 of the West Bengal Co-operative Societies Act, 1983, relating to registration, which runs as follows :-

"(1) If the Registrar is satisfied that an application for registration of a co-operative society and its by-laws is in accordance with the provisions of this Act and the rules, he shall, unless for reasons to be recorded in writing he thinks fit to refuse, register the co-operative society and its by-laws within the period mentioned in Sub-section (1) of Section 13.

(2) If the Registrar fails to dispose of the application for registration of a co-operative society and its by-laws or if registration thereof is refused by him, he shall transfer the application to the Registration Council as required under sub-section (5) of Section 13".

8. Our attention has also been drawn to Section 23 of the West Bengal Co-operative Societies Act, 1983, as to the status and management of cooperative societies, which lays down that a registered co-operative society shall be a body corporate by its registered name with perpetual succession and a common seal, and with power to acquire, hold and dispose of property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it is constituted.

9. The spirit of the argument of Mr. Mitra is that there is no room for status of the proposed co-operative society. Besides such provisions in the aforesaid Act, as quoted above,, our attention has also been drawn to Rule 130 in Chapter IX, as to the special provisions for co-operative housing societies and functions of promoters, of the West Bengal Co-operative Societies Rules, 1987. Rule 130 is as follows :-

"For the purpose of registration of a co-operative housing: society all the promoters intending to join the application for registration shall hold meeting for- (a) adoption of name of the proposed society and of its by-laws, (b) election of the Chief Promoter and the first board including the Chairman, the Vice Chairman and the Treasurer from amongst the promoters, (c) vesting the Chief Promoter, the Chairman, the Vice-Chairman and the Treasurer with powers and function as laid down in these rules, (d) consideration and adoption of the scheme of the project to be undertaken by the proposed society, and (e) consideration and approval of the agreement to be entered into with the vendor or lessor of the

land, building or tenement, as the case may be".

Rule 131 provides function of the Chief Promoter, the Chairman, the Vice-Chairman and the Treasurer. For better appreciation Rule 131 is quoted hereinbelow :-

"The Chief Promoter of a Co-operative Housing Society shall take steps, as may be necessary, under the provisions of the Act and Chapter II of these rules to get the society registered and shall-(a) open a bank account to be operated by him jointly with the Chairman or, in absence of any of them, the Vice-Chairman and the Treasurer together with the other available, and (b) negotiate with the approval of the Chairman to purchase or get land, building or tenant".

It appears from the readings of Rules 130 and 131 of the West Bengal Co-operative Societies Rules, 1987, that there are two stages as to the steps to be taken before its registration of the co-operative society and the steps to be taken after registration of the co-operative society. Rule 132 of the said Act provides holding of the first meeting of the Board of a co-operative Housing Society. Rule 132 is as follows :-

"After registration of a co-operative housing society the Chairman or, in his absence, the Vice-Chairman, shall, within one month from the date of such registration, convene the first meeting of the Board for the purpose of election of office-bearers other than the Chairman, the Vice-Chairman and the Treasurer and for such other purpose as the Chief Promoter may, with the approval of the Chairman, determine.

10. The sum and substance of Mr. Mitra's argument is that looking at the provisions of the West Bengal Co-operative Societies Act and the Rules framed thereunder, as highlighted above, the plaintiffs-respondents cannot sustain a suit and the nature of injunction passed by the learned trial judge is acting harshly and there is sufficient merit in the appeal to be allowed, whereby the impugned order may be set aside.

11. Mr. Roy Chowdhury appearing with Mr. Bhattacharyya strongly opposed the submissions of Mr. Mitra. Mr. Roy chowdhury has tried to convince us that it is not the proper stage before this Court to conceive of any aspect of the maintainability of the suit. If the suit is at all defective or if the suit is not maintainable, a proper issue has to be framed after filing of the written statement and such issue must be heard as a preliminary issue on a point of law as envisaged under Order 14, Rule 2(2) of the Code of Civil Procedure. At the time of hearing of the petition for temporary injunction or sitting over the appeal against the order of temporary injunction or sitting over the appeal against the order of temporary injunction passed by the learned Trial Judge, it would be futile to consider all these questions, and if at all this Court thinks fit, such, questions should be left at large before the learned trial Judge who may consider the same after exhausting all process of law and after giving the parties full opportunities to raise their points of law at the proper stage.

12. Mr. Roychowdhury has also argued that a strong prima facie case has been made out and since a large amount towards the earnest money has been paid, the defendants cannot be left at large to deal with the properties in any manner they think fit and proper and the balance of conveniences and inconveniences is strongly in favour of the plaintiffs respondents. Mr. Roychowdhury has also submitted, inter alia, that the Chief Promoter was brought to enter into an agreement and after such an agreement has been entered into the suit has been filed in accordance with law and all these questions cannot confuse the plaintiffs respondent prayer for temporary injunction to protect the rights of the parties and to preserve the properties as the law demands. Mr. Roychowdhury has also drawn our attention to the prayer portion of the plaint where alternative a prayer has been made to recover the amount of the earnest money together with interest at the rate of Rs. 20/- per cent per annum along with the litigation costs and all other expenses as fully described in the Schedule "B" to the plaint amounting to Rs. 4,96,750.00. He has submitted that without squaring and/or clearing the said amount the defendants appellants cannot go scot-free and this Court may be pleased to protect the interests of both sides until the suit is decided in accordance with law.

13. Patiently we have heard the learned Advocates on both sides at length. We have considered the materials on record and examined the points of law as canvassed on behalf of the respective parties. By way of appreciating the facts of the case in the background of the provisions of law, as discussed above, we find that Rule 130 of the West Bengal Co-operative Societies Rules, 1987, provides the functions of the promoters, namely, for the purpose of registration of a co-operative housing society, all the promoters intending to join the application for registration shall hold the meeting for various acts as set down in clauses (a), (b), (c), (d) and (e) of Rule 130, as quoted above. Rule 130(e) clearly indicates that there may be consideration and approval of the agreement to be entered into with the vendor or lessor of the land, building or tenement, as the case may be. Our reading of Rule 130(e) indicates that this refers to a common draft agreement or any proposed agreement before its execution in accordance with law. Along with Rule 130, if we refer to Section 13(5) of the West Bengal Co-operative Societies Act, 1983, we find that it indicates, inter alia, that if the registration of a co-operative society and its by-laws is refused or the application for such registration is not disposed of by the Registrar within the period mentioned in clause (a) or clause (b), as the case may be, of Sub-section (4) the Registrar shall transfer the application to the Co-operative Registration Council referred to in Sub-section (7) with his comments, and shall inform, in writing, the applicant or the chief promoter of the application of such transfer, within one month of the expiry of the aforesaid period. The Registration Council shall decide the matter within two months from the date of receipt of the application. Section 13(6) provides that if the applicant or the Chief Promoter of the application law, as indicated above, as to whether the plaintiffs should obtain any order of injunction or not. We are, however, afraid lest, before examination and/or

decision of any such question, the rights of the parties are at stake or defeated and/or the property in question are disturbed and/or transferred or interest of either of the parties is prejudiced. Being aware of our limitations and being also anxious to protect the rights of the parties in the proper perspective, our conscience is satisfied that we should dispose of this matter in the manner following :--

14. Regard being had to the materials on record, we direct the learned trial Judge to consider framing of an issue after filing of the written statement regarding maintainability of the suit and if proper questions are raised, such an issue may be considered under Order 14, Rule 2(2) of the CPC and all questions should be considered in accordance with law and our findings and/or observations, as indicated above, may be at least a guideline to consider the questions in the proper perspective. It is made clear that the findings and observations made by us may not prejudice the interest of either party or not influence the learned trial Judge to decide the issue at the proper stage of the hearing of the suit.

15. Since we find that a serious question has been raised as to the maintainability of the suit by the plaintiffs, the same has; got to be considered. It would be difficult to sustain the order of temporary injunction as made in terms of the prayer of the) plaintiffs to restrain the defendants from dealing with the valuable properties for an indefinite period till the disposal of the suit.

16. Mr. Mitra, learned Advocate for the defendants appellants, in his usual fairness, has suggested that for the fitness of things, the defendants may be asked to deposit the entire earnest money to a term deposit before any step is taken to effect transfer of the property in question, subject to the result of the suit. In the light of the concession made above, we also find that in order to avoid any future complication and since there is an alternative prayer of the plaintiffs to claim the earnest money together with all interests accrued to it and other incidental costs, the defendants may be directed to deposit the entire amount as covered by the Schedule "B" to the plaint, without prejudice, before does not receive any information from the Registrar under Sub-section (5) within the period mentioned in that subsection, he shall have the right to appeal to the Co-operative Registration Council within one month from the date of expiry of the said period.

17. Looking at the provisions of the Act and the Rules framed thereunder, we find that the sections of the Act provide speedy and time bound disposal of the application for registration of the proposed society and if there is any refusal: or if anybody is aggrieved thereby he shall have the right to appeal in accordance with law. Such provisions fully indicate, inter alia, that the matter cannot be left in a cold storage for an indefinite period and we do not appreciate as to why the agreement made in the year 1988 is at the same stage till 1993, or till date, and there is neither registration of the proposed co-operative society nor do we find any status of the proposed co-operative society as body corporate to sue and/or

to be sued upon. These questions are very important to be considered so as to find out the locus-standi of the plaintiffs respondents to maintain a suit. True it is, the question of maintainability of the suit, should not be gone into by the learned trial judge or by the appellate court or even by us or; whether the suit should be dismissed in limine or should be allowed to continue until the issue is framed and decide in the manner as envisaged under Order 14, Rule 2(2) of the Code of Civil Procedure. But at the same time it should not be lost sight of the fact that while considering the petition for temporary injunction and granting relief to a party in the interlocutory nature and restraining a party from exercising its lawful rights to deal with the properties, there must be a prima facie case and there must be consideration of the case of raising a fair question to go to trial. If a suit is not properly framed, no statute can be there. If a suit is properly framed, the same is maintainable in law and it should not be struck down until a proper stage is reached when the court is constrained to examine whether a prima facie is made out by a defective suit, or whether a fair question is raised to go to the trial court. With this limited scope, there is room for consideration and/or examination of the relevant provisions of selling the property to any third party in accordance with law. It is ordered accordingly. If such deposit is made by the defendants appellants, that would be absolutely without prejudice to the interests of the plaintiffs respondents without considering the claims of the plaintiffs respondents and subject to the result of the suit and the plaintiffs respondents will not be entitled to withdraw the same till the disposal of the suit. The learned, trial Judge may, however, deposit the said amount in any nationalised Bank for a term as he may think fit and proper. The terms may be long term as the learned Judge may think fit and proper.

18. With these modifications, the appeal and the application for stay are both disposed of.

There will be no order as to costs.

Let a copy of this be sent down to the court below by a special messenger.

Let xerox copies of this order be made available to the learned Advocates on record for both parties on their usual undertakings and upon compliance with necessary formalities.

Nripendra Kumar Bhattacharyya, J.

19. I agree.