

(2019) 04 CAL CK 0069
In the Calcutta High Court
Case No : Writ Petition No 117 Of 2019

Avis Isl And Coconut Plantation Cooperative Society Ltd	APPELLANT
Vs	
Andaman & Nicobar Administration & Others	RESPONDENT

Date of Decision : 22-04-2019

Acts Referred:

Andaman And Nicobar Islands Cooperative Societies Regulations, 1973 — Section 57(2), 57(2)(b), 57(3)

Citation : (2019) 04 CAL CK 0069

Hon'ble Judges : Tapabrata Chakraborty, J

Bench : Single Bench

Advocate : Anjili Nag, M. Tabraiz

Final Decision : Disposed Off

Judgement

Tapabrata Chakraborty, J

The present writ petition has been preferred challenging inter alia an order dated 20th November, 2018 passed by the respondent no.3, an order dated 18th March, 2019 passed by the respondent no.2 and an order dated 20th March, 2019 passed by the respondent no.5.

Mrs. Nag learned advocate appearing for the petitioner submits that Avis Islands Coconut Plantation Cooperative Society Limited (in short, the society) sought permission for conversion of 0.10 hectare of land out of 13.15 hectares from agricultural to commercial. Such permission was granted by the competent authority on 12th November, 2007. The prayer for amendment of its bye-laws to incorporate the concept of Joint Venture Agreement (in short, JVA) and to formulate plans for promotion of tourism was also approved by the Registrar of Cooperative Societies (in short, RCS) on 20th March, 2008. Upon availing such permission, the society entered into a JVA with the respondent no.4 on 7th July, 2008 permitting the said respondent to carry on a tourism related business over 0.10 hectares of land. Such fact was duly intimated to RCS but no objection was

raised for about three years since such execution of JVA was in the interest of the members of the said society. Surprisingly thereafter a show cause notice was issued to the society on 15th July, 2011 stating inter alia that by clause 5 of the JVA, the society gave the right over its entire land to the respondent no.4 and such act was in violation of the 4th Principle of Cooperation, i.e., Autonomy and Independence. By a reply to the same, the society stated that it had already cancelled the said clause 5 of JVA by a letter dated 10th May, 2011 and such cancellation was accepted by the respondent no. 4 on 5th July, 2011. Without considering such reply, the RCS by an order dated 14th October, 2011 directed winding up of the affairs of the society.

She contends that the said order of RCS dated 14th October, 2011 was passed without appreciating that the clause 8 of the JVA pertains to unilateral invocation of termination by a party and does not apply where parties to the said agreement mutually agree to cancel a particular clause of the said agreement. Such infirmities were not taken into consideration by the respondent no.2 while rejecting the society's statutory appeal by an order dated 12th May, 2012. Challenging the said orders a writ petition was preferred by the society and the orders impugned in the same were set aside by an order dated 5th August, 2014 and a direction was issued upon the RCS to consider the reply of the society afresh upon granting opportunity of hearing. The appeal preferred against the said order by the Administration was also dismissed on 12th June, 2015. To put an end to the controversy pertaining to the JVA, the society cancelled the JVA on 14th June, 2015.

Drawing the attention of this Court to the order passed thereafter by the RCS on 10th September, 2015, she submits that new grounds were taken by the RCS in the said order as detailed in paragraph 18 of the same. Such grounds did not feature in the show cause notice dated 15th July, 2011. In the appeal preferred against the same, the appellate authority passed an order on 14th May, 2016 observing inter alia that no interference is called for since the society upon admitting its mistake had cancelled the JVA on 14th June, 2015. Challenging the said orders the society again filed a writ petition. Upon appreciation of the fact that both RCS and the appellate authority had passed orders travelling beyond the ambit of the show cause notice, the Hon'ble High Court by an order dated 31st August, 2017 allowed the writ petition preferred challenging the said orders observing that "I have gone through the orders so passed by the authorities and it reflects that neither any show cause notice was ever issued by the authorities for the subsequent grounds nor any opportunity of hearing was afforded to the petitioner." The orders impugned in the said writ petition were set aside and the matter was remanded to the RCS for a fresh decision. The appeal preferred against the said order by the Administration was also dismissed by an order dated 6th February, 2018. Thereafter a fresh show cause notice was issued on 27th March, 2018 stating inter alia that the JVA was cancelled only to escape from the action initiated. It is thus explicit that the earlier grounds taken by the RCS and by the appellate authority in the orders dated 10th September, 2015

and 14th May, 2016, were dropped.

She argues that the fact of execution of JVA ought not to have been construed to be an action on the part of the society in derogation of the principles of autonomy and independence. The execution of JVA was in the interest of the members of the said society. Such facts ought to have been taken into consideration by the RCS, who had been conferred the authority to cancel an order for winding up at any time, as would be explicit from the provision of section 57 (3) of the Andaman and Nicobar Islands Cooperative Societies Regulations, 1973 (in short, the said Regulations).

Mrs. Nag contends that prior to invocation of clause 57 (2) (b) of the said Regulations, the RCS is required to arrive at a categorical finding that the society "has not commenced working or has ceased function in accordance with law." In the absence of such finding, the RCS had no jurisdiction to direct winding up of the society. Within two days after disposal of the statutory appeal on 18th March, 2019, the respondent no.5 issued the impugned order dated 20th March, 2019 towards resumption of the society's land without granting any opportunity of hearing to the society. Such hot haste maligns the said order be an arbitrary one. In support of the arguments advanced reliance has been placed upon a judgment delivered in the case of the case of Jyoti Nagar Cooperative House Building Society Ltd vs The Punjab State and Others reported in 1969 E-Juris (P&H) (3) 41 and in the case of Pandurang Dagadu Gurav vs B.A. Deshmukh Assistant Registrar, Co-operative Societies (Dairies) Pane reported in 1991 E-Juris (Bom) (12) 26.

The principles of cooperation do not stand codified but the same had been borrowed from the International Cooperative Alliance Statement on the Cooperative Identity. The facts involved in the present lis do not indicate that the society is not under the democratic control of its members. The society is maintaining its autonomy and its management has not been interfered with by the respondent no. 4 on the basis of the JVA. The cooperative principles required to be maintained have been detailed in the judgement delivered in the case of Vipulbhai M. Chaudhary vs Gujarat Cooperative Milk Marketing Federation Limited and others reported in (2015) 8 SCC 1.

Placing reliance upon the 4th paragraph of the JVA, Mr. Tabraiz, learned advocate appearing for the respondents, submits that the society agreed to give its rights in the SITE, as more fully described in the schedule, consisting of 13.15 hectares of land including an area of 0.10 hectares towards commercial use in perpetuity. From clause 5 it would appear that the right over agricultural and plantation produce in the SITE was transferred to the respondent no.4. Furthermore, clause 6 (ii) would reveal that the respondent no.4 was given absolute right to carry on its business at the SITE and by clause 6 (iii) the society was restrained from selling or from creating any encumbrance in the SITE. Clause 7 (i) would reveal that right was conferred upon respondent no.4 to created charge or encumbrance or mortgage the SITE. Clause 7 (k) would reveal that the

respondent no.4 was conferred the discretion to hire the services of any society member or their kin with the understanding that first preference for employment would be given to a meritorious candidate who is a member of the society or part of the society member's immediate family. A composite reading of the said clauses establishes the fact that control over its management was surrendered in favour of the respondent no.4 and such action violates the 4th principle of autonomy and independence.

According to Mr. Tabraiz the 2nd principle pertains to election of members in the board and clause 4 provides that the management of the society if conferred upon a separate entity would constitute violation of autonomy and independence. In support of such contention he has placed reliance upon a judgment delivered in the case of *Ishwar Nagar Cooperative Housing Building Society vs. Parma Nand Sharma and others* reported in (2010) 14 SCC 230.

He further submits that no modified agreement was entered into by the society with the respondent no.4 towards cancellation of clause 5 of the JVA and as a consequence thereof the society lost control over its management. A bare reading of the JVA indicates that the same was a camouflage. The Society had no role in dealing with the property. The basic ingredient of a joint venture agreement was missing in the JVA as the same did not provide the ratio of investment nor did it provide the ratio of loss to be suffered by parties in the event occasion so arises.

He contends that the society surrendered its autonomy and independence to the respondent no.4 and it deviated from its objectives. The society had miserably failed to improve the economic conditions of their members and became incapable of achieving its objectives.

He argues that the Writ Court ought not to transpose itself as an appellate authority when a particular authority had performed its obligation and had rendered a decision in the matter supported with cogent reasons. In the instant case the RCS and the appellate authority have passed the orders detailing the reasons and the said orders are neither arbitrary nor perverse warranting interference of this Court in exercise of its discretionary jurisdiction.

Mr. Tabraiz submits that in course of advancing arguments before the appellate authority, Mrs. Nag had taken two fold issues and as such she is estopped from arguing any further issue and the society cannot be permitted to enlarge the scope of the writ petition.

In reply Mrs. Nag submits that upon the direction of the appellate authority written notes were filed on 14th March, 2019 incorporating the other issues. Such fact has also been stated in paragraph 25 of the writ petition.

She contends that the cancellation of the JVA itself suggests that the members of the society had total control over its landed property. The JVA was pertaining to land in survey nos. 1/1 and 1/2 at Avis Islands and apart from the same the society has land at other places, as would be explicit from the document at page

59 of the writ petition. The members of the society are very poor and illiterate and as such they cannot be made a victim for incorporation of clauses in the JVA which have been highlighted by the authorities to establish the same to be a document towards handing over the control and management of the society to the respondent no.4.

The only issue which survived in the second show cause notice dated 27th March, 2018 was that "the JVA was cancelled only to escape from the action initiated for violation committed by the society." According to the RCS, the society had the jurisdiction to enter into a JVA but the said JVA was termed to be an illegal one without arriving at any categorical finding that on the basis of the said JVA, the society lost control over its autonomy and independence. Had the respondent no.4 availed right over entirety of the land on the basis of the JVA, it is difficult to appreciate as to why the said respondent did not oppose the society's decision towards cancellation of the JVA.

In the order of appellate authority it has only been reiterated that the society entered into an illegal JVA in violation of the cooperative principles. The appeal has been rejected construing the act of cancellation of JVA on the part of the said society as an acceptance of the fact that it had surrendered its democratic control and autonomy.

Indisputably the show cause notices were issued and orders were passed by the RCS invoking the provisions of section 57 (2) (b) of the said Regulations of 1973 which provides that the RCS may make an order directing the winding up of the society "where the society has not commenced working or has ceased to function in accordance with cooperative principles." The main charge against the society is that it had ceded its autonomy and independence and practically handed over the assets comprised in immovable property to a private organisation for running a tourist resort failing to appreciate that before entering into the JVA on 7th July, 2008, the society had got its bye-laws amended to include in the object clause, coconut tree plantation and promotion of tourism. The other notable amendment was to enable the society to enter into any agreement, deeds and contracts including JVA. The society also obtained diversion of part of the land allocated to it for commercial use.

The conditions incorporated in the JVA need to be considered together and not in isolation. A particular clause cannot be taken up and highlighted. A composite reading of the contents of the JVA do not conclusively establish that the entire land was transferred to the respondent no.4. It was a requirement on the part of the respondents to ascertain as to whether there had been any conscious decision to surrender of the entire land to the said respondent no.4. In the absence of such finding, the cancellation of the JVA cannot be construed to be an attempt on the part of the society to escape from the action taken by the authorities and such cancellation does not prove any admission on the part of the society towards commission of an act amounting to gross violation of the 4th principle of cooperation, i.e., autonomy and independence. Democracy demands

accountability and transparency in the activities of the society. There is no allegation that the society had failed to conduct its affairs based on democratic principles. The society, had in fact, acted in the interest of its members and in consonance with its bye-laws. The subsequent cancellation of the JVA itself suggests that the society was in control of its affairs. The cancellation of JVA stands explained by the society to be an act to set at rest all antagonistic controversies and such cancellation was not with an intent to avoid the rigors of the statute.

The measure prescribed in Section 57(2) is of grave consequence, equivalent to capital punishment as far as the society is concerned and the RCS, while exercising his power to direct winding up of a society, is required to exercise discretion. This involves subjective satisfaction on the part of the decision maker through a rational and reasonable mental exercise on the basis of materials disclosed before him. In the order dated 20th November, 2018 passed by the RCS and the order dated 18th March, 2019 passed by the appellate authority, the JVA has been branded to be an illegal one though the said JVA was executed by the society after availing necessary permission from the competent authority and upon approval of the amendment of bye laws.

The appellate authority in the order dated 18th March, 2019 had observed inter alia that "the Regulation of 1973 does not contain any provision wherein a violation of the nature herein above can be cured" though in the facts of this case it would not be an irrational inference that in cases where the society can cure the faults it is charged with - that would be one of the factors for revival of the society, moreso when, the members of the society are very poor and illiterate and they did not have the ability to foresee the effect of the clauses of JVA and as such no mala fide can be attributed to such action on the part of the society.

For the reasons discussed above, this Court is of the opinion that the order dated 20th November, 2018 passed by the respondent no.3 and the order dated 18th March, 2019 passed by the respondent no.2 are not sustainable in law and the same are, accordingly, set aside. The order dated 20th March, 2019 passed by the respondent no.5, being consequential to the orders dated 20th November, 2018 and dated 18th March, 2019, also cannot survive and the same is set aside.

The writ petition is, accordingly, disposed of.

There shall be, however, no order as to costs.

Urgent certified copy of this order, if applied for, be supplied to the parties forthwith upon compliance of usual formalities.