
(1992) 05 DEL CK 0014

In the Delhi High Court

Case No : Civil Writ Appeal No. 1520 of 1983

Brij Bhushan Gupta

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-05-1992

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1992) 23 DRJ 408

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : S.K. Dayal and A.K. Tiwari, for the Appellant;

Judgement

C.M. Nayar, J.

(1) This writ petition is directed against the order dated July 4, 1983, of respondent No.3 by which the allotment in favor of the petitioner of type V flat in Som Vihar Project at R.K. Puram, New Delhi, was cancelled. The petitioner has impugned this order and has prayed for a writ of Mandamus directing the respondents to cancel the order of cancellation and to restore the petitioner to the position of allottee of the flat and for a writ of certiorari for quashing the said order cancelling the allotment in his favor. The petitioner was admitted as a member of the Army Welfare Housing Organisation (hereinafter referred to as the A.W.H.O.). The said organisation has been established by Army order for providing houses to serving and retired military personnel. The petitioner moved an application before the said Organisation for allotment of flat in R.K. Puram, New Delhi, and he was allotted the said flat on March 25, 1981. by the respondent. The petitioner has further averred that this was done after satisfaction of the respondent that the petitioner's share was 1/ 5th in the Hindu Undivided Family (HUF) property in New Delhi. The other members of the Huf are the petitioner's mother, petitioner's wife, petitioner's son and petitioner's unmarried daughter. The area of the Huf property in total is alleged to be 280 sq. yds. The petitioner retired from service on September 30, 1981 and he made

payments directly and by obtaining loan from Housing Development Finance Corporation through the respondent to the tune of Rs.1,14,000/- at 14 per cent interest. The respondent A.W.H.O. vide communication dated September 23, 1979, informed the petitioner that the organisation registered his name for allotment of accommodation as per the details indicated in his "KN3 application form. The membership number was allotted to him and he was asked to refer to the number in all future correspondence with the said respondent. The petitioner on July 28, 1980, the requisite affidavit, as desired by the respondent. It may only be relevant to refer to the following paragraphs of the said affidavit dated July 28, 1980:

"1. That I/my wife or my minor and/or dependent children do not have/own or stand allotted a residential house/plot of land/flat or any other place of dwelling either in my name or in my dependent's name nor have any title, interest, lien or holding in any residential house/plot of land/ flat/ place of dwelling in Benami capacity nor by the virtue of holding a power of attorney or any other such similar documents so as to confer on me or my dependents, any title of ownership in residential property. plot of land, flat or dwelling house in the Union Territory of Delhi.

(2) That I/My wife/ dependent children are holding/right/interest or lien of ownership in a plot of land/flat/property in India. The details of property (Residential/ Commercial/all types of plots/ Huf property/ Joint Property) held in my name, or my wife's name or my dependent children's name together with share of each in such property is/are as under:

Place	Type	Of Size	ownership Name of owner	Individual Share	In Case Of HUF/JOINT Property
42,NDSE-1	Residential	256 sq.M.	Huf Lt.Col.B.B.Gupta	64.08 Sq.M.	New Delhi Building as karta of Huf 2. B-189, Dlf Colony(Sector- II)Faridabad plot 457 sq.m. Huf Mrs.Shashi Gupta 114.3 sq.m.

(3) That I am not owning or holding more than 2 (two) houses/ flats anywhere in India.

(4) That although I am a member of Hindu Undivided Family which owns a residential house in Delhi, my share as the copartner in the said house does not exceed 75 sq. meters." The respondent A.W.H.O. on 25th March, 1981, determined the eligibility for allotment of a house/flat in favor of the petitioner and advised him that he had been allotted a flat of Type V in project Som Vihar R.K. Puram, New Delhi. This allotment was subject to the Rules published in the Master Brochure, as amended from time to time and the Rules and bye-laws of the Delhi Development Authority (for short DDA). Paragraph 2 of this communication reads as follows:

"AFTER taking into account your eligibility for allotment of a house/flat and your

seniority in accordance with Rule 65 as laid down in the Master Brochure, we have pleasure in advising you that it has been decided to allot you a flat of type V in Project, Som Vihar, R.K.Puram, New Delhi. This allotment is subject to the Rules published in the Master Brochure, as amended from time to time, and the rules and bye laws of the Delhi Development Authority. The exact flat number and the floor and block in which it is located, will be determined on the basis of a draw by the Allotment Committee constituted under Rule 66 and will be intimated to you later. No request for change of floor/block/ Project will be entertained under any circumstances thereafter. This allotment is provisional and subject to your continuing our membership, making of payments in time as demanded from time to time, repayment of the loan if and when taken and discharge of your liabilities to us, and execution of necessary documents like lease/ conveyance deed."

(5) The respondent also indicated the other terms and conditions for the said allotment and a further communication was sent to the petitioner on February 9, 1982, and it may be relevant to refer to the following paragraph of the said communication:

"IT is seen from para 3 of the above letter that your house No. J-42 Ndse Part I New Delhi, has been assessed as Huf property by the Income Tax Authorities. However, on perusal of the assessment orders pertaining to the period 1970-71 and 1978-79, forwarded vide your above letter, do not show the names of the coparceners in the aforesaid property. You are, Therefore, requested to please forward the names of the coparceners as shown in the Huf return filed by you before the Income Tax Officer and also any other evidence available with you to show the property as Huf giving the details of the coparceners."

The above said query was raised in view of the fact that the Dda had made a bye-law dated 10th January, 1980, which reads as follows:

"ALLOTMENT of flats/houses in Delhi As per Delhi Development Authority rules, no allotment of house/flat will be made to following category of personnel: (a) owns a house or a flat or a plot of land in his/her/dependent's name. or (b) has a share in landed property in Delhi either-individually or as a member of Hindu Undivided Family exceeding 75 square yds."

(6) The said bye-law, therefore, indicated that any personnel, who has a share in the landed property in Delhi either individually or as a member of Hindu Undivided Family exceeding 75 sq. yds, shall not be eligible for allotment of flat/ house in Delhi. The petitioner submitted the reply and reiterated that his share in the house at J-42, South Extension, Part I, New Delhi does not exceed 75 sq. yds and the said property has been assessed as Huf property by the Income Tax Authorities.

(7) The respondent on April 22, 1982, addressed another communication, which is in the nature of show cause notice, to the petitioner. It was stated in the said show cause notice that under the Mitakshara law, as prevalent in Northern

India, no female member can enter the co-parcenary, as recognised by Hindu law and the co-parceners are the only co-owners with respect to property forming the alleged HUF. In view of this, there are only two co-parceners or co-owners and. as such, the share of the petitioner exceeded the limit of 75 sq. yds, as exempted under the Dda bye/law. The following paragraphs of the said communication read as follows:

"2.The documents forwarded by you under your above quoted letter have been examined and it is revealed that the residential property J-42, Ndse Part I has been assessed as Huf property under Income Tax Act. For determination of Huf under Hindu Law, the number of Co-parceners shown in the letter of the Income Tax Officer District Viii dated 3rd March, 1982 is not relevant. 3. Under the Mitakashara Law as prevalent in Northern India, no female member can enter the co-parcenary as recognised by Hindu Law and the co-parceners are the only co-owners with respect to property forming the alleged HUF. In view of this there are only two co-parceners or co-owners. As such your share in the said property exceeds the limit of 75 sq. yds exempted under Dda bye- law."

(8) The petitioner submitted the detailed reply to the said show cause notice on May 15. 1982, and reiterated that his mother, wife and unmarried daughter are also members of the Huf besides the petitioner and his son and, Therefore, the share in the Huf property in total is much below the limit as Fixed by the DDA. He further submitted that the Huf was recognised as far back as in the year 1969 by the Income Tax Authorities and the respondent had elicited all the necessary information before the order of allotment was made in his favor in the year 1979-1980. The petitioner also paid the amount, as demanded and. therefore ,respondents were estopped to raise the objection about the Huf status. The petitioner also referred to the judgments of the Privy Council in AIR 1937 36 (Privy Council) ; and of the Supreme Court in N.V. Narendranath Vs. Commissioner of Wealth-tax, Andhra Pradesh, and Commissioner of Wealth Tax, West Bengal III Vs. Smt. Champa Kumari Singhi and Others, , where a Hindu-Joint family was held to be consisting of all persons lineally descended from a common ancestor including their wives and unmarried daughters. The respondent did not accept the contention of the petitioner and held that as his share in Huf, as given out in his affidavit, was in excess of 75 sq. yds, he was ineligible ab initio for the allotment of the flat. The Board of Management, as a consequence, decided that the allotment of type V flat in R.K.Puram, New Delhi, made in favor of the petitioner, be cancelled and it was cancelled accordingly. However, the petitioner was given certain options of flats in other places, such as in Noida and in a station of 2nd or 3rd choice, as shown in the application, without loss of seniority etc.

(9) The main question, which arises for consideration in the present writ petition is, whether, the female members of the family , such as the wife and unmarried daughter of the petitioner would form part of the Hindu Undivided Family (HUF) and, Therefore, the share of each person was not in excess of 75 sq. yds, as laid

down by the Dda bye-law.

(10) The contention, raised by the respondent is, that Huf is just a person within the definition of person under the Income Tax Act for the purpose of assessment and in the, present context, the same is of no relevance. Under the Hindu Law, as well as, in the Mitakshara School of Hindu Law, to which the petitioner belongs, it is only the co-parcenary, which has an interest or ownership in the property to the exclusion of other members. The co-parcenary consists of only male members within the four degree of relationship. Therefore, the joint family consisted of members, who are united by tie of sapindaship, arising by birth, marriage or adoption and in view of this the family members of the petitioner, in no way, can be the members of the HUF. However, the Dda bye-law refers to Huf and share in landed property, which when read together means that it pertains to the male members, Constituting the co-parcenary, and at best it can be said that the petitioner and his son are the only male members in the co-parcenary and, Therefore, owners of the property. The petitioner accordingly was rightly held not entitled for allotment of flat.

(11) The learned counsel for the respondent no.3 has further contended that the writ petition is not maintainable since the said respondent was not p73 a "State" within the meaning of Article 12 of the Constitution of India. The dispute between the parties relate to contractual obligations and since the petitioner is bound by the Rules, Regulations and Bye-laws, as contained in the Master Brochure and Rules, as amended from time to time, the petitioner cannot seek the enforcement of the contractual liability arising out of the mutually agreed conditions of the bye-laws and that the petition under Article 226 of the Constitution of India is not maintainable. The supplementary rule No.2 prescribes that all the matters of disputes and differences etc. between the petitioner and respondent no.3 shall be referred to the Chairman of respondent no.3 who shall appoint an arbitrator in the matter and whose decision shall be final and binding on the registrants, as well as, on the organisation respondent no.3 herein.

(12) The first objection was raised as preliminary objection before this Court about the maintainability of the writ petition in view of the fact that A who is not a Government body and a State within the meaning of Article 12 of the Constitution of India. The said objection was referred to the Larger Bench on January 13, 1989. The Division Bench of this Court, on hearing the said reference and having heard the parties at length, held A who as a State within the meaning of Article 12 of the Constitution of India and consequently directed the Single Judge for decision on merits. This order was passed by the Division Bench on September 18, 1990, and it is not denied that this decision has become final between the parties. Therefore, the first objection raised by the respondent no.3 is misconceived and cannot be sustained. The second objection that the contractual obligation between the parties cannot be enforced by proceedings under Article 226 of the Constitution of India, has also no force. This point was not seriously contended before me and seems to be an after thought. The

powers of the High Court to interfere under Article 226 are wide enough to consider the validity of the order issued by an Authority and the same has to be construed liberally. Reference may be made to the following paragraphs in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, : "The term "authority" used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non fundamental rights. The words "any person or authority" p73 used in Article 226 are, Therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant.

(13) What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied.

(14) Here again we may point out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states:" To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract." We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available "to reach injustice whenever it is found". Technicalities should not come in the way of granting that relief under Article 226. We, Therefore, reject the contention urged for the appellants on the maintainability of the writ petition."

(15) The third objection that the petitioner has an alternative remedy by means of an arbitration clause and any dispute and differences between the parties shall be referred to the Chairman of A who, who shall appoint an arbitrator. The petitioner has contended that there was no such arbitration clause when he applied for membership of A who and the subsequent incorporation of this clause in the Brochure cannot adversely affect his right to seek relief in the present proceedings. No serious objection was raised by the respondent no.3 at any relevant time and, in any case, the availability of the arbitration proceedings does not debar the petitioner from taking recourse to ordinary legal remedies, such as the present proceedings. The respondent no. 3 also took no steps at any time to invoke the said clause before an appropriate Court and this point cannot be permitted to be raised at this belated stage.

(16) The point, which now calls for consideration is, whether, the wife and the unmarried daughter can be members of the Hindu Undivided Family along with the petitioner and his son. The status of the family as Huf has been accepted by the Income Tax Authorities and the objection raised herein by the respondent no.3 is that the female members of the family cannot form part of the Hindu Undivided Family. The bye-law issued by the Dda clearly indicates that no allotment of house/flat will be made to the category of personnel who has a share in the landed property in Delhi, either individually or as a member of Hindu Undivided Family exceeding 75 sq. yds. This bye-law does not say that the position has to be viewed only under the Mitakshara Law as prevalent in Northern India laying down that no female member can enter the co-parcenary as recognised by Hindu Law and the co-parceners are the only surviving male members with respect to the Huf property or coparcenary property. The enlarged meaning to the said bye-law cannot be imported which will go against the concept of Huf in the present context. The concept of Joint Hindu Family is well settled to consist of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters, while a Hindu co-parcenary is a much narrower body including only those persons who acquire by birth an interest in the joint or coparcenary property. In this context I may refer to paragraphs 212 and 213 defining Joint Hindu Family and Hindu coparcenary in Hindu Law by Mulla (Sixteenth Edition):

"212.Joint Hindu family. (1) A joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A daughter ceases to be a member of her father's family on marriage and becomes a member of her husband's family. 213. Hindu coparcenary.- A Hindu coparcenary is a much narrower body than the joint family. Generally speaking it includes only those persons who acquire by birth an interest in the joint or coparcenary property. These are the sons , grandsons and great grandsons of the holder of the joint property for the time being, in other words, the three generations next to the holder in unbroken male descent. "

(17) In Kalyanji Vithaldas and others (supra) the Privy Council clearly settled the position that the phrase "Hindu undivided family" is used in the statute with reference not to one school only of Hindu law, but to all schools. The following paragraph may be reproduced in this regard:

" BUT. after all, if the relevant Hindu law had been that the income belonged not to the assessed himself but to the assessed, his wife and daughter jointly, it is difficult to see how that association of individuals could have been refused the description "Hindu joint family." The phrase "Hindu undivided family" is used in the statute with reference not to one school only of Hindu law but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of Act the words "Hindu coparcenary"- all the more that it is not possible to say on the face of the Act that no female can be a member"

(18) In N.V. Narendranath (supra), the concept of Hindu joint family was

distinguished with co-parcenary and it was held that a Hindu joint family consists of all persons lineally descended from the common ancestors, includes their wives and unmarried daughters. Reliance was placed by this judgment on the law, already laid down by the Privy Council in *Kalyanji Vilhaldas and others* (supra). The Hon"ble Supreme Court in *The Commissioner of Wealth Tax, West Bengal* (supra) clearly distinguished the concept of Huf from Hindu co-parcenary. Reference may be made to the following paragraph in this judgment:

"THE only other provision in the Act in which the expression "Hindu Undivided Family" occurs is Section 20. It deals with assessment after partition of a Hindu Undivided family. u/s 3 of the Act it is the Hindu undivided family which is one of the assessable entities. It should be distinguished from a Hindu coparcenary which is a much narrower body than the joint family. A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu co-parcenary includes only those who acquire by birth an interest in the joint coparcenary property, being the sons, grandsons and great grandsons of the holder of the joint property. Thus there can be a joint Hindu family consisting of a single male member and widows of deceased coparceners. It must be remembered that the words "Hindu undivided family" are used in the Income tax statutes with reference not to one school of Hindu law only but to all schools."

(19) In *Surjit Lal Chhabda Vs. The Commissioner of Income Tax, Bombay*, , the Hon"ble Supreme Court further clarified and reiterated the law. The facts of the case are that the appellant- assessed, who was a Hindu received income from an immovable property, which was his self acquired property and he used to be assessed as an individual in respect of the income thereof. On January 26, 1956, he made a sworn declaration before a Presidency Magistrate that he had thrown the property into a family hotchpot in order to impress that property with the character of joint family property and that he would be holding that property as the karta of the joint p73 Hindu family consisting of himself, his wife and one child. The child was unmarried daughter. This raised the dispute as to whether the income of such property was to be assessed as income of Huf of which the assessed was a karta. The preliminary question, Therefore, to be decided was, whether, a single male, his wife and unmarried daughter can constitute the HUF. The Supreme Court held that since the joint and undivided family is the normal condition of the Hindu society, the absence of an antecedent history of jointness is inconsequential. The members of a Hindu family are presumed joint unless the contrary is established. "The strength of the presumption may vary from case to case, depending upon the degree of relationship of the members and the farther one goes from the founder of the family, the weaker may be the presumption . But, generally speaking the normal state of every Hindu family is joint and in the absence of proof of division, such is the legal presumption. The Court went on to hold that a joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughter , on marriage, ceases to be a member of her father's family and

becomes a member of her husband's family. In *Sushil Kumar and Anr Vs. Ram Prakash and Ors*, , the Hon"ble Supreme Court defined the concept of joint family, joint family property and co-parcenary. Reference may be made to paragraphs 17 and 18 of the judgment, which are reproduced as follows:

"17-THOSE who are of individualistic attitude and separate ownership may find it hard to understand the significance of a Hindu joint family and joint property. But it is there from the ancient time perhaps, as a social necessity. A Hindu joint family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. They are bound together by the fundamental principle of sapindaship or family relation ship which is the essential feature of the institution. The cord that knits the members of the family is not property but the relationship of one another. 18.h The coparcenary consists of only those persons who have taken by birth an interest in the property of the holder and who can enforce a partition whenever they like. It is a narrower body than joint family. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. The reason why coparcenership is so limited is to be found in the tenet of the Hindu religion that only male descendants up to three degrees can offer spiritual ministrations to an ancestor. Only males can be coparceners, (see *Hindu Law* by N.R. Raghavachariar, 8th edn., p. 202)"

(20) The facts of this case are not in dispute. The petitioner along with other members of his family, including his son and wife and unmarried daughter have been assessed on the basis of Hindu undivided family by the Income Tax authorities and the same is not denied by the respondent no.3. The only question, which is being raised, is that the wife and the daughter being Hindu females cannot be coparceners under Hindu Law. There is no doubt that the notion of Hindu undivided family and that of Hindu co-parcenary should not be mixed up for the purpose of Indian Income Tax Act. The unit of assessment under the Income Tax Act is the Hindu undivided family of which a female can be a member. A Hindu female cannot be a coparcenary under Hindu law. The bye-law , which is sought to be relied upon by the respondent states that only those personnel shall not be allotted a house or flat, who have a share in landed property in Delhi, either individually or as a member of Hindu undivided family exceeding 75 sq. yds. This bye-law does not lay down that the females have to be excluded in view of the fact that they cannot be coparceners under Hindu Law, which is a much narrower body, including only those persons who acquire by birth an interest in the joint or coparcenary property. The law also does not lay down any bar on the blending of a separate property with joint family property, which may be separate or self acquired of a member of joint Hindu family. The same may be impressed with the character of joint Hindu family, if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein. The position, Therefore, which emerges from the law, as stated above, is that the property of the petitioner in South

Extension consisting of 280 sq. yds. is impressed with the character of a property of Hindu undivided family and it is not necessary to import the concept of Hindu coparcenary property so that the female members such as the wife and unmarried daughter can be excluded. The share of each member including the female members, Therefore, does not exceed 75 sq. yds, as laid down by the Bye-law framed by the DDA.

(21) The petition, as a consequence, is allowed and the Rule is made absolute. The impugned order dated July 4, 1983 is set aside. There shall be no order as to costs.