

(2019) 01 CAL CK 0152
In the Calcutta High Court
Case No : Writ Petitions (Wp) No. 580 Of 2012

Chatter Singh Baid & Ors

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 31-01-2019

Acts Referred:

West Bengal Co-Operative Societies Act, 1973 — Section 71, 77, 86, 95, 95(3), 138, 139
Limitation Act, 1963 — Section 3, 5
Limitation Act 1963 — Article 58, 113
Constitution Of India, 1950 — Article 226

Citation : (2019) 01 CAL CK 0152

Hon'ble Judges : Rajasekhar Mantha, J

Bench : Single Bench

Advocate : Moloy Ghosh, Suman Dutta, Atish Ghosh, Abhrajit Mitra Sarvapriyo Mukherjee, Saptarshi Mukherjee, Rajshree Kajoria

Final Decision : Dismissed

Judgement

Rajasekhar Mantha, J.:-

1. In Course of hearing on the 29th of January it is informed that the petitioner No. 1 has died. The hearing is not interrupted as the society and its secretary are on record and the cause of action of the petitioner No.1 cannot be in any personal capacity.

1(a). The writ petitioner No.2 is a Co-operative Society called the Woodburn Park Cooperative Housing Society Limited. The Petitioner No.1 (since deceased) and 3 are its Chairman and Secretary respectively.

2. The writ petitioners are aggrieved by a judgment and order delivered by the West Bengal Co-operative Tribunal dated 28th February, 2012, in Appeal No. 11 of 2011 dated 5th January, 2011. By reason of such judgment and order an award passed by the Arbitrator in dispute case No. 3/RCS/2010 was affirmed by the Tribunal.

3. The facts of the case stated in brief are that in or about 1973-74 the 3rd respondent and his wife became Joint-members of one East End Apartment Co-operative Housing Society Limited (East End). They had paid admission fees of Rs.25/- and Rs.100/- towards share capital. The said Respondent No.3 also paid a sum of Rs.30,000/-towards proportionate cost of land and construction of housing units. The 3rd Respondent and his wife thus became entitled to one flat unit in East End.

4. East End already owned plot of land 11/1 B, Ekdalia Place, Kolkata-700019. Another plot measuring 1 Bigha and odd was purchased by the East End at 5B Woodburn Park, Kolkata-700020. Two multi-storied buildings containing one flat unit each were to be constructed on the said two plots of land.

5. Sometime in the year 1975 disputes and differences arose between the parties of East End and its Managing Committee and some members filed a writ petition in this Court being No. 205 of 1975.

6. The respondent No. 3 and his wife are stated to have resigned from membership from 11th of December, 1976. On the 9th of January, 1977 the resignation of the 3rd respondent and his wife are stated to have been accepted by the Managing Committee of East End. Unsigned copies of the said letter of resignation are available in the records. The originals have never seen the light of the day.

7. WP No. 205 of 1975 came to be disposed of and an appeal No. 504 of 1977 came to be filed from the said order.

8. By an order dated 15th December, 1978, a Division Bench of this Court disposed of the Appeal No.504 of 1977 and writ petition directing the Registrar, Co-operative Societies, West Bengal, to divide the assets and liabilities of East End into two separate societies/entities.

9. In the said writ petition No.205 of 1975 and proceedings thereunder one M. Chatterjee, Chairman of the Board of East End, filed an affidavit enclosing a list of members of the said society of East End being 118 which included name of the 3rd respondent. By a letter dated 10th January, 1979 the 3rd respondent and his wife are stated to have withdrawn the alleged resignation of their membership of East End. Even after the order dated 15th December, 1978, the said M. Chatterjee addressed a letter dated 16th June, 1979 to the DRCS enclosing a list of members of East End that included the name of the 3rd respondent and his wife.

10. Based on the order said order dated 15th December 1978 passed by the Division bench of this Court, the Deputy Registrar Cooperative Societies, (DRCS) passed a preliminary order dated 5th September, 1979 under Section 71 of the WBCS Act of 1973 dividing East End into two separate societies namely Ekdalia Co-operative Housing Society Limited to be located at Ekdalia property and Woodburn Park Co-operative Housing Society Limited (Woodburn) to be located

at Woodburn Park Property. In the said preliminary order published in the Official Gazette, the respondent No.3 was, however, declared a non-member. The said respondent was, however, deemed a creditor of Woodburn society for a sum of Rs.30,000/-. The said preliminary order of division dated 5th September, 1979 was published in the Official Gazette of the State on the 15th November, 1979.

11. In or about January, 1980 all persons who were declared non-members including the respondent No.3 raised objections to the preliminary order of the DRCS. A final order came to be passed by the DRCS rejecting all such objections, on the 23rd of June 1980. It is alleged by the 3rd respondent that he was not heard before such rejection nor was such final order communicated to him. A Managing Committee was constituted by the DRCS in respect of two societies on the 8th of August, 1980. The 3rd respondent alleged that the same was not communicated to him.

12. In 1981, the 13 persons who were declared non-members filed a writ petition before the Single Bench of this Court challenging the preliminary order dated September 1979 and final order dated 23rd June, 1980 and the order appointing Managing Committee, 8th August, 1980 passed by the DRCS, that was numbered CR 3922 of 1981. The 3rd respondent herein was impleaded as a party respondent to such a writ petition.

13. The said writ petition was allowed by a Single Bench of this Court on the 20th June, 1984 quashing and setting aside the orders of the DRCS referred to hereinabove. A Division Bench of this Court dismissed an appeal filed by Woodburn and remanded the matter to the DRCS for consideration afresh since the persons declared as non-members were not heard.

14. Woodburn challenged the order of the Division bench hereinabove before the Hon'ble Supreme Court by way of special leave petition which was numbered, Civil Appeal No. 2638 of 2005.

15. By an order dated 2nd April, 2008 the said Civil Appeal NO. 2638 of 2005 was disposed of by the Hon'ble Supreme Court. The order is required to be and is set out:-

"1. Challenge in this appeal is to the judgment of a Division Bench of the Calcutta High Court. A learned Single Judge had allowed the writ petition (C.R. No. 3922(W) of 1981) filed by the respondents by setting aside the order dated 23.6.1980 passed by the Deputy Registrar of Co-operative Society. Learned Single Judge had directed allotment of flats made in respect of the Society by the first Managing Committee of the appellant society or the successor of the Managing Committee and held that the same was to be given effect to. Learned Single Judge further held the appointment of Special Officer to be unnecessary and discharged his appointment. He further directed appointment of an Administrator by Registrar of Co-operative Society and directed that all the papers were to be handed over to the Administrator. The appeal before the Division Bench was dismissed by the impugned judgment.

2. Background facts in which the dispute arose are as follows:

The East End Apartment Co-operative Housing Society Ltd. (hereinafter referred to as the "Society") owned two plots of land namely premises No.5B, Woodburn Park Road, Calcutta 700020 and 11/1B, Ekdalia Place, Calcutta-700019. The said society wanted to construct two multistoried buildings at the said two plots of land for the residence of its members. The appellant applied for allotment of flats at premises No.5B, Woodburn Park Road. The society had already constructed a multi storied building at 11/1B, Ekdalia Place, Calcutta consisting of 21 flats.

A dispute arose between the members of the society and the Managing Committee and the matter was brought before the High Court. Ultimately on 15th December, 1978 the Appellate Court directed the Registrar of Co-operative Societies to take steps in accordance with the provisions of the West Bengal Co-operative Societies Act, 1973 (in short 'the Act') for division of the assets and liabilities of the co-operative Society situated at Ekdalia Place and Woodburn Park Road.

Pursuant to the order passed by the Division Bench the Registrar of Cooperative Societies passed a preliminary order on 5th September, 1979 purporting to divide the assets and liabilities of the society. It is alleged that the Registrar recognized 38 members of Woodburn Park society and the names of some members were not mentioned in the preliminary order. They objected to the non-inclusion of their names and filed their objections but they were not heard and their objections were not disposed of. Therefore, they filed a writ petition. Their grievance was that while preparing the final order no notice was given to them and the final order was passed on 23rd June, 1980. Then on 8th August, 1980 further order was passed by the Deputy Registrar purporting to appoint the Managing Committee of the said Woodburn Society without hearing them and disposing of their objections.

Both the orders were challenged before the High Court by filing the writ petition, which was disposed of in the manner noted above.

In appeal, the Division Bench was of the view that the appeal was without merit and was directed to be dismissed. It was noted by the Division Bench that the learned Single Judge had correctly decided the matter since order dated 23rd June, 1980 was found to be bad and subsequent order dated 8th August, 1980 appointing the Managing Committee cannot survive. If the membership issue had been decided in favour of those persons it was not known what would have been the shape of the Managing Committee. The Registrar was directed to hear the preliminary objections filed by the members in accordance with law to decide who are the members and who are not. After the disposal of the question of membership by the Registrar, the Managing Committee was to be formed in accordance with law. Accordingly, the Division Bench was also of the view that the Managing Committee appointed after 8th August, 1980 had no legal sanction and it was open to the Administrator to take appropriate action in accordance

with law.

3. Learned counsel for the appellant submitted that the basic question is whether enquiry can be conducted under Section 77 or 86. To the limited extent as to whether one was a member has to be tested on the question of bifurcation under Section 138. There is a statutory presumption on the basis of entries. If somebody's name is not there, statutory presumption is that he is not a member and audit report is a prima facie evidence for 1979-80 in terms of Section 139. The list of members and the list of shareholders clearly show the number to be 60. The year 1979-80 was the period immediately prior to bifurcation. The total strength of 1979-80 was 124 and the number of shareholders was also 124. In 1978-79 the number was 60.

4. Learned counsel for the respondents supported the orders.

5. There are certain factual aspects involved here. In the writ petition there was no mention about the alleged resignations. The letters of resignation dated 20.8.1976 are on record. There is also no denial of the writing or signatures. Out of 38 who are claimed to have resigned 13 persons filed objection, while rest did not. In the background of the factual position it would be appropriate to set aside the High Court's orders. Let the matter be considered by the Registrar afresh within a period of 6 months. The enquiry will be restricted to decide the question whether there was any resignation and whether letter of resignation was signed by the objectors and whether the resignation was approved by any resolution and on the question of refund of share money and the effect of refund and acceptance. The registrar shall also consider the other materials which have relevance so far as resignation is considered. It would be open to the Registrar to call for the records and the documents from the parties within a period of 6 months. There would be no allotment to 13 persons who raised objections until decision is taken by the Registrar.

6. The appeal is disposed of accordingly. No costs."

16. It is evident and clear from the aforesaid order that the Registrar was directed to decide question afresh as to whether there was any resignation or whether a letter of resignation was signed by the objectors (all persons who challenged the order declaring them as non- members). Certain other directions were issued upon the Registrar as regards conducts his enquiry. The 3rd respondent claims that he had no notice of the proceeding of the Hon'ble Supreme Court.

17. The Registrar took up the matter and heard 13 objectors and held that they were members of 'Woodburn'.

18. Three letters were caused issued by the 3rd respondent to the Registrar Co-operative Societies dated 14th January, 2010, 18th May, 2010 and 18th December, 2009 seeking a declaration that he was a member of Woodburn Park. The DRCS KMAH, referred the dispute to arbitration and appointed an arbitrator.

By reason thereof there has been condonation of delay under Section 95(3) of the WBCS Act, 1973. Admittedly, the order of reference to the Arbitrator by the Registrar was not challenged at any point of time by Woodburn.

19. The 3rd respondent filed a plaint before the arbitrator and the writ petitioner filed a written statement. The matter was heard and disposed of by the arbitrator recognising and holding the 3rd responded as a lawful member of Woodburn. An award dated 5th January, 2011 in dispute 3/RCS of 2010 in this regard was passed by the said Arbitrator.

20. The writ petitioner carried the said award in appeal before the West Bengal Co-operative Tribunal, which was registered as Appeal No. 11 of 2011 and was disposed of on 20th February 2012 upholding the award. The writ petitioners are aggrieved by the same, and hence the writ petition.

21. The principal ground urged before this Court is that the Arbitrator had failed to notice that the 3rd respondent's claim for membership of Woodburn was hopelessly barred by limitation. They assert that the cause of action of the 3rd respondent if any arose when their withdrawal of resignation was denied by East End immediately after 10th of January, 1979. Even if this is not taken to be correct the writ petitioners argued that the cause of action of the Respondent No.3 arose on the 23rd of June, 1980 when the DRCS passed his final order.

22. It appears to this Court that the 3rd respondent contended in Paragraph 2 (9) of the plaint before the Arbitrator that they had no knowledge of the final order dated 23rd June, 1980 which has not been controverted by the writ petitioners at paragraph 14 of their written statement before the Arbitrator. The said final order came to be challenged in a writ petition which was finally disposed of by the Supreme Court on 2nd April 2008.

23. On merits the Arbitrator found that the 3rd respondent was recognized as member of East End in an affidavit dated 14th February filed by M. Chatterjee in writ petition No. 205 of 1975. The said affidavit was followed by a letter dated 10th January, 1979 of the said M. Chatterjee addressed to the DRCS, enclosing thereof a list of members of East End which included the 3rd respondent. The 3rd respondent was also a party to the 2nd writ petition being CR No. 3922 (W) of 1981 which quashed the preliminary and final orders of the Registrar declaring inter alia the 3rd respondent as non-members.

24. The said matter was finally decided by the Hon'ble Supreme Court that had allowed the objectors raised the dispute before the ARCS as regards their alleged resignation. The expression "objectors" used by the Hon'ble Supreme court in its order dated 2nd April, 2008 needs to be ascertained from the order as a whole particularly as set out in Paragraph 14 hereinabove.

25. The argument of the writ petitioners that the expression objectors was restricted to only 13 petitioners before the Hon'ble Supreme court cannot be accepted. This is so as term 'objector' was used in the earlier paragraph in the

order dated 2nd April 2008 as set out hereinabove connoted all persons who objected to having been declared non-members and hence the 3rd Respondent could definitely take benefit of the order passed by the Hon'ble Supreme court referred to hereinabove.

26. It is true that some of such persons declared as non-members did not eventually seek remedy. However, since the 3rd respondent had objected to the preliminary and final orders of the Registrar dated 23rd June, 1980 and 8th August, 1980, he was entitled to maintain the reference before the Registrar.

27. There is yet another way of looking at the matter. The Hon'ble Supreme Court in the order aforesaid did not restrict any other objectors from raising disputes before the Registrar for being declared a non-member. Since the order of the Single bench in writ petition being CR 3922 (W) of 1981 and the Division Bench Judgment in FMAT No. 1971 of 1984 dated 1st August, 2002, was set aside by the Single Bench, all objectors declared by the High Court as members, must be deemed to have being authorised by the Hon'ble Supreme court to agitate their grievance as regards their alleged resignation from the membership of 'East End' before the Registrar under the West Bengal Co-operative Societies Act of 1973.

28. The petitioners further argued on the issue of Limitation that even assuming for the sake of argument that the 3rd respondent's cause of action arose out of the judgment of the Hon'ble Supreme Court dated 2nd April, 2008 in Civil Appeal No. 2638 of 2005, Sub Section 3 of Section 95 of the WBCS Act, 1973, prescribed a period of two months from the date of accrual of cause of action (i.e.2 months from 02-04-2008) for seeking remedy before the Registrar.

29. Sub-Section 3 of Section 95 is set out hereunder:-

"95. Disputes to be referred to Registrar.- (1) Any dispute concerning the business of a co-operative society capable of being the subject of civil litigation or any dispute relating to the affairs of a co-operative society (other than a dispute relating to the disciplinary action taken by a co-operative society against the paid employees of the co-operative society or the terms and conditions of service of the paid employees of the co-operative society) shall be referred in the prescribed manner to the Registrar, if the parties thereto are among the following:-

(a).....

(b).....

(c).....

(d).....

(2) Any dispute mentioned in sub-section (1) other than a dispute relating to recovery of money shall be referred to the Registrar within two months from the date on which the cause of action arises.

(3) Notwithstanding anything contained in this section or in any other law for the time being in force, the Registrar may admit any dispute after the expiry of the period of limitation provided in sub-section (2) if the applicant satisfies the Registrar that he had sufficient cause for not referring the dispute within such period of limitation, and the dispute so admitted shall not be barred by limitation."

30. The delay in approaching the Registrar to take benefit of the order by the Hon'ble Supreme Court (supra) was about 2 years. The 3rd respondent was, however, required to explain the period of two years having lapsed after the decision of the Hon'ble Supreme Court. It appears from the facts that on 30th March, 2009 that the Registrar had upheld the right of membership of 12 out of 13 members who were petitioners before the Hon'ble Supreme Court. The petitioner has raised his first complaint before the Registrar by letter dated 18th December, 2009. The Registrar did not find the issue of delay to be fatal and condoned of delay in raising the dispute, under the provisions of Section 95(3) of 1973 Act having found sufficient cause. The petitioners have not challenged the order of reference by the Registrar condoning delay under Section 95(3) at any point of time ever. They must, therefore, be deemed to have accepted the said order. There is no whisper in the writ petition against the order of reference or condonation of delay by the Registrar under Section 95(3). The petitioners are thus estopped from raising the Question of Limitation before the Arbitrator. The Arbitrator need not and could not have entered into the Question of Limitation as it has been decided by the Registrar under Section 95(3) of the 1983 Act.

31. In answer to this Counsel for the 3rd respondent would argue and first rely upon the judgment of the Hon'ble Supreme court in the case of Union of India and others Vs. West Coast Papers Mills Limited reported in (2004) 2 SCC 747. In the said decision, West Coast the Respondent therein was transporting goods through railways and was aggrieved by revision of the freight with effect from 1st February, 1964. West Coast therein challenged the revision of freight before the Railway Rates Tribunal which declared the rates unreasonable on 18th April, 1966. The railways moved the Hon'ble Supreme Court by way of SLP which was dismissed on 14th October, 1978 allowing the parties to move the High Court. The respondent filed a writ petition in the year 1972 before the High Court which was disposed of granting liberty to the parties to file a suit. Two suits came to be filed by West Coast thereafter in December, 1973 and April, 1974. It was argued by the Railways that the application was barred by limitation. The Hon'ble Supreme Court held in reference to Article 58 and 113 of the Limitation Act 1963, that while under Article 58 the time to sue would run from the date on which, "the first right to sue accrued", whereas under Article 113 the time is stipulated to run from the date on which the "right to sue accrue". It was clarified therein that pendency of judicial proceedings had kept order passed by the railways therein, in jeopardy until disposal thereof. The suit was, therefore, held to be filed within limitation after the High Court had observed that disputed questions of fact ought to be agitated by way of a civil suit. Paragraphs 19, 21

and 26 of the said decision are set out herein below.

"19. Articles 58 and 113 of the Limitation Act read thus:

Description of suit

Period of limitation

Time from which Period begins to run

58. To obtain any other Three years When the right to sue Declaration

Three years

When the right to sue Declaration first accrues.

113. Any suit for which no Three years When the right to sue Period of limitation is accrues. Provided elsewhere in this Schedule.

Three years

When the right to sue Period of limitation is accrues.

21. A distinction furthermore, which is required to noticed is that whereas in terms of Article 58 the period of three years is to be counted from the date when "the right to sue first accrues". In terms of Article 113 thereof, the period of limitation would be counted from the date "when the right to sue accrues". The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose.

26. Despite the rigours of Section 3 of the Limitation Act, 1963, the provisions thereof are required to be construed in a broad-based and liberal manner. We need not refer to the decisions of this Court in the matter of condoning delay in filing appeal or application in exercise of its power under Section 5 of the Limitation Act."

32. Mr. Ghosh, Learned Senior Advocate, would argue in reference to Para Nos. 16 and 26 of the said judgment that the same cannot benefit the 3rd Respondent. I am unable to accept the said contention. The said decision in my view applies in the instant case. The cause of action to approach the Registrar must be deemed to have arisen only after 2nd April 2008 decision of the the Hon'ble Supreme court decision in Civil Appeal No. 2638 of 2005, until when, since 1980, the 3rd respondent's right to membership of was in jeopardy.

33. It has been submitted by the parties that limitation is a question of jurisdiction. Jurisdiction itself is a mixed question of fact and law.

Since two concurrent views have been taken in the facts by two fora below, the

same, in this court's view, should not normally be upset more so under Article 226 of the Constitution of India. This position of law is not well-settled.

34. In view of the above and since the two fora specialised statutory below after due appreciation in evidence on record have found in favour of the 3rd respondent on merits this Court would be slow to interfere with such findings under Article 226 of the Constitution of India. Even otherwise I do not find any serious perversity in the impugned orders on this score. It is also a settled principle of Administrative law that if two views are possible, a writ court will not substitute its own views on that of an authority below.

35. Reliance has been placed by Counsel for the petitioner on a decision of a Co-ordinate Bench of this Court in WP No. 395 of 2009 being judgment dated 30th August 2011 where Woodburn had challenged the order dated 31st March, 2009 passed by the Registrar, Co-operative Societies allowing 12 out of 13 petitioners before the Hon'ble Supreme Court as members Woodburn. By the said judgment and order dated 30th August, 2011 a Co-ordinate Bench of this Court had set aside the order passed by the Registrar and remanded the matter back to him for consideration afresh. The said judgment was challenged before the Division Bench of this court in three several writ petitions by three of challenged aggrieved members. The three appeals were allowed by a Division Bench of this Court in APO No. 331, 333 and 394 of 2011 by judgment and order dated 25th September, 2018.

36. Counsel for the petitioners also relied upon a judgment of the Co-ordinate Bench of this Court in respect of order passed by the Registrar in favour of the legal heirs of one deceased declared non-member Dwarakadas Kothari in favour of his legal heirs, being WP NO.813 of 2013. The said writ petition was allowed by a judgment and order dated 24th December, 2014 wherein the order of the Arbitrator and Appellate Tribunal thereunder were set aside. Learned Counsel for the 3rd respondent submits that the said judgment is pending challenge in appeal. I have considered the said judgement and with due respect to His Lordship, am unable to persuade myself with the views expressed therein

37. The writ petitioners would lastly argued that the 3rd respondent was fence sitter and was conveniently awaiting the result of the decision of the Hon'ble Supreme court and also the views of the arbitrator and Tribunal in the matters pending before them filed at the instance of 13 objectors and hence should not be allowed to be inducted as a member of the society.

38. This court notices a very vital fact that the 3rd Respondent had contributed a sum of Rs.30,000/- with which the property at Woodburn Park purchased at Rs.22 Lakhs near about 1976-77 has not been returned or even offered to be returned. If one calculates equivalent share of land of Rs.30,000/- in the property of the respondent No. 3 the current market value of the property would definitely saddle Woodburn and its current members with a huge liability.

39. Lastly, this Court also notices that the proceeding between the 3rd

respondent and Woodburn is not in the nature of a private dispute between two individuals in a suit for specific performance. The President and Secretary of Woodburn, who seem to have over-zealously crusaded and fought the non-members cannot have any personal interest in opposing them as the society comprises of members and shareholders. The misplaced and dogged opposition of the petitioner No.1 and 3 to the persons who had lawfully become members in East End after having paid a valuable share towards purchase of land meant for construction of a multi-storied building in which all members have equal right to reside, is contrary to the spirit of the Co-operative jurisprudence.

40. The authorities conferred with powers to decide admission of a member or otherwise within meaning of statute have held in favour of the 3rd respondent that he has wrongfully been declared as non-member. The opposition and the technical grounds urged by the writ petitioners cannot be bona fide.

41. In view of the aforesaid observation the writ petition was dismissed with costs assessed at Rs.11,000/- payable to the petitioners to the 3rd respondent.

42. Urgent certified server copy of this judgment, if applied for, shall be given to the parties.