

(2009) 08 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No. 2820 of 2002 and Civil Application No. 1572 of 2006

Deviprabha Nanasaheb Deshmukh

APPELLANT

Vs

Laxminagar Co-operative Housing Society Ltd. and Others

RESPONDENT

Date of Decision : 03-08-2009

Acts Referred:

Arbitration Act, 1940 — Section 30
Constitution of India, 1950 — Article 166

Citation : (2009) 6 BomCR 157 : (2010) 3 MhLj 32

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : T.G. Gaikwad, holding for . and V.D. Salunke, for the Appellant; M.A. Tripathi, h/f., V.G. Shelke and M.L. Dharashive, AGP for Respondent Nos. 4 to 6, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Shinde, J.—This petition is filed challenging the judgment and order passed by the Secretary, Co-operation Department i.e. respondent No. 6, dated Nil passed by respondent No. 6 in revision petition No. Rev. 27/2001/CR-35/15-C.

2. The brief facts of the case, as narrated in the petition, are as under:

It is the case of the petitioner that she is member of respondent No. 1 Society. The said society came to be registered on 4.11.1972. Accordingly, the petitioner has deposited an amount of Rs. 150/- as against the share. The petitioner purchased three shares of Rs. 50/- each. Respondent No. 1 society issued share certificate No. 346 in favour of the petitioner. It is the further case of the petitioner that the petitioner has followed the bylaws of the society and paid amounts from time to time. However, the society respondent No. 1 in its special general meeting dated 26.7.1992 passed resolution No. 7 and cancelled the membership of the petitioner. The society had also issued letter dated 2.8.1992 thereby informing the petitioner that her membership is cancelled and sent a cheque for an amount of Rs. 10,178/- to the petitioner. It is further case of the

petitioner that letter dated 2.8.1992 issued by respondent No. 1 is nothing but an expulsion of the petitioner from the society, which is required to be done u/s 35 of the Maharashtra Co-operative Societies Act 1960 (hereinafter for the sake of brevity referred to as the 'said Act').

It is further case of the petitioner that from time to time representations were made to the Government authorities mentioning therein that the resolution passed by respondent No. 1 society expelling the present petitioner as member of the society is in contravention of Rule 3 of the Maharashtra Co-operative Societies Rules 1961 (hereinafter for the sake of brevity referred to as the 'said Rules'). However, no cognizance was taken by the authorities. In the meanwhile, liquidator came to be appointed on respondent No. 1 Society. The petitioner made representation on 9.3.1999 to the Liquidator requesting to consider her claim and decide the right of the petitioner. However, no action was taken by the liquidator.

It is further case of the petitioner that meanwhile, respondent No. 1 society has created record to show that the plot which was allotted to the petitioner has transferred to respondent No. 3. It is further case of the petitioner that expulsion of the petitioner as member was without giving an opportunity to the petitioner to put forth her case and said resolution is without approval of the Assistant Registrar.

It is further case of the petitioner that she filed appeal No. 41 of 1999 before respondent No. 5 u/s 152 of the said Act challenging the resolution expelling her as member of the respondent No. 1 society. The Divisional Joint Registrar, Co-operative Societies by judgment and order dated 20.1.2000, allowed the appeal filed by the present petitioner.

3. Respondent No. 3 herein filed revision before the State Government being aggrieved and dissatisfied with the judgment and order dated 20.1.2000 in appeal No. 41 of 1999. The Revisional authority has set aside the judgment and order passed by the Divisional Joint Registrar, Co-operative Society in appeal. Hence, this petition, filed by the petitioner.

4. On perusal of the compilation of the petition, it appears that respondent No. 3 has filed reply to the petition on 26.9.2003. This matter was heard by this Court for admission on 28.1.2003 and Rule was issued in the petition. Hearing of the petition was expedited. Interim relief in terms of prayer Clause 'C' was granted. Today, the matter is taken up for final hearing.

5. Learned Counsel for the petitioner submits that the judgment and order passed by the Divisional Joint Registrar is passed after perusal of the record and the documents the same is well reasoned judgment and the said judgment and order is set aside by the Revisional authority, without calling record of the case. It is further submitted that the petitioner is a member of the society and she has deposited entire amount of membership, which was required to be deposited in accordance with the bylaws. It is further submitted that by way of resolution

without affording opportunity to the petitioner, no membership can be cancelled. According to the learned Counsel, the resolution passed by respondent No. 1 society is in utter disregard to the provisions of Section 35 of the said Act, since no notice or opportunity of hearing was afforded to her before resolution was passed. It is further argued that while entertaining revision there is no compliance of Rule 26 r.w. Rule 29 of the said Rules, which contemplates that any resolution passed by the Society expelling member should be approved by the Assistant Registrar. It is further argued that the order passed in revision by the State Government is without jurisdiction, the Revisional powers u/s 154 of the said Act are vested with the State Government. The business rule are framed under Article 166 of the Constitution of India and powers to decide the appeal or revision are delegated to the Minister on behalf of the Governor of Maharashtra. Under Rule 6 of the said Rules those powers are delegated to the cabinet Minister and therefore, the said powers delegated under Article 166 of the Constitution of India, cannot be exercised by the Secretary. Learned Counsel further invited my attention to the judgment delivered by the Full Bench in the case of Sheikh Mohamed Fatemohamed and etc. Vs. Raisuddin Azimuddin Katil and Others, etc., to contend that the order passed by the Secretary in revision is without jurisdiction. It is further argued that the administrator who was appointed to look after the affairs of the respondent No. 2 society had no power to grant or cancel the membership. In respect of his contention, learned Counsel placed reliance on the judgment of this Court in the case of Ballumal A. Jaisingh Vs. J.J. Builders and Others, . Learned Counsel has taken me through the contents of the pleading in the petition and the annexures thereto as well as the order passed by the revisional authority. He submitted that the point of limitation was not raised by other side before the appellate authority. Learned Counsel for the petitioner ultimately submits that the writ petition deserves to be allowed.

6. Learned Counsel appearing for respondent No. 3 has invited my attention to the provisions of Section 152 of the Societies Act and more particularly Sub-section 3 of Section 152 and submitted that if the petitioner was aggrieved by the resolution passed by respondent No. 1 Society, expelling the petitioner, the appeal should have been filed within two months from the date of resolution. He further submits that even if it is admitted that the petitioner was not aware about passing of resolution, even then there was communication dated 2.8.1992 by respondent No. 1 to the petitioner about her expulsion as member as per the resolution No. 7 passed by the general body meeting held on 26.7.1992. The petitioner has replied the letter dated 2.8.1992 by her representation dated 17.8.1992. On the basis of the Exh. E and Exh. F, counsel for the respondent submits that it is not the case of the petitioner that the petitioner had not informed about passing of the resolution dated 26.7.1992. Learned Counsel for the respondent submits that the letter addressed by petitioner itself indicate that the petitioner was aware of passing of the said resolution dated 26.7.1992. Therefore, according to the respondents, the petitioner should have filed appeal within two months at least from 2.8.1992 or 17.8.1992. Learned Counsel invited

my attention to the provisions of Section 153 of the Societies Act and submitted that the authority has no power to condone the delay unless application is filed as required u/s 153 of the Societies Act for condonation of delay. The judgment and order passed in appeal is silent about the delay in filing the appeal. The appeal should not have been entertained by the Divisional Joint Registrar since it was time barred and no application was preferred by the petitioner to that effect before the appellate authority. Learned Counsel further submits that the petition is totally silent about filing any application for condonation of delay as required u/s 153 of the Societies Act. Therefore, learned Counsel for the respondent submits that the order passed by the revisional authority has been rightly passed when the appeal cannot be entertained, which is filed beyond time, without application for condonation of delay. There was no question of further adjudication of the said appeal. Learned Counsel further submits that the appellant was hopelessly time barred and same was filed in 1999 though cause of action arose in 1992.

7. Learned AGP submits that non filing of application for condonation of delay in filing the appeal and entertaining the appeal by the appellate authority, goes to the root of the matter and therefore, once the appeal was time barred, there was no question of further adjudication by the appellate authority of the said appeal in the absence of application of condonation of delay, as required u/s 153 of the said Act. Learned AGP further submits that even the point that the resolution passed by the general body of respondent No. 1 Society was without notice and without hearing the petitioner should have been taken in appeal, if the appeal would have been filed within time but in the instant case the appeal was filed in the year 1999 challenging the resolution which was passed in July, 1992, therefore, the Revisional authority is perfectly justified in entertaining the revision and setting aside the order passed by the appellate authority.

8. After hearing learned Counsel appearing for the petitioner, learned Counsel for respondent No. 2 and learned AGP for respondent State, I am of the considered view that the Divisional Joint Registrar should have followed the provisions of Sub-section (3) of Section 152 of the said Act, which reads thus:

152(3) An appeal under Sub-section (1) or (2) shall be filed within two months of the date of the communication of the order or decision.

Sub-section 3 of Section 152 mandates that the appeal under Sub-section (1) or (2) shall be filed within two months from the date of communication of the order or decision. Further Section 153 of the said Act provides that appeal may be filed against any decision or order within specified period, the appellate authority may admit the appeal after expiry of such period, if the appellant satisfied the appellate authority that they had sufficient cause for not preferring the appeal within the said period.

9. In the instant case, the Divisional Joint Registrar, though exercised powers of appeal has not followed provisions of Sub-section (3) of Section 152 and the provisions of Section 153 of the said Act. There is no single word in the judgment

passed by the Divisional Joint Registrar about any application filed for condonation of delay or he has considered the same as per the provisions of Sub-section (3) of Section 153 of the Societies Act.

The authority who has conferred the valuable powers of appeal cannot be said to be ignorant about the substantial provision of statute and cannot bypass the express provisions and decide the matter on merits unless satisfied itself that appeal is within time limit prescribed by the statute. The judgment and order passed by the Divisional Joint Registrar in utter disregard to Sub-section (3) of Section 152 and Section 153 of the Societies Act goes to the root of the matter.

10. The petitioner may have good case on merits as contended by the learned Counsel appearing for the petitioner, however, the appeal filed by the petitioner herein should not have been entertained by the appellate authority on merits ignoring that there was stipulation of two months for filing of appeal from the date of communication of order or decision.

11. The Secretary in revision has rightly entertained the point raised by respondent No. 3 that the appeal filed by the petitioner herein was hopelessly time barred, there was no application filed by the petitioner for condonation of delay, the Divisional Joint Registrar has ignored the provisions of Sub-section (3) of Section 152 and 153 of the said Act. The Secretary has come to the definite conclusion that the appellate authority was not empowered to entertain the appeal which was hopelessly time barred in absence of application for condonation of delay or any prayer to that effect as contemplated u/s 153 of the Societies Act.

12. The learned Counsel for petitioner relying on the judgment of Full Bench of this Court in the case of Sheikh Mohamed Fatemohamed and etc. (supra) has tried to contend that Secretary is not empowered to entertain the revision. On careful perusal of the Full Bench judgment, it appears that the Full Bench has considered the delegation of powers to entertain the appeal and not of revision. This court had occasion to consider this point in the case of Purna Cooperative Sugar Factory and Anr. v. Jaiparakash s/o Shankarlal Mundada and Ors. reported in 2003 CTJ 484 and after considering the Full Bench judgment as well as other judgments in para 22, this Court has held that,

The language used in Section 152 and Section 154 is totally different. Sub-section (4) of Section 154 clearly provides for delegation of power of the State, to be exercised also by an officer of the rank of Secretary to Government. There is no provision in Section 152, akin to the provision contained in Sub-section (4) of Section 154.

Therefore, in the result this Court held that the Secretary was justified in entertaining the revisional powers u/s 154 of the Maharashtra Co-operative Societies Act therefore, in view of the judgment cited supra, which has considered even the judgment of the Full Bench and came to the conclusion that under Sub-section 4 of Section 154 of the said Act the State Government can

delegate the revisional powers to the Secretary, therefore, the submission of the learned Counsel for the petitioner that the Secretary who had entertained revision in this case had no jurisdiction to entertain the same is liable to be rejected.

13. Taking over all view of the matter, since the appeal filed by the petitioner herein before the Divisional Joint Registrar was filed in the year 1999 which was delayed almost by seven years and which was without any application for condonation of delay should not have been entertained. The Divisional Joint Registrar ignoring the provisions of Sub-section (3) of Section 152 and Section 153 of the Societies Act, has entertained the appeal giving total go bye to the said provisions. For filing appeal before any authority or quasi judicial authority, statutory limitations are prescribed and therefore, even registration of appeal and entertaining the same on merits itself was not proper in absence of application for condonation of delay and without observance of Section 153 of the Societies Act.

This Court had occasion to consider the provisions of Section 30 of the Arbitration Act 1940 in the case Ballumal A. Jaisingh (supra) and has considered the point that whether in absence of proper application to condone the delay whether the court has jurisdiction to condone the delay? The Court after appreciating the facts involved therein has held that the court is prevented from taking cognizance of any matter if it is barred by limitation. The court can exercise the jurisdiction in which the application to that effect is made and in absence of the application, the court will have no jurisdiction to take up the matter and consequently the court has no power to condone the delay.

14. Therefore, viewed from any angle the order passed by the Revisional authority does not call for any interference in the writ jurisdiction and the same is confirmed. The writ petition is dismissed. Rule discharged. Interim relief is vacated.

15. Civil application No. 1572 of 2006, in view of dismissal of writ petition, does not survive and the same is accordingly disposed of.