
(1995) 12 CAL CK 0040
In the Calcutta High Court
Case No : C.O. No. 11804 (W) of 1995

Dilip Kumar Dey

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 14-12-1995

Acts Referred:

Constitution of India, 1950 — Article 226

West Bengal Government Premises (Tenancy Regulation) Act, 1976 — Section 3(2)

Citation : (1996) 1 CALLT 307

Hon'ble Judges : Rabin Bhattacharyya, J

Bench : Single Bench

Judgement

Rabin Bhattacharyya, J.—The petitioner has initiated the instant writ application for mandamus commanding the respondent to set aside, rescind or withdraw the annexure-J dated 19.6.95, certiorari, Rule NISI, injunction and for other consequential reliefs.

2. The gravamen of the allegations which generated the initiation of the writ application is that the petitioner was a lawful tenant at Flat No. 0/2 Maniktala Govt. Housing Estate, saddled with obligations to fulfil the conditions. The rent, as determined, according to the terms of the tenancy, was for sum of Rs. 235/- payable per month inclusive of occupier's share of taxes and external service charges bereft of payment of electricity charges.

3. The petitioner, in due performance of the agreement, continued in possession. With the passage of time, the petitioner applied for withdrawal of joint membership of Iswarchandra Vidyasagar Samabay Niwas Ltd. a different housing at Bagmari which was acceded to by the respondent opposite parties dated 10.7.92.

4. In the premises, the petitioner was not armed with any flat in the said Niwas and the provisions of the West Bengal Premises (Tenancy Regulation) Act, 1976 became inoperative. The petitioner never owned any flat at B-4/7 in the said Niwas and a certificate was duly issued by the authorities. The notice of

termination was not kept alive by the authorities, since withdrawn. A show-cause notice was issued which was replied to by the petitioner.

5. The tenancy of the petitioner at Flat No. 0/2 at Manicktala Housing Estate, however, stood terminated on the foot of purchase of a flat by the petitioner at ICV, Bagmari Road. The petitioner denied the membership, ownership and purchase of any flat beyond Flat No. 0/2 at Manicktala.

6. In the back-ground, the notice dated 9.6.95 is patently lost its sting and illegal which was served and/or issued on the imagination of purchase of a flat in the Housing Estate. The right of the petitioner cannot be snapped off and for redressal of the grievance, he took the aid of writ to enforce his right when possession of his flat at Manicktala was denied preventing access of the petitioner to it.

7. The claim of the petitioner is sought to have been unfounded by the respondent No.2 on the pure and simple ground that the petitioner was a tenant of Flat No. 0/2 at Manicktala Middle Income Group Govt. Housing Estate who purchased a flat jointly with his wife being Flat No. 8-4/7 at ICB Samabay Ltd., in the year of 1978, lying within a distance of 25 kms. from the residence of the writ petitioner. Such purchase folds the right of the petitioner to become a tenant by the provisions of the aforesaid statute governing the relationship between the petitioner on the one hand and the respondent on the other. Notices galored for termination of tenancy at Manicktala as the acquisition of flat at Bagmari became dominant for the letter dated 14.2.95.

8. It assumed the character of benami as the purchase was founded by the petitioner and his wife. The representation of the petitioner was made known to him by the authorities. On withdrawal of membership on 9.11.78 at ICV with a request for allotment in favour of Dipankar and his mother brings the action within the fold of the Act who cannot avoid the rigour of it by which the parties are governed.

9. The entire attempt of the petitioner is a contrivance to keep himself away from the purview of the Act The tenancy has been rightly terminated and the letter dated 16.9.95 was procured by the petitioner from the society that he did not own any flat which in fact was contrary to the actual state of affairs. The petitioner has his remedy elsewhere which cannot be explored by resorting to writ to the exclusion of the specific remedy. Supplementary affidavit is the replica of the writ.

10. A side fact has been given currency that he was thrown out of possession, but all his personal belongings are still in the said flat at No. 0/2 Manicktala Govt. Housing Estate accordingly he is a craving for Justice to a restore possession of the flat to him at Manicktala.

11. The viability of the claim is to be adjudged in the back-ground of existence or non-existence of more than one flat, it held by the petitioner, within the radius of

25 kms. of Manicktala Govt. Housing Estate.

12. The petitioner to found his claim has relied on a number of annexures appended to the writ application and the supplementary affidavit. The respondent party has all along engineered through their learned Counsel that the right of the petitioner to retain the flat No. 0/2 at Manicktala Govt. Housing Estate is permanently crippled for maintaining more than one flat by him and members of his family within a radius of 25 kms. The operation of Section 3(2) of the West Bengal (Tenancy Regulation) Act, 1976 has blown off the claim of the petitioner to continue as a tenant or occupier in respect of the flat at Manicktala main road, as submitted. The construction of a house subsequently by a tenant or acquired a house or an apartment either in his own name or in the name of any member of his family within a reasonable distance from such premises should be construed alongwith the definition "Family" of the Explanation appended to Section 3 of the Act.

13. The acquisition of flat at ICV Samabay Niwas by the petitioner and his wife and subsequently transferred, according to the learned counsel for the respondents in the name of his son, has bolted the claim of the petitioner to remain in possession of the flat at Manicktala. They might have withdrawn or transferred the flat in the name of his son, but that does not cure the illegality committed by them in the background of operation of the said Act by which the parties are governed. The learned Counsel for the petitioner has refuted the claim of the respondent on the count that the petitioner at no point of time was armed with any flat at ICV Samabay Niwas.

14. But the question which is patent for examination of the court within the realm of the writ jurisdiction is as to whether the petitioner has or had really more than one flat either in his own name or in the joint name elsewhere within a reasonable distance. The petitioner, if comes within the fold of Section 3 of the Act, the remedy cannot be excavated by him by any means whatever. Thus, in the light of the claim, the definition "Family" should be construed keeping in view the scheme and object of the statute.

15. Family has been defined to include parents and other relations of the tenant who ordinarily reside and dependent on him. The two essential ingredients coming within the wing of the definition family are "ordinarily, reside with him and dependent on him." The above noted expressions are not mutually exclusive of each other but co-extensive. The conditions must be satisfied, in default, the definition of family shall remain incomplete and inoperative. It is manifest from the materials on record that the wife of the petitioner has an independent income of her own and his son is not dependent on her husband as all of them earn their livelihood by the sweat of their own brows.

16. More so, it does not filter through any of the affidavits of the parties that the son who is an occupier of flat at ICV was putting up with his father at Manicktala Main Road.

17. Further, when the petitioner, his wife and their son having independent source of income, the question of dependence is a misnomer. At the most, the wife may come within the first part of essential requirement of Section 3 of the Act namely, "ordinarily reside with him" and nothing more. Therefore, the other requirement "dependent on him" still remains unsatisfied. There is an unnatural silence in the statute as to what course the law will take when one condition is satisfied keeping the other unfulfilled. This is a big "why" in the statute which none of the learned counsel made any attempt to reconcile it. If a logical interpretation is put in, it can be inferred legitimately that a person cannot purchase or acquire more than one flat within a reasonable distance from the other in occupation of his or the members of his family dependent on him.

18. Besides, the petitioner has all along claimed that no transfer of flat is made in favour of his son at Bagmari excepting the withdrawal of membership from ICV. There is no tangible material that the reallocation of the flat was the result of withdrawal of membership. In the context, the expression "withdrawal" cannot be equated with the word "Transfer". The shade of meaning of "withdrawal" is distinguished from the concept of "Transfer".

19. Over and above, it is notorious that the respondent No. 2 has imported the concept of benami in paragraph 12 & 15 of his affidavit-in- opposition. It is settled principle of law that the respondent is not clothed with any jurisdiction to adjudicate upon title nor the respondent parties could assume the jurisdiction of the Civil Court. From the trend of the affidavits of the respondents, this court does not find any clear picture about the claim of the respondent as the defence is shifty and fragile. In one place, the allegation of "Transfer" has been made to be the mountain to exploit the relief but at the next breath, the word "Withdrawal" has been used with emphasis which in my view is not a substitute for "Transfer". I have gone through the statute with the aid of the learned Counsel for the parties, but there is no microscopic provision in the statute that an allotment where withdrawn, the other flat, if any, in occupation of a tenant could or would stand terminated. When the withdrawal was allowed the matter was left entirely to the wisdom of the respondent authorities to reallocate the flat in favour of Dipankar or any body in place of him. There was no embargo for them to allot in favour of others. There is no material on record that the withdrawal was a condition precedent to allot the flat in favour of Dipankar. The learned Counsel for the respondent has made the annexure-A of the supplementary affidavit dated 20.9.95 as capital where from it appears that Dilip used to let out flat from time to time. It has been asserted there that an enquiry was held about the flat at ICV Samabay Niwas revealing the state of affairs, but there is no material on record that there was any participation of the petitioner and the member of his family in the said enquiry ever.

20. The respondent No. 2 has affirmed in his affidavit-in-opposition through annexure-A about the withdrawal of membership and allotment of the flat where the question of "Transfer" is meticulously silent. The controversy has raised a gulf

between "Transfer & Withdrawal". The authorities considered the withdrawal of the membership as already indicated and allotment of flat is a subsequent event independent of withdrawal. Thus, the annexure-Y appended to the supplementary affidavit of the respondent No. 2 does not reveal the actual state of affairs when the expression "Transfer" was given currency. Even if the court pays the highest premium to the claim of the respondent, the withdrawal of membership does not confer any right on the respondent to terminate the tenancy of the petitioner at Manicktala Housing. In the background of the above it is predominant that there is a rupture in the family where his son Dipankar is living at ICV having an independent income of his own divorce from the income of his parents. The word "dependent" is a question of fact, but, not a matter of inference. Dipankar had no income of his own had not been traversed in the affidavit by the respondents.

21. The learned Counsel for the petitioner had most assiduously claimed that instances are not rare but many where the Govt. has allowed an allottee to retain one flat and surrender the other, if acquired subsequently last but not the least, the petitioner must be given one flat as submitted which cannot be forfeited in the wake of vacillating defence.

22. I cannot accept the contention of the learned Counsel for the respondents that the claim of the petitioner is lost its momentum to remain in the flat of the housing estate at Manicktala for the withdrawal of membership from the ICV. This is absolutely a technical view for which no feather could be added to the cap of the respondents. It can be recalled that technicalities are not the hand-maid of justice. If the technicalities are indulged in the substantive justice will cry in silence. His right to remain in the flat, therefore, is trampled down on the ground of technicalities. If 11 does, the hydra with jaws open will swallow up the social order, in particular, when the Act is a beneficial legislation.

23. The most vital question that occupies an important place for decision is as to whether a Writ of mandamus lies against the respondents. The petitioner is emphatic that the Writ against the respondent is maintainable in view of the infringement of fundamental rights. The same according to the petitioner is not available in the ordinary forum. The alternative remedy, according to the respondent, is the appropriate remedy which must be explored without rushing to the Writ Court which is not the Court of Appeal.

24. After considering the respective submissions, I am not unmindful about the law laid down by the Supreme Court in *Anandi Muktha Sudgri S.N.V.S.J.M.S. Trust v R. Rudani* AIR 1980 SC 1604 where the Court held that the "authority" used under Article 226 must receive a liberal meaning unlike the term in Article 12 of the Constitution of India. It is well settled principle of law that those rights which are exclusively are of private character, mandamus is unknown to writ jurisdiction but when a body is vested with public duty mandamus will lie. Thus when a party is not armed with equally convenient remedy mandamus cannot be denied. It has made a spectacular advance. Article 226 confers special powers on

the High Court to issue writs in the nature of prerogative writs. The same can be issued for the enforcement of fundamental rights and for no other purpose. Judicial decisions also galore that for enforcement of legal right, writ jurisdiction can be availed of. The words "any person" or "authority" as embodied in Article 226 must not receive any restrictive interpretation which is universal in application. They may cover any other person or body entrusted with the performance of the public duty.

25. In the instant case the action of the respondents does not meet the requirements of law nor does it meet the reasonableness of its action. In such circumstances, the mandamus being a wide remedy could be made available to reach injustice wherever it has found and that the technicalities should not torture a litigant. Therefore, I am not at all impressed by the contention of the learned Counsel of the respondents that the action of it has met the reasonableness disentitling the petitioner to explore relief in the writ jurisdiction. Therefore, I reject the contention of the respondents and uphold that of the petitioner.

26. In the facts and circumstances of the case, I strike down annexure "J" dated 19.6.95 with a direction on the respondent to put the petitioner in possession of the flat being Flat No. 0/2 in the MIG Housing Estate, Maniktala. forthwith. The respondents are not to interfere and/or disturb the possession and enjoyment of the flat of the petitioner excepting in due process of law.

27. In the result, the petition succeeds and the objection/affidavits over-ruled. Issue mandamus accordingly.

Later:--

Liberty is accorded to the Counsels for the parties to take down the gist of this order for communication.