
(2022) 09 BOM CK 0153
In the Bombay High Court
Case No : Writ Petition No. 748, 2838 Of 2008

Geeta And Others

APPELLANT

Vs

Vijayanand Gruh Nirman Sahakari And Others

RESPONDENT

Date of Decision : 30-09-2022

Acts Referred:

Maharashtra Co-Operative Societies Rules, 1961 — Rule 19, 28, 29
Maharashtra Co-Operative Societies Act, 1960 — Section 35

Citation : (2022) 09 BOM CK 0153

Hon'ble Judges : Amit B. Borkar, J

Bench : Single Bench

Advocate : P.B. Patil, S.S. Paliwal, P.C. Marpakwar, R.M. Vaidya

Final Decision : Dismissed

Judgement

Amit Borkar, J

(1) Both these Writ Petitions raised a common question of law and were therefore heard together and are disposed of by this common judgment.

(2) In Writ Petition No. 2838/2008, both the Courts below have dismissed the dispute. In Writ Petition No. 748/2008, both the Courts below have decreed the dispute.

(3) The question that arises for consideration is whether, in the absence of expulsion of a Member of Co-operative Housing Society, can the Managing Committee cancel the allotment of a flat on the ground of non-payment of dues of the Society, particularly when the By-law of the Society mandates that the number of Members shall not exceed the number of flats available for allotment.

(4) The facts relevant for adjudication of both the Writ Petitions are as under:-

(i) In Writ Petition No. 2838/2008, undisputedly, Petitioner is the Member of Respondent No. 1 – Tenant Co-Partnership Housing Society. According to Petitioner, the total cost of Flat No. 6, Type A, First Floor, allotted in favour of

Petitioner was Rs. 42,600/-, out of which he had deposited Rs. 14,600/- and the remaining amount was to be paid by way of loan from the Maharashtra Housing Finance Co-operative Society Ltd. On 21/04/1981, the Society issued notice to Petitioner calling upon him to deposit the remaining amount within 15 days. On 05/07/1981, Respondent No. 1 – Society, by the Managing Committee's Resolution, cancelled the allotment of the Petitioner's flat without expelling the petitioner as a member. On 31/10/1981, the Managing Committee allotted the Suit flat in favour of Respondent No. 2. On 16/05/1986, Petitioner filed a dispute bearing No. 444/1986 in the Co-operative Court challenging the decision of the Managing Committee dated 05/07/1981 cancelling the allotment of flat, for delivery of possession and damages. The Co-operative Court held that the allotment in favour of Petitioner was provisional and since Petitioner failed to deposit the remaining amount and submit Power of Attorney, cancellation of the allotment was legal. Appeal No. 12/2007 filed by Petitioner was dismissed. Hence, the present Writ Petition.

(ii) In Writ Petition No. 748/2008, Respondent No. 1 is undisputedly a member of the Petitioner – Society. According to him, Flat No. 11 of Type B was allotted to the Disputant. Out of the total cost of Rs. 41,000/-, Respondent No. 1 deposited Rs. 14,000/- individually and Rs. 21,000/- by loan. Petitioner – Society informed the Disputant to deposit the balance amount of dues. The Managing Committee of Petitioner – Society cancelled the allotment for non-payment of the balance amount. Respondent No. 1, therefore, filed a dispute seeking a declaration that Respondent No. 1 is entitled to possession of the property in dispute and a declaration that the Resolution dated 05/07/1981 passed by Petitioner – Society was illegal. The Co-operative Court allowed the dispute holding that Respondent No. 1 is undisputedly Member and Share Holder of the Society; Flat No. 11 of Type B was allotted to Respondent No. 1; Respondent No. 1 paid Rs. 41,000/- to Petitioner. The Co-operative Appellate Court dismissed the Petitioner's Appeal holding that Respondent No. 1 had paid the amount of Rs. 15,750/- during the period 30/12/1976 to 12/04/1978. The amount of the loan of Rs. 33,000/- was sanctioned by the Maharashtra Housing Finance Bank. A power of attorney was already executed by Respondent No. 1. The Society has therefore filed the present Writ Petition.

(5) Shri Patil, learned Advocate for Petitioner in Writ Petition No. 2838/2008 submitted that undisputedly Petitioner is Member of Tenant Co-operative Housing Society. Clause D.1.1.(ii) of By-laws mandates that the number of Members shall not exceed the number of flats available for the allotment. Therefore, each member is entitled to the flat. He submitted that the rights of the member of a Co-operative Society are governed by the Maharashtra Co-operative Societies Act, Rules and By-laws. The Management of the Housing Society has to be conducted in accordance with the provisions of the By-laws. Since the Bye-laws require an equal number of Members with the flats available, in the absence of expulsion of an existing member, no new Member such as Respondent No. 2 could have been enrolled and allotted a flat. He submitted that in the absence of

cancellation of Membership by following the procedure under Section 35 of the Maharashtra Co-operative Societies Act (hereinafter referred to as "the said Act"), Rules 28 and 29 of the Maharashtra Co-operative Society Rules, the rights of a Member of the Housing Society to hold flat cannot be taken away. Undisputedly, such procedure has not been followed by Respondent No. 1, and therefore Petitioner is entitled to allotment of flat. In support of the submission, he relied on the judgment of this Court in the case of Atomica Co-operative Housing Society vs. Shri B.R. Ballal & others reported in 1988 (2) Bom. C.R. 104 and the judgment in the case of M/s. Siddharth Holding Pvt. Ltd. & another vs. Saidale Co-operative Housing Society Ltd. & others reported in 2004(2) ALL MR 232.

(6) Per contra, Shri Paliwal, learned Advocate for Respondent No. 1 – Society submitted that the allotment in favour of Petitioner was provisional subject to the condition that permanent allotment would be made in favour of a Member only after receipt of the entire amount of dues of the Society. He submitted that the cost of a Type A flat was Rs. 60,200/-. Petitioner had deposited only Rs. 17,600/- and failed to execute the Power of Attorney in favour of the Society to enable the Society to create a charge on the flat; therefore, a notice dated 21/04/1981 was issued calling upon Petitioner to pay the balance amount. Petitioner, in respect of the said notice, refused to deposit the balance amount. Therefore, Respondent No. 1 – Society, by Resolution dated 05/07/1981, cancelled the provisional allotment. He submitted that the judgment in the case of Atomica Co-operative Housing Society (supra) is inapplicable to the facts of the case, as in the present case, the Society has more than one scheme at Mouza Dhantoli, Mouza Somalwada and Ajni. He submitted that Petitioner could not insist upon a particular flat based on the provisional allotment. He invited my attention to the judgment in Writ Petition No. 918/1999 and LPA No. 166/2007 wherein other Members of Respondent No. 1 – Society had filed a dispute dismissed by this Court. He submitted that the Courts below, therefore, rightly dismissed the dispute. He, accordingly, submitted that the impugned judgments and Awards passed by the Courts below are legal and proper.

(7) In Writ Petition No. 748/2008, Shri Paliwal, learned Advocate for the Petitioner - Society, submitted that the Courts below, on similar facts, had dismissed the dispute of the Member of Petitioner – Society but recorded contradictory findings while allowing the dispute of Respondent No. 1. He submitted that in the facts of the case, there was provisional allotment subject to payment of the remaining amount. In the absence of payment of the remaining amount, the Society had rightly cancelled the allotment. In the absence of such payment, there is no vested right with Respondent No. 1 to claim the flat. He submitted that the findings recorded by the Courts below are perverse.

(8) Per contra, Shri Vaidya learned Advocate for Respondent No. 1 – original Disputant, invited my attention to the By-law D.1.1.(ii), which states that the number of Members shall be equal to the number of tenements. He submitted

that in the absence of expulsion of a member, the Disputant was entitled to the allotment of a flat. He submitted that undisputedly Respondent No. 1 is a Member and Share Holder of a Co-operative Housing Society. He was allotted Flat No. 11 of Type B. A power of attorney was already made available to the Society. He submitted that in view of the judgments in the cases of Atomica Co-operative Housing Society and M/s Siddharth Holding Pvt. Ltd. (supra), the concurrent findings recorded by the Courts below need not be disturbed in the absence of perversity.

(9) Having considered the submissions on behalf of both the parties, in the light of the question framed above, it is necessary to note the relevant By-laws of the Housing Society, which read thus:-

"D.1.1(ii)

The number of ordinary members shall not exceed the number of Flats, tenements or Plots available for allotment."

F.2.3:-

No member shall be allotted a dwelling house/tenement Flat or Plots by the Society unless:-

a) He is an ordinary member holding not less than such number of fully paid up shares as would be equal to ten percent of the proportionate cost of the dwelling house tenement Flat Plot land, roads and other items of capital investment for provision of common amenities, utilities and services on the basis of the initially approved plans and estimates.

b) he agrees to purchase additional fully paid up shares or keep in deposit so as to make his total holding in the Society equal to the proportionate cost of the capital investment referred to in (a) above as may be finally determined and certified by the Society and in such installments as may be determined by the Society at the time of allotment.

F.2.9:-

If a member who has been allotted a tenement Flat or Plot, does not pay the dues regularly, the Managing Committee may, after giving 30 days notice to him bring down his name in the register of members for allotment of Flat, tenement or Plot. This will be in addition to any other action which the Society may take against the member for the same.

F.5.1:-

If the dues recoverable from any member or past member of deceased member shall at any time be equal to or exceed the amount credited or payable to such member or past member of deceased member, the Committee may serve a notice upon such member or past member or nominee, heir or legal representative of the deceased member requiring him to pay the sum within 14

days from the service of such notice at a place or places to be named in the notice. If the requirement of such notices are not complied with, the Committee may set off the share or interest, deposit, dividend, bonus or profits of such member or past member or deceased member specified in the notice in or towards the payment of any such debt and all sums credited or payable to such member or past member or deceased member and any dividend and interest declared but not paid shall upon being thus declared by the Committee as a set-off become the property of the Society and a statement to this effect shall be included in the notice, provided however, no such action shall be taken except under Section 35 of the Maharashtra Co-operative Societies Act, 1960, read with Rules 28 and 29 of the Maharashtra Co-operative Societies Rules, 1961."

(10) Undisputedly, both the Disputants are Members of the Co-operative Housing Society. Undisputedly, the Society has not expelled the Disputants as Members of the Co-operative Housing Society. There is no conditional allotment letter on record. Though, according to the Society, the allotment in question was provisional, the Society has not placed on record any such document which imposes the condition of payment of the remaining amount and a condition in case of failure to deposit the remaining amount, the allotment would stand cancelled. In light of the aforesaid undisputed or proved facts, it is necessary to refer to the judgment of this Court in the case of Atomica Co-operative Housing Society (supra). In the facts of the said case, the Disputant had filed a dispute in the Co-operative Court challenging the decision to cancel shares and allotment. There was no expulsion of the Disputants as Members of the Society. It was held that the cancellation of the allotment of flats to the two Members who committed default was within the Authority of Society. However, this Authority is subject to the provisions of the said Act and Rules. This Court, in Paragraphs 14, 15 and 16, held as under:-

"14. "Member" means "a person joining in an application for the registration of a Co-operative Society which is subsequently registered, or a person duly admitted to Membership of Society after registration and includes a nominal, associates or sympathiser member. The Registrar is required to classify all societies into one or other classes of the Society and also into sub-classes as may be prescribed. Under the Maharashtra Co-operative Societies Rules, hereinafter referred to as "Rules", the classes and sub-classes of the Society have been prescribed. Accordingly, the petitioner's Society has been classified as a Housing Society. While, the purchase of shares of the Society has not been laid down as a necessary condition for admission to Membership. Rule 19 precludes the Society from admitting as member any person unless he fulfils conditions (i) to (iv) laid down in it. Condition No. (iii) requires that the applicant to a membership has to fulfil "all other conditions laid down in the Act, Rules and Bye-Laws. Rules and the Act do not lay down that a member must hold a certain number of shares, but Bye-Laws require that every person on applying for Membership shall deposit "the value of at least five shares. It is mandatory that "every member must hold at-least five shares in the Society. A person all of whose shares have been

transferred, repaid, forfeited or cancelled shall cease to be a member.

15. It is, thus, clear that upon forfeiture or cancellation of shares, a member ceases to be a member. Thus, if the disputants are deprived of their shares, either by transfer, forfeiture or cancellation, their Membership comes to an end and with it ends their right to participate in the affairs of the Society. The nexus between the Membership and the allotment of flats is clearly established in the bye-laws 6(2), which enjoins the General Body not to admit members exceeding the number of tenements or flats. In other words if there are 51 flats in the Building, there shall only be 51 members. Thus, there is clear nexus between Membership and the flat allotted to a member. It follows, therefore, that a member shall hold one flat and if he ceases to be a member, he shall cease to hold that flat. This is a Housing Society whose object is to provide houses to its members. Every member has only one connection with the Society, viz., the house or the flat. For the purpose of fulfilling this objective, the members enter into an association of corporate life which goes by the name Co-operative Society.

Therefore, Membership and the right to seek a house as a member are inseparable incidents of a Co-operative Housing Society. One does not become a member without the intention to acquire a house. Therefore, when a person ceases to be a member, his right to live in the house comes to an end. Similarly, when the house allotted to a member is taken away by the Society, what remains is the empty shell of Membership stripped off the very reason for the Membership. I cannot conceive of Membership of a housing society without the right to acquire a house attached to it.

16. An incidental question is, whether even after taking away the right to occupy the flat on account of default in payment of the call money, the rights as a member survive. The rights which a member exercises, such as the right to vote at a meeting right to frame policy, right to contest election, and generally govern the affairs of the Society are intended to subserve the primary object which, in the context of this case is providing and securing house through Membership. To suggest that a member whose flat has been taken away may still function as a member by participating in the meeting and managing the affairs of the Society is to ignore the realities of life. Membership of a Co-operative Society is not acquired for the purpose of exercising the empty right to vote at meeting but for the purpose of acquiring and living in a house. A situation in which a member deprived of his house continues to be a member of a Housing Society is inconceivable. It is opposed to the very object, purpose and reason which lead to the formation of a Co-operative Housing Society. The nexus between the allotment of the flats, the right to occupy the flats and the membership is so close and inseparable that one cannot exist without the other."

(11) It is pertinent to note that the By-law F.2.9 authorizes the Managing Committee, after giving 30 days' notice to the member, to bring his name down in the register of Members for allotment of flat, tenement or plot in addition to any other action which the Society may take against the member. Therefore, in

my opinion, the Society was not authorized under the By-law to cancel the allotment of a member on the ground of non-payment of dues. The notice issued to the Disputant was 15 days' notice and not 30 days' notice as required under F.2.9.

(12) In the case of M/s Siddharth Holding Pvt. Ltd. (supra), the learned Single Judge of this Court, after considering the judgment in the case of Atomica Co-operative Housing Society (supra), was considering the interpretation of a similar By-law which required the enrollment of Members not exceeding the number of tenement or plots available for the allotment, held that the seniority of the date of enrollment is not correct approach while dealing with the problems involved in the said case. Accordingly, it is held that each of the Disputants, having admitted as valid Members of the Society, will have to be treated at par with the other Members. Similarly, in the facts of the present case, neither there is a dispute about the validity of admission of the Disputants as Members of the Society nor regarding the eligibility of the Disputants as Members.

(13) Having considered the judgment in the case of Atomica Co-operative Housing Society (supra) and M/s Siddharth Holding Pvt. Ltd. (supra) and the By-laws of the Society, in my opinion, it is the obligation of Respondent-Tenant Co-operative Housing Society towards the Disputants to allot the flat as long as they continue to remain as Members. The Housing Society cannot take away the partial right of a Member of the Co-operative Housing Society to occupy the flat in the absence of cancellation/expulsion of such member.

(14) In the case of Kantilal S/o Dwarkadas Shah vs. Shri Sahakari Graha Nirman Sanstha & another reported in 1999 (3) ALL MR 288, the Disputant was enrolled as a Member, but subsequently, his Membership was terminated without following the due procedure of law.

The decision was challenged before the Co-operative Court, which directed the Society to allot the plot as per his entitlement. In the Execution Proceedings filed by the member, the Society objected that there is no plot available with the Society. The Court held that what was directed by the Court was the allotment of a plot that does not mean that the plot is allotted only if it was available. The Court, in the context of the said case, observed thus:-

"It is a duty of the Society to make such plot available because the direction is not in respect of any specific plot but the Society shall make the allotment of the plot. This direction is given only because the Petitioner is a member of the Society and continues to be the member of the Society and his right to get the plot has been deprived by the Society in violation of all the provisions of the law. How to make the plots available is the outlook of the Society."

(15) At this stage, it is necessary to consider the judgment of the Hon'ble Apex Court in the case of A. Jithendernath vs. Jubilee Hills Coop. House Building Society & another reported in (2006) 10 SCC 96 wherein the Hon'ble Apex Court, while dealing with the case of a person in whose favour provisional allotment was

made by the Co-operative Society, declined to make further payment. Though the matter before the Hon'ble Apex Court arose out of the Execution Proceedings, the Hon'ble Apex Court held that the Appellant therein as a member has a right, although not indefeasible, to be considered for allotment of a plot along with other members similarly situated. It is also held that such a right could not have been taken away nor directed to be taken away by any court of law. In Paragraph 54, the Hon'ble Apex Court observed as under:-

"54. The Cooperative Society having been formed for the purpose of allotment of plots to its members must strictly and scrupulously follow the statutory rules as also the bye-laws framed by it. It must also act within the four corners not only of the statute and statutory rules but also the bye-laws framed by it. In terms of the extant law, seniority rule would govern the matter of allotment of land amongst the members of the Society. This Court is not in a position to determine the inter se dispute, if any, even as regards the seniority amongst the members. In fact this Court has not been called upon to do so nor in view of the lis between the parties we can go thereinto. Whether the appellant would be senior in the matter of allotment of plot over the others is a disputed question of fact. Such disputed question of fact, as and when any occasion arises therefor, must be gone into and adjudicated upon by an appropriate forum. The appellant as a member has a right, although not indefeasible, to be considered for allotment of a plot along with other members similarly situated. Such a right, therefore, could not have been taken away nor directed to be taken away by any court of law."

It needs to be noted that the observation to the effect that a Member has no indefeasible right to seek allotment was in the context of By-law of the said Society wherein the By-law like D.1.1.(ii) was absent. Therefore, in my opinion, the observations made in the judgment supports the case of Petitioner than Society.

(16) For the reasons stated above, I hold that the Co-partnership Housing Society, having By-law like D.1.1(ii), is under a legal obligation to allot a suitable tenement to each of its Members as Member of the Co-operative Housing Society has an inseparable right to seek tenement from the Society.

(17) In Writ Petition No. 2838/2008, it appears that the flat allotted in favour of the Disputant had been allotted in favour of Respondent No. 2 in 1981. Therefore, this fact situation is similar to the fact situation in the case of M/s Siddharth Holding Pvt. Ltd. (supra), wherein there was no flat available for allotment to the Disputant. The learned Single Judge of this Court, after considering the judgment of the Hon'ble Apex Court in the case of Gurubax Sing v. Financial Commissioner and Anr., reported in 1991 Supp (1) SCC 167, quoted Paragraph 23 of the said judgment held as under:-

"Under the above circumstances we feel that while this Court is to administer justice according to law there may be scope for doing justice and equity between

the parties. In such a situation we remember what the Institutes of Justinian, *De Justitia Et Jure*, in 'Liber Primus' Tit. I said: "Justitia est constans et perpetua voluntas jus suum cuique tribuendi." Justice is the constant and perpetual wish to render everyone his due. "Jurisprudencia est divinarum atque humanarum rerum notitia, justitiae atque injustitiae scientia." Jurisprudence is the knowledge of the things divine and human; the science of the just and unjust. The divine is that which right reason commends. The humane is also in the contents of the law. As Mas Rumelin said, in the *Struggle to Govern Law*, "Justice is rivaled by equity." The dilemma that equity is to be better than justice and yet not quite opposed to justice, but rather a kind of justice has troubled us. Gustav Radbruch clarifies the mutual relation between two kinds of justice, namely, cumulative and distributive. We may call "just" either the application or observance of law, or that law itself. "The former kind of justice, especially the justice of the Judge true to the law," according to him, "might better be called righteousness." Here "we are concerned not with justice which is measured by positive law, but rather with that by which positive law is measured." Justice in this sense means equality. Aristotle's doctrine of justice of equality is called by him cumulative justice which requires at least two persons while distributive justice requires at least three. Relative equality in treating different persons while granting relief according to need, or reward and punishment according to merit and guilt is the essence of distributive justice. While in cumulative justice the two persons confront each other as co-equals, three or more persons are necessary in distributive justice in which one, who imposes burdens upon or grants advantages to the others, is superior to them. Therefore, it presupposes an act of distributive justice which has granted to those concerned, equality of rights, equal capacity to act, equal status." According to Radbruch, distributive justice is the prototype of justice. In it we have found the idea of justice. In it we have found the idea of justice, toward which the concept of law must be oriented." Law offers and protects the conditions necessary for the life of man and his perfection. In the words of Cardozo, "What we are seeking is not merely the justice that one receives when his rights and status are determined by the law as it is, what we are seeking is a justice to which law in its making should conform." The sense of justice will be stable when it is firmly guided by the 'pragma' of objective and subjective interests."

(18) Applying the same principle as was done by the learned Single Judge of this Court in the case of *M/s Siddharth Holding Pvt. Ltd.* (supra), the following order is passed:-

Respondent No. 1 – Society is directed to provide a suitable flat at Dhandoli Scheme after payment of Rs. 14,600/- along with interest @ 10 % from 02/11/1979 till the date of payment or Respondent No. 1 – Society shall acquire a suitable flat of similar measurement in the same or nearby locality to accommodate the Disputant or to pay the market value of the flat of similar measurement in the same locality, after such payment.

(19) Rule is made absolute in Writ Petition No. 2838/2008 in the above terms. Writ Petition No. 748/2008 is dismissed. Rule is discharged. Pending Application(s), if any, stand(s) disposed of.

(JUDGE)

(20) At this stage, learned Advocate for the Society prays for stay of the judgment. Considering the controversy involved, the effect and operation of the judgment is stayed for a period of eight weeks from today.