**(1992) 11 BOM CK 0094**

**In the Bombay High Court**

**Case No :** Writ Petition No''s. 1409 to 1412 etc. of 1991

Jayakar Rao N. Shetty APPELLANT

Vs

Regional P.F. Commissioner and others RESPONDENT

**Date of Decision :** 05-11-1992

**Acts Referred:**
Transfer of Property Act, 1882 — Section 58

**Citation :** (1993) 2 LLJ 78 : (1993) 1 MhLj 85 : (1993) MhLj 85

**Hon'ble Judges :** Ashok Agarwal, J

**Bench :** Single Bench

**Advocate :** S.M. Dharap, for the Appellant; H.V. Mehta and K.D. Shukla, for the Respondent

## Judgement

1. The right of the employees to withdraw from their provident fund for the purchase of their dwelling houses is questioned by the first respondent, the Regional Provident Fund Commissioner, and hence the petitioners have filed the present petitions.

2. The petitioners are employees of the Abhyudaya Co-operative Bank Ltd., the third respondent herein. They are members of the Employees'' Provident Fund and the scheme framed under the Employees'' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Act"). Each of the petitioners desires to purchase a residential flat. They have entered into agreements with different builders for purchasing their flats. They have obtained loans from their employers, the third respondent. They have deposited xerox copies of the agreements entered with the builders their employers. The amount advanced by the employers having fallen short of the requisite purchase price, they desire to withdraw from their provident fund. It is contended on behalf of the first respondent that the petitioners are not entitled to withdraw from the provident fund because the flats which they are proposing to purchase are encumbered. Reliance is placed on clause 3(a)(iii) of para 68-B of the Employees Provident Fund Scheme, 1952. The said provision has, therefore, fallen for my

interpretation.

3. In exercise of the powers conferred by Section 5 of the Act, the Central Government has framed the Employees'' Provident Fund Scheme, 1952. Chapter VIII of the Scheme deals with nominations, payments and withdrawal from the funds. The relevant para which falls for my consideration is paragraph 68-B which deals with a provision for withdrawal from the fund for the purchase of a dwelling house, flat or for the construction of a dwelling house including the acquisition of a suitable site for the purpose. Sub-para (1) of paragraph 68-B in so far as it is relevant for the present enquiry is concerned, is as under :-

"The Commissioner, may ..... sanction from the amount standing to the credit of the member in the Fund, a withdrawal -

(a) for purchasing a dwelling house/flat or for constructing dwelling house including the acquisition of a suitable site for the purpose from the Central Government, the State Government, a co-operative society, an institution, a trust, a local body a Housing Finance Corporation (hereinafter referred to as the agency/agencies); or

(b) for purchasing a dwelling site for purpose of construction of a dwelling house or a ready-built dwelling house/flat from any individual;

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(bb) for purchasing dwelling house/flat on ownership basis from a promoter governed by the provisions of any Flats or Apartments Ownership Act .....

Provided that the member has entered into an agreement with the promoter ........ and the said agreement is registered under the Indian Registration Act, 1908;

(c) for the construction of a dwelling house on a site owned by the member or the spouse of the member of jointly by the member and the spouse, for the purchase of a house/flat in the joint name of the member and the spouse under clauses (a) and (b) above.

Explanation - In this paragraph, the expression, "Co-operative Society" means society registered or deemed to be registered under the Co-operative Societies Act,...."

4. Sub-paragraph (2) of paragraph 68 deals with the extent of the amount which a member can withdraw. Accounting to sub-paragraph (2) the amount of withdrawal will not exceed the member''s basic wages and dearness allowance for thirty six months or the member''s own share of contributions together with employer''s share of contribution with interest thereon or the actual cost towards the acquisition of the dwelling site together with the cost of construction thereon or the purchase of the dwelling house/flat or the construction of the dwelling house, whichever is the least. Since there is no controversy in the instant case, in regard to the quantum of the amount, which the petitioners are entitled to

 

withdraw, it is not necessary to dilate any further on the said sub-paragraph (2).

5. Then follows sub-paragraph 3 which has raised controversies between the contending parties to the petition. The relevant paragraph, in so far as is relevant, reads as under :-

"3 (a) No withdrawal under this paragraph shall be granted unless :

.....

(iii) the dwelling site or the dwelling house/flat or the house under construction is free from encumbrances."

The aforesaid paragraph 3 is followed by proviso and the relevant portion thereof reads as under :-

"Provided that where a dwelling site or a dwelling house/flat is mortgaged to any of the agencies, referred to in clause (a) of sub-paragraph (1).... such a dwelling site or a dwelling house/flat, as the case may be shall not be deemed to be an encumbered property;"

There is one more proviso attached to subparagraph 3 and the same, so far as is relevant, is as under :-

"Provided also that where the site of the dwelling house/flat is held in the name of any agency, referred to in clause (a) of sub-paragraph (1) and the allottee is precluded from transferring or otherwise disposing of the house/flat, without the prior approval of such agency, the mere fact that the allottee does not have absolute right of ownership of the house/flat and the site is held in the name of the agency, shall not be bar to the giving of withdrawal under clause (a) of sub-paragraph (1), if the other conditions mentioned in this paragraph are satisfied."

There are several other clauses in paragraph 68-B which deal with different conditions for withdrawal. It is not necessary to refer them in this petition since these clauses do not deal with the controversy which arises in the present petition.

6. Coming to the facts of the present case the petitioners are employees of the third respondent, which is a bank, run by a co-operative society. It cannot be disputed that the third respondent is a co-operative society. Each of the petitioners desires to purchase a residential flat. They have, therefore, entered into agreements with different builders. The agreements have been lodged for registration under the Indian Registration Act. The third respondent, in order to help the petitioners to acquire residential flats, have advanced loans as per their requirements. The petitioners have deposited xerox copies of the agreement with the third respondent. Since the amounts advanced by the third respondent have fallen short of the requirements the petitioners approached the Regional Provident Fund Commissioner, the first respondent herein, for withdrawal of the amounts lying to the credit of the provident fund. Their applications are rejected. The objection is that the flats proposed to be purchased are encumbered.

According to the first respondent, the petitioners are not entitled to withdraw in view of the provisions of clause 3(a)(iii) of paragraph 68-B. According to the first respondent, no withdrawal is permissible if the flats in question are not free from encumbrances. The aforesaid clause is followed by two provisos which call for interpretation. The first proviso states that where a dwelling house or flat is mortgaged to any of the agencies referred to in clause (a) of sub-paragraph 1 such a house or flat shall not be deemed to be encumbered property. A look at clause (a) of paragraph 68-B shows that the agencies referred therein are the Central Government, State Government, a Co-operative society, an institution, a trust, a local body or a Housing Finance Corporation. In the instant case, the third respondent is a co-operative society, It is, therefore, one of the agencies mentioned in clause 1(a) of paragraph 68-B. Even if one were to hold that the petitioners have mortgaged their flats to the third respondent u/s 58(b) of the Transfer of Property Act by deposit of title deeds, in the instant case the xerox copies of the agreements between the petitioners and their respective builders, the same by virtue of the above proviso will not make the flats an encumbered property since the said mortgage has been made in favour of one of the agencies described in clause 1(a) of paragraph 68-B. Hence though in ordinary parlance the flats to be purchased may have been encumbered with the third respondent by fiction of law as provided under the above proviso, the same cannot be deemed to be encumbered so as to bar the right of the petitioners to withdraw from their provident fund.

7. There is one more proviso to clause 3 of paragraph 68-B which has some relevance and that is third proviso to clause 3 (a). The same in so far as it is relevant to the present case, is as under :-

"Provided also that where the ..... house/flat is held in the name of any agency referred to in clause (a) of sub-paragraph (1) and the allottee is precluded from transferring or otherwise disposing of the house/flat, without the prior approval of such agency, the mere fact that the allottee does not have absolute right of ownership of the house/flat and the site is held in the name of the agency, shall not be a bar to the giving of withdrawal under clause (a) of sub-paragraph (1), if the other conditions mentioned in this paragraph are satisfied."

8. In my view, the aforesaid proviso gives a further clarification to what is stated in the first proviso. It emphasises that if the flat is held in the name of any of the agencies, in the instant case even if the flats were to be held to be in the name of the third respondent because of the mortgage by deposit of title deeds and even if the petitioners were precluded from transferring them without prior approval of the third respondent because they are not the absolute owners thereof, the same, under this proviso, will not be a bar to allow them withdrawal of the fund, because, the third respondent which is a co-operative society, is one of the agencies referred to under sub-clause 1 (a) of paragraph 68-B. In the circumstances, I do not find that the aforesaid provisions of clause 3(a) of paragraph 68-B can be a bar to the right of the petitioners to claim withdrawal

 

from their provident fund.

9. Shri Mehta, the learned Advocate, appearing on behalf of the first respondent has contended that the agencies referred to in sub-clause 1(a) of paragraph 68-B should not be given wide connotation but should be read in the context in which they are to be found. According to him, it is not each and every co-operative society which is intended to be included within the term ''agencies'' under sub-clause 1(a). According to him, it has to be a co-operative housing society. In the instant case, the third respondent is not a housing society, but a banking society. Since the flats in question have been encumbered not with a Housing Society but with the banking society, the first and the third provisos appearing in clause 3(a) will have no application. Hence the flats in question are not free from encumbrances. The petitioners are, therefore, not entitled to withdraw from their provident fund.

10. In my view, I do not find any justification in restricting the meaning of the term co-operative society to mean only a co-operative housing society. Paragraph 68-B deals with withdrawal from the fund for the purchase of dwelling house/flat. Had the Legislature intended to restrict the "agency" to include only a co-operative housing society and not all co-operative societies, nothing was simpler than so specifically mention a co-operative society. The phrase co-operative society is preceded by other agencies such as Central Government and the State Government. It is followed by other agencies such as institutions, local bodies and housing finance corporation. These other agencies are not the agencies which deal only with housing. Only the last agency, namely the housing finance corporation deals with housing. Hence where the Legislature has intended to qualify an agency to be one which deals with housing it was specifically so provided in case of a finance corporation. It has not done so while describing "co-operative societies". The omission is significant and will have to be given its full meaning for its true and proper interpretation. It cannot therefore be held that it is only if these other agencies deal with housing that they are to be considered as agencies under the said clause. Hence I find no merit in the contention advanced by Shri Mehta that "a co-operative society" as found in sub-clause 1(a) is only a co-operative housing society and not any co-operative society. It has to be remembered that the Act and the scheme is a beneficial piece of social welfare legislation aimed at promoting and securing the well being of employees and it will not be proper for a Court to adopt a narrow or a restricted interpretation as suggested by Shri Mehta, which will have the effect of defeating the very objection and purpose of the Act. It cannot be doubted that the provision of residential accommodation one of the objects, which is dealt with by the scheme. All that the petitioners are asking is withdrawal of the amounts lying to the credit of their respective funds, If the right which is specifically sought to be bestowed to the petitioners by paragraph 68-B is denied by putting artificial and a restricted interpretation, as is suggested by Shri Mehta, the very object of the Act and the Scheme will be defeated. For the foregoing reasons, I find that the petitioners have made good their claim for withdrawal of the requite amount

 

from their provident funds.

11. Rule is made absolute in terms of prayer clause (a). Since the builders in question have threatened cancellation of the agreement because of the delay in making payment, the first respondent is directed to take immediate steps to comply with the above order and permit withdrawal, in any event not later than four weeks from today.

The petitioners in each of the petitions will be entitled to costs of their respective petitions.

Expedite the issue of certified copy of this judgment.