
(1999) 02 BOM CK 0029

In the Bombay High Court

Case No : Civil Revision Application No. 899 of 1989

Kantilal Shah

APPELLANT

Vs

Shri Sahakari Graha Nirman Sanstha and Another

RESPONDENT

Date of Decision : 10-02-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32

Citation : (1999) 3 ALLMR 288 : (2000) 1 BomCR 122 : (2000) 2 MhLj 630

Hon'ble Judges : S.B. Mhase, J

Bench : Single Bench

Advocate : A.S. Bajaj, for the Appellant; D.P. Bakshi, for the Respondent

Judgement

S.B. MHASE, J.—The order challenged is dated 16th February, 1987, passed by Joint Civil Judge Senior division, Aurangabad in Execution Petition No. 27 of 1984 below Exh. 36. The execution petition pertains to the execution of the award of the Co-operative Court, passed u/s 91 bearing No. ACR/ 509/82 dated 8th April, 1983. The present petitioner is a member of the said society and as a member of the said society, which is tenant ownership co-operative housing society, this petitioner was to get a plot for house from the said society. However, when without following the procedure of terminating the membership his membership was terminated and the plot which was to be allotted to him was not allotted, the dispute started. What is pertinent to be noted is that the award passed by the Co-operative Court is to the following effect:

"The dispute is decreed. It is decided and declared that the disputant is a member of defendant No. 1 society and he is entitled to get an allotment of plot from the defendant No. 1. The defendants shall allot plot from defendant No. 1 society to the disputant. The defendants shall pay Rs. 365/- to the disputant towards the costs of dispute and shall bear their own cost."

2. As per this award, respondent No. 1 society has been directed to allot the plot to the petitioner. However, the respondent-society filed application Exh.37 and

reported to the Executing Court that all the plots of the society have been allotted and there is no plot with the society so as to allot it to the present petitioner and therefore, the execution cannot be proceeded with. They have further stated that after the resolution to dismember the present petitioner was passed, but prior to institution of dispute, the balance plots which were with the society, have been allotted by the society to the different members, who were enrolled subsequent to disputation petitioner and, therefore, the award cannot be executed. It is an admitted position on record that it was never disclosed before the Co-operative Court that the society is not possessed of the plots which can be allotted to the present petitioner. For the first time, in a execution petition this was pointed out by the society and, therefore, it is not possible for the present petitioner to know whether the society is possessed of a plot for allotment to him. However, it is not necessary to go into this aspect, because the Court cannot go behind the decree. What is directed is the allotment of the plot and that does not mean that if the plot is available the said plot should be given by the society. The fact remains that the petitioner was entitled to get a plot and, therefore, mandatory directions have been issued. At the time when petitioner was illegally dismembered by the society, the respondent society was possessed of plot that could have been allotted to petitioner and, therefore, petitioner's right to get plot have been decreed by the Court. That means the society if already possessed of any plot shall allot that plot and if not possessed of it, the society shall make it available from its own funds and/or the funds raised from the rest of the members of the said society and/or from the assets of the society and shall allot it to the petitioner. How to obey that direction is a lookout of the said society and if in case the society's officers are not in a position to obey the directions of the Court, the Order 21 of the CPC provides for the procedure of executing that said decree namely, attachment of the properties of the society and put it to sale till the direction is obeyed by the society and/or the Court can proceed against the members of the managing committee of society by following the procedure of the civil prison, etc. All this could have been done so as to force the society to implement the award which has been passed by the Co-operative Court. This is required to be mentioned because in a housing society being a co-operative society, the Government extends facilities and makes allotment of the lands at a subsidized rates and once the land is obtained by the said society, the members of the society try to remove from the said society those members who are not required by the members of managing committee and for that purpose without following the procedure they remove the members and enrol other members favourable to them and exhaust the plots. Thus, the benefit which is availed in favour of the original membership from the Government is not allowed to be taken by those original members and some other members who are favourable to some members of the managing committee, they are extended such types of benefits. This Court cannot forget that the land which is allotted to the society in the present matter if of the CIDCO and has been allotted to them because it is a co-operative society. Therefore, the society which obtains a benefit cannot take away that benefits of the members by the high handedness

of the managing committee members and ultimately distributes the plots to the members of their choice, enrolled later on and such society cannot be permitted to say that these are no plots with them and decree cannot be enforced. Under these circumstances, therefore, the ways provided under Order 21 of the CPC can be used by the Court for the purposes of execution of the award under execution. The Court shall not forget that the direction in the present matter is in the nature of mandatory injunction that the plot shall be allotted to the petitioner and, therefore, procedure as provided under Order 21, Rule 32 of the CPC can be followed for the purposes of the execution of the decree of a mandatory injunction as has been granted by the Co-operative Court and, therefore simpliciter that there is no plot cannot be a ground to say that the decree is not executable. 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. Therefore, the decree cannot be said as not executable, because the society is not possessed of the plot. How to make the plots available is the outlook of the society. Court shall see that the mandate is obeyed and if the mandate is not obeyed, then follow the procedure under Order 21, Rule 32 of the Code Civil Procedure for the obedience of the order. Therefore, this Court does not agree with the observations of the Court that the decree is not executable because the plots are not available with the society. The revision petition is allowed. The decree is hereby confirmed. The trial Court is hereby directed to execute the decree of mandatory injunction as against the society in accordance with the law. Rule is made absolute.

3. Petition allowed.