

(2009) 10 DEL CK 0022
In the Delhi High Court
Case No : CS (OS) No. 426 of 2008

Manmohan Kishan Malik

APPELLANT

Vs

Avtar Kishan Malik (Deceased) though Legal Representatives
and Others

RESPONDENT

Date of Decision : 13-10-2009

Acts Referred:

Delhi Co-operative Societies Act, 1972 — Section 20, 26
Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 — Rule
21, 22, 23, 42
Insurance Act, 1938 — Section 44, 44(1)
Limitation Act, 1963 — Article 58, 65

Citation : (2010) 6 RCR(Civil) 515

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Rajiv Bahl, for the Appellant; Sandeep Sethi Vikas Sharma and Nikhil Bhalla for Defendant No. 1, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.—The suit though bears number of the year 2008 was instituted in 1991 in this Court. On 20th September, 2001 the following preliminary issue was framed on the question of maintainability:

Whether in view of various preliminary objections taken by defendant No. 1 in written statement to the suit of the plaintiff is liable to be dismissed?

2. During the course of hearing on the preliminary issue on 15th December, 2005 it was felt by this Court that it was necessary to direct the Supreme Court Co-operative House Building Society Limited, Niti Bagh to produce the complete file relating to plot No. B-100, Niti Bagh, New Delhi. Notice was accordingly directed to be issued to the said society. Thereafter on change in pecuniary jurisdiction, the suit was transferred to the District Court. The plaintiff applied for amendment of the plaint to enhance the valuation in the plaint for pecuniary jurisdiction and upon no objection from the only contesting defendant i.e., defendant No. 1 (whose legal heirs had been substituted on 5th November, 2004) the application

for amendment was allowed and consequently the suit transferred back to this Court. The counsel for the plaintiff and the senior counsel for the legal representatives of the defendant No. 1 have been heard on two aspects of maintainability i.e., the effect of nomination under the Delhi Cooperative Societies Act and on the aspect of limitation. Neither of the counsels referred to the order dated 15th December, 2005 directing the society to produce the records of the property. Though the clerk from the society had appeared before this Court pursuant to the notice issued on 17th February, 2006 but since the suit was on that date found to be below the minimum pecuniary jurisdiction of this Court, it appears that the records sought were not perused. On none of the subsequent dates was there any direction for reappearance of the clerk from the said society or for summoning the records. After perusing the file, in my view, the said record is not necessary for pronouncing on the aspect of maintainability on which the counsels had been heard.

3. The plaintiff has instituted the suit for the relief's of declaration, partition, rendition of accounts and injunction. It is pleaded that Malik Arjun Das was a member of the Supreme court Bar Cooperative House Building Society Ltd and in the draw of lots of the said society held on 15th December, 1971 was allotted a residential plot bearing Municipal No. 100, Block B, Niti Bagh, New Delhi; the said plot admeasures 513.40 sq yds; that the plaintiff and the 11 defendants on the date of institution of the suit were the suit the natural heirs of Shri Malik Arjun Das who had died intestate and the plaintiff and the defendant No. 1 had inherited 1/6th undivided share each in the said property of Malik Arjun Das and the other defendants who were also the legal heirs of some of the original heirs of Malik Arjun Das had the remaining share in the said property; that Malik Arjun Das had desired that property B-100 Niti Bagh, New Delhi should be jointly built by the plaintiff, defendant No. 1 and the defendant No. 11, namely Shri Anand Kumar Malik; consequently after the death of Malik Arjun Das it was mutually agreed between the plaintiff and the defendant No. 1 that since defendant No. 11 was residing in USA and was no more interested in the aforesaid property, the property be jointly constructed for residential purposes by the plaintiff and the defendant No. 1; that since the plaintiff was employed outside Delhi and was also likely to be out of India for indefinite period, the property should be constructed by the defendant No. 1 on his own behalf as well as on behalf of the plaintiff, out of the monies left by Malik Arjun Das and the remaining costs of construction be shared between the plaintiff and the defendant No. 1; it was further agreed that after construction, the premises be let out by defendant No. 1 on his own behalf as well as on behalf of the plaintiff to some good tenant and the rent realized be divided equally between them; that the defendant No. 1 was also entitled to adjust the share of the rent of the plaintiff from towards the share of the plaintiff for construction of the super-structure on the said plot together with interest at 10% per annum. It is further pleaded that on the basis of the said understanding, construction was raised on the said property; that the plaintiff was in America and defendant No. 1 had visited the plaintiff in the year 1987 and

there the plaintiff requested the defendant No. 1 to render accounts to him. The defendant No. 1 then had assured the plaintiff to furnish the accounts but refused to render accounts qua the property inspite of assurances; that the defendant No. 1 then started claiming that Malik Arjun Das had nominated him as the sole owner of the property to the exclusion of others and that a perpetual lease had also been executed in his name as the sub-lessee by the society. The plaintiff accordingly filed the suit for partition of the property, for rendition of accounts, for declaration that perpetual sub-lease dated 20th November, 1974 in favour of the defendant No. 1 is null and void and not binding on the plaintiff and the other defendants and for permanent injunction restraining the defendants from alienating, encumbering or parting with the property.

4. It appears that vide ex parte order dated 3rd July, 1991 in the suit the defendant No. 1 was restrained from alienating, encumbering or parting with possession of the property. Subsequently, on 31st October, 1991 the defendant No. 1 was permitted to change the tenant in the property without, however, being entitled to sell or encumber the property. Vide order dated 12th September, 1994 the banks where Malik Arjun Das was having the accounts were directed to retrain the documents containing the signatures of Shri Malik Arjun Dass.

5. The defendant No. 1 has contested the suit on several grounds. He also claims a Will of Malik Arjun Dass in his favour. However, at this stage we are not concerned with the said plea. The hearing on the preliminary issue was confined, as aforesaid, to the aspect of nomination of the defendant No. 1 in the records of the society and to the aspect of the claim in suit being within time. The facts which are not in dispute are -

- i. that Malik Arjun Dass had become a member of the society in the year 1961;
- ii. that Malik Arjun Dass had nominated the defendant No. 1 as his nominee in the society in the year 1968;
- iii. the plot No. B-100 Niti Bagh, New Delhi was allotted to Malik Arjun Dass on 15th December, 1971;
- iv. that Malik Arjun Dass had paid the full dues of the society as an allottee and had also paid the stamp duty and registration charges for the perpetual sub lease with respect to the said plot to be executed;
- v. that Malik Arjun Dass expired on 29th January, 1974;
- vi. the perpetual sub lease of the plot was executed by the Land and Building Department of the Delhi Administration and the society in favour of the defendant No. 1 on 20th November, 1974 and,
- vii. the construction on the aforesaid plot was carried out in 1978 - 79. The suit as aforesaid was filed in 1991.

6. The senior counsel for the defendant No. 1 has contended that since it is

borne out / admitted that defendant No. 1 had been nominated by Shri Malik Arjun Dass as his nominee, the defendant No. 1 alone is entitled to and the owner of the aforesaid plot and the plaintiff or any of the other defendants, who are the other natural heirs of Malik Arjun Dass will have no share in the said plot.

7. The counsel for the plaintiff has contended that the aforesaid plea is no longer *res integra*. Reliance is placed on -

i. Smt. Sarbati Devi and Another Vs. Smt. Usha Devi, where in relation to a nomination qua the benefits of the LIC policy, the Supreme Court held that Insurance Act where under the nomination was made was not intended to alter the law of succession and nomination does not make the nominee the sole heir qua the insurance proceeds. It was held that a nominee is not equivalent to a heir or a legatee.

ii. Ashok Chand Aggarwala Vs. Delhi Administration and Others,

iii. Gopal Vishnu Ghatnekar Vs. Madhukar Vishnu Ghatnekar,

iv. Priya Nath Mehta Vs. Manju Aggarwal and Others,

v. Sushila Devi Bhaskar v. Ishwar Nagar Cooperative House Building Society Ltd. 45(1991) DLT 528.

In all of which, qua nomination in a Cooperative society also, it has been held that the nominee does not take as a sole heir and the principles as laid down in Smt Sarbati Devi (*supra*) apply. The counsel for the plaintiff has thus contended that merely because there is a nomination by the common predecessor of the parties, Malik Arjun Dass in favour of the defendant No. 1, does not make the defendant No. 1 the sole owner of the property.

8. The senior counsel for the defendant No. 1 has contended that the facts of the present case are distinguishable and the law in the judgments aforesaid would not apply. Though it is contended that nomination under a special law as the Cooperative Societies Act would displace succession under the ordinary law of succession but in view of the judgments aforesaid including of the Division Bench, that question would not be open at least to this Court to consider. He has, however, contended that in all the aforesaid cases the deceased was the owner of the land allotted and/or had the perpetual lease executed in his favour. It is contended that it was in those circumstances, since the deceased had become the owner, that the courts held that such ownership would devolve according to the ordinary law of succession and not in accordance with the nomination. It is argued that in the present case there was no perpetual lease of land executed in favour of the deceased Malik Arjun Dass. He thus had only a membership of the society and which under Sections 20 and 26 of the Delhi Cooperative Societies Act, 1972 then applicable had a right to determine as who would become a member. It is further urged that the right to become a member is not a common law right but flows only from Section 26 and it is a case of transfer of membership and not of substitution of succession. It is urged that the rights are

to be thus governed by Cooperative Societies Act only and not by the common law rights. It is further urged that since the title to the property by execution of perpetual lease came into existence after the demise of predecessor and which by virtue of nomination came to be in existence in favour of the defendant No. 1 only, the question of other natural heirs of Shri Malik Arjun Dass having any right in the said property does not arise. The judgments aforesaid relied upon by the plaintiff were read out to show that in each of the said cases the title had vested in the deceased by execution of the perpetual lease or by the courts in the judgments having held the deceased to have become the owner. Reliance was also placed on Santosh Kakkar v. Ram Prasad 1998 1 AD (Delhi) 938 where another Single Judge of this Court had on the basis of the nomination held the nominee alone to be the owner and the other natural heirs to have acquired no rights. In the said case, the deceased was merely a member and in fact the allotment of the land had also been made several years after his demise and in such facts it was held that the rights of the parties flow from the nomination and not the natural law of succession. The senior counsel for the defendant No. 1 contended that the facts of the present case are akin to Santosh Kakkar (supra) rather than to the other judgments.

9. The counsel for the plaintiff has of course sought to distinguish Santosh Kakkar (supra). He has contended that in that case the court found the deceased to have paid only a minuscule portion of the preliminary/dues of the society and the entire amount had been paid by the nominee. It is contended that the facts of this case are otherwise. Here the deceased had cleared the entire dues and in fact also deposited monies for stamping and registration, as borne out from the documents relied upon by the defendant No. 1 himself and merely because the perpetual lease remained to be executed, would not deprive the other heirs of benefit of succession. He also relied upon judgment dated 5th October, 2005 of another single Judge in Deepak Vohra v. Pankaj Vohra CS(OS) 20/2004 where also provisions of the Cooperative Societies Act were considered and the dicta in Smt Sarbati Devi and Ashok Chand Aggarwal (supra) followed. It may be noted that this judgment gives yet another reason. It has been held that Cooperative Societies Act is a local Act while Hindu Succession Act is a Central Legislation dealing with law of succession and generally, the law of succession under the Central Act cannot be diluted or abrogated by the State Act being the Cooperative Societies Act; the law of succession is an occupied field in view of the Hindu Succession Act, 1956 and thus Cooperative Societies Act, in that case of 2003, could not deal with the said subject matter and in any case the endeavour has to be made to harmoniously construe the provisions of the said Acts and the only conclusion can be that insofar as the matter of succession is concerned, the same is governed by either intestate succession or testamentary succession, while the nominees are appointed to facilitate the acts to be done for effecting the succession.

10. Insofar as the senior counsel for the defendant No. 1 has sought to distinguish the consistent view of this Court for the reason of the perpetual lease

having not been executed in favour of Malik Arjun Dass and having been executed for the first time in the name of the defendant No. 1 only, I had, during the hearing, enquired from him as to what is the effect of allotment which in this case admittedly was in the name of Malik Arjun Dass. He was asked to look up the matter under the Rules for allotment of Nazul land framed under the DDA Act. The senior counsel contended that under Rules 21, 22 and 23 of the DDA (Disposal of Developed Nazul Land) Rules, 1981 the vesting of the land is only on execution of the sub lease. However, I do not find the position to be so. A reading of the said Rules, particularly Rule 42 shows that rights accrue on allotment. In fact, Rule 42 provides that the allottee is deemed to be the sub-lessee on the terms and conditions of the lease "to be executed". There is a reason for the same. The form of the lease/perpetual sub lease is also prescribed under the said Rules. It is thus not as if after the allotment, the terms and conditions of the perpetual sub lease are to be negotiated between the parties and if the parties are unable to concur on the same, the allotment is of no avail. The allottee has no choice in the matter of the terms and conditions of the perpetual sub lease and is deemed to have accepted the allotment in acceptance of the terms and conditions of the perpetual sub lease as set out in the Rules themselves. The execution of the perpetual sub lease is thus merely a ministerial act and the rights in the land accrue on allotment, which in the present case admittedly happened three years prior to the demise of Malik Arjun Dass.

11. Though during the hearing I had entertained certain doubts whether the judgments aforesaid of this Court continue to be good law in the light of the dicta in Zoroastrian Co-operative Housing Society Limited and Another Vs. District Registrar Co-operative Societies (Urban) and Others, and Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, though not cited by either of the counsels, but nevertheless giving a special status to the cooperative laws. However, on carefully perusing the said two subsequent dicta of the Supreme Court, I am unable to, on the basis thereof hold that the consistent dicta of this Court distinguishing a nominee from a successor requires any reconsideration. I also find that Division Bench of the Bombay High Court in Om Siddharaj Co-operative Housing Society Limited Vs. The State of Maharashtra and others, and a recent Division Bench judgment of this Court in Abhay Sapru Vs. Chitralkha Bukshi, have also taken the same view and with which I am respectively bound and concur.

12. There is yet another reason for not disturbing the aforesaid consistent dicta. The Supreme court in Smt. Sarbati Devi (supra) has also held that when all along the High Courts have taken the view that mere nomination does not deprive the heirs of their rights and when inspite thereof the Parliament has not chosen to make any amendment to the act, in such situation unless there are strong and compelling reasons to hold all these decisions to be erroneous, the court should be slow to take a different view.

13. Another contention of the senior counsel for the defendant No. 1 on the basis

of para 11 of Smt Sarbati Devi (supra) must also be noticed. He has contended that while the Supreme Court, qua the proceeds of the policy, has held the nomination to not interfere with the general law of succession, qua the commission of insurance agent u/s 44(1) of the Insurance Act, the nomination prevails. The reason there for given is that there is no right in common law to such commission and since right has been created u/s 44 itself, the same was also held entitled to provide for the beneficiary of such right. Senior counsel for the defendant No. 1 has contended that the right of transfer of membership is also not a right under the common law but a right created in the Cooperative Societies Act and thus the said Act is entitled to provide for the beneficiary thereof also.

14. I am however unable to accept the said position. Though the right of membership of a society may be a right governed by the Cooperative Societies Act but once such right has resulted in acquisition of an immovable property by a member, the devolution of such immovable property will be governed not by the Societies Act but by the general law of succession as aforesaid.

15. I thus hold the defendant No. 1 to have not acquired any exclusive rights in the property subject matter of the suit by virtue of nomination in his favour and the rights of the other heirs of the deceased Malik Arjun Dass would not be defeated by such nomination.

16. That brings me to the question of limitation. The senior counsel for the defendant No. 1 has contended that the suit has admittedly been filed after more than 12 years of the execution of the perpetual lease deed in exclusive favour of the defendant No. 1 and after the defendant No. 1 has raised construction thereon and is thus barred by time and ought not to be entertained. It is further argued that no prayer for cancellation of the perpetual lease deed has been made and the only prayer is for declaration of the lease deed as void. Reliance is placed on Article 58 of the Limitation Act providing a period of limitation of three years for obtaining a declaration from the date when the right to sue first accrues and on Smt. Dilboo (Dead) by Lrs. and Others Vs. Smt. Dhanraji (Dead) and Others, laying that whenever a document is registered, the date of registration becomes the date of deemed knowledge. Reliance is also placed on Subodh Kumar Gupta Vs. Shrikant Gupta and Others, laying down that if it is the case of the plaintiff that document was obtained by fraud or misrepresentation or by suppression of material facts or for any other like reason, he must have the same set aside through court and unless he does that, he cannot go behind the agreement, ignore it as a void document and proceed to sue.

17. In my view once the court has come to the conclusion that the defendant No. 1 as a nominee was entitled to have the perpetual lease deed executed in his favour on behalf of and/ or the benefit of all the legal heirs, the execution thereof would not give any right to the defendant No. 1 and notwithstanding the execution of the perpetual lease deed he would continue to hold the property for and / or for the benefit of all the heirs as per the law of succession. The law

being, that nomination is only for the purposes of discharging the society and/or the perpetual lessor of the land, mere execution of a perpetual sub lease in such situation cannot be said to be such an Act which would give a cause of action to others who may have a share in the property.

18. A perusal of the Schedule to the Limitation Act, particularly, part V thereof dealing with the suits relating to immovable property would show that limitation for a suit or any interest in an immovable property based on title under Article 65 thereof is of 12 years and commencing from the date when the possession of the defendant becomes adverse to the plaintiff. If the defendant No. 1 took possession of the property and/or got the perpetual lease deed executed in his favour for and on behalf of all the heirs, then all the heirs of the deceased Malik Arjun Dass acquire a right in the property immediately on his demise. Their such rights cannot be defeated by long lapse of time howsoever long it may be. For one of the co-owners to say that he has become the absolute owner of the property, he has to show that he has for over 12 years prior to the institution of the suit been claiming adversely to the other co-owners and to the knowledge of the other co-owners. Such disputed questions of fact, particularly in the light of averments in the plaint as noted in the initial paragraph of this judgment cannot be decided at this stage. Thus the question of limitation affecting maintainability of the suit on which parties were heard is not found to be such which can be disposed of without recording evidence and is left open for consideration.

19. The suit otherwise is held maintainable notwithstanding the nomination in favour of the defendant No. 1.