

(2004) 10 CAL CK 0028
In the Calcutta High Court
Case No : F.M.A. No. 356 of 2004

Parul Sengupta and Another

APPELLANT

Vs

Registrar of Co-operative Societies and Others

RESPONDENT

Date of Decision : 07-10-2004

Acts Referred:

Citation : (2005) 1 CHN 281

Hon'ble Judges : Barin Ghosh, J;Alok Kumar Basu, J

Bench : Division Bench

Advocate : Sunil Kumar Mitter, Somen Bose and Shivaji Mitra, for the Appellant;Ravi Kapoor and Sanjoy Kr. Baid, for the Respondent

Judgement

Alok Kumar Basu, J.—A very important question of law having far reaching consequences on the working of Housing Co-operatives of the State has been raised through the present appeal.

2. For better appreciation of the points raised in the appeal, it would be proper to give the background behind filing of the present appeal, which is as follows:

One Biswa Ranjan Sengupta, who died on 22nd July, 2003, hereinafter referred to as "the said deceased" was a member of the respondent Co-operative Housing Society, hereinafter referred to as "the said Society", and was allotted a flat in the apartment constructed by the said Society. The writ petitioner is the married daughter of the said deceased. During the lifetime of the said deceased, he nominated the petitioner in respect of his share and interest in the said Society and, accordingly, such nomination was recorded in the Register maintained by the said Society for that purpose. By a letter dated 13th November, 2003 the said Society informed the petitioner that she could not be admitted as a member of the said Society because she was no longer a member of the family of the said deceased. This stand was taken by the said Society on the basis of the stand taken by the Deputy Registrar, West Bengal Co-operative Societies, as communicated by a letter dated 11th November, 2003 addressed by him to the

said Society. The contents of that letter dated 11th November, 2003 is as follows:

"With reference to his letter above, this is to inform him that as late Sengupta had family of his own, the nomination made by late Sengupta in favour of Smt. Wahi can't be accepted, as it was not done in terms of Section 79 of W. B.C. S. Act read with Rule 127 of W. B. C. S. Rules, 1987.

Hence letter of administration/succession certificate is required in favour of Smt. Wahi in terms of Rule 128 of W.B.C.S. Rules, 1987."

3. This stand taken by the Deputy Registrar of Co-operative Societies, which was followed by the said Society was the subject-matter of challenge in the writ petition. Section 79 of the West Bengal Co-operative Societies Act, 1983 and Rules 127 and 128 of the West Bengal Co-operative Societies Rules, 1987 are as follows:

Section 79 of the West Bengal Co-operative Societies Act.

"Section 79. Nomination of transferee.-Subject to the by-laws of a cooperative society, a member of such co-operative society may in accordance with the rules nominate a person in whose favour the co-operative society shall dispose of the share or interest of such member on his death."

Rules 127 and 128 of the West Bengal Co-operative Societies Rules.

"127. Nomination of transferee.-(1) A member of a co-operative society may in accordance with the provision of Section 79, nominate in writing any person belonging to his family to whom the share or interest or the value of such share or interest shall, on his death, be paid or transferred under the provision of the Act:

Provided that if a member has no family he may nominate any person to whom such share or interest or the value of such share or interest shall be paid or transferred.

Provided further that such member may, from time to time, revoke such nomination and make a fresh nomination.

(2) Every co-operative society shall keep a register of all person so nominated.

(3) In case the nominee of a member dies, the member shall report the death to the society and make a fresh nomination if he so desires.

Explanation.-For the purpose of this rule a family shall have the same meaning as given in the Explanation to Sub-section (2) of Section 13 and shall include major sons and daughters.

128. Disposal of deceased member's share or interest and procedure for calculation of value of shares.-(1) When upon the death of a member of a co-operative society, the question of transferring the share, or paying interest of such deceased member arise, and the board of such society finds that the

deceased member did not make any nomination in accordance with the provisions of Section 79, or that the existence or residential address of the person nominated cannot be ascertained, or that for any other sufficient cause such transfer or payment cannot be made without unreasonable delay, the board may transfer the share or pay interest of such deceased member in favour of or to any person who presents in writing his or her claim for the said share or interest and produces, in support of such claims, probate, letter of administration or succession certificate issued by a competent court having jurisdiction, and makes a written declaration in an affidavit before a Magistrate and he or she is the rightful claimant, being the legal heir or representative of the deceased.

2(a) Where a co-operative society has to make a refund of the value of a share, the value of the share shall be deemed to be equal to the amount paid upon the share:

Provided that where a portion of the assets is estimated to be bad or doubtful in the latest audited balance sheet, and is not covered by funds created out of profits, the board may, for the purpose of such payment, reduce the value of the share, in the same proportions as the aggregate amount of assets which are not bad or doubtful, less the amount of outside liabilities, bears to the paid-up share capital.

(b) Where a transfer of share or interest is made, the value of the share or interest shall be deemed to be the sum actually paid by the member for the acquisition of such share or interest."

4. In order to appreciate the true scope of the Explanation to Rule 127 of the said Rules one is required to take note of Sub-section (2) of Section 13 of the said Act. Section 13 of the Act is contained in Chapter 2 thereof. That Chapter deals with registration. Section 13 provides for application for registration. Sub-section (1) thereof requires an application for registration to be made by persons. Sub-section (2) of Section 13 is as follows:

"13(2). Where an application for registration of a co-operative society and its by-laws is made by individuals, the number of applicants shall not be less than ten, each of whom shall belong to a different family:

Provided that in the case of a co-operative housing society, the number of applicants shall not be less than eight.

Explanation.-For the purpose of this Sub-section, a family shall be deemed to consist of husband, wife, minor sons and daughters, dependent widow of a predeceased son, minor sons and daughters of a dependent widow of a predeceased son and husband's dependent parents."

5. By the judgment and order impugned in this appeal the learned Trial Judge allowed the writ petition. Before the learned Trial Judge respondents appeared, who, however, did not appear before us, and contended that a married daughter no longer remains the member of the family of her father for she becomes a

member of the family of her husband. This submission was made on the basis of concept of "family" occurring in the Hindu Succession Act. The learned Trial Judge rejected that contention by holding that the Explanation to Rule 127 of the said Rules includes major sons and daughters as members of the family in addition to minor sons and daughters without any clarification as to their marital status and, accordingly, for the purpose of Rule 127 of the said Rules it cannot be said that the married daughters are excluded. We have no reason to differ from such view of the learned Trial Judge for the Co-operative Societies Act and the Rules made thereunder did not intend at all to direct a different line of succession. Accordingly, there is no scope for interfering with the judgment and order appealed against.

6. However, the instant appeal is not by any of the respondents in the writ petition. This appeal is, on the basis of leave granted by this Court, by the widow and the son of the said deceased, who were not made parties to the writ petition and who inherited the estate left by the said deceased for admittedly he died intestate.

7. The appellants are contending that as heirs of the said deceased, they are also entitled to inherit the interest and share of the said deceased in the said society as well as in the allotment of the said flat.

8. Before we address ourselves to the said contention of the appellants it is necessary for us to refer to a judgment of the Supreme Court in the case of Usha Ranjan Bhattacharjee and Others Vs. Abinash Chandra Chakraborty and Others, . In that case the allottee member of a Co-operative Housing Society died as a bachelor, who, however, during his lifetime nominated the respondent. The appellants contended that they inherited the property according to the Rules of intestate succession. The Supreme Court disposed of the appeal by holding that the respondent is entitled to get possession of the flat in accordance with the provisions of Section 70 of the said Act in view of the finding of the Tribunal that the respondent had obtained a valid nomination from the deceased member allottee. While dealing with the matter the Supreme Court took note of sections 69 and 70 of the said Act. It was contended before the Supreme Court that if a rival claim of title to the property is raised, the Cooperative Tribunal is not incompetent to decide such title. This contention of the appellant was rejected by saying that within the limited scope of enquiry to be made for determining the question of valid nomination u/s 69 of the Act, title to the property could not be determined. It was stated that in terms of determination of valid nomination the consequential direction for delivery of possession can be given in favour of the person having valid nomination under the provisions of Section 70 of the said Act, but the dispute as to the question of title is not to be decided within the limited scope and ambit of sections 69 and 70 of the Act. The Supreme Court approved the contention of the appellant to the effect that within the limited scope of sections 69 and 70 of the said Act, the Co-operative Tribunal was not required to determine the disputed question of title between the parties in

dispute and the High Court had also gone wrong in holding that when a valid nomination is made, the nominee acquires title to the property. The Supreme Court ultimately disposed of the appeal by holding that the respondent is entitled to get the possession of the flat in accordance with the provisions of Section 70 of the said Act, but directed that the dispute as to the title of the said flat should not be held to have been decided either by the Co-operative Tribunal or by the High Court by the impugned judgment and such question is kept open to be decided by an Appropriate Forum if such challenge is made before the Appropriate Forum. That judgment makes it abundantly clear that a mere nomination does not make the nominee the successor-in-title of the nominator to the property in question.

9. In *Smt. Sarbati Devi and Another Vs. Smt. Usha Devi*, , the Supreme Court was concerned with the status of nominee in the beneficial interest in the amount payable under the life insurance policy on the death of the assured nominator. While deciding the matter the Supreme Court took note of Section 39 of the Life Insurance Act, 1938. In *Shri Vishin N. Kanchandani and Another Vs. Vidya Lachmandas Khanchandani and Another*, , the Supreme Court was concerned with the status of nominee in the beneficial interest in the amount payable on the Government Savings Certificates. In that matter the Supreme Court took note of sections 6, 7 and 8 of the Government Savings Certificates Act, 1959. In both the cases the Supreme Court held that the amount payable or paid to the nominee either under a Life Insurance Policy or under a Savings Certificate becomes part of the estate of the deceased, which is governed by the law of succession applicable to him, either testamentary or intestate. The principal reason behind such declaration of law is that none of the said Acts did or could change the line of succession. The learned counsel appearing on behalf of the writ petitioner could not point out any provision contained in the said Act or the Rules framed thereunder which would show that either the legislature or the delegated legislature ever intended to interfere with or change the line of succession in relation to any interest of a member in a co-operative society. We would, however, like to look at various provisions of the Act.

10. The Act is divided into XVII Chapters. Chapter-I deals with preliminary matters and contains sections 1 to 8. Chapter-II deals with Registration and contains sections 9 to 18. Chapter III deals with Transfer of assets and liabilities and division and amalgamation of co-operative societies and contains sections 19 to 22. Chapter IV deals with status and management of co-operative societies and contains sections 23 to 34. Chapter V deals with Election Authority, cadre of services and Co-operative Service Commission and contains sections 35 to 38. Chapter VI deals with duties and obligations of Co-operative Societies and contains sections 39 to 61. Chapter VII deals the properties and funds of cooperative societies and contains sections 62 to 68. Chapter VIII deals with eligibility for membership and privileges, liabilities and obligations of members and contains Section 69 to 84. Chapter IX deals with special provisions for cooperative housing societies and contains sections 85 to 89. Chapter X deals

with audit, inspection and inquiry and contains sections 90 to 94. Chapter XI deals with settlement of disputes and contains sections 95 to 98. Chapter XII deals with winding up and dissolution of co-operative societies and contains Sections 99 to 103. Chapter XIII deals with special provisions for co-operative land development bank, central co-operative bank, primary co-operative credit society and apex housing society and contains sections 104 to 123. Chapter XIV deals with enforcement of obligations and recovery of sums due and contains Section 124 to 133. Chapter XV deals with jurisdiction, appeal and revision and contains sections 134 to 137. Chapter XVI deals with offences, penalties and procedure and contains sections 138 to 142. Chapter XVII deals with miscellaneous matters and contains Section 143 to 147. In addition to that there are Six Schedules to the Act. Section 2 of the said Act defines separately "Central Co-operative Bank", "Central Co-operative Land Development Bank", "Central Society", "Co-operative Farming Society", "Co-operative Land Development Bank", "Co-operative Society", "Co-operative Society with limited liability", "Cooperative Society with unlimited liability", "Co-operative Credit Society" and "Co-operative Housing Society". The definition of "Co-operative Housing Society" as given in Sub-section (18) of Section 2 of the said Act is as follows:

"(18) 'co-operative housing society' means a co-operative society, the object of which is to provide its members with dwelling house, apartments, or lands or construction of dwelling houses or apartments, and maintenance of common services in connection therewith, and includes a federation of such societies."

There cannot be any dispute that the provisions contained in Chapters I to VIII, X to XII and XIV to XVII are applicable to all Co-operative Societies, but, provisions contained in Chapter IX applies to Co-operative Housing Societies in addition; whereas provisions contained in Chapter XIII applies to Co-operative Land Development Bank, Central Co-operative Bank, Primary Co-operative Credit Society and Apex Housing Society in addition. There is, therefore, no doubt that sections 69, 70, 79 and 80 contained in Chapter VIII of the said Act applies to Co-operative Housing Society. We have taken note of the provisions contained in Section 79 of the said Act. It would be useful to take note of sections 69 and 70 of the said Act, which were noted by the Supreme Court in *Usha Ranjan Bhattacharjee* (supra). Section 69 of the said Act prescribes the eligibility for membership of co-operative society and says an individual competent to contract u/s 11 of the Indian Contract Act, 1872, any co-operative society, the State Government and subject to the approval of the State Government any association or body of persons or any financial bank are eligible for membership of co-operative society. In addition to that it provides that a student who has not attained the age of majority shall be eligible for membership of a co-operative society formed in an educational institution to which he belongs. The said Section also authorises an employee of a co-operative society to be its member and also induction of nominal member having no voting right. Section 70 of the said Act requires the person eligible for membership to apply for admission in the prescribed manner, which application is required to be hung up in the notice

board of the society for the purpose of giving objections thereto, if any, and also directs disposal of such objections and prescribes the period therefor. It also provides for adjudication by the Registrar or by his subordinate the disposal of such objection brought before him by the person aggrieved. Section 80 of the said Act directs that on the death of a member of a co-operative society, his share or interest in the co-operative society shall be transferred to a person, if any, nominated, or if there is no nomination or if the existence or residence of the nominee cannot be ascertained by the Board or for any other cause, the transfer cannot be made without unreasonable delay, to the person who, subject to the production by such person of probate, letter of administration or succession certificate, appears to the Board to be entitled in accordance with the Rules to the possession of such share or interest as part of the estate of the deceased member or on application of such person within three months from the date of death of the member, to such person. It further provides that if the share or interest cannot be transferred or if the person to whom such share or interest is payable, claims payment of the value of such share or interest shall be transferred to a person qualified to be a transferee to the share u/s 78 on receipt of the value from such person and the value of the share or the interest of the deceased member determined in accordance with the Rules shall be paid to the person nominated u/s 79 or to the person referred to in Section 80 of the Act after deducting the amount payable under the Act to the Co-operative Society from the estate of the deceased member. At this juncture it must be kept in mind that Rule 127 of the said Rules does not permit nomination in favour of any person who does not belong to the family of the deceased member, when the deceased had a family. This, along with the direction contained in Section 80 of the said Act to transfer the share or interest of a deceased member of a co-operative society to a person producing a probate or a letter of administration or succession certificate or to pay to him the value of such share or interest, makes it abundantly clear that there had been and has been no intention in the said sections to alter the line of succession. At this juncture it is necessary to keep in mind that the Act has an overriding effect, as contained in Section 143 thereof. The legislature, however, by the Act did not intend to entrench upon the Acts made by the Parliament directing succession, at least no such intention can be culled out either from Section 143 of the said Act or otherwise.

11. Be that as it may, inasmuch as we are concerned with allotment of a flat by a Co-operative Housing Society in favour of the said deceased, it is obligatory on our part to take note of the provisions contained in Chapter IX of the said Act. Section 85 of the said Act has imposed one more eligibility criteria for being a member of such a society, and that is he should be a permanent resident of West Bengal or intends to reside in West Bengal permanently. It then provides that any person eligible for membership of such a society may apply to such society for being admitted as a member and membership shall not be denied to him if plots of land, houses or apartments in buildings constructed or under construction by it are available for allotment to such person on the date of

application and plot of land or house or apartment as applied for shall be allotted to him. It, therefore, makes it abundantly clear that a member of such a society would automatically be entitled to an allotment and if the property to be allotted is not available, membership should be denied. Sub-section (3) of Section 87 of the said Act is as follows:

"(3) A plot of land or a house or an apartment in a building including the undivided interest in the common areas and facilities shall constitute a heritable and transferable immovable property within the meaning of any law for the time being in force:

Provided that notwithstanding anything contained in any other law for the time being in force, such heritable and transferable immovable property shall not be partitioned or sub-divided for any purpose whatsoever."

The declaration contained in Sub-section (3) of Section 87 of the said Act is clear and unambiguous. By such declaration it has been made abundantly clear that in relation to an immovable property allotted by a Housing Co-operative Society, the legislature did not intend to change the line of succession of a member in his such allotted property. The statutory embargo is that such a property cannot be sub-divided or partitioned. This embargo was inserted consciously for the legislature is aware of the fact that a deceased member may have more than one heir. This aspect of the matter was taken note of by the Supreme Court in *Gayatri De v. Mousumi Co-operative Housing Society Ltd. and Ors.*, reported in 2004(2) WBLR (SC) 364. In that case there was no nomination. While dealing with the matter the Supreme Court took note of Sub-section (3) of Section 87 of the said Act and, thereupon, observed in paragraph 26 of the report as follows:

"26. In terms of the Act and the Rules, the heirs of a deceased person are, therefore, entitled to inherit the flat allotted to the deceased as in the instant case. Admittedly, the flat in question was allotted to the father of the appellant who died thereafter and as a consequence thereof, the heirs of the said deceased became and would be entitled to the estate and as a result thereof to the said flat with proportionate interest in the land."

The expression used was not "one heir", but "heirs".

12. Therefore, while a Housing Co-operative Society may transfer the share and interest of a deceased member in favour of the nominee, the nominee does not become the sole owner of such share or interest, he remains the agent of the heirs of the deceased member. Such a nominee, therefore, is not entitled to possession of the flat allotted in favour of the nominator by a Co-operative Housing Society to the exclusion of the heirs. Although such a flat cannot be partitioned or sub-divided, every heir of the deceased is entitled to possess the same jointly with each other.

13. At this juncture it is our duty to point out that in Section 80 of the said Act there is a requirement to produce probate, letter of administration or succession

certificate. In case a person dies leaving a Will, a probate may be granted to the executor to the Will provided he applies for the same. In the absence of an Executor applying for probate, on the application of a beneficiary under the Will, letters of administration may be granted. A Will may deal with movable properties as well as immovable properties or any of them. In relation to immovable properties no succession certificate can be had. That can only be had in relation to movable properties and, in particular, in relation to payments due to the estate of the deceased by third parties. If a person dies intestate, on his death, his heirs become, by operation of law, joint owners of the property of the deceased member. In such view of the matter, it appears to us that while" framing Section 80 of the said Act, the legislature was considering the interest of a member of other co-operative societies but not of housing co-operative societies. Be that as it may, the definition of "member" as contained in Clause (28) of Section 2 of the said Act includes a joint member. Explanation appended thereto provides that joint member shall mean any one of two persons admitted jointly to the membership of a co-operative society under Sub-section (4) of Section 69 of the Act and shall include either husband and wife, father and son or unmarried daughter, and mother and son or unmarried daughter. It is now well-settled that an Explanation is not part of the statute. Thus, at the best it may be said that for the purpose of admission under Sub-section (4) of Section 69 of the said Act, which authorizes admission of pair-wise any two persons as joint members, the legislature intended that such pair would be those mentioned in the said Explanation. We do not propose to hold that the writ petitioner, in whose favour nomination has been made, shall not be made a member of the said Society and having regard to the legislative intent contained in Sub-section (4) of Section 69 it may not be possible for us to direct the appellants to be joint members along with the writ petitioner, but to protect the interest of the appellants in the flat, which they have inherited, it is necessary for the said Society to record their interest expressly in the Share Certificate as well as in its records pertaining to members and, in particular, in the register of members so that one of the joint owners merely because of the nomination in her favour cannot transfer either the share, in which she has a part interest, or the allotment, where also she has a part interest, for the same is expressly declared to be transferable and, accordingly, can only be transferred by express consent of all the heirs.

14. With the above we dispose of the appeal without, however, any order as to costs.

15. Urgent xerox certified copy of this judgment, if applied for, be handed over to the learned advocates for the parties as early as possible.

Barin Ghosh, J.:

16. I agree.