
(2009) 08 BOM CK 0185

In the Bombay High Court

Case No : Writ Petition No. 5832 of 2009

Shantilal Lalchand Changede and Others

APPELLANT

Vs

Prasad Oak and Others

RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Maharashtra Co-operative Societies Act, 1960 — Section 102, 102(2), 30, 73, 75
Maharashtra Co-operative Societies Rules, 1961 — Rule 19

Citation : (2010) 5 BomCR 337 : (2009) 6 MhLj 584

Hon'ble Judges : S.B. Mhase, J; R.M. Savant, J

Bench : Division Bench

Advocate : A.S. Desai, for the Appellant; Samir Patil, AGP for State, M.M. Vashi, instructed by M.P. Vashi, Associates for Intervenors, for the Respondent

Final Decision : Allowed

Judgement

S.B. Mhase, J.—Rule, with the consent of the parties made returnable forthwith and heard.

2. The Petitioners have approached this Court under Article 226 of the Constitution of India challenging the order dated 15th April 2009 passed by the Deputy Registrar of Cooperative Societies, West Ward, Bombay. By the said order, the Respondent No. 1 exercising power u/s 102 of the Maharashtra Cooperative Societies Act, 1960 (for short "the said Act") has appointed one Shri. Ashok Pagare, the Assistant Cooperative Officer, KWest Ward, Bombay as an interim liquidator of the Cool Home Versova Cooperative Housing Society Ltd. the Petitioner No. 6 herein.

3. At the outset we would like to clarify that normally we would not have entertained the present petition, since the order under challenge is only an interim order and the parties could approach the Deputy Registrar under Sub-section (2) of Section 102 of the said Act before the final order of liquidation is passed. But we have decided to exercise our extraordinary jurisdiction in the

peculiar facts and circumstances which we are going to enumerate hereinbelow as a result of which we are of the view that the order which has been passed appointing an interim liquidator though passed by the Deputy Registrar purportedly under the garb of protecting the interest of the society and its members, but is in fact passed to defeat the decree which has been passed by the City Civil Court, Bombay in Short Cause Suit No. 5985 of 1978 and which has been confirmed by this Court in First Appeal No. 837 of 1986 by judgment dated 26th September 2008 and thereafter confirmed by the Apex Court by rejecting the SLP No. 26174 of 2008, and thereby an attempt is being made by the Respondent No. 1 to support the defendants in the said suit, i.e, the encroachers in the suit property. Therefore, in order to uphold the majesty of law, and not allow it to suffer at the hands of the Deputy Registrar, who has exercised powers of liquidation u/s 102 of the said Act, obviously and patently for the reasons which in our view are not sustainable in law.

4. The society in question, i e., the Petitioner No. 6 herein was registered on 24th March 1972 bearing registration No. BOM/HSG/ 3430 of 1972. At the time of registration the society was not possessed of property. However, immediately after registration, on 30th March 1972 the society purchased the property bearing Plot No. 30, C.T.S. No. 1301/24 of village Versova, Mumbai Suburban District, Mumbai admeasuring 652.16 square meters and also obtained possession of the said plot. It appears that thereafter some persons encroached upon the said plot and in order to remove the encroachment, the Petitioner No. 6 society filed a suit in the City Civil Court, Bombay being Short Cause Suit No. 5985 of 1978. The said suit was decided on 3rd September 1986 and decree for eviction of the encroachers was passed by the Court in favour of the society. Against the said judgment and decree of the City Civil Court, Bombay, the defendants preferred an appeal in this Court being First Appeal No. 837 of 1986. The said First Appeal was dismissed by this Court on 26th September 2008 and the decree passed by the City Civil Court, Bombay in the above referred to suit was confirmed. Against both these decrees, the defendants in the suit preferred SLP bearing SLP No. 26174 of 2008. The said SLP was also dismissed by the Apex Court on 17th April 2009. Thus, ultimately the decree passed by the City Civil Court, Bombay in Short Causes Suit No. 5985 of 1978 was confirmed upto the Apex Court. It would be relevant to reproduce the order of the Apex Court. "Having heard learned Counsel for the respective parties, we are not inclined to entertain the SLP and the same is dismissed. However, time is given to the petitioner to vacate the suit premises within 31st July 2009. In the event the premises are not vacated within the said date, the respondent No. 1, society, will be entitled to execute the decree with police assistance."

5. It is important to note that after the property in question was purchased by the society in the year 1972, within few years the litigation as stated above in respect of the said property commenced. The society and its managing committee members were pursuing the said litigation so as to evict the trespassers and encroachers from the said property, and ultimately, as stated

above the decree in favour of the Petitioners has attained finality on dismissal of the aforesaid SLP No. 26174 of 2008. Suffice it to state at this juncture, that since the property was encroached upon, it could not be developed by the society and the construction activity as per the object of the society could not be carried out by the society and its managing committee members who came into power from time to time.

6. It appears that the Intervenor one Mr. Lalchand Mohandas Wadhwani and Anr. made a complaint to the Deputy Registrar the Respondent No. 1 on 4th March 2009 and on that basis Deputy Registrar i.e., the Respondent No. 1 herein initiated an enquiry and ultimately passed the order which is impugned in the present petition. Intervenor as on date are not the members of the said society. They claim that their father who has expired long back, was a member of the said society. Therefore, if their father was member of the said society, in view of the provisions of Section 30 of the said Act, the intervenors should have made an application to the society to transfer the shares of their deceased father in their names so as to become member/members of the society. It is an admitted position on record that such an application was never made by the Intervenor. What is important to be noted is that the application dated 4th March 2009 was made by the Intervenor to the Deputy Registrar only after the decree has been confirmed by this Court and while the matter was pending before the Apex Court. Therefore, the Intervenor became alive of their rights only when they found that there is a decree in favour of the society and the society is likely to get possession of the property, then they made an application making various grievances before the Deputy Registrar including the prayer for appointment of the Administrator. Under these circumstances we have our serious doubts about the bonafides and motives of the intervenors in the matter.

7 However, interestingly at the hearing of this petition Mr. Vashi, learned Counsel for the Intervenor made a statement that the Intervenor desire to support the Petitioners for getting possession of the property and the intervenors are not interested in the liquidation of the society.

8. We also desire to place on record that after the intervenors had made an application dated 4th March 2009, since the Respondent No. 1 had not taken any action on that application, the intervenors approached this Court by filing a writ petition being Writ Petition No. 553 of 2009 claiming that they are members of the said society.

However, the facts which are enumerated above, namely, that the intervenors claim through their deceased father and the shares which were standing in the name of their father on his death were not transferred in their names was not brought to the notice of this Court by any of the parties to the said Writ Petition. This Court in the said Writ Petition had therefore no occasion to deal with the issue of the locus standi of the Petitioners therein to prosecute the said Writ Petition. The said Writ Petition was disposed of by this Court by issuing the directions to the Respondent No. 1 to dispose of the representation of the

Petitioners therein. These facts are self explanatory about the motive of the intervenors in the backdrop of the confirmation of the decree against the encroachers.

9. In this backdrop of facts the impugned order has been passed by the Deputy Registrar. There are four reasons assigned by the Respondent No. 1 for passing the said order. We propose to deal with each of the grounds which are mentioned in the said order. The first ground appears to be the report dated 8th April 2008 submitted by the Cooperative Officer Gradel. The said officer was directed to take inspection of the record of the society. However, the said Officer visited the suit plot and reported that there was no building in the name of the society and there were certain shops constructed on the said plot which did not belong to the members of the society. The said officer further reported that on the said plot there was no office of the society and no record of the society was available there. In the facts stated above, when the plot was encroached and was not in possession of the society and the society was trying to get possession of the property through the Court and the decree obtained by the society became executable on 17th April 2009, it is strange that the said Officer makes a report that there was no office of the society and no record of the society is available and that the property is in possession of third persons. In view of the facts stated above, the first reason given for appointing the liquidator is not sustainable in law. The Deputy Registrar did not make a reference to the fact that the society is trying to get possession of the property and litigation is pending and therefore they could not develop the said property. Having found that the society's office is not there, he should have made an attempt to find out the managing committee members of the said society, their addresses so as to find out the record and to obtain an explanation from them as to why the property could not be developed by them. Neither the Deputy Registrar nor the Cooperative Officer bothered to make such an enquiry and mechanically put up a ground that there is no office of the society and that the property is in possession of third persons who are not members of the said society, as if they had discovered the misconduct on the part of the managing committee of the said society.

10. The second ground given by the Deputy Registrar is that they have made efforts to find out where the bank account of the petitioner society is. It is stated that in that context they made correspondence with the Maharashtra State Cooperative Bank, Branch at Khar and the Mumbai District Central Cooperative Bank and both these Banks have reported that the said society has no account with them. However, we find that the Deputy Registrar has forgotten to look into his own record, namely, when the society was to be established and registered with the Registrar of Cooperative Societies, the society must have made an application seeking permission for opening a bank account and accordingly the permission must have been granted by his office. Therefore, from his own record it would have been possible to trace out where the account of the said society is, instead of making such correspondence with the banks. . Apart from this, the Petitioner No. 6 is a housing society and therefore for the said housing society

which is the approved bank by the Department for opening the bank account, should have been ascertained and enquires with that bank only should have made by the Deputy Registrar. Apart from that, non tracing of a bank account of the society cannot be a ground for the purpose of putting the society into liquidation. We fail to understand as to why the Respondent No. 1 did not make an attempt to find out who the managing committee members were, and ask them about the bank account of the said society. Therefore, in our opinion, the ground made out by the Respondent No. 1 that there is no bank account of the said society is not sustainable in law for appointment of the liquidator.

11. The third ground mentioned by the Respondent No. 1 is that in view of the object of the said society it was necessary to obtain the land on lease or purchase the land and construct building on Plot No. 30 so as to allot flats to its members. It is further stated that the said society has been registered on 24th March 1972 and at that time alongwith the registration proposal the agreement pertaining to purchase of Plot No. 30 was annexed but till today the society has not constructed the building on the said plot. We do not want to repeat the reasons which we have already given dealing with ground No. 1. The fact is that the plot was encroached upon and the litigation was going on which had ended in April 2009. Thereafter the decree is required to be put to execution taking recourse to Order XI of the Code of Civil Procedure, 1908, and only thereafter the property could have been developed. But unfortunately the Respondent No. 1 did not make any enquiry as to whether the property has been purchased by the society as per the agreement or not. Since the agreement was on record it would have been possible for the Respondent No. 1 to approach the Registration Office of the saledeeds and obtain Index No. II from the Registrar of Assurances so as to find out whether the property is purchased or not after the Petitioner No. 6 society is registered. On such investigation the Respondent No. 1 would have found that there is a saledeed dated 30th March 1972 in favour of the society. Not only that, but had the Respondent No. 1 properly investigated the matter he would have also noticed that the property is encroached upon by some third persons and the managing committee is not at fault in not developing the property. This ground therefore is also unsustainable.

12. The fourth ground is that after the end of financial year, within 45 days the statement of accounts and the audited statement of accounts should have been produced before the Department and that the said audited statement of accounts have not been submitted. Further it is stated that the annual general body meeting is required to be held before 14th of August or at any rate with the permission of the Registrar of the Cooperative Societies before 14th of November, and there is no report to that effect. However, it is important to note that except the pending litigation there was no activity which could be undertaken by the said society and as a result of which no building construction activity could take place. Obviously there was no question of statement of accounts to be prepared by the said society, except the expenses incurred for litigation. So far as the holding of general body meeting is concerned, it is not

stated for which year the general body meeting was not conducted is not mentioned, a general statement has been made that the general body meeting should be conducted before 14th of August and further within the extended period upto 14th of November. However, we find that the Respondent No. 1 has lost sight of Section 75 of the said Act which gives power to the Registrar to call for the general body meeting of the said society and further actions are contemplated to expel the members of the said society for not holding the general body meeting. In any case that cannot be a ground germane for appointing the liquidator, because those who are responsible for not holding the general body meeting can be dealt with taking recourse to the provisions of Section 75 of the said Act.

13. The last paragraph is the summary of the grounds enumerated hereinabove. It is stated that for last 37 years the society has not done anything and therefore the Respondent No. 1 decided to liquidate the society. We have dealt with each of the grounds which have been given in the impugned order and have pointed out how the grounds are not sustainable in law in the facts and circumstances of the present case.

14. The cooperative housing societies in Mumbai are established by the persons so as to facilitate construction of residential accommodation for them. They are not established for liquidating. The members are interesting in getting residential accommodation. With such a hope to get a home, since 1972 some members and managing committee members of the Petitioner No. 6 society were prosecuting the litigation so as to get back possession of the plot so that it can be developed. This basic object of the housing society has been overlooked by the respondent No. 1 while passing the order of liquidation. Continuation of the functioning of the society either at the hands of the managing committee members or by appointing an Administrator on the said society so that the activity of the society can be continued should have been the approach of the Deputy Registrar. The Deputy Registrars are expected to see that the cooperative societies remain functional and are continued instead of liquidating them. Liquidation of the society is the last resort to be taken by the Registrar, namely, after having made all efforts and only if the society cannot be made a functional one or the society is so burdened with loans that is impossible for the society to repay then only the Registrar should take the extreme step of liquidating the society. The approach of the Respondent No. 1 in the instant case is to the contrary, and it seems the Respondent No. 1 was in a hurry to appoint a liquidator for reasons which are not far to seek.

15. Under the Maharashtra Cooperative Societies Act, 1960 the Registrar has adequate powers if he finds that the society is not functioning and that there are disputes between the members of the society and/or that the cooperative movement discipline has not been followed by the managing committee members. When the Registrar finds that the elections of the society are not conducted, he can take appropriate steps to elect the new managing committee

members and to remove the old members taking recourse to provisions of Sections 78 or 73H of the said Act. However, ignoring all such powers which are vested in him which could have made the society workable in the interest of its members so that residential accommodation can be provided to its members, unfortunately, the respondent No. 1 has taken a decision to liquidate the said society.

16. It is obvious that if the society is liquidated the assets of the said society will have to be auctioned through the liquidator appointed by the cooperative department, then it is possible that the persons who have lost the litigation upto the Apex Court can purchase the property in the auction or the said property could be purchased by a builder/developer. We therefore have a strong suspicion that only in order to make the said property available to such encroachers, i.e., the defendants in the suit and to defeat/ frustrate the decree which has been confirmed by the Apex Court, the Respondent No. 1 Registrar has taken a decision to appoint the liquidator. Since the Deputy Registrar ? Respondent No. 1 has not taken note of these facts and ignoring all these facts and overlooking the provisions of the said Act, decided to appoint liquidator, we have every doubt in respect of the motives of the said Registrar and we are of the opinion in the conspectus of the facts as narrated above that the actions of the Respondent No. 1 have been actuated by malafides. Probably he is colluding with the defendants in the said suit to defeat and frustrate the said decree which has become executable against them and therefore he has dared to pass the order appointing the interim liquidator so as to make the property available to the defendants in the said suit when the auction is held. It would also be significant to note that the Intervenor became alive and the wheels of the cooperative department started moving only after the decree against the encroachers was confirmed by this Court and the SLP against the said decree was pending for admission in the Apex Court, which decree has ultimately also been confirmed by the Apex Court. This speaks volumes for the conduct of the officers of the cooperative department and especially the Respondent No. 1 herein.

17. Therefore, we have no reservations in holding that malafides on the part of the Respondent No. 1 in dealing with the Petitioner No. 6 ? society are writ large on the proceedings. Under these special circumstances and in order to preserve the interest of the said society and to maintain the majesty of law and to send a message that such type of conduct will not be countenanced on the part of the cooperative department, we quash and set aside the impugned order dated 15th April 2009.

18. Since we are constrained to make observations that we have made against the Respondent No. 1, we make it clear that the Respondent No. 1 Mr. Prasad Oak shall not deal with this society in any manner or in any enquiry. We instead appoint Mr. J. D. Patil, Deputy Registrar, A Ward, Bombay as officer to deal with the enquiries and complaints of the members or in respect of the managing committee members of the Petitioner No. 6 society. The said Shri. J. D. Patil

would deal with the society as if he is the concerned Registrar of the society under the Cooperative Societies Act, 1960. We further direct Mr. J. D. Patil that he shall find out from the record of the society as who are the members, and the managing committee members of the Petitioner No. 6 ? society. If for any reason he finds that the present members who claim to be the managing committee members of the said society are holding office without there being an election of the said society, he shall call the meeting of the general body of the said society and elect new managing committee to manage the affairs of the said society. The said meeting to elect the new managing committee members shall be presided over by Mr. J. D. Patil personally and he shall not delegate that power to anyone. We also direct Mr. J. D. Patil that before holding the general body meeting, from the record which is available with the Petitioner Nos. 1 to 15 or from the Members Register, he shall find out who were the initial members of the said society and if there are new members enrolled, when they were enrolled and whether they were unrolled as per Rule 19 of the Maharashtra State Cooperative Societies Rules, 1961. He shall also find out if any member of the said society has expired and whether the shares of the said deceased member has been transferred to the heirs of the said member or not. If any application is made u/s 30 of the said Act by any person, he shall also deal with it in accordance with law.

19. We also make it clear that in case the intervenors in the present Writ Petition make an application u/s 30 of the said Act, said application shall be decided by the Registrar in accordance with the provisions of Section 30 of the said Act and Rules framed thereunder without being influenced by the observations made by this Court in this order.

20. Shri. J. D. Patil shall bear in mind that the decree which we have mentioned above in this order is to be executed as against the defendants in the said decree and the possession of the property in question is to be obtained and handed over to the plaintiffs, i.e., the Petitioners abovenamed, so that the society can proceed with the construction of residential accommodation for its members.

21. While this order was being passed Shri. Mahendra Kalyankar, Divisional Joint Registrar, Cooperative Societies was present in the Court and the appointment of Shri. J. D. Patil is in consultation with him. The parties also have no objection to the appointment of Shri. J. D. Patil. Shri. Prasad Oak, Respondent No. 1 was also present in the Court. Shri. Ashok Pagare, Assistant Cooperative Officer, the person who is appointed as liquidator is also present in the Court. Shri. Pagare states that except the order appointing him as liquidator, he has not in any manner dealt with the society and he is not possessed of any record of the said society.

22. We have allowed the intervention application in the peculiar facts and circumstances of the present case which are enumerated above. We make it clear that we have not expressed any opinion as to the entitlement of the intervenors for membership of the society u/s 30 of the said Act. That matter is to be dealt with by the Registrar and the society in accordance with law.

23. With the aforesaid observations we dispose of the above petition by making the Rule absolute accordingly.

24. A copy of this order to be sent to the Commissioner of Cooperation and Registrar of Societies, Maharashtra by Shri. J. D. Patil.