

(2012) 04 BOM CK 0036

In the Bombay High Court

Case No : Notice of Motion No. 2024 of 2011 in Suit No. 1267 of 2011

Shashikiran Ashok Parekh

APPELLANT

Vs

Rajesh Virendra Agrawal and Others

RESPONDENT

Date of Decision : 16-04-2012

Acts Referred:

Maharashtra Co-operative Societies Act, 1960 — Section 22, 30, 30(1)
Maharashtra Co-operative Societies Rules, 1961 — Rule 25

Citation : (2012) 4 ALLMR 618 : (2012) 4 MhLj 370

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Harihar Bhavé with Ms. Aarti Khadilkar instructed by Bhavé and Co, for the Appellant; R.A. Shaikh for Defendant No. 1 and Ms. Pramila Latkar, representative of the Court Receiver present, for the Respondent

Judgement

R.D. Dhanuka, J.—The Plaintiff has filed this suit for a declaration that the Plaintiff has complete and absolute right, title and interest and is the sole owner of the suit flat bearing Tenement No. 11, situated in Madhurima Cooperative Housing Society, D.N. Nagar, Andheri (West), Mumbai. The Plaintiff has also sought a declaration that she is the owner of Flat 303 in the newly constructed building of Defendant No. 2 Society. The Plaintiff has taken out this Notice of Motion for injunction and appointment of the Court Receiver. in respect of the suit flat. The Plaintiff is the sister of Defendant No. 1. It is the case of the Plaintiff that on 21 October 1974, the Plaintiff was allotted Tenement No. 11 in Building No. 1 at D.N. Nagar, Andheri by MHADA. The Plaintiff had paid entire consideration of Rs.24,300/to MHADA. The Plaintiff has produced her Bank statement showing the payments made. The Plaintiff got married on 10 March 1980 and shifted to her matrimonial home. It is the case of the Plaintiff that parents of the Plaintiff and Defendant No. 1 were staying along with the Plaintiff. Parents of the Plaintiff continued to stay in the said tenement No. 11 when the Plaintiff has shifted to matrimonial home. It is the case of the Plaintiff that all throughout the Plaintiff paid the maintenance to the Society. It is the case of the

Plaintiff that ultimately MHADA transferred the entire property in favour of the Society by executing a Deed of Conveyance. Even in the Conveyance Deed, the name of the Plaintiff was shown as the original tenant in respect of Tenement No. 11. The Plaintiff states that on the suggestion made to the Plaintiff that the membership of Defendant No. 2 Society be transferred in the name of the mother of the Plaintiff during the period when the Plaintiff had shifted to her matrimonial home, the Plaintiff had made a request to the Society to join the mother as associate member in respect of the suit flat. It is the case of the Plaintiff that accordingly, the Society had joined the mother of the Plaintiff, Smt. Hira Virendra Agrawal as associate member. On 27 March 1999, the father of the Plaintiff expired. On 13 October 2004, the mother of the Plaintiff expired in the suit premises.

2. It is the case of the Plaintiff that on 12 October 2005, Defendant Nos.3 and 4 proposed redevelopment in respect of the flats in the Society and all the members of the Society were informed about the proposal of the redevelopment. However, no information came to be received by the Plaintiff. It is the case of the Plaintiff that in the month of January 2010 when the Plaintiff visited the suit flat, the Plaintiff came to know that the building in which the suit flat was situated, had been demolished and the entire building was redeveloped by Defendant Nos.3 and 4. The Plaintiff thereafter, made enquiries with the Society and came to know that there was an agreement entered into by and between Defendant No. 1 and Defendant Nos.3 and 4 in respect of the suit flat and the developer agreed to provide a permanent alternate accommodation, i.e. new Flat No. 303 in the new Building in lieu of the original flat in favour of Defendant No. 1. The Plaintiff has, therefore, filed this suit for declaration of her ownership.

3. Defendant No. 1 has filed an affidavit in reply. It is the case of Defendant No. 1 that though all record showed that the entire consideration amount in respect of Tenement No. 11 was paid by the Plaintiff, in fact, the same was paid out of the family funds. Defendant No. 1 has disputed the ownership of the Plaintiff in respect of Tenement No. 11. It is the case of Defendant No. 1 that during the life time of the mother of the Plaintiff and Defendant No. 1, Tenement No. 11 came to be transferred by the Society in favour of the deceased mother. It is the case of Defendant No. 1 that on 1 June 1983, the mother of the Plaintiff and Defendant No. 1 had nominated three persons in the record of the Society in respect of Tenement No. 11, namely, (i) Mr. V.K. Agrawal (husband), (ii) Smt. Shashi A. Parekh (daughter, Plaintiff herein) and (iii) Mr. Rajesh V. Agrawal (son, Defendant No. 1 herein).

4. Counsel appearing on behalf of Defendant No. 1 placed reliance on the nomination form dated 27 April 2003, whereby Defendant No. 1 alone was nominated in respect of the Society which was approved in the meeting of the Managing Committee held on 19 October 2003.

5. On 7 August 2005, Annual General Meeting of the Society was held. The text of the resolution of the AGM held on 7 August 2005 is thus:

At the end of the meeting, topic regarding transfer came up again for discussion. It was pointed out that Mrs. Hira Agrawal had submitted to the society the nomination in favour of Mr. Rajesh Agrawal, more than a year before her death. Further, Mr. Rajesh Agrawal has submitted a valid Indemnity Bond on requisite stamp paper as required for transfer of flat in the name of nominee, indemnifying the society in case of any claim arising in future and hence society may very well approve the transfer in the name of Mr. Rajesh Agrawal as per Byelaws. Hence, the members present finally approved the transfer.

6. It appears that on the basis of the nomination form filed by the deceased mother, Defendant No. 2 Society has transferred the suit flat in favour of Defendant No. 1. Vide agreement dated 13 May 2009 between Defendant No. 1 on the one hand, and Defendant Nos.3 and 4 on the other, Defendant Nos.3 and 4 agreed to allot Flat No. 303 in the new building in lieu of original Tenement No. 11. The said agreement is registered.

7. I have been informed that the construction of the new tenement is complete. By an ad interim order dated 4 March 2011, Mr. Justice S.J. Kathawalla appointed Court Receiver in respect of Flat No. 303 and directed to forthwith take possession of the suit flat from Defendant Nos.3 and 4. The Court Receiver has been directed to display a board on the door of the suit flat showing that the suit flat is in his possession. Parties are directed to maintain status quo in respect of the suit flat.

8. Counsel appearing on behalf of Defendant No. 1 informs that his client also rely upon a will alleged to have been executed by the deceased mother. He, however, fairly admits that his client has not applied for probate in respect of the alleged will. He also fairly submits that his client has also received a sum of Rs.4 lakhs from Defendant Nos.3 and 4 towards the alternate accommodation till the possession of the suit flat is handed over to his client.

9. Section 30 of the Maharashtra Cooperative Societies Act, 1960 reads as follows:

30. Transfer of interest on death of member.-(1)On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules or, if no person has been so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member:

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the Society.

Provided further that, nothing in this Subsection or in Section 22, shall prevent a minor or person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a society.

(2) Notwithstanding anything contained in Subsection (1), any such nominee, heir or legal representative, as the case may be, may require the society to pay

to him the value of the share or interest of the deceased member, ascertained in accordance with the rules.

(3) A society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(4) All transfers and payments duly made by a society in accordance with the provisions of this section, shall be valid and effectual against any demand made upon the society by any other person.

Rule 25 of the Maharashtra Cooperative Societies Rules, 1961 reads as follows :

25. Nomination of persons.(1) For the purpose of transfer of his share or interest under Sub Section (1) of Section 30, a member of a society may, by a document signed by him or by making a statement in any book kept for the purpose by the society nominate any person or persons. Where the nomination is made by a document, such document shall be deposited with the society during the member's life time and where the nomination is made by a statement, such statement shall be signed by the member and attested by one witness.

(2) The nomination made under Subrule (1) may be revoked or varied by any other nomination made in accordance with that Subrule.

(3)(i) Where a member of a society has not made any nomination, the society shall on the member's death, by a public notice exhibited at the office of the society, invite claims or objections for the proposed transfer of the share or interest of the deceased within the time specified in the notice.

(ii) After taking into consideration the claim or objections received in reply to the notice or otherwise, and after making such inquiries as the committee considers proper in the circumstances prevailing, the committee shall decide as to the person who is in its opinion is the heir or the legal representative of the deceased member and proceed to take action u/s 30.

10. In the case of Gopal Vishnu Ghatnekar Vs. Madhukar Vishnu Ghatnekar, this Court has considered Section 30 of the Maharashtra Cooperative Societies Act, 1960 and Rule 25 of the Maharashtra Cooperative Societies Rules, 1961. This Court has held as under :

It is very clear on the plain reading of the section that the intention of the section is to provide for who has to deal with the society on the death of a member and not be create a new rule of succession. The purpose of the nomination succession. The purpose of the nomination is to make certain the person with whom the society has to deal, and not to create interest in the nominee to the exclusion of those who in law will be entitled to the estate. The purpose is to avoid confusion in case there are disputes between the heirs and legal representatives and to obviate the necessity of obtaining legal representation and to avoid uncertainties as to with whom the society should deal to get proper discharge. Though, in law, the society has no power to

determine as to who are the heirs or legal representatives, with a view to obviate similar difficulty and confusion, the section confers on the society to determine who is the heir or legal representative of a deceased member and provides for transfer of the shares and interest of the deceased member's property in such heir or legal representative. Nevertheless, the persons entitled to the estate of the deceased do not lose their right to the same. Mr. Naik contends that once a person is nominated and the society transfers the share or interest of the deceased to him, he becomes the owner. If that is to be accepted it will follow that if a society accepts a person as the heir or legal representative and transfers the share or interest to him, that person will become the owner. That, obviously, cannot be the intention of the legislature. Society has no power, except provisionally and for a limited purpose to determine the disputes about who is the heir or legal representative. It, therefore, follows that the provision for transferring a share and interest to a nominee or to the heir or legal representative as will be decided by the society is only meant to provide for interregnum between the death and the full administration of the estate and not for the purpose of conferring any permanent right on such a person to a property forming part of the estate of the deceased. The idea of having this section is to provide for a proper discharge to the society without involving the society into unnecessary litigation which may take place as a result of dispute between the heirs or uncertainly as to who are the legal heirs or representatives. This being the position, the contention of Mr. Naik cannot be accepted. Even when a person is nominated or even when a person is recognised as an heir or a legal representative of the persons who are entitled to the estate of the interest of the deceased member by virtue of law governing succession are not lost and the nominee or the heir or the legal representative recognized by the society, as the case may be, hold the share and interest of the deceased for disposal of the same in accordance with law. It is only as between the society and the nominee or heir or legal representative that the relationship of the society and its member is created and this relationship continues and subsists only till the estate is administered either by the person entitled to administer the same or by the Court or the rights of the heirs or persons entitled in the estate are decided in a Court of law. Thereafter the society will be bound to follow such decision. The Plaintiff, therefore, cannot be said to have become the owner of the property qua the other heirs merely by virtue of the nomination.

(Emphasis supplied).

The judgment of this Court in the case of Gopal Vishnu Ghatnekar (supra) has been subsequently followed by this Court in the case of Om Siddharaj Co-operative Housing Society Limited Vs. The State of Maharashtra and others, and in the case of Chitra Haldipur Vs. Shahid Bhagat Singh CHS Ltd. and Others, .

11. It is an admitted position that the name of Defendant No. 1 has been recorded by Defendant No. 2 Society on the basis of the nomination form

submitted by the deceased mother. It is also an admitted position that though Defendant No. 1 has propounded alleged will of his deceased mother, no probate petition has been filed so far. In view of the decisions of this Court referred to above, I am of the view that the nominee has no legal right. In my opinion, nomination in the record of the society does not create any interest in the nominee to the exclusion of those who would be entitled to the estate in accordance with law and succession. Even if a person is nominated in the records of society, right of the other legal heirs or legal representatives who are otherwise entitled to the estate of the interest of the deceased member by virtue of law in succession is not lost. In my opinion, such nominee holds the share and interest of the deceased as a trustee for the disposal of the same in accordance with law. By virtue of Section 30 of the Maharashtra Cooperative Societies Act, 1960 read with Rule 25 of the Maharashtra Cooperative Societies Rules, 1961, society is under obligation to transfer the share or interest of the deceased member to the person or persons nominated in accordance with the rules and if no person has been nominated, to such person as may appear to the committee to be the legal heir or legal representative of the deceased member. Such relation of the society and its member continues to subsist only till the rights of the heirs or persons entitled to the estate are decided by the appropriate court. No rights are thus created in favour of the nominees on transfer of the interest of the deceased member. I am unable to accept the submission made by Shri Shaikh, the Learned Counsel appearing for Defendant No. 1 that Defendant No. 1 has become owner by virtue of the membership and the shares having been transferred in his favour upon the death of the deceased mother. I am also unable to accept arguments of the Learned Counsel Shri Shaikh that his client have been in possession of the suit flat and agreement has been entered into between him and the developers and therefore he is entitled to occupy the newly constructed flat by Defendant Nos. 3 and 4 unconditionally. In my opinion whether the Plaintiff has exclusive right in respect of the suit flat or has 50% right, she being one of the heirs of the deceased mother, or has no right at all, can be decided in suit and not at this stage. The suit property is required to be protected. By consent of both the parties, Court Receiver has been appointed in respect of the suit flat.

12. In my opinion, interests of justice would be met if the Court Receiver is directed to invite bids from the Plaintiff and Defendant No. 1 for the purpose of agency. I, therefore, pass the following order: (i) The Court Receiver, High Court, Bombay is directed to invite the Plaintiff and Defendant No. 1 to submit their bids for the purpose of agency in respect of the suit flat;

(ii) The Court Receiver is directed to appoint a party who offers highest bid in respect of the suit flat as agent of the Court Receiver;

(iii) Such party will be appointed as agent of the Court Receiver on usual terms and conditions on payment of royalty and furnishing security;

(iv) Defendant No. 1 is directed to deposit Rs.2 lakhs in this Court within a period

of eight weeks. Such deposit will be subject to the final disposal of the suit.

The Notice of Motion is disposed of in the aforesaid terms. There shall be no order as to costs.