
(1992) 07 CAL CK 0008
In the Calcutta High Court
Case No : C.O. No. 16157 (W) of 1988

Sm. Gayatri De

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 02-07-1992

Acts Referred:

Constitution of India, 1950 — Article 226

West Bengal Co-operative Societies Act, 1983 — Section 13, 57, 69, 7, 78

Citation : 97 CWN 10

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Advocate : Tarun Kumar Ghosh, for the Appellant; T.H. Sengupta, for the Respondent

Judgement

Shyamal Kumar Sen, J.—This writ application involves several questions as will appear from facts set out hereinafter. It appears from record that one Sati Prasanna Bhomick died intestate on 18th August, 1985, leaving behind him his five married daughters and one married son. The said Sati Prasanna Bhomick since deceased during his life time sold major part of his residential property at No. 15, Ballygunge Circular Road, Calcutta - 19, to Mousumi Co-operative Housing Society Limited under Registered Deed No. 8752 dated the 27th October, 1980. As per the said deed of conveyance a sum of Rs. 1,50,000/- was adjusted as an advance in part payment of the price of 3 flats to be given by the Mousumi Co-operative Housing Society Limited to the said Bhowmick since deceased. Thereafter the said Sati Prasanna Bhowmick retained one flat in his name and surrendered the remaining two flats to the said Society in June, 1983, which was duly accepted by the said society.

It also appears from record that the said Society issued two share certificates of Rs. 1,00,000/- denomination of each bearing Nos. 51 and 52 on the 30th October, 1980 to the said Sati Prasanna Bhowmick and allotted a flat being No. A-2 on the 5th floor at the Mousumi Apartments located at 15, Ballygunge

Circular Road, Calcutta - 19 to him under their letter No. 58-A, dated the 29th November, 1982 and the said Sati Prasanna Bhowmick paid a sum of Rs. 1,00,000/- to the said Society for his said apartment out of the original estimated price of Rs. 2,63,000/- only. The Petitioner submitted that in Clause No. 13 of the said letter, it has been stipulated that the right and interest in the said Society of said Sati Prasanna Bhowmick will be governed by the provisions of the West Bengal Co-operative Societies Act, Rules and the Bye-Laws of the said Society.

2. It also appears from record that the said Society issued two shares certificates of Rs. 100,00/- denomination of each bearing Nos. 51 and 52 on the 30th October, 1980 to the said Sati Prasanna Bhowmick and allotted a flat being No. A-2 on the 5th floor at the Mousumi Apartments located at 15, Ballygunge Circular Road, Calcutta - 19, to him under their letter No. 58-A, dated the 29th November, 1982 and the said Sati Prasanna Bhowmick paid a sum of Rs. 1,00,000/- to the said Society for his said apartment out of the original estimated price of Rs. 2,63,000/- only. The petitioner submitted that in Clause No. 13 of the said letter, it has been stipulated that the right and interest in the said Society of said Sati Prasanna Bhowmick will be governed by the provisions of the West Bengal Co-operative Societies Act, Rules and the Bye-laws of the said Society.

3. Dr. Subrata Bhoumick son of Sati Prasanna Bhowmick, by letter dated 6th December, 1986 intimated his father's death and requested for time for completion of legal processes for transfer of his father's interest to one of the legal heirs. No reply was sent in respect of the said letter and as a result thereof the petitioner and other heirs of the said deceased was under the impression that steps will be taken for transfer of the said name Dr. Bhoumick sent a reminder of this letter dated 6th December, 1986, and requested the Special Officer to let him know how much the legal heirs owe to the Society for this flat. It appears from record that the Special Officer replied to Dr. Bhoumick's letter dated 6th December, 1986 stating therein that since the transfer of the said deceased's interest was not claimed within stipulated time, i.e., 90 days after his death, he has re-allotted the flat.

4. It has been submitted on behalf of the petitioner that in terms of the West Bengal Co-operative Societies Act, and Rules the heirs of a deceased are entitled to receive first allotment as in the instant case. The flat in question was allotted to the said Sati Prasanna Bhowmick who died thereafter and as a Consequence thereof the heirs of the said deceased are entitled to succeed to the Estate and as a result thereof to the said flat.

5. Mr. Tarun Kumar Ghosh, learned Advocate for the petitioner further submitted that u/s 87(3) of the West Bengal Co-operative Societies Act right of a member who has already been allotted a flat is heritable upon his heirs on his death.

6. He has also referred to various provisions of the West Bengal Co-operative

Societies Act, 1973 particularly, Section 79, 80(b) (c), 82(b) and Rule 12B.

7. Section 7 provides as follows :-

Nomination of transferees - Subject to the by-laws of a co-operative society, any 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 of interest of such member on his death.

8. Section 80 provides as follows :-

Disposal of deceased member's share or interest - (1) On the death of a member of a co-operative society shall, subject to the provisions of Sections 57 and 78 and to the further provisions of this section, be transferred-

(a). to the person, if any, nominated u/s 79; or

(b). If there is no nominee or if the existence or residence of the nominee cannot be ascertained by the board or if, 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 rule to the possession of such share or interest as part of the estate of the deceased member, or

(c). on the application of the person referred to in clause (b) within three months from the date of death of the member, to such person as may be specified in the application. (2) If the share or interest of a deceased member cannot be transferred in accordance with the provisions of sub-section (1) or if the person to whom such share or interest is payable under that sub-section claims payment of the value of such share or interest or if the co-operative society in accordance with the rules and its by-laws decides to proceed under this sub-section-(a) the share shall be transferred to a person qualified to be a transferee of the share u/s 78 on receipt of the value of the share from such person; and

(b) 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 clause (b) of sub-section (1) of this section after deducting the amount payable under this Act to the cooperative society from the estate of the deceased member.

9. Section 82(b) provides as follows : When the membership of a member of a co-operative society referred to in clause (a) terminates by reason of death, expulsion, resignation or insanity or any other cause, his possession of or interest in, any land held by him under the co-operative society shall vest in his heir, executor or administrator or in the person if any, nominated by him u/s 79, if such heir, executor, administrator or person willing to be admitted as a member of the co-operative society and is eligible for membership u/s 69;

10. Rule 127 provides as follows :-

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 registrar of all persons 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 of 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.

11. Rule 128 provides as follows :-

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 arises, 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 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 that 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 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 requisition of such share or interest.

12. It appears from reading the said Section in the context of sub-section (c) thereof it means that "on the death of the member of the co-operative society his shares or interest in the co-operative society shall be transferred on the application of the person referred to in Clause (b) within three months from the date of death of the member to such person as may be specified in the application." transfer of share or interests can be made only by a co-operative society and not by the legal heirs because if it is read "by a co-operative society" after the word "transferred" then the meaning and obligation become clearer which means it is an obligation of the society to transfer the share or interest of the society to transfer the share or interest of the deceased member within the stipulated period referred to in Section 80 of the Act.

13. The learned Advocate for the respondents has referred to the Section 85(3) which provides that "a person shall not be a promoter or admitted as a member of a co-operative housing society until he has made a declaration and sworn before an Executive Magistrate to the effect that he is not a member of any other co-operative housing society in West Bengal and that he or any member of his family does not own any house or apartment or plot of land in the city, town or village where the co-operative housing society is located."

14. He has also referred to Rule 135(5) which provides that no person shall be admitted as a member of a co-operative housing society who is not considered by a board thereof as one having genuine need for housing or additional accommodation from such society."

15. The question of admission of membership in the instant case becomes immaterial. The question, however, is if transfer or devolution of interest of a deceased member. The applicant being one of the heirs of a deceased member, in my opinion, is entitled to succeed to the estate and of the deceased and that being so the right, title and interest of the deceased member in the apartment of the co-operative society devolves upon his heirs and the aforesaid Section 85(3) and Rule 135(5) cannot have any application in the instant case.

16. In my opinion, it was not proper for the Special Officer to re-allot the flat to a stranger particularly when he has received the letter regarding transfer of ownership in favour of the legal heirs without giving any opportunity of hearing and without deciding the question as to who is entitled to the said flat.

17. There cannot be any manner of doubt that on the death of a member of a Co-operative Society, his share or interest in the Co-operative Society shall in the absence of a nominee be transferred to a person who appears to the Board to be entitled to in accordance with the rules to the possession of such interest or part of the estate of the deceased member.

18. It also appears on proper construction of the statute that a member of a Co-

operative Society shall cease to be such member if he dies and upon his death his share or interest in absence of any nomination to that effect may be transferred by the Board or the Society 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 claim probate, letters of administration or succession certificates issued by a Competent Court. Thus re-allotment of the said apartment to a stranger not being the legal heirs of the deceased member is without jurisdiction, unconstitutional, not maintainable in law and liable to be set aside.

19. The Special Officer in the instant case has taken the decision to reallocate the said apartment without considering the case of the legal heirs of the deceased member and without giving them any opportunity of hearing and, as such, the said decision of the Special Officer appears to be contrary to the principles of natural justice.

20. It is no doubt true that a proceeding is pending before the Registrar under the West Bengal Co-operative Societies Act, 1983, but such pendency of the proceeding is no bar to the maintainability of the instant writ application against the said Society or the Officer or the Managing Committee thereof to forbear from re-allotting the said apartment to another not being the member of the legal heirs of the deceased member, when it is found that such action or the act is not authorised by law or in clear violation of the fundamental right of a citizen.

21. On proper construction of the aforesaid Sections it appears that right, title and interest of the member in the apartment of co-operative society is a heritable right and will devolve upon his heirs on his death. It is clear from Section 87(2) that the legislature has recognized that the property in question is heritable and legal heirs of the deceased allottee are entitled to succeed to the flat in question. There is provision for nomination in favour of any member of the family and in case there is no nominee the property may be transferred to the person who has been granted probate, letters and administration or succession certificate as the case may be.

22. Learned Advocate for the respondent also urged that the writ application is not maintainable inasmuch as no writ lies against co-operative society and the statute contemplates adequate machinery inasmuch as, the dispute as in the present case could be proceeded with before the registrar where the disputes are in fact pending.

23. Learned Advocate for the petitioner, however, contended that pendency of the proceeding before the Registrar cannot be a bar to the filing of the writ petition in the facts of the instant case.

24. In support of his contention he has referred to the following decisions :-

In the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust and Others Vs. V.R. Rudani and Others*, it has been held that the words "any person or authority" used in Article 226 are,

therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied. It may be pointed out that mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. The judicial control over the last expending maza of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available to reach injustice wherever it is found. "Technicalities should not come in the way of granting that relief under Article 226.

25. In the case of Jagannath Agarwala vs. B.N. Dutta & Ors., reported in AIR 1983 Cal. 26 it has been held by the Division bench of this Court that the "petitioner"s failure to appeal from an order by which he is aggrieved will not disentitle him to relief under Article 226 of the Constitution provided he is otherwise found entitled. His failure to avail of the ordinary remedies under the statute by way of appeal or revision will not disentitle him to relief when he seeks the High Court"s assistance for a writ, but that is a circumstance which may well be taken into consideration in deciding whether the discretionary relief provided by Certificate can be given to the petitioner.

26. The question is different. It has to be seen whether the Rules of natural justice have been violated or whether the authority concerned acted without jurisdiction or exceeded its jurisdiction in making the impugned order; and lastly we have to see whether there is an error of law apparent on the face of the record which would justify the issue of a writ.

27. Considering the facts and circumstances of the case, in my view the petitioner should succeed in this writ application. There will be an order quashing and cancelling the said letter dated 1st November, 1988, issued by the Special Officer Mousumi Co-operative Housing Society Limited, the respondent no. 3. There will be a further direction to take appropriate steps in accordance with law for transfer of the flat in question in favour of writ petitioner and also to hand over possession of the same to her upon payment of the balance amount due and payable after adjusting the said sum of Rs. 1,00,000/- paid by her father Sati Prasanna Bhowmick.

28. The application is accordingly disposed of. There will be no order as to costs. Let Xerox copy of this order be given to the learned Advocates for the parties on compliance of usual formalities.