

(2015) 03 AHC CK 0022
In the Allahabad High Court
Case No : Writ C. No. 47599 of 2007

Tulasi Ram Patodia

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226, 227
Penal Code, 1860 (IPC) — Section 406, 409, 420, 465, 467
Societies Registration Act, 1860 — Section 13

Citation : (2015) 3 ADJ 626 : (2015) 109 ALR 783 : (2015) 2 AWC 1866 :
(2015) 2 ESC 1196 : (2015) 127 RD 731

Hon'ble Judges : B. Amit Sthalekar, J.

Bench : Single Bench

Advocate : Krishna Bihari, Bidhan Chandra Rai and K. Bihari, for the Appellant;
Sujeet Kumar, Advocates for the Respondent

Judgement

B. Amit Sthalekar, J.—I have heard Sri B.C. Rai, learned counsel for the petitioner, Sri Mata Prasad, learned Additional Chief Standing Counsel for the respondents No. 1 and 2, and Sri Sujeet Kumar, learned counsel for the respondents No. 3. No one has put in appearance on behalf of the respondents No. 4 and 5 and as per office report dated 01.11.2014 service on the respondents No. 4 and 5 shall be deemed to be sufficient.

2. This is a writ petition filed by the petitioner seeking quashing of the order passed by the Deputy Registrar, Firm Societies and Chits, Agra dated 29.06.2007.

3. Briefly stated the facts of the case are that there is a charitable Society, namely, Sri Bhagwan Bhajan Ashram, Vrindavan Mathura registered under the Societies Registration Act, 1860 (hereinafter referred to as the Act, 1860). Sometime in the year 2003 Assistant Registrar, Societies allowed 14 persons to become members of the Society. It is alleged that proper procedure was not followed and therefore, a dispute arose between the petitioner Tulasi Ram

Patodia and Sri Raj Kumar Poddar, respondent No. 3, Secretary of the Society. Subsequently a Writ Petition No. 22572 of 2003 was filed and thereafter a Special Appeal No. 514 of 2004 was filed. In the special appeal an interim order was granted on 07.05.2004 which was again extended by subsequent order dated 02.09.2004. Accordingly, the Assistant Registrar, Firms, Societies and Chits suspended the list of office bearers of the Society till further orders of the Court by his order dated 30.09.2004. It is alleged that the respondent No. 3, in the meantime became Secretary of the Society in an election which was held on 12.05.2003 even though interim order was operating in the case. It is alleged that after the respondent No. 3 took over the charge of Secretary, he has misused his office and has committed several irregularities and caused financial loss to the Society and that he has also sold several shops situated in Modern Town, New Delhi in violation of the mandatory provisions of Section 5-A of the Act, 1860, which provides that prior to such transfer of property previous permission of the District Judge has to be taken but no such permission of the District Judge was taken. In the meantime the Deputy Registrar, Firms, Societies and Chits passed an order on 20.07.2006 holding the election of office bearers of the Society to be valid and this order was then challenged by the petitioner by filing Writ Petition No. 43516 of 2006 which was dismissed by the Court by order dated 23.08.2006 but the Court observed that there appears to be serious objections from either sides regarding misappropriation and dealing with the property of the Institution for personal benefits and a direction has been given by the Assistant Registrar, Firms, Societies and Chits to both sides to place before him the complete records and details within a period of three months. In pursuance of the order of the High Court, the petitioner submitted a representation before the Deputy Registrar, Firms, Societies and Chits along with the certified copy of the Court's order dated 23.08.2006 with the prayer that the said respondent inquire into the act of the respondent No. 3 in selling of land and other irregularities. The Deputy Registrar issued notice to the parties requiring details of the property sold and for producing the minutes books, membership register, agenda register, cash book, pass book and other relevant records by 23.11.2006. The petitioner complied with the said order and supplied all the relevant documentary material but the respondents did not submit any documents. Thereafter the petitioner also lodged an F.I.R. at the Police Station Vrindavan, District-Mathura under Sections 406, 409, 420, 465, 467 and 468 IPC against the alleged office bearers of the Society. The Magistrate is stated to have taken cognizance of the matter and passed the order for lodging an FIR, whereupon the respondents No. 3 and 4 filed Criminal Revision No. 388 of 2007 challenging the same. The Sessions Judge, Mathura stayed the operation of the order dated 06.01.2007 regarding non registering of the FIR and the said criminal revision was allowed by the High Court and the matter was remanded to the Sessions Judge, Mathura with a direction to decide the revision within a period of one week. In the meantime, the Deputy Registrar, Firms, Societies and Chits rejected the revision/complaint filed by the petitioner by order dated 29.06.2007 observing that the sale deeds were executed by the respondent No.

4 as Vice President and Sri Ram Kumar Maheswari, as member of the Society and therefore a direction was given to the Secretary, Ram Kumar Poddar, respondent No. 3 herein to seek permission from the competent court under Section 5-A of the Act, 1860.

4. Sri B.C. Rai, learned counsel for the petitioner submits that the following properties were sold by the respondent No. 4 alongwith one Ram Kumar Maheswari:--

"(i) Property No. 53/3, situated at New Market W.E.A., Karolbagh, Delhi (one part)

(ii) Property No. 53/3, situated at New Market W.E.A. Karolbagh Delhi.

(iii) Property No. 53/3, situated at New Market W.E.a., Karolbagh, Delhi (one part)

(iv) Property No. 37-A A.D.L.A. Industrial Estate-Fareedabad.

(v) Property situated at Vrindava, Mathura."

5. It is submitted that the sale of these properties was illegal and void because prior to such transfer of property by way of sale no permission was taken from the principal court of original jurisdiction in the District as per the requirements of Section 5-A of the Act, 1860.

6. The submission is that the provision of Section 5-A of the Act, 1860 are mandatory and it shall not be lawful for a governing body of a Society registered under the Act or any of its members to transfer, without the previous approval of the court, any immovable property belonging to such Society. Sub-Section (2) emphatically provides that every transfer made in contravention of Section (1) shall be void.

7. At this stage a preliminary objection was raised by Sri Sujeet Kumar, learned counsel appearing for the respondent No. 3 that the writ petition is not maintainable on the ground that the petitioner was throughout aware of the sale of the properties inasmuch as in the impugned order it has itself been mentioned that the meeting of the Society was held on 20.08.1995 wherein a decision was taken in the presence of the petitioner for sale of the properties mentioned in the impugned order and therefore it is not open for the petitioner to raise the objection of non-compliance of Section 5-A of the Act, 1860 and in any case the Deputy Registrar, Firms, Societies and Chits, respondent No. 2 by the impugned order directed the parties to apply to the Court and obtained permission as required under Section 5-A of the Act, 1860.

8. During the pendency of this writ petition an amendment application was filed by the petitioner seeking to bring on record certain facts and also seeking to amend the relief in the writ petition by seeking to challenge the order dated 17.04.2006 and 20.01.2012.

9. In the amendment application it has been stated that the petitioner had already filed complaint before the Deputy Registrar, Firms, Societies and Chits,

Agra on 10.01.2011 which was dismissed on 20.10.2012. During the hearing of the application the petitioner came to know that an application under Section 5-A of the Act, 1860 had been filed on 08.03.2006 seeking permission for sale of the properties of the Society. The application was allowed by the District Judge, Mathura by his order dated 17.04.2006 which fact was not disclosed by the respondents in earlier proceedings and thereafter an impugned order dated 29.06.2007 was passed by the Deputy Registrar, Firms, Societies and Chits permitting the respondents to apply for permission to sell the properties, under Section 5-A of the Act, 1860 even though the respondents had filed application for the same purpose on 08.03.2006 and also got the order on 17.04.2006. Neither the application nor the order make any reference to the previous order dated 29.06.2007.

10. It is also stated that due to the petitioner's extreme old age, he being 90 years of age, he was not aware of the order dated 17.04.2006 nor of the order dated 20.01.2012 and therefore he may be permitted to amend the writ petition challenging these two orders also.

11. The second objection raised by Sri Sujeet Kumar is that the writ petition itself was filed in 2005 and the order sought to be challenged by way of amendment application, namely, 17.04.2006 and 20.01.2012 were well within the knowledge of the petitioner and therefore challenge to the same at this stage is grossly barred by laches.

12. At this stage, it may also be noted for purposes of record that it is understood between the contesting parties that any order on the amendment application would also be an order on the merits of the case or the maintainability of the writ petition itself.

13. Sri B.C. Rai, learned counsel submits that throughout the petitioner's case was that the properties of the Society had been sold by the respondents No. 3 and 4 exclusively without seeking any permission from the principal court of original jurisdiction as required under Section 5-A of the Act, 1860 and the provisions of the Act being mandatory the sale of the said properties was null and void. It is submitted that these are the properties which have been mentioned as sold in 1995 itself, in the impugned order dated 29.06.2007 and in any case the burden would be upon the respondents to show that prior to disposal of the properties mentioned in the order dated 29.06.2007 the application under Section 5-A of the Act, 1860 had been filed and permission of the principal civil court of original jurisdiction taken. The order dated 29.06.2007 indicates that the sale deeds were executed as far back as in 1995 whereas the Deputy Registrar has granted liberty to the parties to apply to the court under Section 5-A of the Act, 1860 for obtaining permission for the sale of the said properties only through the order dated 29.06.2007. Section 5-A does not contemplate grant of a post sale certificate/permission by the Court.

14. Section 5-A of the Societies Registration Act, 1860 reads as follows:

"5-A. Restriction on transfer of property-(1) Notwithstanding anything contained in any law, contract or other instrument to the contrary, it shall not be lawful for the governing body of a society registered under this Act or any of its members to transfer, without the previous approval of the Court, any immovable property belonging to such society. " 15. On a careful reading of the provisions of Section 5-A it will be seen that compliance of the provisions thereof are mandatory and the language of the Section is in the nature of a restraint on the governing body of the Society or any of its members to transfer any immovable property belonging to such Society without the previous approval of the Court.

16. Sub-Section 2 of Section 5-A in fact emphatically declares that every transfer made in contravention of sub-section (1) of Section 5-A shall be void, therefore, in such circumstances considering the clear and unambiguous language of Section 5-A of the Act, 1860 it must necessarily be held that the provisions of Section 5-A of the Act, 1860 are mandatory.

17. Explanation-I to Section 5-A defines "Court". The word "Court" shall have the meaning assigned to it in section 13. Section 13 of the Act defines "Court" to mean that principal court of original civil jurisdiction of the District in which the Chief Building of the Society is situated. A post sale permission is neither contemplated nor would be permissible since by virtue of the mandate of subsection 2 of Section 5-A any such sale prior to the Court's permission shall be void. The objection of the learned counsel for the respondents that the decision to sell the properties was taken in the Resolution dated 20.08.1995 in the presence of the petitioner is of no consequence in as much as mere Resolution does not imply that permission was taken and in any case it is not the case of the respondents also that after the Resolution any permission was taken from the principal civil court of original jurisdiction to sell the said properties. Therefore, the impugned order dated 29.06.2007 is patently illegal and without jurisdiction and is accordingly quashed. The writ petition is allowed.

18. So far as the amendment application is concerned and challenge to the orders dated 20.01.2012 and 17.04.2006 are concerned, the petitioner in the affidavit filed in support of the amendment application while explaining the delay has stated that he had filed a complaint before the respondent No. 2 on 10.01.2011 which was dismissed by the order dated 20.01.2012. So far as the knowledge about this order is concerned, there is no explanation in any paragraphs of the affidavit as to when the petitioner acquired knowledge about the order dated 20.01.2012. All that has been stated in paragraph 7 of the affidavit is that due to lack of intricacies of the legal procedure and proper advice, the petitioner could not challenge the subsequent order dated 20.01.2012.

19. This in my opinion is not a sufficient explanation for condoning the delay in challenging the order dated 20.01.2012 through an amendment application filed on 27.11.2013.

20. So far as challenge to the order dated 17.04.2006 passed by the District Magistrate, Mathura is concerned, in paragraph 4 of the affidavit it is also stated that an application under Section 5-A of the Act, 1860 was filed on or about 08.03.2006 seeking permission for sale of the property of the Society and this application was allowed by the District Judge, Mathura by order dated 17.04.2006. In paragraph 6 of this affidavit it has been stated that the petitioner came to acquire knowledge of this order dated 17.04.2006 for the first time when he filed a complaint before the respondent No. 2. How in what matter he acquired knowledge about this order has not been explained. Besides this order is an order passed by the District Magistrate, Mathura in the capacity of principal court of original civil jurisdiction under Section 5-A of the Societies Registration Act, 1860 and this order can only be challenged through a revision and not in the present writ petition.

21. Sri B.C. Rai, learned counsel for the petitioner submits that this writ petition may be converted into a revision so far as challenge to the order dated 17.04.2006 is concerned and he has placed reliance on the judgment of the Supreme Court reported in *The Reliable Water Supply Service of India Vs. Union of India (UOI) and Others*, Similar view has been taken by a Division Bench of the Kerala High Court in *Nafeesa v. Deputy Collector and Special Land Acquisition Officer*.

22. In support of his submission reliance has also been placed upon a judgment of the Supreme Court reported in *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, wherein it has been held that where the statutory right to file an appeal has been provided for it is not open to the High Court to entertain the petition under Article 227 of the Constitution of India. Even if where remedy by way of appeal has not been provided against the order and judgment of the District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where the remedy for filing a revision before the High Court under Section 115 of the Civil Procedure Code has been expressly barred by a State Enactment only in such a case a petition under Article 227 of the Constitution of India would lie and not under Article 226 of the Constitution of India. Paragraph 6 of the judgment reads as follows:

"[6] The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see *National Insurance Co. Ltd., Chandigarh Vs. Nicolletha Rohtagi and Others*, . This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly

misconceived. Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 of CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected, and a State enactment has barred the remedy of filing revision under Section 115 C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution. Thus, where the State legislature has barred a remedy of filing a revision petition before the High Court under Section 115 C.P.C., no petition under Article 226 of the Constitution would lie for the reason that a mere wrong decision without anything more is not enough to attract jurisdiction of High Court under Article 226 of the Constitution." 23. The Supreme Court in a recent decision in Special Appeal No. 2548 of 2009 and SLP (C) No. 25828 of 2013, Radhey Shyam and Ors. v. Chhabi Nath and Ors. decided on 26.02.2015 has held that judicial orders of civil court are not amenable to writ jurisdiction under Article 226 of the Constitution.

24. Paragraph 25 of the judgment reads as follows:

"25. Accordingly, we answer the question referred as follows:

(i) Judicial orders of civil court are not amenable to writ jurisdiction Under Article 226 of the Constitution.

(ii) Jurisdiction Under Article 227 is distinct from jurisdiction from jurisdiction Under Article 226.

Contrary view in Surya Dev Rai is overruled."

25. The present writ petition is a petition filed under Article 226 of the Constitution of India whereas the order sought to be challenged by way of amendment application is the order dated 17.04.2006 passed by the District Judge, Mathura in exercise of powers under Section 5(A) of the Societies Registration Act, 1860 as the principal court of original civil jurisdiction and therefore the amendment application cannot be allowed so as to permit the petitioner to challenge the aforesaid order in the present writ petition.

26. Further, considering that the order dated 17.04.2006 is sought to be challenged after amending the writ petition, I am of the view that it was always open for the petitioner to challenge the same through a revision petition or such other remedy as may have been available under the law and this writ petition challenging the order dated 29.07.2006 cannot be converted into a revision so as

to enable the petitioner to assail the order dated 17.04.2006.

27. Thus, on a conspectus of facts and law, I am of the opinion the amendment application is completely devoid of merit and is accordingly rejected.

28. There shall be no order as to cost.