

CASE NO.:
Appeal (civil) 3523 of 1998

PETITIONER:
Gayatri De

RESPONDENT:
Mousumi Cooperative Housing Society Ltd. & Ors.

DATE OF JUDGMENT: 16/04/2004

BENCH:
S. Rajendra Babu , Dr. AR. Lakshmanan & G.P. Mathur.

JUDGMENT:
J U D G M E N T

Dr. AR. Lakshmanan, J.

This appeal involves several interesting questions as will appear from the facts set out hereunder:

The appellant herein filed a writ petition before the High Court of Calcutta praying, inter alia, for cancellation of the letter dated 1.11.1988, issued by the Special Officer of the Society, for declaration that the possession of the Flat being No. A- 2 on 5th Floor should be given to the legal heirs of late Sati Prasanna Bhowmick, the deceased member, upon receipt of all dues in respect of the said apartment by the said Society and for an interim order of injunction restraining the society and the Special Officer from alienating transfer of the said apartment No.2 to anybody other than the legal heirs of the deceased member and for other reliefs.

The father of the appellant/writ petitioner \026 Sati Prasanna Bhowmick \026has died intestate in August, 1985 leaving being him the following legal heirs :

- | | | | |
|----|----------------------|---|------------------|
| a) | Smt. Gayatri De | - | Married daughter |
| b) | Smt. Atri Das | - | -do- |
| c) | Smt. Maitry Roy | - | -do- |
| d) | Smt. Anita Sarkar | - | -do- |
| d) | Sri Subrata Bhowmick | - | son |
| e) | Smt. Mita Das | - | Married daughter |

The said legal heirs, namely, the four daughters and the son have separately, by letters, given their consent thereby authorising the appellant to take possession of the flat being No.A-2 from the respondent-Society. The appellant has been authorised by all the legal heirs of late Sati Prasanna Bhowmick to take possession of the flat stands in the name of their deceased father.

The appellant's father, owner of rent free land at 15 B Ballygunge, Calcutta-700 019, entered into an agreement on 18.10.1977 for sale of the land in question on which the said Society desired to make the apartment. On 27.10.1980, an indenture was entered into between the father of the appellant and the Housing Society. The total price was Rs.13,90,069.28 against which the earnest money amounting to Rs.7,30,000/- was paid towards part payment of the price. Clauses 10 and 12 of the agreement of 1977 runs as follows:

"Page B"

It is worth mentioning, in this connection, that Priti was the name of the pre-deceased wife of the said Sati Prasanna Bhowmick and the late mother of the appellant herein. By letter dated 29.11.1982, the Society intimated the father of the appellant that they had favourably considered the application and accepted the membership under the terms and conditions contained in the said letter. The father of the appellant had been informed by the said letter that the Society had

allotted him a three bed rooms flat on facing flat No. A-2 having covered area of 1268 sq.ft. approximately (including common area) on 5th floor in the project of the society. The estimated cost of the flat was mentioned at Rs.2,53,600/- @ Rs.200/- per sq.ft. inclusive of proportionate land value.

Clause 13 of the said letter runs as follows:

"Page D"

On 13.10.1980, the Society issued two share certificates bearing Nos. 51 and 52 in favour of Sati Prasanna Bhowmick, since deceased and a flat being No.A-2 on the 5th floor at the said multi storied building had been allotted to him under their letter dated 29.11.1982. The Secretary of the society made demands of payments for the flat in question and the other flats allotted to other members. Series of correspondences went on and the father of the appellant took time to clear all the dues. Some trouble arose which hampered the progress of the said society and other litigations were cropped up. One Mr.Arun Prakash Sarkar, an advocate of the High Court at Calcutta, had been appointed as a Special Officer. The Special Officer intimated this under his signature that the High Court had authorised him to take immediate steps to have the construction work continued and also to give liberty to him to consider the question of allotment of applications etc, The father of the appellant, since deceased, who was an aged ailing octogenarian became ill and could not take any further steps regarding his own flat namely, A-2/5 which had been allotted to him as already mentioned hereinabove. It is worth mentioning, in this connection, that since after the early part of 1983, there was neither any demand for money nor of any communication regarding his liability in respect of the said flat from the end of the said Society during the life time of Sati Prasanna Bhowmick.

By letter dated 6.12.1986, Dr. Subrata Bhowmick, son of Sati Prasanna Bhowmick, since deceased, the erstwhile allottee in respect of flat No. A-2/5 wrote a letter to the Special Officer of the Society intimating him about the demise of his father and mentioning therein that they had since found that their father did not leave any nominee for the flat mentioned above. It was also mentioned therein that they were taking such action under the West Bengal Cooperative Societies Act, 1983 (hereinafter referred to as "the Act") and the laws to get their father's interest transferred to one out of all brothers and sisters and as some of them were outside Calcutta and even outside India and it was likely to take time. No reply was sent by the Society to the letter dated 18.12.1986. The Special Officer, for the first time, on 1.11.1988 wrote a letter to Dr. Subrata Bhowmick that in accordance with the Act, the Rules made thereunder and the bye-laws of the Society, a claim for transfer of interest is required to be made within a stipulated time and as no claim for transfer of the interest of their late father has been made in time, the flat in question has already been re-allotted and the Society will make payment of the amounts made after deduction in accordance with law.

The appellant filed a writ petition in the High Court of Calcutta for a mandamus commanding respondents 2 and 3 to withdraw, cancel and not to give effect to the purported letter dated 1.4.1988 issued by the Special Officer of the Society and to forbear from acting on the basis thereof and pursuant thereto. Other consequential reliefs/prayers were also made.

The writ petition was resisted by the Special Officer of the Society submitting therein that the said writ petition was not maintainable in law and sustainable on facts and should be rejected in limine. The appellant filed an affidavit in reply denying and disputing the correctness of the statements, contentions and submissions made in the affidavit-in-opposition. It was specifically stated that the Special Officer having been appointed by the High Court and the decision and action of the Special Officer could not be assailed in any Court subordinate to the High Court and as such the High Court was moved against the wrongful and illegal action of the Special Officer. In spite of availing the remedy of reference of the dispute to the Registrar under the Act, which

according to the appellant, was no bar to the maintainability of the writ application, it was asserted that the appellant was ready and willing to pay the balanced amount in respect of the said flat and also prepared to comply with all the formalities in respect of the said flat. The writ application was heard and disposed of on 2.7.1992 by a learned single Judge. The ordering portion of the said judgment is reproduced hereinbelow:
"page N & O"

Against the aforesaid judgment and order, the Society preferred an appeal before the Division Bench. The Division Bench allowed the appeal filed by the Society and dismissed the writ petition filed by the appellant. It reads thus:

"(a) Since the entire amount has not been paid, no right, title and interest had passed in favour of the father of the appellant Sati Prasanna Bhowmick ; (b) The provisions of the Act and the Rules made thereunder leave no manner of doubt that the appellant does not have any right to allotment of a flat nor the heirs of the deceased could claim title in relation to the flat in question in violation of the provisions of Chapter IX of the said Act ; (c) The heirs nominated after the expiry of the stipulated period could not derive any right contrary to or inconsistent with the provisions of the Act. The writ petition was not maintainable for non-impleading the necessary party and no writ will lie against the respondent-Society.

Being aggrieved by and dissatisfied with the judgment of the Division Bench, the appellant filed this appeal by way of special leave petition.

We heard Shri V.R. Reddy & Shri Tapas Ray, learned senior counsel, appearing for the appellant and Shri S.B. Sanyal, learned senior counsel assisted by Shri Somnath Mukherjee, learned counsel, appearing for the respondents.

Shri V.R. Reddy took us through the pleadings, affidavits filed before the High Court as well as before this Court and the annexures.

He made the following submissions:

He submitted that in the event of death of a member, the legal heirs of such deceased member are entitled to inherit and give allotment of the apartment which the deceased member was entitled to. In the instant case, the deceased member died leaving no more nominating any person to inherit the apartment. According to Shri V.R. Reddy, in the event of the deceased member dies leaving no more nominating any person to inherit the apartment, the interest of the deceased member could be inherited by all the legal heirs or by one of the legal heirs in the event other legal heirs give their rights in favour of such single legal heir. He submitted that the Cooperative Society is not competent to re-allot a valid allotment in favour of the deceased member even when all financial obligations are complied with, ignoring the rights of legal heirs of such deceased member. He invited our attention to Sections 79, 80, 82, 85, 87 and the corresponding Rules.

Shri V.R. Reddy further submitted that the writ petition was maintainable since the order impugned was passed by the Special Officer, appointed under the provisions of the Act and as such he is a statutory officer and, therefore, he should be regarded as a public authority and, therefore, the writ petition filed by the appellant is maintainable in law.

Shri V.R. Reddy also submitted that the right and interest of the legal heirs of the deceased member could not be denied in the event of time taken in nominating, particular legal heirs for the same could not be done within three months from the date of the death of the member because of certain unavoidable circumstances as the legal heirs were not available immediately in giving their consent and giving up their rights in favour of the single legal heir in whose favour the property desired by all the legal heirs to be transferred. More so, when the Cooperative Society was intimated well in advance seeking extension of time in providing particular name in whose favour the property the legal heirs desired to be transferred. Shri V.R. Reddy contended that the

valid membership in favour of deceased member could not be cancelled only because the name of the nominee in whose favour of the property was to be transferred had taken some time for selecting such nominee by all the legal heirs.

Countering the arguments, Shri S.B. Sanyal, learned senior counsel appearing for the respondents, submitted as under:

- (a) the judgment and order impugned in this appeal is unexceptionable;
- (b) the father of the appellant paid only Rs.one lakh against the title cost of the flat of Rs.2.60 lakhs despite several reminders during his life time and as such, acquired no right, title or interest in his allotted flat No. A-2/5 under Section 87 of the Act and under Rule 153 of the Rules framed thereunder;
- (c) The present appellant cannot claim any such title or interest over the same by way of inheritance. The modality for such devolution by inheritances are stipulated under Section 80(1)(a), (b) & (c) of the Act. The appellant having failed to comply with such formalities of the claim, automatic entitlement to the right, title and interest in the flat was no longer available to the appellant.

As per the directions of this Court dated 13.4.1998, the nomination register along with the zerox copy thereof was submitted. The said register is a statutory register under Section 79 of the Act and Rule 127 of the Rules and is conclusive evidence that late Sati Prasanna Bhowmick did not appoint any nominee in respect of his flat.

The writ petition filed by the appellant is not maintainable as the respondent-Society is not a State or even the instrumentality of the State within the meaning of Article 12 of the Constitution of India. According to Shri S.B. Sanyal, the Society is an autonomous body, duly governed by an elected Board under the provisions of the Act and the bye-laws of the Society and the Society is not recipient of any State assistance in the form of shares, subsidy loans, working capital etc. and there is no State control or State nominee or Government Officers on deputation to the service of the Society. Therefore, he would submit that since the Society is governed by the Act, Rules and bye-laws devoid of any elements of public law warranting remedy in the form of mandamus, the writ petition is not maintainable. The appellant forfeited her right to the shares and interest of late Sati Prasanna Bhowmick because of her negligence to prefer the claim with probate, letter of administration or succession certificate before the Board within the period of 90 days as stipulated in Section 90(1)(b) and (c) of the Act. The appellant has also discharged her onus for preferring her claim within the stipulated period. It was submitted that sub-Section (3) of Section 85 of the Act being a special statute would govern the relationship of the parties and thus the question of his heirs and successors being automatically entitled thereto does not arise and the membership which was heritable could be claimed in the manner laid down under the Act and Rules framed thereunder. The appellant being allottee of Flat No.4-A/2 in the same building is not entitled to a second flat being No.5-A/2 under Section 85(3) of the Act and Rule 135 (2) of the Rules. The third party allottee was not made a party to the writ petition.

Concluding his arguments, Shri S.B. Sanyal submitted that the appellant is a stranger so far as Flat No.5-A/2 is concerned. She is neither the nominee of late Sati Prasanna Bhowmick nor the one claiming right, title and interest of late Sati Prasanna Bhowmick under Section 80 (1)(b) and (c) of the Act within 90 days of his demise to the satisfaction of the Board and thus

forfeited her right to succession to the subject flat under Section 72 and Section 87(2) of the Act and Rule 153 of the Rules.

Shri S.B. Sanyal further submitted that even though the appellant is not entitled to any right, shares and interest of late Sati Prasanna Bhowmick, the respondent-Society is ready and willing to refund the amount to the appellant.

We have given our thoughtful consideration to the arguments advanced by the learned senior counsel appearing on either side with reference to the pleadings, records, annexures and the case laws.

Before we proceed to deal with the issues in question, it is beneficial to consider the relevant provisions of the Act and the Rules made thereunder.

Sections 2(28), 2(32), 79, 1005..(pages 6-11)

We shall now deal with the question whether the right of ownership of a flat in multi-storied building under the Act is inalienable and transferable. The other question as to whether in the event of the deceased member dies leaving no more nominee any person to inherit the apartment interest of the deceased member for such apartment should be inherited by all the legal heirs or by one of the legal heirs in the event other legal heirs give their rights in favour of such single legal heir may also arise.

Section 87 of the Act deals member's right of ownership and sub-Section(3) of the said Section makes it abundantly clear that a plot of land or a house or an apartment in a multi-storied building 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. 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.

Section 80 of the Act deals with disposal of the deceased member's share or interest and clause (b) of sub-Section(1) speaks that 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 appears to the Board to be entitled in accordance with the Rules, possession of such shares or interest as part of the estate of the deceased members; or sub-Section (c) on the application of the person referred to in clause (b) within three months from the date of death of member to such person as may be specified in the application which clearly indicates that while disposing of deceased member's share or interest the preferential claim always goes to the heirs and legal representatives of the deceased member in absence of any nominee. Section 82(b) of the Act is very specific that notwithstanding anything contained elsewhere in this Act or any other law for the time being in force when the membership of a member by a cooperative society referred to in clause (a) terminates by reason of death or any other cause his possession of, or interest in, in land held by him under Cooperative Society shall vest in his heirs or in the person, if any, nominated by him under Section 79, if such heir is willing to be admitted as a member of the Society.

Section 80(c) of the Act makes it clear that on the death of the member of the Society, his share or interest in the Society shall be transferred on the application of the person referred to in clause (b) within three months from the date of the death of the member of such person as may be specified in the application. Therefore, transfer of

shares or interest can be made only by a Society and not by the legal heirs because if it is read by a Cooperative Society after the word "transfer" then the meaning and application becomes clear which means it is an obligation 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.

While disposing of the appeal, the learned Judges of the Division Bench of the High Court gave much stress on sub-Section (3) of Section 85 of the Act as also Rule 135 of the Rules taking the present case to be a case for admission of membership which is not in the instant case. In the present case, the question of admission of membership becomes absolutely immaterial, the real question, however, is of transfer of devolution of interest of a deceased member. The appellant being one of the heirs of the deceased member was and still is entitled to succeed to the estate of the deceased member as per the mandatory provisions of the statutes and that being so the right, title and interest of the deceased member in the apartment of the Society devolves upon his heirs and in that background, Section 85(3) and Rule 135(5) neither have nor can have any application in the instant case because there cannot be any manner of doubt that on the death of a member of a Society his share or interest in the 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 Rules, possession of such interest as part of the estate of the deceased member and herein in the instant case the son who himself is admittedly not a member of the Society in question or any other Housing Society became entitled to be considered for such allotment immediately he gave notice to the appropriate authority which too long before the alleged re-allotment was said to have been made, In our opinion, the order passed by the Special Officer re-allot the flat to a stranger even after he had received letter regarding transfer of ownership in favour of legal heirs in December, 1986, long before such alleged re-allotment, claimed to have been made in April, 1988, that is, more than 16 months from the receipt thereof when giving any opportunity of being heard and without deciding the question as to who was entitled to the said flat in accordance with law. The said action of the Special Officer who is a statutory functionary was not only improper but also illegal, arbitrary and motivated.

In fact, the respondent-Society has informed that the allotment in favour of the deceased allottee stood cancelled because of no appropriate person could be named as legal heir of the allottee in whose in whose favour respondent-Society was to make the allotment and as such the Society has been threatening of re-allotting the earmarked flat for the deceased allottee to a stranger ignoring the rights of the legal heirs.

It is now brought to our notice that the flat has not been allotted to a third party and remains vacant. The allotment letter of membership of the flat to the father of the appellant (Annexure P-4) dated 29.11.1982 clearly stipulates that the right and the interest in the Society of the member will be governed by the provisions of the Act, the Rules made thereunder and the bye-laws of the Society and that the members will also be liable to be discharged his obligations as the member of the Society in accordance with the abovementioned Act, Rules and the bye-laws.

It was then argued by Shri S.B. Sanyal that the appellant being allottee of Flat No. 4-A/2 in the same building is not entitled to a second flat being No. 5-A/2 under Section 85(3) of the Act and Rule 135 of the Rules. This argument cannot be countered with reference to the letter dated 6.12.1986, the letter written by Dr. Subrata Bhowmick to the Special Officer of the Society. The said letter reads thus:

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The letter is self explanatory.

Dr. Subrata Bhowmick, son of late Sati Prasanna Bhowmick brought to the notice of the Society about the death of his father in August, 1985 and also by intimating the Society that since their did not

leave any nominee, they are taking such action under the Act and laws to get their father's interest transferred to one of us-brothers or sisters. This letter has not been noticed by the Division Bench. Therefore, the argument of Shri S.B. Sanyal has no force at all. Now, we come to the maintainability of the writ petition. We have already elaborately extracted the arguments advanced by both the senior counsel on the question of maintainability of the writ petition and hence, we are not repeating the same again.

In the instant case, the Division Bench authorised Mr. Arun P. Sircase, an advocate, to act as Special Officer and to take immediate steps to have the construction work continued and while taking steps to try and negotiate with M/s Mukhje and Associates to have the work done through them. In discharge of his statutory function, the Special Officer of the Society issued letter dated 6.4.1985 (annexure P-7) to all the members to clear their dues in respect of the flat allotted to them as soon as possible. The very same Special Officer, exercising his statutory function, issued a letter dated 1.11.1988 (Annexure P-10) to the father of the appellant herein that since no claim for transfer of the interest of late Sati Prasanna Bhowmick has been made in time by the legal heirs, the flat in question has already been re-allotted and since no claim for payment of the value of the share or interest has been made by any person entitled in law to receive the payment lying in the deceased member's account after deduction of the amount, if any, payable to the Society. The Society will make payment in accordance with law.

The appellant herein filed a writ petition in question in the nature of mandamus commanding the respondent therein not to give effect to the letter dated 1.11.1988 issued by the Special Officer of the Society and to forbear from acting on the basis thereof and pursuant thereto. Thus it is seen that the subject matter of the writ petition is the order passed by the Special Officer in discharging of his statutory functions, the writ petition is maintainable in law. The Special Officer is appointed under the provisions of the Act and as such he is a statutory Officer and, therefore, he should be regarded as a public authority. Apart from that Art. 226 of the Constitution is not confined to issue of writ only to a public authority, the bar extends also to issue directions to any person. In our opinion, in a case where the Cooperative Society is under the control of a Special Officer, a writ would lie.