

THE HON'BLE SRI JUSTICE M.GANGA RAO

WRIT PETITION No.19831 OF 2005

ORDER:

The 1st petitioner's father and the 2nd petitioner's husband, late Sri Rachuri Rama Rao, being a member of the 1st respondent-Society, was allotted house plot No.31 in the lay out LP No.5/80 of VUDA, Rushikonda Village, Yendada Panchayat, Visakhapatnam District, the same was conveyed to him through a registered sale deed No.5611/1982 dated 04.06.1982 and an amount of Rs.417/- was paid towards developmental charges, etc. vide proceedings dated 03.02.1984. The Board of Directors cancelled the allotment of plot for the reason that the allottee had not constructed the house within one year. The allottee was informed vide proceedings dated 03.02.1984 of the first respondent-Society that the Board of Directors vide Resolution dated 21.01.1984 had resolved to restore the cancelled plot. But, again on 13.08.1987 they unilaterally cancelled the allotment of plot as well as sale deed and on the same day allotted and conveyed the plot to the second respondent, on the ground that the allottee has violated the condition of sale deed. The sale deed was cancelled behind the back of the allottee, contrary to the procedure prescribed.

2. The petitioners state that *in spite* of prolonged oral and written representations for transfer of allotment of plot in their favour, the first respondent-Society kept quiet and dragged the matter for a long time. In the year 1993, the petitioners were informed by the first respondent that the allotment given to Rachuri Rama Rao was cancelled.

3. The cancellation of the sale deed and execution of fresh sale deed in favour of the second respondent was known to Rachuri Rama Rao, when he received notice dated 11.06.1990 issued by one Sri P.Govinda Swamy, Enquiry Officer and Co-operative Sub-Registrar, in connection with an enquiry under Section 51 of the Cooperative Societies Act, 1964. The allottee received the said notice only on 28.06.1990 after schedule date of enquiry conducted on 23.06.1990, on which date he had to attend for enquiry. Hence, he sought for another date for his personal attendance vide telegram dated 30.06.1990. Thereafter, no further enquiry was conducted and in the meanwhile, the allottee died on 25.01.1991. Later, through letter dated 30.08.1991, the second petitioner, wife of the allottee, being the legal heir of Late Sri Rachuri Rama Rao, sought for approval of membership in her favour. As nothing was heard from the first respondent-Society, the first petitioner filed C.C.No.436 of 1993 on the file of the District Consumer Forum, Visakhapatnam, seeking that the first respondent-Society shall hand over the house plot No.31 physically to him and also for damages. On legal advise, he had withdrawn the Consumer Case No.436/1993 with permission to file a petition under Section 61 of the Andhra Pradesh Cooperative Societies Act, 1964 (for short 'the Act'), before the third respondent within 15 days. In pursuance to the said order, the petitioners filed ARC No.1/1998-1999 before the third respondent under Section 61 of the Act for cancellation of the sale deed dated 13.08.1987 executed by the first respondent-Society in favour of the second respondent. The same was dismissed by the third respondent on counters being filed by respondents 1 and 2, mainly

on the grounds that notice under Section 126 of the Act is not issued before filing application under Section 61 of the Act and the application is barred by limitation as three years period expired from 13.08.1987, on which date the sale deed was cancelled.

4. The petitioners preferred appeal in O.A.No.110/2002 before the Andhra Pradesh Cooperative Tribunal, Vizag, against the order of the third respondent passed in ARC No.1/1998-1999 and the same was dismissed on 21.10.2003. Being aggrieved by the order of the Andhra Pradesh Co-operative Tribunal, Vijayawada in O.A.No.110 of 2002 dated 21.02.2003 confirming the order in ARC No.1/1998-1999, dated 27-10-2000, the present writ petition came to be filed.

5. The present writ petition is filed mainly contending that both the lower authority and the appellate authority erred in holding that the notice under Section 126 of the Act was mandatory before filing the application under Section 61 of the Act before the third respondent; both the lower authorities failed to see that a notice under Section 126 of the Act is contemplated only when a person chooses to file a suit before the Civil Court and the said notice is to be served upon the Registrar or at his office; no prior notice under Section 126 of the Act is required to file application under Section 61 of the Act before the Deputy Registrar of Co-operative Societies, as the petitioner had not filed suit before the Civil Court; both the authorities failed to appreciate the required period of limitation and its computation, erred in holding that the period of limitation is only three years that too from 1987 and thereby erroneously held that the claim is time barred; both the authorities failed to appreciate the nature of dispute raised

before them while considering the dispute as the only dispute to cancel the registered sale deed dated 13.08.1987 and declaring them as owners in pursuance to the title vested in the year 1982 in favour of the deceased Rachuri Rama Rao by duly cancelling the subsequent deeds; the authorities failed to appreciate the fact that no notice or opportunity was afforded to late Rachuri Ram Rao before cancelling the allotment of plot and registration of sale deed dated 13.08.1987; both the authorities erred in holding that Exs.A.3 to A.5 indicate about the reminders made by the first respondent-Society and late Rachuri Rama Rao in respect of compliance of the conditions in clause 2 to 7 of the sale deed; Ex.A.1 postulates the general conditions and the only condition is with regard to construction of a residential house to be made by a person, who avail the housing loan. The deceased allottee Rachuri Rama Rao applied for housing loan but no loan was sanctioned on the ground that VUDA was sought to acquire the society's land.

6. The petitioners state that no prior notice under Section 126 of the Act is necessary to be issued for filing application under Section 61 of the Act before the Deputy Registrar of Cooperative Societies as the petitioners have not approached the Civil Court. The provision under Section 126 of the Act states that prior notice to the Registrar is required only when the civil suit before the Civil Court is filed. Here, no suit or plaint is filed before the Civil Court against the Society or the Registrar, but only application under Section 61 of the Act before the Deputy Registrar of Cooperatives, Visakhapatnam, is filed for which no prior notice is required. Both the authorities erred in holding that prior notice to the

Registrar is required as per Section 126 of the Act and the application is liable to be dismissed.

7. Petitioners further state that the original authority i.e. the 3rd respondent has not conducted proper enquiry as contemplated under the provisions of the Act and Rules while adjudicating the dispute and has not chosen to record the evidence of any witness in order to prove the documents marked as Exhibits with an opportunity to cross examine them. Thus, the enquiry is vitiated as the same is contrary to the principles of natural justice. The findings of the original authority-3rd respondent in the order dated 27.10.2000 are not supported by any evidence brought on record except merely marking documents as Exhibits and as such all the findings on merits of the case are unsustainable. The period of limitation in respect of declaration of title and the consequential recovery of possession is 12 years under Article 65 of the Limitation Act, 1963. The said period of 12 years in this case has to be computed from 11.06.1990 i.e. from the date of notice through which the first petitioner's father came to know about the cancellation of allotment of plot No.31 in L.P.No.5/1980 of Rushikonda Village, Visakhapatnam District, whereas the authorities below chosen to compute the period of limitation as only three years that too from 1987 and held as the claim is time barred. Even the limitation of three years is to be calculated from the date of knowledge of cancellation of registered sale deed i.e. from 11.06.1990, as such, within said three years period of limitation, the petitioners filed a case in C.C.No.436/1993 before the District Forum, Visakhapatnam, under Consumer Disputes Act. Subsequently, the same was withdrawn on 08.05.1998 with

liberty to file a petition under Section 61 of the Act before the third respondent within 15 days and accordingly the same was filed on 17.05.1998. Thus, there is no delay in raising a dispute before the third respondent.

8. The first respondent-House Building Cooperative Society filed counter stating that the Society allotted a house plot bearing No.31 in lay out L.P.No.5/80 of Rushikonda Village and executed a registered sale deed dated 04.06.1982 on conditions in favour of Rachuri Rama Rao. Since the conditions in the sale deed and the bye laws of the Society were violated and the allottee failed to remit the developmental charges, the sale deed executed in favour of Rachuri Rama Rao was cancelled by registered cancellation deed dated 13.08.1987 vide Registration No.5574/1987 and the plot was allotted to another member of the society, the second respondent herein, vide registered sale deed dated 13.08.1987 bearing document No.5575/1987. Subsequently, the petitioners pursued the matter before the Forum under Consumer Protection Act, 1986. Counter further states that the petitioners, who are the legal heirs of Rachuri Rama Rao, approached the Deputy Registrar of Cooperative Societies, Visakhapatnam, by ARC No.1/1998-99 questioning the cancellation of allotment and sale deed. The Deputy Registrar of Cooperative Societies, Visakhapatnam, dismissed the petition on 27.10.2000. The petitioners approached the Andhra Pradesh Cooperative Tribunal, Vijayawada, in O.A.No.110/2002 against the order in ARC No.1/98-99. The Tribunal dismissed the appeal on 21.10.2003 with observation that the petitioners/appellants are entitled for refund of the amount

paid for allotment of the plot to the Society with interest @ 6% per annum till they receive the payment.

9. The second respondent filed a counter stating that the petitioners have no *locus* to file the present writ petition as they are not members of the first respondent-Society and prayed for dismissal of the writ petition. It further states that the disputed plot bearing No.31 in Rushikonda Village lay out was originally allotted to Rachuri Rama Rao, by way of registered sale deed bearing document No.5611/1982 dated 04.06.1982 by the first respondent Society. He failed to pay the developmental charges as demanded by the first respondent Society and also failed to comply with the conditions of the sale deed. He was not in possession of the plot. The first respondent Society after issuing several notices cancelled the sale deed under cancellation registered sale deed bearing document No.5574/1987 dated 13.08.1987. It is further stated that the first respondent Society after cancelling of sale deed, allotted the plot to the second respondent through registered sale deed dated 13.08.1987 for valuable consideration. He constructed a compound wall to prevent trespassers. The cancellation, allotment and registration of plot in favour of the 2nd respondent are done as per Society's bye-laws, Rules and Regulations and provisions of the Act. The first petitioner after five years of cancellation of sale deed in the year 1987, filed case in C.C.No.436 of 1993 before the District Consumer Forum and the same was dismissed. Thereafter, the first petitioner filed ARC No.1/98-99 before the Deputy Registrar of Cooperative Societies, Visakhapatnam, under Section 61 of the Act. After elaborate enquiry, the third respondent dismissed the ARC on 27.10.2000.

Against the order of the third respondent, the petitioner filed appeal in O.A.No.110 of 2002 before the Tribunal. The Tribunal dismissed the appeal on 21.10.2003. The original allottee or his legal heirs, petitioners herein, failed to construct the house in the plot as per the conditions of sale deed. Thereby, the allottee violated clause 2 and clause 5 of the conditions of the sale deed.

10. Learned senior counsel Sri Surya Karan Reddy, appearing for the petitioners, would contend that the first petitioner's father Rachuri Rama Rao, the husband of the second petitioner, was allotted a house plot No.31 by the first respondent in the layout LP No.5/80 of Visakhapatnam, Rushikonda (V), Visakhapatnam District, and the plot was conveyed by way of registered sale deed vide document No.5611/1982 dated 04.06.1982 in favour of the first petitioner's father. The first respondent Society cancelled the allotment of plot on 08.01.1984 on the ground that the allottee had not constructed a house within one year from the date of allotment as per the conditions of the sale deed. However, again on 06.03.1984, the first respondent Society restored the plot to him. The allottee applied for loan as per clause 42 of the sale deed, but the loan could not be sanctioned. As the VUDA proposed to acquire the lands of the first respondent-Society, the first respondent-Society filed W.P.No.11981 of 1987 before this Court. Later, the Society has withdrawn the writ petition. The first petitioner's father could not construct the house due to non-sanction of housing loan. Hence, it could not be a ground for cancellation of allotment. However, the first respondent-Society without any notice or intimation cancelled the allotment by registered cancellation deed bearing

document No.5574/1987 dated 13.08.1987. On the same day, the plot was registered to the second respondent vide registered document No.5575/1987 dated 13.08.1987. After the death of the allottee, the petitioners made several representations to transfer the plot to them, but they were informed that the plot was cancelled and registered in favour of the second respondent. Immediately, they filed C.C.No.436 of 1993 before the District Consumer Forum, Visakhapatnam. Later, the petitioners have withdrawn the Consumer Case with liberty to approach the authorities under Section 61 of the Act. Accordingly, they filed application before the Deputy Registrar of Co-operative Societies, Visakhapatnam. The same was dismissed on erroneous appreciation of law and facts without conducting proper enquiry as per the provisions of the Act and Rules without examining any witness and allowing cross examination of witnesses except simply marking the documents. The Deputy Registrar has to conduct enquiry akin to the Civil Court as the jurisdiction of the Civil Court is barred under Section 121 of the Act. The appeal preferred by the petitioner before the Tribunal was also dismissed confirming the order of the Deputy Registrar. Both the authorities below dismissed the application on erroneous appreciation of law and facts holding that the application was filed before the Deputy Registrar of Societies without issuing prior notice under Section 126 of the Act to the Registrar. Further, the counsel would contend that there is no obligation to issue a prior notice under Section 126 of the Act as the petitioners have not filed the suit before the Civil Court. The authorities erroneously held that the petitioners filed the application beyond limitation of three years

from the year 1987 when the first respondent Society cancelled the sale deed. He further contended that the limitation for declaration of title and recovery of possession is 12 years and the limitation has to be computed from 11.06.1990 the date on which the first petitioner's father came to know about cancellation of allotment of plot No.31. In support of his contention, he relied on the judgment of this Court reported in ***Prapul Chandra Mukpalkar and another vs. P.Ramachandra Reddy and another***¹. But, even otherwise, three years period is to be calculated from the date of knowledge of cancellation of registered sale deed i.e. from 11.06.1990. Within the said period of three years, the first petitioner filed C.C.No.436 of 1993 before the District Consumer Forum. Both the authorities failed to consider that the cancellation of sale deed and execution of another sale deed in favour of the second respondent is without notice and against the principles of natural justice and contrary to the provisions of the Act.

11. The counsel for the first respondent-Society would contend that the first respondent-Society allotted house plot No.31 in the lay out L.P.No.5/80 of Rushikonda Village and also executed a registered sale deed dated 04.06.1982 in favour of the father of the first petitioner. When the conditions of the sale deed and bye-laws of the Society were violated, the sale deed executed in favour of the allottee was cancelled on 13.08.1987 and the plot was re-allotted and conveyed through registered sale deed dated 13.08.1987 to another member. Petitioners filed a consumer dispute case before the District Consumer Forum and the same

¹ 1998 (2) ALT 766

was dismissed as withdrawn. Questioning the cancellation deed, the petitioners approached the Deputy Registrar of Cooperative, Visakhapatnam, in ARC No.1/1998-99, which was dismissed. Against the dismissal order passed in ARC No.1/1998-99, the petitioners filed an appeal under Section 76 of the Act before the Tribunal. The Tribunal dismissed the appeal. He would further contend that the petitioners filed this writ petition to issue Writ of Mandamus against the order of the first respondent and the same is not maintainable, only a Writ of Certiorari to quash the order of Tribunal is maintainable against the order of the quasi judicial authorities. He relied on judgments reported in ***Syed Yakoob v. K.S.Radhakrishnan and others***² and ***Birla Sun Life Insurance Co. Ltd., Mumbai v. Insurance Imbudsman, Hyderabad, and another***³. The Tribunal after considering all the issues, held issue No.3 in favour of the first respondent-Society holding that cancellation of sale deed by the Society cannot be found fault with.

12. The counsel for the second respondent would contend that the first petitioner's father was originally allotted with plot No.31 of Rushikonda (V) and conveyed the plot through registered sale deed. For violation of the conditions of the sale deed in clauses 2 and 5 for non-payment of the developmental charges and non-construction of the house therein, the plot was cancelled and cancellation deed was executed in the year 1987 and the plot was re-allotted to the second respondent and the same was registered through sale deed in the year 1987. The original allottee and the petitioners have not fulfilled the conditions of the sale deed. The petitioners approached the authorities only after eight years after

² AIR 1964 SC 477

³ 2014 (6) ALD 176

death of the original allottee. There is no illegality in cancelling the sale deed and re-allotting the plot and registering the same in favour of the second respondent. He further contended that no absolute interest is created by sale deed in favour of the original allottee. As per condition No.5 of the sale deed, the original allottee failed to construct the house within one year. Hence, there is no illegality in cancelling the sale deed by the cancellation deed. He relied on the decision reported in ***Indu Kakkar v. Haryana State Industrial Development Corporation Ltd. and another***⁴ wherein it is held that the resumption of the industrial plot for non-setting up of the industry and complete erection and installation of machinery and production within the period prescribed is valid while holding that the conditions of allotment cannot be said to be unenforced by the operation of Section 11 of the Transfer of Property Act, 1872.

13. Sri Surya Karan Reddy, learned senior counsel, would contend that in the present case a plot was allotted by the Housing Society for construction of residential house, no condition of the sale deed is challenged, but only due to valid reasons, the house could not be constructed. As per the conditions of the sale deed, the allottee has to construct the house after availing the loan. But, the loan was not sanctioned due to pendency of land acquisition proceedings. Thereafter, the first respondent illegally cancelled the allotment of house plot. Hence, the decision in ***Indu Kakkar (supra)*** has no application to the facts of the present case. In ***Syed Yakoob (supra)***, it has been held that a writ of *certiorari* can be issued for correction of error or jurisdiction committed by the

⁴ (1999) 2 SCC 37

inferior courts or Tribunals. When the Court or Tribunal Acts illegally and improperly as for instance it decides a question without giving an opportunity to be heard to the party affected, there is no bar to the aggrieved party to approach this Court under Article 226 of the Constitution of India, even by seeking Writ of *Mandamus* on technical grounds the writ petition cannot be thrown out, without deciding the issue on merits in the interest of justice.

14. Having carefully considered the submissions of the counsel on record, in considered view of this Court, it is found that both the authorities below had not considered the law and facts properly. The Tribunal and the lower authority under Section 61 of the Act, grossly erred in coming to the conclusion that prior notice under Section 126 of the Act is pre-requisite to file an application under Section 61 of the Act as the petitioners have not filed suit before the civil Court. The Tribunal and the lower authority committed error of law and fact in dismissing the application on the ground of limitation when the limitation is a mixed question of fact and law when the period of limitation in respect of declaration of title and consequential relief of recovery of possession is 12 years under Article 65 and Section 27 of the Limitation Act, 1963.

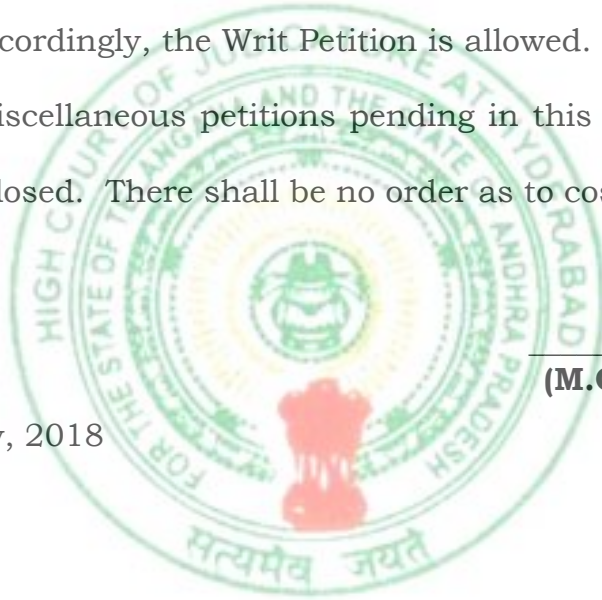
15. The Tribunal also failed to see that the lower authority had not conducted proper enquiry akin to the Civil Court, as the Civil Court jurisdiction is barred under Section 121 of the Act. In support of his findings, the lower authority had not examined any witness in chief or in cross, no opportunity was given to the petitioners and only on mere surmises and conjectures, without

properly appreciating the legal evidence, dismissed the application. Hence, to meet the ends of justice, both the orders of the Tribunal and lower authority i.e. order dated 21.10.2003 passed in ARC No.1/1998-1999 by the Deputy Registrar of Cooperative Societies, Visakhapatnam, and order dated 21.02.2003 passed in O.A.No.110 of 2002 by the Andhra Pradesh Co-operative Tribunal, Vijayawada, are set aside. The matter is remanded back to the lower authority i.e. The Deputy Registrar of Cooperative Societies, Visakhapatnam, for fresh consideration of petitioners' application in ARC No.1/98-99 as per law.

16. Accordingly, the Writ Petition is allowed.

17. Miscellaneous petitions pending in this petition, if any, shall stand closed. There shall be no order as to costs.

16th February, 2018
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(M.GANGA RAO, J)