

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7928 OF 2015

1. The Chairperson/Secretary
St. Anthony's Homes Co-op. Society Ltd.
253/254-B, St. Anthony's Road (North)
Chembur, Mumbai – 400 071.

...Petitioner

Versus

1. Mr.Kenneth Paul
2. Mrs. Angela Paul
Both residing at A. B. Paul and Co.
403, Vikas Bldg., 11th Bank Street,
Fort, Mumbai – 400 001.
3. Deputy Registrar, C. S., “M” Ward,
having his office at Room No.202,
Kokan Bhavan, 2nd Floor,
Navi Mumbai – 400 614.
4. Divisional Joint Registrar,
Co-op. Societies, Mumbai Division,
Mumbai, Malhotra House, 6th floor, Opp.
G.P.O. Fort, Mumbai-400 001.

...Respondents

Mr. Clive D'souza, for Petitioner.

Mr. Govindshankar Krishnan I/b Malvi Ranchoddas & Co. for
Respondent nos.1 and 2.

Mr. A. B. Kadam, AGP for Respondent nos. 3 and 4.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 5th April, 2019.

PRONOUNCED ON: 3rd May, 2019.

JUDGMENT:-

1. Rule. Rule made returnable forthwith. With the consent of
the Counsels for the parties heard finally.

2. This petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of the order passed by Deputy Registrar, Co-operative Societies, 'M' Ward, Mumbai on 3rd March, 2012 in an appeal under Section 23(2) of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as 'the Act'), whereby the Petitioner – Society was directed to admit Respondent nos.1 and 2 as the members of St. Anthony's Homes Co-operative Society Ltd. (hereinafter referred to as 'the Society'), and the order passed by the Additional Joint Registrar, Co-operative Societies, Mumbai Division, in Revision Application No.140 of 2012, dated 25th July, 2013, whereby the revision preferred by the Petitioner – Society against the order passed by the Deputy Registrar dated 3rd March, 2012 came to be dismissed.

3. The background facts can be stated in brief as under:

The Society is a Tenant Ownership Co-operative Housing Society registered under the provisions of the Act of 1960. It is a plot holders' society having 98 plots. The plots were leased out to its members for 998 years. Initially plot No.459 was leased out by the society to one Mr. Alexandre Vaz, in the year 1950. Share certificates were issued in favour of Mr. Alexandre Vaz. Subsequently, the shares came to be transferred pursuant to

the request of the members whose name(s) were recorded in the register of the members of the society at the relevant point of time. Ultimately, on 10th April, 1998, pursuant to an application of Mrs. Marina D'souza, the said plot No.459 came to be transferred in the names of Mrs. Marina D'souza, her husband Mr. Joe Gregory D'souza and son Mr. Warren D'souza.

4. Respondent nos.1 and 2 staked claim to the membership of the Society and to the said plot on the strength of a gift-deed allegedly executed by Mrs. Marina, Mr. Joe and Mr. Warren on 16th August, 1999. The Petitioner – Society rejected the claim of Respondent nos.1 and 2 vide communication dated 18th March, 2010. Being aggrieved, Respondent nos.1 and 2 preferred an appeal before the Deputy Registrar under Section 23(2) of the Act of 1960. The Deputy Registrar, after hearing Respondent nos.1 and 2, and the Petitioner – Society was persuaded to allow the appeal, by the impugned order dated 3rd March, 2012, holding, *inter alia*, that the erstwhile members had executed the gift-deed in respect of the subject plot on 16th August, 1999 in favour of Respondent nos.1 and 2, and the said gift-deed was duly registered with the Registrar of Assurances on 11th April, 2011, no claims and/or objections were received pursuant to the publication made by Respondent nos.1 and 2 in respect of

the subject plot and the Society did not substantiate its claim that the members were defaulters.

5. The Petitioner – Society assailed the aforesaid order of the Deputy Registrar by filing Revision Application No.140 of 2012, under Section 154 of the Act, 1960. The Joint Registrar, Co-operative Societies, by the impugned order dated 25th July, 2013, found the order passed by the Deputy Registrar sound and justifiable and thus dismissed the revision application. The Joint Registrar was of the view that the Registrar is not empowered to examine the legality and validity of the document tendered by Respondent nos.1 and 2 in support of its claim. The authorities under Act, 1960, were not expected to embark upon an enquiry as to the title to the property in respect of which membership was claimed. Since there was no order of a Competent Court throwing cloud over the legality and validity of the gift-deed, the authorities under the Act, 1960 were enjoined to direct the Society to admit Respondent nos.1 and 2 as the members thereof.

6. Being further aggrieved and dissatisfied with the aforesaid judgment and order passed by the Joint Registrar and the actions initiated by the authorities under the Act of 1960 to enforce the said orders by issuing directions under Section

79(2) of the Act, 1960, the Petitioner – Society has invoked the writ jurisdiction of this Court.

7. I have heard Mr. D'souza, the learned Counsel for the Petitioner – Society, Mr. Krishnan, the learned Counsel for Respondent nos.1 and 2 and Mr. Kadam, the learned AGP for Respondent nos.3 and 4.

8. Mr. D'souza, the learned Counsel for the Petitioner urged that the authorities have wholly misconstrued the nature of the controversy and have approached the question in a perfunctory manner. According to the learned Counsel for the Petitioner, the authorities have committed a grave error in sustaining the claim of Respondent nos.1 and 2 without there being any legally admissible document to substantiate the said claim. The authorities have conveniently over-looked the fact that the alleged gift-deed was executed on 16th August, 1999, but it was never registered. The learned Counsel would urge that the finding recorded by the authorities that the gift-deed came to be registered on 11th April, 2011, is factually unsustainable. What came to be registered on 11th April, 2011 was a unilateral 'deed of confirmation' and not gift-deed, as alleged by Respondent nos.1 and 2. Even otherwise, in view of the indenture of lease, whereby the subject plot was leased out in favour of the

predecessor in title of the erstwhile members, the subject plot could not have been assigned or transferred by way of any other disposition without the express permission of the society. It was, thus, urged that the authorities have mechanically passed orders to admit Respondent nos.1 and 2 as members of the Society without examining their entitlement to become a member of the society.

9. Per contra, Mr. Krishnan, the learned Counsel for Respondent nos.1 and 2 urged that the Petitioner – Society has been stonewalling the efforts of Respondent nos.1 and 2 to become member of the Society despite there being a lawful disposition in their favour. Without disputing that the gift-deed was executed on 16th August, 1999, the learned Counsel for Respondent nos.1 and 2 urged with tenacity that the said gift-deed came to be subsequently registered along with a deed of confirmation on 11th April, 2011 and, thus, clothed the rights of ownership to Respondent nos.1 and 2. In the circumstances, the steadfast refusal of Petitioner – Society to admit Respondent nos.1 and 2 as members of the Petitioner – Society is totally unjustifiable, submitted the learned Counsel for Respondent nos.1 and 2.

10. The learned Counsel for Respondent nos.1 and 2 would support the impugned order passed by the Joint Registrar, taking the view that the authorities under the Act of 1960 could not embark upon an enquiry as to the title to the subject land. As Respondent nos.1 and 2 have tendered the gift-deed dated 16th August, 1999, which came to be registered subsequently and thereby substantiated their claim to become members of the Petitioner – Society, there was no plausible reason for the Petitioner – Society to deny the legitimate claim of Respondent nos.1 and 2, asserted the learned Counsel for Respondent nos.1 and 2.

11. In the context of aforesaid submissions, it is imperative to note that the facts are rather uncontroverted. It is incontestable that Mrs. Marina, Mr. Joe and Mr. Warren D'souza were admitted as the members of the Petitioner – Society. The claim of Respondent nos.1 and 2 is rested on a gift-deed allegedly executed by the D'souzas on 16th August, 1999. Respondent nos.1 and 2 do not claim that the said gift-deed was immediately tendered for registration. On the contrary, Respondent nos.1 and 2 have relied upon a deed of confirmation executed on 11th April, 2011 whereby the said gift-deed dated 16th August, 1999 was sought to be confirmed. In

the meanwhile, one of the donors namely Joe D'souza died on 16th May, 2000. The deed of confirmation has accordingly been executed on behalf of Mrs. Marina and Mr. Warren D'souza. The controversy revolves around the import of the said gift-deed dated 16th August, 1999 and the deed of confirmation dated 11th April, 2011 and the consequences which emanate therefrom.

12. At the outset, it is necessary to note the scope of enquiry undertaken by the Registrar under Section 23(2) of the Act of 1960. Concededly, the Registrar is not entrusted with the jurisdiction to examine the validity and legality of the documents which are tendered in support of the claim to membership. The authorities are on the contrary expected to examine whether the requisite criteria or conditions prescribed in the rules or the by-laws of the society are fulfilled by the person who seeks the membership of the society.

13. In this context, the Joint Registrar, placed reliance upon a judgment rendered by the learned Single Judge of this Court in the case of ***Harish Commercial Premises Co-Op Soc. Ltd. vs. Smt. Varsha Dinesh Joshi And Ors¹***, wherein the nature and import of the proceedings under Section 23 of the Act of 1960 was explained in the following words:

1 2006(2) ALL MR 1.

“12. In any event I am of the opinion that in the proceedings arising under Section 23 of the Maharashtra Co-operative Society Act what is required to be considered is prima-facie whether the respondents who are claiming to be the member are the lawful occupiers and have right, title and interest in the said property on the basis of which he is seeking membership of the society. The jurisdiction of the Registrar under Section 23 does not extend to determine the validity and/or otherwise of the documents which are already executed in favour of the concerned person because that is the jurisdiction of the Civil Court and if any person raising any challenge to the said agreement is required to file appropriate civil suit.”

14. It would be contextually relevant to note that the aforesaid pronouncement was referred to and relied upon in a subsequent judgment of this Court in the case of **R.N.A. Classic CHS Ltd vs. Deputy Registrar, Co-operative Society and Ors.**² and the following observations were made:

“14.In the said context, it is required to be noted that by the judgments in **Harish Commercial Premises** (supra), and **Videocon Appliances Ltd.** (supra) the scope of inquiry whilst considering the application for membership has been enunciated by a learned Single Judge of this Court. It would therefore apposite to refer to the said judgments at this stage. In **Harish Commercial Premises** (supra) case, the agreement on the basis of which the membership was claimed was sought to be questioned by the society concerned therein. The learned Single Judge of this Court held that the society has not taken any steps by filing civil proceedings or civil suit challenging the said agreement and seeking cancellation thereof. The learned single Judge whilst so holding held that the jurisdiction of the Registrar under Section 23 does not extend to determine the validity and/or otherwise of the documents which are already executed in favour of the concerned person because that is the jurisdiction of the civil court and if any person seeks to raise any challenge to the said agreement he is required to file appropriate civil suit.”

15. In the aforesaid judgment, this Court has held that while considering the question as to whether a person should be admitted to the membership of the society, the aspects which would be relevant are, whether the said person is in occupation of the premises in question and whether the said person has a lawful right and interest in the said premises. The Registrar under Section 23 has no jurisdiction to determine the validity and legality of the documents which are tendered in support of the said claim as the said question is clearly in the realm of the Civil Court.

16. The learned Counsel for the Petitioner, in contrast, placed reliance upon a judgment of the learned Single Judge in the case of ***Bandra Owners Court Co-operative Housing Society Ltd. Vs. The Divisional Joint Registrar of Co-operative Societies and Ors.***³, wherein after referring to the aforesaid judgment in the case of ***Harish Commercial*** (supra), the following observations were made.

“8. By the impugned order, Respondent no.1 though read and referred a Judgment of this Court **Harish, [2006(2) ALL MR 1]** (supra) and specifically para 12, but failed to take note of basic principles so laid down in the Supreme Court Judgments so referred and cited above. Merely because someone has claimed membership, a Society is not under obligation to grant the same. The lawful occupation, their rights, title and interest in the property, permissible transfer of

shares and/or property and/or interest as per the byelaws and all related aspects, just cannot be overlooked by the concerned parties, including the Society, as well as, the Registrar/ Authorities.”

17. The learned Counsel for the Petitioner would thus urge that the pronouncement in the case of **Harish Commercial** (supra), in view of the aforesaid observations in the case of **Bandra Owners** (supra), cannot be construed as an authority for the proposition that whenever the claim for membership is made by a person on the basis of some document, of howsoever doubtful character, the authorities are enjoined to direct that such person be admitted as a member of the society without holding any enquiry.

18. In the facts of the case, the submission canvassed on behalf of the Petitioner seems to have some substance. It is one thing to say that the Registrar under Section 23 of the Act cannot venture to enquire into the title to the subject property but another to extend the said proposition to hold that the Registrar cannot look into the nature of the claim made before it, for the membership of the Society.

19. In the case at hand, it is indubitable that the alleged gift-deed was executed on 16th August, 1999. The perusal of material on record reveals that the said gift-deed was not

tendered for registration till the document titled deed of confirmation came to be executed and tendered for registration, in the year 2011. The provisions contained in Part IV of the Registration Act, 1908, prescribe time of presentation of document for registration. Section 23 provides that no document other than a Will shall be accepted for registration unless presented within four months from the date of its execution. Whereas under Section 25 if the Registrar is satisfied that owing to urgent necessity and unavoidable accident, there was delay in presentation of the document for registration, he may direct that the document be accepted for registration provided the delay in presentation does not exceed four months. A conjoint reading of Section 23 and 25 of the Registration Act, 1908, thus, indicates that the total period of eight months from the date of execution of the document is available for registration, if the conditions prescribed in Section 25 are fulfilled.

20. In the instant case, the gift-deed appears to have been executed on 16th August, 1999, before Mr. T. J. Rao, Hon'ble Consul for India, Melbourne-Australia. If the gift-deed was executed out of India then the provisions contained in Section 26 of the Registration Act, 1908 come into play and they

provide that the Registrar may accept such document for registration if he is satisfied that the instrument was so executed and it has been presented for registration within four months after its arrival in India.

21. The reference to the aforesaid provisions of the Registration Act, 1908 becomes imperative in the backdrop of the fact that the document in question was allegedly tendered for registration in the year 2011 i.e. after almost 12 years of its execution. The aspect of delay, apart the question of the very presentation of the gift-deed for registration, even in the year 2011, is not free from infirmities. This Court has, therefore, sought the production of, and perused, the 'deed of confirmation' which was registered on 11th April, 2011. Upon the perusal of the said document, the following broad features emerge therefrom:

(i) The said deed of confirmation was executed by Respondent no.1 herein Mr. Kenneth Paul, in the capacity of the constituted attorney of Mrs. Marina and Mr. Warren D'souza. The deed of confirmation was thus not executed by the donors-in-person.

(ii) The deed of confirmation was accepted by Respondent no.1 in his capacity as the donee also along with Respondent no.2 Angela.

(iii) The said deed of confirmation has been executed in pursuance of a general power of attorney executed by Mrs. Marina and Mr. Warren D'souza before Mr. John Bennison, Notary Public, Melbourne, which does not reveal the date of execution of the said power of attorney.

(iv) What was tendered along with the said deed of confirmation is a notarised copy of the gift-deed allegedly executed on 16th August, 1999.

(v) The Registrar made an endorsement on the said copy to the effect that, "original document is lost therefore certification is done on the notarised copy", on 14th March, 2011.

(vi) A report was given at the Tilak Nagar Police Station vide entry No.240/2010 that the original gift-deed executed on 16th August, 1999, was lost on 28th October, 2010.

22. In the light of the aforesaid facts, it is pertinent to note that, the registration of the gift-deed dated 16th August, 1999,

which forms the substratum of the claim of Respondent nos.1 and 2, is not free from infirmities. It is not the case of Respondent nos.1 and 2 that the original gift-deed was tendered for registration at any anterior point of time, before it was allegedly lost on 28th October, 2010. The deed of confirmation is also peculiar in the sense that it has been executed by Respondent no.1 in the capacity of the donor, (thereby confirming the gift-deed dated 16th August, 1999), and it has also been accepted by Mr. Kenneth Paul, Respondent no.1, as the donee thereof. These aspects, which are essentially rooted in facts, require proper adjudication. In exercise of extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, this Court is not expected to examine the disputed questions of facts.

23. Another provision which has a material bearing on the controversy is the effect of registration as regards the operability of the document. Section 47 of the Registration Act, 1908 reads as under:

“Section 47 in The Registration Act, 1908 :

47. Time from which registered document operates —

A registered document shall operate from the time which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.”

24. In view of the aforesaid provision a registered document operates from the date of its execution and not from the date of its registration. Thus, in the case at hand, if the objection as to delayed registration is found to have no bearing on its registration then, the right, title and interest in respect of the said gift-deed pass with retrospective effect i.e. from the date of execution thereof. From this standpoint also, the question as to whether the gift-deed dated 16th August, 1999 was, in fact, registered assumes material significance.

25. The situation which, thus, obtains is that the questions which emerge for consideration, indicated above, cannot be examined by the authorities under the Act of 1960, having regard to the limited nature of their jurisdiction. Thus, no purpose would be served by remitting the matter to the authorities under the Act, 1960. Yet, these questions have a material bearing upon the entitlement of Respondent nos.1 and 2 to become a member of the Petitioner – Society. There is material to indicate that Mrs. Marina and Mr. Warren D'souza, the original members of the Petitioner – Society, qua, the subject plot, have since been residing in Australia. In the circumstances, it would be in the fitness of things to allow the Petitioner – Society to agitate all the grievances regarding the

sustainability of the claim of Respondent nos.1 and 2, on the basis of the alleged gift-deed of 16th August, 1999, by instituting a proper proceedings before a proper forum and, in the meanwhile, continue the ad-interim order passed by this Court on 27th June, 2018, whereby Respondent nos.1 and 2 were restrained from initiating any coercive steps against the Petitioner for implementation of order dated 3rd March, 2012 passed by the Deputy Registrar, and the impugned order dated 25th July, 2013, passed by the Joint-Registrar for a further period of six months so that the Petitioner – Society can seek appropriate reliefs from the forum, which it chooses to approach.

26. The upshot of the aforesaid consideration is that the Writ Petition is allowed to the limited extent in the following terms:

(i) The impugned orders directing the Petitioner – Society to admit Respondent nos.1 and 2 as members of the Petitioner – Society are not interfered with.

(ii) However, the Petitioner – Society is at liberty to initiate appropriate proceedings before an appropriate forum questioning the sustainability of the claim of Respondent nos.1 and 2 based on the

gift-deed allegedly executed on 16th August, 1999, in their favour.

(iii) The parties are at liberty to agitate all the questions as regards the legality and validity of the gift-deed allegedly executed on 16th August, 1999, including the question as to whether the said gift-deed was, in fact, registered on 11th April, 2011; the consequences which emanate from its non-registration till 11th April, 2011 and the effect of execution and registration of the confirmation deed on 11th April, 2011.

(iv) It is hereby made clear that the forum, before which the Petitioner – Society agitates the aforesaid issue, shall decide all the questions in accordance with law without being influenced by any of the observations made by this Court while deciding this petition.

(v) In the meanwhile, for a period of six months from the date of this order, Respondent nos.1 and 2 shall not take any coercive steps against the Petitioner – Society for implementation of the order passed by the Deputy Registrar dated

3rd March, 2012 and confirmed by the Joint
Registrar by the order dated 25th July, 2013.

27. Rule is made absolute in the aforesaid terms. There shall
be no order as to costs.

[N. J. JAMADAR, J.]