

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.O. No. 451 of 2018

**Mrs. Hashi Mukherjee and others
Vs.
The State of West Bengal and others**

For the petitioners : Mr. Sagar Bandyopadhyay,
Mr. Soumyen Datta,
Mr. Tapan Sil,
Mr. Abhishek Bhar

For the respondent no.3 : Mr. Indranil Roy,
Mr. Dipayan Choudhury,
Mr. Suvrodal Choudhury

Hearing concluded on : 13.12.2022

Judgment on : 20.12.2022

The Court:

1. The petitioners are a section of members of a Housing Society. The said Society was registered with effect from May 22, 2013 before the Competent Authority under the West Bengal Apartment Ownership Act, 1972 (for short, "the 1972 Act") on the application of a majority of the members of the building. The writ petitioners were excluded from the application and the accompanying declaration.
2. On December 30, 2015, several amendments took place in the 1972 Act. The amendments to some of the Sections, including Sections 2, 3, 10, 10A, 11 and 12 of the Act were given retrospective effect from July 5, 1972 by the State Government. It is relevant to mention that

the amendment Act was published in the Kolkata Gazette on December 7, 2015. Section 1(2) thereof empowered the State Government to appoint such date from which the Amending Act shall come into force. The State Government was also empowered to provide different appointing dates for different provisions of the Amending Act. The State Government, *vide* Notification dated December 30, 2015, gave retrospective effect to the Sections mentioned above from July 5, 1972, that is, the date of promulgation of the parent Act.

3. The present writ petition has been filed against the Notification No.13-HL/1M-11/2013, dated December 30, 2015 issued by the Principle Secretary, Department of Housing, insofar as the same relates to giving retrospective effect to the amended provisions of Section 2 from July 5, 1972. It is argued that the said Notification is in excess of authority and ultra-vires the West Bengal Apartment Ownership (Amendment) Act, 2015 and the parent Act of 1972 as well as the Constitution of India and should be struck down.
4. It is submitted that under Rule 3 of the West Bengal Apartment Ownership Rules, 1974 (hereinafter referred to as “the 1974 Rules”), all the owners or majority of the owners are required to submit declaration before the competent authority.
5. The disparity of the said Rule with the provisions of Sections 2 and 10 of the 1972 Act was considered in a Judgment of a co-ordinate bench of this Court reported at 2014 (2) CHN (Cal) 186 [*Debdas Banerjee Vs. State of West Bengal and others*].

6. The learned Single Judge, in the said Judgment, struck down Rule 3, as had been amended in July/August, 2003, with the rider that the factual findings contained in the impugned order had not been examined. It was found that since unworkability of the provisions of the Act would seem to continue as a result of striking down of Rule 3, the learned Single Judge expressed hope and trust that adequate measures shall be taken immediately to undo the virtual mischief that Section 2 of the Act has presented.
7. The ground for striking down Rule 3 was the disparity between the same and Section 2 of the parent Act.
8. It is contended that in view of the multifarious activities of a welfare State, it cannot presumably be possible to work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the Executive or any other agency, but there is a danger inherent in such a process of delegation and an over-burdened Legislature or one controlled by a powerful Executive may unduly overstep the limits of delegation. It may not lay down any policy at all : it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the Executive; it may confer an arbitrary power on the Executive to change or modify the policy laid down by it without saving for itself any control over subordinate legislation. The self-effacement of legislative power in favour of another agency, either in whole or in part, is beyond the permissible limits of delegation. In support of such proposition, learned counsel for the petitioners cites *Avinder*

Singh and others Vs. State of Punjab and others, reported at (1979) 1 SCC 137.

9. Next placing reliance on *A.N. Parasuraman and Others Vs. State of Tamil Nadu* [(1989) 4 SCC 683], learned counsel submits that it is well-established that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot be delegated. What is permissible is to leave to the delegated authority the task of implementing the object of the Act after the legislature lays down adequate guidelines for the exercise of power.
10. Learned counsel for the petitioners next relies on *State of Rajasthan and others Vs. Basant Nahata* [(2005) 12 SCC 77], in support of the proposition that the delegation of legislative power cannot be wide, uncanalised or unguided. The legislature, while delegating such power, is required to lay down the criteria or standard so as to enable the delegatee to act within the framework of the statute. The principle on which the power of the legislature is to be exercised is required to be disclosed. It is also trite that essential legislative functions cannot be delegated.
11. Learned counsel next cites *Director General of Foreign Trade and Another Vs. Kanak Exports and Another*, reported at (2016) 2 SCC 226. In the said judgment, the Supreme Court observed that a delegated or subordinate legislation can only be prospective and not retrospective, unless the rule-making authority has been vested with power under a statute to make rules with retrospective effect.

12. Learned counsel for the petitioners also relies on *Jayam and Company Vs. Assistant Commissioner and Anr.*, reported at (2016) 15 SCC 125. The Supreme Court held in the said judgment that, when it comes to fiscal legislation, the Legislature has power to make the provision retrospectively. By placing reliance on *R.C. Tobacco (P) Ltd. Vs. Union of India* [(2005) 7 SCC 725], the Supreme Court reiterated the broad legal principles while testing a retrospective statute as follows:

- “(i) A law cannot be held to be unreasonable merely because it operates retrospectively;
- (ii) The unreasonability must lie in some other additional factors;
- (iii) The retrospective operation of a fiscal statute would have to be found to be unduly oppressive and confiscatory before it can be held to be unreasonable as to violate constitutional norms;
- (iv) Where taxing statute is plainly discriminatory or provides to procedural machinery for assessment and levy of tax or that is confiscatory, courts will be justified in striking down the impugned statute as unconstitutional;
- (v) The other factors being period of retrospectivity and degree of unforeseen or unforeseeable financial burden imposed for the past period;
- (vi) Length of time is not by itself decisive to affect retrospectivity.”

13. Learned counsel appearing for the petitioners then cites *Roger Mathew Vs. South Indian Bank Limited* [(2020) 6 SCC 1] for the proposition that law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion.

- 14.** It is argued by the petitioners that Section 1(2) of the Amending Act of 2015 cannot be said to have authorised the Executive of the State Government to give retrospective operation to the Amending Act, as such power was not vested with the State Government under the said Amending Act. Moreover, as laid down in the judgments cited by the petitioners, giving retrospective operation to a substantive legislation is a legislative action and the State Government had no authority either under the Constitution or under the provisions of the parent Act of 1972 or the Amending Act of 2015 to give retrospective operation to the said Amending Act.
- 15.** In view of the retrospective operation, where any issue was finalised on the basis of the provisions of the parent Act of 1972 as prevalent prior to December 30, 2015 would be rendered nugatory or completely altered, the petitioners contend.
- 16.** Learned counsel for the respondent no.3 refutes the petitioners' arguments and argues that the prayers made in the writ petition are a camouflage to cover up the real purpose behind the present litigation to have the registration of respondent no. 3 under the 1972 Act cancelled and to harass the respondent no. 3 and its members.
- 17.** It is submitted that the *Debdas Banerjee* (supra) judgment necessitated the amendment of 2015. It is evident therefrom that the Amendment Act of 2015 is a validation law. The petitioners, it is contended, are not aggrieved by the amendment/substitution of Section 2 of the 1972 Act but with the retrospective effect given to the amendment of Section 2 from July 5, 1972.

- 18.** Learned counsel for the respondent no. 3 next contends that the thrust of the petitioners' arguments is only on the point that essential legislation cannot be delegated to the executive. However, since the delegation of power itself under Section 1 (2) of the Amending Act, 2015 has not been challenged, the exercise of such power by way of the impugned Notification dated December 30, 2015 cannot be challenged in the absence of any arbitrariness and/or illegality in exercising such delegated power.
- 19.** Learned counsel cites *Jayam and Company Vs. Assistant Commissioner and Another*, reported at (2016) 15 SCC 125 for the proposition that retrospective legislation would be admissible in cases of validation laws.
- 20.** The next judgment cited on behalf of the respondent no. 3 is *Atar Singh Vs. State*, reported at AIR 1964 All 339, where a learned Single Judge of the Allahabad High Court held that in laying down whether the delegation of the power to fix date of commencement of the Act amounts to a delegated legislative authority, the Courts of law must take a liberal view and should not ordinarily declare such a provision to be *ultra vires*.
- 21.** Learned counsel appearing for the respondent no. 3 next places reliance on *Madras Bar Association Vs. Union of India and Another* (2021 SCC OnLine SC 463) to show the limits to amend the provisions of an Act retrospectively and in support of the proposition that the test of judging the validity of the amending and validating enactment is whether the legislature enacting the statute has competence over the

subject-matter; whether by validation, the legislature has removed the defect which the Court had found in the previous law; and whether the validating law is consistent with the provisions of Part III of the Constitution.

22. Upon hearing learned counsel for the parties, one of the features which stands out in the present case is that the *vires* of Section 1(2) of the Amending Act, which empowers the State Government to decide and notify the date of commencement of the said Amending Act, has not been challenged. What has been challenged is the retrospectivity lent to the said Act by virtue of the impugned Notification.
23. The source of inspiration for the amendment can be traced to the Single Bench judgment of *Debdas Banerjee* (supra). The learned Single Judge upheld the challenge to Rule 3 of the 1974 Rules and struck down the same on the ground that it was *ultra vires* Section 2. In paragraph 42 of the said judgment, it was held as follows:

“Since unworkability of the provisions of the Act would seem to continue as a result of striking down of Rule 3, I hope and trust that adequate measures shall be taken immediately to undo the virtual mischief that section 2 of the Act has presented.”
24. The learned Single Judge formed the opinion in paragraph 37 of *Debdas Banerjee* (supra) that it was unfortunate that when Section 2 was amended twice, the legislature forgot to insert the words “majority of” at the appropriate place. Since it was not done, the Court held that it could not harmonise the statutory provisions by unduly stretching

the words used by the legislature to fill in gaps or omissions in the provisions of an Act.

- 25.** The West Bengal Apartment Ownership (Amendment) Act, 2015 was enacted with effect from December 17, 2015 vide Notification dated December 7, 2015. In Section 1 (2) thereof, it was stipulated that the Act shall and shall be deemed to come into force on such date as the State Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different provisions of the Act.
- 26.** Taking a cue from *Debdas Banerjee* (supra), Section 2 of the Amending Act inserted the phrase “or majority of the owners” in Section 2 of the parent Act of 1972.
- 27.** The Notification assailed herein was published in the Official Gazette on December 30, 2015 and appointed July 5, 1972 as the date on and from which Section 2 of the Amending Act shall be deemed to come into force.
- 28.** Since the amendment was evidently introduced, inter alia, to rectify the “unworkability” of the parent Act due to the majority owners being left out, as pointed out in *Debdas Banerjee* (supra), it can very well be termed as a ‘validating’ or ‘clarificatory’ statute, at least to such extent as it introduced the concept of majority of owners. Therefore, following the ratio of the Supreme Court, as laid down in paragraph no. 15 of *Jayam & Co.* (supra), the retrospective effect given to Section 2 of the Amending Act would be admissible, since it is in the nature of a

validation law, that is, where the law as initially passed was held to be inoperative by the court.

29. Again, one of the tests laid down by the Supreme Court in paragraph 41 of *Madras Bar Association* (supra), of judging the validity of an amending and validating enactment, is that by validation, whether the legislature has removed the defect which the Court had found in the previous law. The said test is passed by the 2015 Amending Act with flying colours.
30. In any event, the Amending Act itself has not been challenged by the writ petitioners. Section 2 thereof amends Section 2 of the parent Act and Section 1 (2) thereof confers power on the State Government to appoint the date when the Act or its various provisions shall, or shall be deemed to, come into force. The language used in Section 1 (2), conspicuously, is “This Act shall and *shall be deemed to* come into force as the State Government may, by notification in the Official Gazette, appoint...”. Therefore the Legislature has, in no uncertain terms, conferred power on the Executive, functioning as the State Government, to give effect to the Act, or its different provisions separately, either prospectively (as indicated in “shall come into force”) or retrospectively (as in “shall be deemed to come into force”).
31. A learned Single Judge of the Allahabad High Court, in *Atar Singh* (supra), held as long back in the year 1963 that in laying down whether the delegation of the power to fix the date of commencement of the Act amounts to a delegated legislative authority, the Courts of

law must take a liberal view and should not ordinarily declare such a provision to be *ultra vires*.

32. The petitioners cited *Avinder Singh* (supra). In it, the Supreme Court criticizes excessive delegation of essential legislative power. However, it is also observed that in view of the multifarious activities of a welfare State it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. However, legislative policy ought not to be delegated. In fact, in the said case, the Supreme Court went on to hold that none of the canons governing delegation of legislative power had been breached.
33. Again, in *A.N. Parasuraman* (supra), it was reiterated by the Supreme Court that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot be delegated.
34. Such observation, however, came with the rider that what is permissible is to leave to the delegated authority the task of implementing the object of the Act after the legislature lays down adequate guidelines for the exercise of power. In the present case, the object and purpose of the introduction of the concept of “or the majority of members” was clearly to render the provisions of the parent Act workable, as indicated in *Debdas Banerjee* (supra). Thus, the retrospectivity attributed to such amendment by the impugned Notification was in tune with and to give effect to the object of the Amending Act itself.

- 35.** The Supreme Court, in *Roger Mathew* (supra) also reiterated the principle that law-making power may not be granted to an administrative body to be exercised under the guise of administrative discretion. In delegating powers with respect to the administration of statutes, the legislature must ordinarily prescribe a policy, standard, or rule for their guidance and must not vest them with an arbitrary and uncontrolled discretion with regard thereto.
- 36.** The petitioners also rely on *State of Rajasthan* (supra), where it was held that the necessity of the legislature's delegating its powers in favour of the executive is a part of legislative function and a constituent element of the legislative power as a whole under Article 245 of the Constitution. What was deprecated in the judgment was wide, uncanalised or unguided delegation. The principle on which the power of the legislature is to be exercised is required to be disclosed and essential legislative functions cannot be delegated, it was observed. In the instant case, none of such vitiating factors is found. In fact, the delegation to assign the date of commencement, by Section 1 (2) of the Amending Act, has not been challenged at all, nor is there any cogent ground to so assail.
- 37.** If we examine the context of *Kanak Exports Case* (supra), also cited by the petitioners, paragraph 113 thereof indicates that the provision-in-question therein conferred powers upon the Central Government to "amend" the policy which had been framed. The same was clearly a piece of "delegated legislation" in its true sense. However, in the case at hand, the legislature itself declared the policy and tenor of the

amendment in clear terms and unambiguous language. What was left to the executive was the power to appoint dates on which the Amending Act would commence or would be “deemed to” commence. Power was specifically given also to appoint different dates for different provisions of the Amending Act.

38. Construing the present impugned Notification in proper perspective, the same was prompted by the Single Bench decision in *Debdas Banerjee* (supra) and sought to rectify the “unworkability” of the parent Statute, at least insofar as the introduction of the concept of “or majority of the owners” is concerned. The retrospectivity attributed to Section 2 was, therefore, intended by the legislature in passing the Amending Act. The impugned Notification only breathed life into such legislative intent and was clearly designed to fulfill the object of the Amending Act.
39. Here, the legislature clearly enumerated the specific amendment sought to be introduced and only left the date of appointment to the executive. Thus, no power to amend legislative policy was delegated in the first place. Even if we assume that the retrospectivity touches legislative policy, it was exercised by the executive in such a manner so as to serve the clarificatory and validating object of the Amending Act. Thus, the ratio laid down in *Kanak Exports Case* (supra) does not aid the cause of the present petitioners in any manner.
40. Another germane aspect is required to be dealt with here. By virtue of the impugned retrospectivity of the Notification, the executive did not take away any vested right of anybody. The left-out minority of owners

of the concerned property could not be construed to have, in the first place, any negative right under the parent Act to resist full implementation of the parent Act. Rather, the converse is true, inasmuch as the retrospective element in the impugned Notification conferred a right in favour of majority of owners which is in consonance with, and will further the purpose of, the Amending Act and the parent Act.

- 41.** In fact, it should be kept in mind that sub-section (1) of Section 10A of the parent Act, after the 2015 amendment, retained the right with the minority number of owners to submit the requisite declaration, if they so choose, “subsequently”, thereby going that extra mile to ensure that the option of the minority owners to participate or not to participate in the registration of declaration is not curtailed in any manner.
- 42.** In any event, the declared object and purpose of the parent Act of 1972 was, inter alia, to provide for the ownership of an individual apartment and to make such apartment heritable and transferable property. To bring as many apartment owners within the purview of the Act as possible would only further, and not hamper, such objective. The amendment to Section 2 enabled properties where a majority of the owners wanted to come within the fold of the parent Act, which is highly probable, to be so brought. Its retrospectivity was only to ensure that the purpose of the Act would not be frustrated by allowing too many cooks to spoil the broth and restricting the choice of choosing applicability of the Act only to the two extremities - sole

owners and all owners - but leaving out concurring majority owners, which has the highest probability of occurrence in modern apartments.

43. The impugned Notification only served such purpose and, thus, cannot be faulted in any manner.
44. In view of the above reasons, the challenge to such Notification is not tenable in the eye of law and must fail.
45. Accordingly, W.P.O. No.451 of 2018 is dismissed on contest, thereby upholding the impugned Notification No. 13-HL/1M-11/2013 dated December 30, 2015, whereby July 5, 1972 was appointed as the date on and from which Section 2 of the Amending Act *shall be deemed to come into force* and December 17, 2015 was appointed as the date on and from which the other provisions of the Amending Act *shall come into force*.
46. There will be no order as to costs.
47. Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)