

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9027 OF 2022

SANTOSH
SUBHASH
KULKARNI

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Vipul Fatehchand Shah

Age 66 years, Occupation: Business,
Adult, Indian Inhabitant, having his
address at Flat No.4, Nav Samir CHSL.,
193/195, Khetwadi, Back Road, Mumbai
400 004

Anil H. Shah, C.C.A. of Vipul Shah

...Petitioner

Versus

- 1 Deputy Registrar, C.S. Mumbai
D-Ward, 6th Floor, Malhotra House, Fort,
Mumbai – 400 001
- 2 Niruben Fathehchand Shah
- 3 Parulben Fatehchand Shah
Nos.2 and 3 both are Adult, Indian
inhabitant, having their address at Flat
No.156, Building No.3, Samrt Ashok
CHSL., Malbar Hill, Walkeshwar,
Mumbai – 400 006.
- 4 Chairman/Secretary, Nav Samir CHSL.,
193/195, Khetwadi, Back Road,
Mumbai – 400 004.
- 5 Divisional Joint Registrar,
Cooperative Societies, Mumbai, 6th Floor,
Malhotra House, Fort, Mumbai –400 001
- 6 State Minister for Cooperation
Maharashtra State, Mantralaya,
Mumbai – 400 032

...Respondents

Mr. Prasad Shenoy, a/w Mr. Vikrant Shetty and Ms. Sakina
Electricwala, i/b Dhruve Liladhar & Co., for the
Petitioner.

Mr. P. P. Pujari, AGP for the State/Respondent Nos.1, 5 & 6.
Mr. R. S. Alange, for Respondent Nos.2 and 3.

CORAM: N. J. JAMADAR, J.

DATED : 6th APRIL, 2023

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of the learned Counsel for the parties heard finally at the stage of admission.

2. This petition takes exception to an order dated 10th June, 2022, passed by the Minister (Co-operation) in Revision Application No.233 of 2021, preferred by the petitioner, whereby the said revision application came to be dismissed upholding the orders passed by the Deputy Registrar, Co-operative Societies, on 7th January, 2020 and Divisional Joint Registrar dated 27th November, 2020 directing respondent No.4 Society to grant membership to respondent No.3.

3. Shorn of superfluities the background facts are as under:

(a) Fatehchand Shah was the husband of Niruben, respondent No.2 and father of Vipul, the petitioner and Parulben – respondent No.3. Fatehchand and respondent No.2 had purchased Flat No.4 in Nav Samir Co-operative Housing Society Ltd., respondent No.4. The petitioner claims to have been in the occupation of the said flat.

(b) Fatehchand died on 10th December, 2016. During his lifetime Fatehchand had submitted a nomination on 9th February, 2012 and constituted Parulben, respondent No.3, as nominee to his 50% share in the subject flat. After the demise of Fatehchand, respondent Nos.2 and 3 approached respondent No.4 Society to register the name of Parulben, respondent No.3. As respondent No.4 Society did not register the name of respondent No.3 as a member of respondent No.4 Society, respondent Nos.2 and 3 approached the Deputy Registrar by filing an application dated 8th April, 2019 seeking direction to respondent No.4 Society.

(c) By an order dated 7th January, 2020 purportedly passed under Section 154B-27(1) of the Maharashtra Co-operative Societies Act, 1960 ("the Act, 1960"), the Deputy Registrar was persuaded to direct respondent No.4 to act upon the nomination made by Late Fatehchand and grant membership to Parulben, respondent No.3. Respondent No.4 Society was further directed to make a communication to the petitioner to furnish the share certificate and in the event of default make entry on the counter foil of the share certificate and make necessary entries in the record of the Society. The Deputy Registrar was of the view that under the provisions of

Section 30 and Section 154B-13 the Society was under obligation to register the name of the nominee as a member of the Society. A nominee thereby does not become the owner of the flat but a Trustee.

4. Being aggrieved the petitioner preferred an appeal before the Divisional Joint Registrar. By an order dated 27th November, 2020, the Divisional Joint Registrar dismissed the appeal affirming the direction issued by the Deputy Registrar.

5. Being further aggrieved the petitioner preferred a revision application before the State Government under Section 154 of the Act, 1960. By the impugned order the Minister (Co-operation) was also persuaded to reject the revision application as no fault could be found with the orders impugned before him.

6. Still aggrieved, the petitioner has invoked the writ jurisdiction of this Court. The petitioner asserts Fatehchand died intestate and, therefore, the petitioner is entitled to 1/3 share in the 50% share of his deceased father in the subject flat. The authorities below, according to the petitioner, have passed the orders mechanically without properly taking into account the fact that the alleged Will set up by respondent Nos.2 and 3 is neither registered nor a proceeding to obtain probate in

respect of the said Will was instituted when the first impugned order came to be passed.

7. I have heard Mr. Shenoy, the learned Counsel for the petitioner, and Mr. Alange, the learned Counsel for respondent Nos.2 and 3 and Mr. Pujari, the learned AGP for respondent Nos.1, 5 and 6. The learned Counsel took the Court through the impugned orders and the material on record.

8. Mr. Shenoy would submit that the impugned order is legally infirm. The authorities have not at all adverted to the fact that the claim of respondent Nos.2 and 3 is based on an unregistered Will. Unless and until probate in respect of the said Will propounded by respondent Nos.2 and 3 is obtained, the said Will would be of no avail to substantiate the claim of respondent No.3. Mr. Shenoy would urge that the Deputy Registrar, Cooperative Societies, failed to give full import to the provisions contained in Section 154B-13 of the Act, 1960. Under no circumstance a nominee can become a full-fledged member of the Society, to the prejudice of the legal representatives, who are in law entitled to succeed to the estate of the deceased member of a co-operative Society. At best, a nominee can become a provisional member subject to the adjudication of the right to succeed to the estate of the deceased

member. To bolster up this submission, Mr. Shenoy placed a strong reliance on a judgment of this Court in the case of *Karan Vishnu Khandelwal vs. Honourable Chairman/Secretary Vaikunth (Andheri) Co-operative Housing Society Limited and others*¹

9. Mr. Shenoy further submitted that the impugned order is causing great prejudice to the petitioner. In view of the impugned orders the petitioner's legitimate claim to get a permanent alternate accommodation in the event of redevelopment of defendant No.4 Society, which is in the offing, is seriously prejudiced. Therefore, the impugned order is required to be quashed and set aside, urged Mr. Shenoy.

10. Per contra, Mr. Alange would urge that no interference is warranted in the impugned order. The authorities have directed respondent No.4 to register the name of respondent No.3 as a nominee in conformity with the provisions contained in Section 30 of the Act, 1960 and Rule 25 of the Maharashtra Co-operative Societies Rules, 1961 ("the Rules, 1961"). Since the nomination was made before the insertion of Section 154B, the insistence for admitting respondent No.3 as a provisional member is unsustainable, urged Mr. Alange.

1 2022 SCC Online Bom 4701.

11. Facts are rather uncontroverted. First, it is indisputable that the subject flat was acquired by Late Fatehchand and Niruben, respondent No.2. Second, Late Fatehchand had submitted a nomination form with a request to include the name of respondent No.3 as the nominee.

12. The controversy between the parties revolves around the question as to whether the estate of Late Fatehchand is to be administered according to the testamentary dispossession or on the footing that Late Fatehchand died intestate. Respondent Nos.2 and 3, it seems, have set up a Will purportedly executed by Late Fatehchand bequeathing the property in favour of respondent No.3. On the contrary, the petitioner asserts Late Fatehchand died intestate and, therefore, he has 1/3 share, like respondent Nos.2 and 3, in the estate left behind by Late Fatehchand.

13. The aforesaid controversy, however, does not appear to be germane to the registration of the name of respondent No.3 as a member of respondent No.4 Society, in a strict sense. Section 30(1) of the Act, 1960 governs the transfer of interest on the death of a member of the Society. It reads as under:

“30. Transfer of interest on death of member.-

(1) On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a

person or persons nominated in accordance with the rules, or, if no person has been so nominated to such person as may appear to the committee to be the heir or legal representative of the deceased member.

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society:

Provided further that, nothing in this sub-section or in section 22 shall prevent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a society.”

14. Section 30, on its plain reading, ordains a Society to transfer the share or interest of the deceased member to his nominee, if nomination is made, and, in the absence of nominee, to the person, who may appear to the Committee to be the heir or legal representative of the deceased member. The first proviso to Sub-section (1) of Section 30 further mandates that such nominee or legal representative be duly admitted as a member of the Society.

15. Mr. Shenoy would urge that the aforesaid provision is of general application. It would not apply to a Housing Co-operative Society, in view of the special provisions incorporated in Chapter XIII B under the caption Co-operative Housing Societies. Under Section 154B-13, special provisions have been made to admit a nominee as a provisional member only, urged Mr. Shenoy.

16. Section 154B-13 of the Act, 1960 reads as under:

154B-13. Transfer of interest on death of a Member

On the death of a Member of a society, the society shall transfer share, right, title and interest in the property of the deceased Member in the society to a person or persons on the basis of testamentary documents or succession certificate or legal heirship certificate or document of family arrangement executed by the persons, who are entitled to inherit the property of the deceased Member or to a person duly nominated in accordance with the rules;

Provided that, society shall admit nominee as a provisional Member after the death of a Member till legal heir or heirs or a person who is entitled to the flat and shares in accordance with succession law or under will or testamentary document are admitted as Member in place of such deceased Member :

Provided further that, if no person has been so nominated, society shall admit such person as provisional Member as may appear to the Committee to be the heir or legal representative of the deceased Member in the manner as may be prescribed.”

17. Mr. Alange would urge that the provisions contained in Section 154B would not govern the case at hand as the nomination was made in the year 2012. Fatehchand passed away on 10th December, 2016 before Chapter XIII B came to be inserted in the Act, 1960 with effect from 9th March, 2019. According to Mr. Alange, the situation would be governed by the provisions contained in Section 30 of the Act, 1960 and Rule 25 of the Rules, 1961.

18. On a reading of Chapter XIII B which incorporates special provisions in respect of Co-operative Housing Societies, as a whole, it is difficult to accede to the submission of Mr. Alange.

Sub-Section (2) of Section 154B provides that, *inter alia*, Section 30 of the Act, 1960 shall not apply to the Housing Societies.

19. The position which emerges with the insertion of Chapter XIII B was considered by this Court in the case of ***Kiran Khandelwal*** (supra). After extracting the provisions contained under Section 154B-13, this Court observed as under:

“11. Thus as of now in terms of Section 154B-13, as inserted w.e.f. 9th March, 2019, society is empowered to transfer share, right, title and interest of the deceased member in the society to a person, on the basis of (i) testamentary documents or (ii) succession certificate or (iii) legal heir-ship certificate or (iv) document of family arrangement executed by persons, who are entitled to inherit the property of deceased member or (v) to a person duly nominated in accordance with the Rules. However, the first proviso appended thereto, clarifies that a nominee shall be admitted, only as a provisional member, within the meaning of Section 154B -1 (18) (c) of the MCS Act till legal heir or heirs or a person entitled to the flat and shares in accordance with Succession Law or under Will or testamentary document or admitted as member in place of such deceased member.

20. Even otherwise, the legal position is well neigh settled that a nominee does not become an owner of the estate of the person, who has nominated him. Nominee is a mere Trustee for the persons who are otherwise entitled to succeed to the estate of the deceased.

21. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of ***Indrani Wahi vs. Registrar of Co-operative Societies and others*** wherein in the

context of the provisions of West Bengal Co-operative Societies Act, 1983, the legal position was expounded by the Supreme Court as under:

“17. Having perused the aforesaid provisions, there can be no doubt, that where a member of a cooperative society nominates a person in consonance with the provisions of the Rules, on the death of such member, the cooperative society is mandated to transfer all the share or interest of such member in the name of the nominee. The above interpretation of Section 79, at our hands, also emerges from Section 80(1)(a) which postulates, that the share or interest of a member of the society, “on his death” shall be transferred to a person “nominated under Section 79”. It is also essential to notice, that the rights of others on account of an inheritance or succession is a subservient right. Only if a member had not exercised the right of nomination under Section 79, then and then alone, the existing share or interest of the member would devolve by way of succession or inheritance. The heading of Section 80 - “Disposal of deceased member's share of interest” lends further credence to the above interpretation.

18. In addition to the aforesaid statutory provisions, we would like to make a reference to Rules 127 and 128 of the West Bengal Co-operative Societies Rules, 1987 (hereinafter referred to as ‘the 1987 Rules’). Rules 127 and 128 of the 1987 Rules are extracted below:

.....

20. Rule 128 of the 1987 Rules also leads to the same inference. Inasmuch as Rule 128 aforementioned provides, that only in the absence of a nominee, the transfer of the share or interest of the erstwhile member, would be made on the basis of a claim supported by an order of probate, a letter of administration or a succession certificate (issued by a Court of competent jurisdiction).

21. Insofar as the instant aspect of the matter is concerned, there is no doubt in our mind, that even Rules 127 and 128 of the 1987 Rules, lead to the inference, that in case of a valid nomination, under Section 79 of the 1983 Act, ‘the Cooperative Society’ is liable to transfer the share or interest of a member in the name of the nominee. We hold accordingly.

22. Having recorded the above conclusion, it is imperative for us to deal with the conclusion recorded in paragraph 6 (already extracted above) of the judgment of this Court in the Usha Ranjan Bhattacharjee case (supra). In this behalf, it is necessary to clarify that transfer of share or interest,

based on a nomination under Section 79 in favour of the nominee, is with reference to the concerned Cooperative Society, and is binding on the said society. The Cooperative Society has no option whatsoever, except to transfer the membership in the name of the nominee, in consonance with Sections 79 and 80 of the 1983 Act (read with Rules 127 and 128 of the 1987 Rules). That, would have no relevance to the issue of title between the inheritors or successors to the property of the deceased.”

22. In view of the aforesaid enunciation of law which equally governs the provisions contained in Section 154B-13 of the Act, 1960, the nomination of respondent No.3 would entitle her to become a provisional member of respondent No.4 Society to the extent of the share of deceased Fatehchand subject to the determination of *inter se* disputes amongst the legal heirs of deceased Fatehchand.

23. If the impugned orders are tested on the aforesaid touchstone, no infirmity can be found therein. In fact, the Deputy Registrar had specifically noted that the nominee would not become the owner of the flat but would act as a Trustee for the legal heirs. However, in the operative orders there is no specific direction that respondent No.3 be admitted as a provisional member. It would, therefore, be expedient to clarify that respondent No.3 be admitted as a provisional member of respondent No.4 Society.

24. The petition thus stands disposed with a clarification that in conformity with the impugned orders respondent No.4 shall

admit Parulben, respondent No.3, as the provisional member of the Society.

25. Rule made absolute to the aforesaid extent.

26. No order as to costs.

[N. J. JAMADAR, J.]