

# SUPREME COURT OF INDIA

Hindustan Coop. Housing Building Society Ltd.

Vs.

Registrar, Co-operative Societies

C.A.No.957 of 2009

(Dr. Arijit Pasayat and Asok Kumar Ganguly JJ.)

12.02.2009

## JUDGMENT

**Dr.Arijit Pasayat, J.**

1. Leave granted.
2. Challenge in this appeal is to the judgment of Delhi High Court in Writ Petition No.686/1992 and Review Petition No.268/2006 in the aforesaid writ petition.
3. Background facts in a nutshell are as follows:

“On 5.9.1962 Anoop Singh who as a member wrote to appellant-Society asking for refund of monies (Rs.3110/- towards membership and Rs.15,000/- each for plot in appellant's colony). The reason stated was that as the membership process with appellant was getting delayed and he has purchased a plot in Green Park and as per Govt. Policy there are no chances of getting more than one plot in Delhi.

On 9.5.1972 late Anoop Singh filed application for transfer of his membership in favor of his daughter, the respondent no.2.

On 18.11.1973, by a letter the appellant-society informed Anoop Singh that the Managing Committee by resolution dated 05.09.1973 allowed the transfer and asked for share certificate and other documents to enable transfer.

On 12.10.1978, appellant-society requested Anoop Singh to file an affidavit which was questioned by respondent no.2 by letter dated 27.10.1978.

On 26.3.1979 Anoop Singh did not file the requisite affidavit and Administrator of appellant-society by letter informed that the transfer could not be confirmed unless affidavit is filed.

On 14.4.1979 Anoop Singh replied stating that it is not possible to file the affidavit as he does not know full or part of lease hold or freehold of the property.

On 29.5.1979 Administrator informed Anoop Singh of his inability to transfer the membership as the affidavit was not filed and asked to withdraw the deposit from society to which Anoop Singh requested for reconsideration vide letter dated 06.06.1979.

On 11.7.1979 appellant's administration made it clear that no allotment could be made in favour of respondent no.2 to which Anoop Singh again requested for reconsideration vide letter dated 11.11.1979.

On 22.3.1980 appellant-administration informed Anoop Singh that even though clause 5(2) of Lease Deed provides for transfer without affidavit - allotment of plot could not be possible unless original member establishes his own eligibility for allotment for plot. However, opportunity of personal hearing was granted to Anoop Singh.

On 24.11.1980, Administrator of appellant-society removed the name of Anoop Singh categorically stating that it could not be transferred in favor of respondent no.2.

On 22.1.1982, Secretary of the society also by its letter informed Anoop Singh that transfer could only happen after submission of indemnity bonds and affidavits so it is suggested that respondent no.2 be made fresh member of society w.e.f. date of transfer.

On 1.02.1982 Anoop Singh tendered his resignation.

On 14.02.1992 respondent no.2 filed WP(C) being 686/92 without challenging the orders of the Administrator dated 26.03.1979, 29.05.1979, 11.07.1979 and 24.11.1979, seeking writ of Mandamus asking appellant and respondent no.1 for allotment of plot or in alternative to refund money paid by respondent no.2.

On 30.10.1995 Rule was issued. On 19.09.2005 ex-parte proceedings qua appellant-society were initiated in High Court.

On 16.02.2006 the High Court allowed writ petition and issued directions to respondent no.1 to recommend the case to appellant-society for allotment of plot in category 'C' of 125 sq. yards.

On 22.05.2006 appellant-society came to know about the above order vide letter dated t. 22.05.2006 issued by respondent no.1.

On 01.07.2006 appellant society then filed a Review Petition being 268 of 2006 and on 1.9.2006 the High Court issued notice. On 19.1.2007 the High Court dismissed review petition.

The High Court by the order in writ petition held that the transfer in favour of Jasjit Kaur has been accepted by the Society and therefore she was entitled to allotment of the plot. It was held that the Registrar, Cooperative Society had no authority in law to sit over the affidavit and not to recommend the case for allotment to Jasjit Kaur. A direction was therefore given to the Registrar, Cooperative Societies to forthwith recommend the case of Jasjit Kaur for allotment of plot in Category `C' of 125 sq. yards. A Review Petition was filed inter-alia taking the stand that after Mr. Anoop Singh had asked for refund of money, and therefore, raising the question of any transfer in law did not arise. The review petition was rejected on the ground that no case for review was made out.”

4. Mr. K.T.S. Tulsi, learned counsel for the appellant submitted that the High Court has clearly lost sight of various provisions, more particularly, Rule 25 of the *Delhi Co-operative Societies Rule, 1973* (in short the `Rules') framed under *Delhi Co-operative Societies Act, 1972* (in short the `Act'). It was pointed out that without availing the statutory remedies available under the Act and the Rules, the respondent No.2 Jasjit Kaur filed a writ petition. Since disputed questions were involved, the High Court ought not to have interfered in the matter. According to him directions given are clearly contrary to law.

5. In response, learned counsel for respondent No.2 submitted that she has been fighting a battle for getting her legitimate right and after having accepted the prayer for transfer, the Society cannot turn around and take a stand that since Anoop Singh was disqualified, the order of the High Court is indefensible. In any event it is submitted that plot has been allotted pursuant to the High Court's order and, therefore, by passage of time the petition has become infructuous.

6. We find that before the High Court there was no appearance on behalf of the present appellant.

7. Rule 25 of the Rules reads as follows:

"25. Disqualification of Membership: No person shall be eligible for admission as a member of a co- operative society if he-

(a) has applied to be adjudicated an insolvent or is an undischarged insolvent; or

(b) has been sentenced for any offence other than an offence of a political character or an offence not involving moral turpitude and dishonesty and a period of five years has not elapsed from the date of expiry of the sentence:

(c) in the case of membership of a housing society: (i) owns a residential house or a plot of land for the construction of a residential house in any of the approved or un-approved colonies or other localities in the National Capital Territory of Delhi, in his own name or in the name of his spouse or any of his dependent children, on lease hold or free-hold basis or on power of attorney or on agreement for sale;

Provided that disqualification of membership as laid down in sub-rule (1)(c)(i) shall not be applicable in case of co-sharers of property whose share is less than 66.72 sq. metres of land;

Provided further that the said disqualification shall not be applicable in case of a person who has acquired property on power of attorney or through agreement for sale and on conversion of the property from leasehold to freehold on execution of conveyance deed for it, if such person applies for the membership of the housing society concerned; (Amended on 6.8.97)

(ii) he deals in purchase or sale of immovable properties either as principal or as agent in the national Capital Territory of Delhi: or

(iii) he or his spouse or any of his dependant children is a member of any other housing society except otherwise permitted by the Registrar.

2. Notwithstanding anything contained in the rules or the bye-laws of the co-operative society, if a member becomes, or has already become, subject to any disqualification specified in sub-rule (1), he shall be deemed to have ceased to be a member from the date when the disqualifications were incurred.

3. A member who ceases to be a member of a co-operative society under sub-rule (2) shall not be entitled to exercise rights of memberships or incur liability as member with effect from the date referred to in sub-rule (2) but as from the date he becomes a creditor of the co-operative society in respect of the amount due to him on account of paid up share capital, deposit, cost of land deposited or any other amount paid by him to the co operative society as its member. As from the date of his ceasing to be a member or the society under sub-rule (2), the amount standing to his credit shall be paid to him by the co-operative society within 3 months and when the co-operative society is already under liquidation, the amount due to him will be credited as a debt due to a third party from the co-operative society.

4. If any question as to whether a member has incurred any of the disqualification referred to in sub-rule (1) arises, it shall be referred to the Registrar for decision. His decision shall be final and binding on all concerned. The power of the Registrar under this rule shall not be delegated to any other person appointed to assist the Registrar.”

8. For the purpose of the present case Sub-rule (2) of Rule 25 is of paramount importance. There is a deemed disqualification. The effect of it has not been examined by the High Court.

9. It is, as noted above, a deeming provision. Such a provision creates a legal fiction. As was stated by James, L.J. in *Levy, Re, ex p Walton*<sup>1</sup>.

"when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. After ascertaining the purpose full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate." (See *Hill v. East and West India Dock Co.*<sup>2</sup>, *State of Travancore Cochin v. Shanmugha Vilas Cashewnut Factory*<sup>3</sup>, *American Home Products Corp. v. Mac Laboratories (P) Ltd.*<sup>4</sup> and *Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi*<sup>5</sup>. In an oft-quoted passage, Lord Asquith stated: (All ER p. 599 B-D)

"If you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, existed must inevitably have flowed from or accompanied it. ... The statute states that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs". (See *East End Dwellings Co. Ltd. v. Finsbury Borough Council*<sup>6</sup>)

10. "The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible." (Per Lord Radcliffe in *St. Aubyn (L.M.) v. Attorney-General (No. 2)*<sup>7</sup>)

11. "Deemed", as used in statutory definitions is meant "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which some matter or thing has - the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion." (Per Windener, J. in *Hunter Douglas Australia Pty. v. Perma Blinds*<sup>8</sup>.)

12. When a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else (per *Cave, J., R. v. Norfolk County Court*<sup>9</sup>).

"When a statute gives a definition and then adds that certain things shall be 'deemed' to be covered by the definition, it matters not whether without that addition the

definition would have covered them or not." (Per *Lord President Cooper in Ferguson v. McMillan*<sup>10</sup>)

13. Whether the word "deemed" when used in a statute established a conclusive or a rebuttable presumption depended upon the context (see *St. Leon Village Consolidated School Distt. v. Ronceray*<sup>11</sup>).

"I ... regard its primary function as to bring in something which would otherwise be excluded." (Per *Viscount Simonds in Barclays Bank v. IRC*<sup>12</sup>).

14. "Deems" means "is of opinion" or "considers" or "decides" and there is no implication of steps to be taken before the opinion is formed or the decision is taken. [See *R v. Brixton Prison (Governor), ex p Soblen*<sup>13</sup>]

15. Learned counsel for the appellant is right that normally when a statutory remedy is available, the same should be availed. In the instant case that aspect has also not been examined by the High Court. We are therefore of the considered opinion that the writ petition needs to be heard by the High Court afresh to be decided keeping in view the applicable legal provision. Since no counter affidavit had been filed by the present appellant before the High Court we permit it to do so within a period of one month. If any rejoinder is to be filed the same shall be filed within a period of two weeks from the date of filing of the counter affidavit. We request the High Court to explore the possibility of disposing of the writ petition within a period of four months by fixing a definite date after a period of six weeks from today. Till the disposal of the writ petition by the High Court afresh, no third party rights in respect of the plot which is stated to have been allotted to respondent No.2 shall be created by the appellant.

16. The appeal is allowed to the aforesaid extent with no order as to costs.

<sup>1</sup>(1881 (17) Ch.D 746)

<sup>2</sup>1884 (9) AC 448

<sup>3</sup>(AIR 1953 SC 333)

<sup>4</sup>1986 (1) SCC 465

<sup>5</sup>(1996 (4) SCC 76)

<sup>6</sup>1951 (2) All ER 587 (HL)

<sup>7</sup>1951 (2) All ER 473, All ER p.498 F-G.

<sup>8</sup>1970 (44) Aust LJ 257

<sup>9</sup>1891 (60) LJ QB 379

<sup>10</sup>1954 SLT 109

<sup>11</sup>1960 (23) DLR (2d) 32)

<sup>12</sup>1961 AC 509 (HL)

<sup>13</sup>1962 (3) All ER 641: All ER p.669 C.