

Amardeep Co-Operative Housing Society Vs State of West Bengal

Court: Calcutta High Court

Date of Decision: March 9, 1992

Citation: (1992) 2 ILR (Cal) 275

Hon'ble Judges: Bhagabati Prasad Banerjee, J; A.K. Bhattacharjee, J

Bench: Division Bench

Advocate: Shakti Nath Mukherjee, Chandra Nath Mukherjee and Z. Rahaman, for the Appellant; Milan Chandra Bhattacharjee and Keshab Bhattacharjee, for the Respondent

Final Decision: Allowed

Judgement

Bhagabati Prasad Banerjee, J.

The interesting questions of law had arisen in this case is whether the period of limitation prescribed in Rule

152 of the West Bengal Co-Operative Societies Rules, 1973, was directory and/or mandatory and whether after the expiry of the period of

limitation as prescribed under Rule 152 of 1973 Rules stands automatically extended by repeal of the old Act and the Rules and the introduction of

Rule 195 in/the year 1983 under the new Act.

2 This is an appeal against an order of the learned trial Judge dated May 15, 1991, passed on the writ application wherein the Court below

rejected the writ application and wherein a point was taken that in view of the provision of Rule 152 of the West Bengal Co-Operative Societies

Act, 1973 the Liquidator who was appointed by the Registrar of Co-Operative Societies on July 30, 1979, had jurisdiction to take over charge

when the said Rule 152 provides that the liquidation proceeding of a Society should be concluded within a period of two years from the date of the

winding up and that there was provision of extension of this period only for a period of another three years which had expired. According to the

learned trial Judge, after the old Acts and the Rules had been repealed and new Rule 195 had been introduced, wherein it was provided that the

liquidation proceeding of a Society should be closed as expeditiously as possible, had kept alive the life of the Liquidator.

3 The facts of this case are not in dispute. The Petitioner, Co-Operative Society had been registered on October 29, 1976 by the Registrar of Co-

Operative Societies Act under the provision of the West Bengal Co-Operative Societies Act, 1973, and on July 30, 1979, an order was passed

for winding up of the said Co-operative Society and a Liquidator was appointed. The members of the said Society made an application for

cancellation of the said winding up proceedings which was rejected by the Registrar of Co-Operative Societies on November 29, 1979. The

Liquidator appointed by the Registrar of Co-Operative Societies in the said winding up proceeding on July 30, 1979 was directed by the

Registrar of Co-operative Societies to proceed and to take charge of the properties of the Co-operative Societies on December 19, 1980. The

Appellant before us did not challenge the validity and/or legality of the winding up proceeding and the orders of appointing of the Liquidators in the

year 1979. The order passed by the Registrar rejecting the application for cancellation of the winding up proceeding by an order passed by the

Registrar on September 29/1979, is not also a subject-matter of challenge before us. The only question that has been raised before us is that the

winding up proceeding has become barred by the law of limitation prescribed under Rule 152 of the West Bengal Co-Operative Societies Rules,

1974. The said Rule 152 of the Societies Rules provides that the liquidation proceedings of a Society shall be closed within a period of two years

from the date of the order of winding up; proviso provided that such period can be extended from time to time, by the Registrar for reasons to be

recorded in writing, by an aggregate period of not more than three years.

The West Bengal Co-Operative Societies Act and the Rules of 1974 have been repealed by the West Bengal Co-Operative Societies Act, 1983,

which had come into force on August 1, 1987.

4. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the Appellant, contended that in view of the provisions of Rule 152 of 1979

Rules the liquidation proceeding has become barred by limitation after a lapse of the period mentioned in Rule 152. Admittedly, in the instant case,

after the expiry of two years from July 30, 1979, the said period of limitation had not been extended in exercise of the power conferred under the

proviso, of the said Rule 152 which provides extension of the period from time to time for reasons to be recorded in writing but the aggregate

period could not exceed beyond the period of three years and even assuming that there has been extension of the period of limitation as

contemplated under Rule 152 of the old Rules the liquidation proceeding had come to an end and was not existing in the eye of law when the new

Act came into force and that if the proceeding was not pending and/or alive at a point of time when the new Act came into force the provision of

Rule 195 of the new Rules of 1987 could not revive a proceeding which became nonest under the new Rule 195 of 1987 Rules the

liquidation proceeding should be closed as expeditiously as possible or, in other words, the period of limitation prescribed in, the new Rule 195 the

period of limitation prescribed in the old Rule 152 under 1973 Rules have been given a go by. It was submitted that in case any proceeding was

pending at the date of commencement of the new Act of 1987 it could be dealt with under the new Act and new Rules but as the winding up

proceeding which was not alive as the same had become barred by the limitation under the old Act and the Rules, the Liquidator had become

functus officio and had no jurisdiction to function when the new Act came into force and the Registrar had no jurisdiction to direct the Liquidator

to proceed with the liquidation proceeding.

5. Mr. Milan Kumar Bhattacharjee, learned Advocate appearing on behalf of the Respondents, contended that the provision of Rule 152 should

be held directory and not mandatory and further submitted that the liquidation proceeding was in fact kept pending because of an order passed by

the Registrar of Co-Operative Societies on December 7, 1979 when on the basis of an application filed by the Chairman of the Co-Operative

Societies for passing, certain orders and on the body of that application a direction was issued by the Registrar of Co-Operative Societies on

December 7, 1979 to the following effect:

called for records to be put up by 11.12.1979. No further action should be taken by the Liquidator till further orders.

Such direction was not recorded in the order-sheet and the said direction was not communicated to, the parties concerned. Relying on these

endorsements made by the Registrar of Co-Operative Societies it was submitted by Mr. Bhattacharjee that the liquidation proceeding was kept in

abeyance by the Registrar and, as such, at the date when the new, act came into force the proceeding must be held to have been pending and

consequently the proceeding had not become barred by the law of limitation as contended by Mr. Mukherjee. In order to appreciate the verbal

contention of the parties, it is necessary to examine the relevant provisions relating to winding up proceeding to examine the scope and effect of the

relevant provisions of the Acts and the Rules framed thereunder.

6. The order of winding up was passed under the old Act. Section 89 of the old Act confers power upon the Registrar to order for winding of a

Co-Operative Society on three different grounds. Sub-section (2) of Section 89 provides that the order for winding up shall take effect where no

appeal is preferred u/s 134, on the expiry of the time allowed for preferring an appeal or where the appeal is preferred upon rejection of the appeal

by the appellate authority. Admittedly, in the instant case no appeal was preferred by any of the parties concerned and, as such, they said order

has become effective after the expiry of two months period of limitation from July 30, 1979. Section 90 of the old Act provides power for

appointment of a Liquidator. Section 91 of the said Act provides powers and obligations of a Liquidator. Sub-sections (4) and (5) of Section 91

provides various powers to the Liquidator during the period when the Liquidator will be functioning after taking charge of the assets and properties

of the Co-Operative Societies as well as the books of accounts and the Registrar was to cause the said accounts to be audited and the Liquidator

should furnish the register, vouchers, documents etc. for this purpose. Sub-section (8) of Section 91 provides that after the liquidation proceeding

is over the surplus assets of the Co-Operative Societies should be distributed or utilized in the manner provided by the by-laws of the Co-

Operative Societies and in case the by-laws of the Co-Operative Societies did not make any provision in this regard, the surplus assets shall vest in

the liquidator who shall transfer it to the Co-Operative Development Fund. Admittedly, in the instant case there was no debtor and that no one had

any claim from the said Co-Operative Societies, but on account of certain technicalities, defaults or lapses it appears that the order of winding up

was passed, by the Registrar on July 30, 1979. Section 93 of the said old Act provides the power of the Registrar who was of the opinion that the

said Society should continue to exist and, in the instant case, an application for invoking power u/s 93 of the old Act was filed and that the same

was also, rejected by the Registrar of Co-Operative Societies by an order passed on November 29, 1979. Rule 149 of the said old Rules

provides the procedure for distribution of the assets of the Society after its liquidation. Rule 150 of the said Rules, inter alia, provides that at the

conclusion of the liquidation preceding the Liquidator shall call a general meeting of the members at such time and place and in such manner as he

thinks fit and place before such meeting:

(i) Summary proceeding;

(ii) Report of the cause of the failure of the Society;

(iii) The members at such meeting after due consideration of the report placed by Liquidator may by resolution request the Registrar to cancel the

registration or the order for winding up of the Society as they think fit.

If there be a quorum at such meeting and the resolution as aggregate by 3/4th members of the presence it shall be binding upon the Registrar.

7. Rule 152 prescribed the period within which the termination of liquidation proceeding within specific time obligatory on Registrar.

Rule 153 provides disposal of the Books and Accounts and other documents of the Society after the proceeding is concluded and the Liquidator

has to be deposited the same with the Registrar. These are the relevant provision in connection with the proceeding for Winding up of an

appointment of a Liquidator. On the question whether the provision of Rule 152 of the old Rules were directory or mandatory. The Supreme

Court in the case of *Paradise Printers and Others Vs. Union Territory of Chandigarh and Others*, observed that generally the use of the word

"shall" prima facie indicates that the particular provision is imperative. But that is not always so. The meaning to be given to a word depends upon

the context in which it is used. The word takes the colour depending upon the context. The Court must examine why the Legislature or the rule-

making authority has chosen the word "shall". After examining the purpose and the scope of the statute or rule the Court must give such meaning

as to render the provision workable in a fair manner. Court must give such meaning which would promote the purpose and object of the rule.

When there is a choice of meanings there is a presumption that one which produces an unjust or inconvenient results was not intended. In *K.*

Prasad and Others Vs. Union of India (UOI) and Others, the Supreme Court also observed that mere non-mention of consequences of violation

of the provision will not necessarily indicate that the provision is not mandatory.

8. In *Montreal Street Rly. Co. v. Normandin* (1917) A.C. 170 Sir Arthur Channel said that when the provision of a statute relates to the

performance of a public duty and the case is such that to hold null and void acts done in respect of the duty would work serious inconvenience or

injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the

Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of

the acts done.

9. In deciding whether the step is mandatory or directory, the Court considers the broad policy of the Act and the principle of fairness to the

subject. The policy is not to be frustrated by mere technicality, on the other hand the subject is not to be prejudiced by the neglect of a safeguard

inserted by Parliament for his protection.

10. Where a Court or Tribunal whose jurisdiction is laid down by Act is under a statutory duty not to make a certain type of order the duty is

mandatory. A purported order made in contravention of the duty will be void as made in exercise of jurisdiction: see *B v. B.* (1961) 2 All E.R.

396, *Public Prosecutor v. Koi* (1968) A.C. 829 and *R. v. Kettering exp. Patmosr* (1968) 1 W.L.R. 1836.

11. Mr. Bhattacharjee, learned Advocate appearing on behalf of the Respondents, relied upon a decision of the Division Bench of this Court in the

case of Bhagirathi Co-operative Joint Farming Society Ltd. Vs. Howrah Zilla Parishad, for holding that a statutory provision which prescribes a

particular manner or time for the performance of any act and that goes on further to provide that breach thereof would render the performance

void or without jurisdiction must necessarily be held to be absolute. But absence of any provision providing for such penal consequence need not

necessarily need to be contrary conclusion. Whether such provision would be directory or not to depend upon the nature and effect of the

prescription and the intention of the legislation as would appear from the scheme of the Act. In this case a dispute u/s 86 of the old Co-Operative

Societies Act was initiated but the award was not made within three months from the date of reference as provided under the Act and no extension

of time was obtained. The Division Bench in the case held that the Arbitrator did not become functus officio and award made thereof was not null

and void. Relying upon this decision Mr. Bhattacharjee contended the similar interpretation is to be given passed in construing the provision of Rule

152 of the old Rules. The Division Bench in Bhagwati Co-Operative case (Supra) has considered that when a party has applied for an arbitration

and on the basis of a dispute whether the innocent party who had no control over the arbitration proceeding is not bound to suffer because of the

lapse and/or negligence on the part of some other parties. In this connection the observation of Sri Arthur Chelmsford in Montreal Street Railways

Co.'s case (Supra) is relevant wherein it has been held that when the provision of the statute relates to performance of a public duty and the case is

such that to hold null and void acts done in respect of his duties would work serious inconvenience or be unjust to persons who have no control

over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it has been the practice to hold such

provision to be directory only, the neglect of them punishable does not affect the validity of the acts done. Accordingly, principle of interpretation

followed by the Division Bench in Bhagwati Co-Operative Case in respect of the validity of an award u/s 87(4) and (5) of the West Bengal Co-

Operative Societies Act, 1973, is not applicable while interpreting the provisions of Rule 152 of the said Rules where the object of the provision is

different. In deciding whether a provision is mandatory or directory the Court has to consider the object of the provision in question. It is not the

object to frustrate by mere technicality and on the other hand the subject is not to be, prejudiced by the neglect of a safeguard provided by

Parliament for this purpose.

12. Where an authority has been conferred that the statutory duty to make certain order the duty is mandatory. In the instant case, admittedly even

after the order of winding up proceeding was passed in the year 1979 the said Co-Operative Society was allowed to function for several years.

The said Co-Operative Society was allowed to hold Annual General Meeting for the purpose of electing the office-bearers and every year the

auditors of the Co-Operative Societies Department have audited the accounts of the said Co-Operative Society and that from 1979 till December

1990 the said Co-Operative Society was allowed to function and the Registrar has treated the said Co-Operative Society valid for all practical

purposes. Question is after lapse of so many years when the Registrar of the Co-operative Societies acquired to the position that the said Co-

Operative Society was validly functioning and that as a matter of fact as and today there is now a 15 storied building owned by the Co-Operative

Society and the flats are owned by the individual members of the said Co-Operative Society. It is also not in dispute that nobody gets any money

from the Co-Operative Society. This state of affairs was brought about by lapse of time, and in the facts and circumstances of the case can it be

said that the said Co-Operative Society should be deemed to have been wound up in that year 1979 and the said Co-Operative Society ceased to

exist and that in the absence of any liabilities the assets of the said Co-Operative Society shall be distributed as per the bye-laws or to vest in the

Government. Inasmuch as in the absence of any provision for distribution of the assets as provided under bye-laws the entire surplus assets after

meeting the liabilities the property of the Government to be created to the account of the Co-Operative Development Fund.

13. We are unable to hold that the said order of winding up made by the Registrar had been kept in abeyance for the purpose of suspending the

period of limitation. After the winding up proceeding is passed the only power the statute has conferred upon the Registrar was to cancel the same

on application filed by the members of the Society u/s 93 of the said Act and that the said power u/s 93 of the said Act had been exercised by the

Registrar by rejecting the said application, and thereafter the Registrar of Co-Operative Societies could not invoke any power not conferred by the

statute. The Registrar of Co-Operative Societies being a statutory authority cannot exercise any power which is not expressly conferred by the

statute. We are unable to accept the contention of Mr. Bhattacharjee, the learned Advocate appearing on behalf of the Respondents, that the

order passed on December 7, 1979, by the Registrar of Co-Operative Societies was passed in exercise of the power of revision u/s 135 of the

old Act. The power of review and revision u/s 135 of the old Act has to be exercised in the manner and on the existence of the condition

precedent for exercise of such power, but admittedly in the instant case the Registrar of the Co-Operative Societies did not exercise power on his

own motion or on an application. The said power of review had not been exercised and from the records also we did not find any support to such

an argument made by the learned Counsel for the first time before this Court. If any proceeding for review is initiated by an authority in that event

such proceeding is to be concluded either allowing or rejecting the application for review. Merely making an endorsement on the body of the

application by the Registrar calling for records and ordering it to be put up on a particular date and directing the Liquidator not to take further

action until further orders, cannot be said to be an order passed under review and we are unable to accept this contention that there was any order

keeping in abeyance of the winding up proceeding for the purpose of taking the advantage of the provision of Rule 195 of the new Rules. There

cannot be any doubt that the time when the new Act came into the force the said winding up proceeding was not alive at all. In our view, when a

proceeding for winding up was passed, it was passed and the relevant provision and the rules made it absolutely clear that the Liquidator had to

take immediate charge of the society and the Books of Accounts, and the Liquidator can alone act as representative of the Co-Operative Society.

The Liquidator had to submit accounts to the Registrar and after doing this the Liquidator had to distribute the surplus assets as provided u/s 91(8)

of the old Act. In view of the relevant provision, the scope and object of the proceedings, we have no hesitation in holding that the provision of

Rule 152 of the old Rules was clearly mandatory. The winding up proceeding if initiated was to be concluded within the period of limitation and in

the manner laid down therein. When an order for winding up of the Co-Operative Societies has been passed the Liquidator had to exercise the

powers as provided under the Act and ultimately the Liquidator has to conclude the proceedings after liquidating the surplus assets and disbursing

the assets thereby putting to an end to a Co-Operative Society, but on the other hand, in the instant case, it seems that in 1979 they said Co-

Operative Society was treated as valid and subsisting, and after a lapse of 11 years the said proceeding could not be reopened by this time when

there had been a 15 storied building and for all practical purposes the said Co-Operative Society was treated as valid and legal. In such

circumstances, in view of the principle laid down by the Supreme Court in the case of The Nayagarh Co-operative Central Bank Ltd. and Another

Vs. Narayan Rath and Another, wherein the Supreme Court held that it was not open to the authorities concerned to set aside an appointment of a

person and the Rules of Co-Operative Societies after having acquired in it and after having for all practical purposes, accepted the appointment as

valid is fully applicable. It was not desirable that the appointment should be invalidated in this manner after so many years. The principle of waiver

and acquiescence were fully applicable in the facts and circumstances of the case. It is not the law that for mere non-mentioning of the

consequence of violation of the provision necessarily indicate that the provision is not mandatory while considering whether the provision is

mandatory or directory the consequence that would follow because of non-observance of the provision is a very relevant factor and that it appears

that the consequence of non-observing the said provision as mandatory, it would create prejudice and hardship to the interest of third parties and it

would result in an anomalous, illogical and impressionable result, the same must be construed as mandatory. The winding up proceeding could not

be kept in abeyance and a Society under liquidation cannot be allowed to function as a validly constituted society. The provision cannot be

construed as directory at the convenience of an erring party. That apart, if the intention of the Legislature and of the Rule-making authority was

there the period of limitation prescribed under Rule 152 of the old Rules was merely directory in that event there was no necessity on the part of

the Rule-making authority to change the rule and dispense with the period of limitation. The legislative intention is also clear from this that the period

of limitation under Rule 152 was not directory. In that event it would have a devastating effect on the members of the Co-Operative Society who

had spent several lakhs of rupees for the purpose of constructing a 15 storied building in the heart of the city of Calcutta and that the assets which

should be allowed to be vested to the Co-Operative Development Fund because of the lapses and negligence on the part of the Registrar of Co-

Operative Societies for no fault on the part of the members of the said Societies. Accordingly, we are of the view that the period of limitation

prescribed under the Rule 152 of the old Rules must be held to be mandatory; otherwise, the very object, of the Act would be frustrated. The

Supreme Court in the case of Skandia Insurance Co. Ltd. v. Kokilaben Chandra Vadan AIR 1987 S.C. 1184 held that in order to find the

intention of the Legislature into the motive and philosophy of the relevant provision keeping in inning to that to be achieved by enacting the same

Considering the scheme of the Act it is clear to us that when a winding up order has been passed it is a mandatory duty on the part of the

Liquidator to conclude the proceeding within the period prescribed and the Registrar cannot sit over the matter and allow the Co-Operative

Society to function for one decade and the Registrar cannot give effect to an order which had lapsed being barred by limitation and cannot revive

an order whose life had come to an end. Under the scheme of the Act after the winding up order is passed the Co-operative Society cannot

function and the Liquidator has to liquidate the assets and, that too, within the time which is specified. Considering all aspects of the matter we are

of the view that the winding up proceeding has become barred by limitation as provided under Rule 152 of the old Rules and consequently an

order passed by the Registrar on December 19, 1990, directing the Liquidator to proceed with the liquidation is invalid. We are of the view that in

the facts and circumstances of the case when the proceeding has become dead, it cannot be revived and no life to the proceeding could be injected

by virtue of the provision of Rule 195 of the new Rules as on the date when the new Act had come into the force, no proceeding for winding up

was pending in the eye of law. Accordingly, we are of the view that the learned trial Judge was wrong in rejecting the writ application on the

ground mentioned in his order. Accordingly, this appeal is allowed. Order of the learned trial Judge dated May 15, 1991 passed on the writ

application filed by the Appellant is set aside and the writ petition is allowed. The order dated December 19, 1990, passed by the Registrar of Co-

Operative Societies is set aside and the Respondents are restrained from giving any effect or further effect and/or to take any further action on the

basis of the order of winding up and appointing Liquidator by the order dated July 30, 1979 being No. 381/4(CMAH). Appeal is allowed. There

will be no order as to costs.

14. Let a Xerox copy of this judgment be given to the learned Advocates for the parties on usual terms and conditions.

A.K. Bhattacharjee, J.

I agree.

Appeal allowed.