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GAYATRI DE

v.

MOUSUMI CO-OPERATIVE HOUSING SOCIETY LTD. AND ORS.

APRIL 16, 2004

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[S. RAJENDRA BABU, DR. AR. LAKSHMANAN AND  
G.P. MATHUR, JJ.]

*West Bengal Cooperative Societies Act, 1983 :*

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*Ss.80(1)(b) and (c) and 87(3)—Co-operative Housing Society—Death of a member—Transfer of interest of deceased member in absence of any nominee—Held, a plot of land, a house or an apartment in a multi-storied building shall constitute a heritable and transferable immovable property provided it is not partitioned or sub-divided—It is an obligation of the Society to transfer the share or interest of deceased member within the stipulated period—While disposing of deceased member's share or interest, preferential claim always goes to his heirs and legal representatives in absence of any nominee—On facts, appellant being one of the heirs of the deceased member is entitled to succeed to the estate of the deceased .*

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*Constitution of India, 1950 :*

*Article 226—Co-operative Housing Society—Special Officer of Society appointed by High Court—Cancelling allotment of deceased member—Writ petition by heir challenging cancellation—Held, Special Officer is a statutory functionary—Society being under control of Special Officer, writ petition is maintainable in law.*

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**Respondent Society purchased some land from appellant's father the vendor, to construct a multi storied building thereon. The vendor was admitted as a member and was allotted a flat in the Society. After making part payment towards the cost of the flat, the vendor died without nominating any person to inherit the flat. Meanwhile in a litigation involving the Society, the High Court appointed a Special Officer to monitor progress of the Society. The son of the vendor, the deceased allottee, wrote a letter to the Special Officer about the death of his father and steps being taken to transfer his interest to one of his heirs, but the**

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Society did not reply. About two years later, the Special Officer informed him that since claim for transfer was not made within the stipulated period, the flat had already been reallocated. A

The appellant, one of the daughters of the deceased allottee, filed a writ petition in the High Court for a direction to the respondents to withdraw or cancel the letter issued by the Special Officer. The Single Judge allowed the writ petition and directed the respondents to take steps to transfer the flat in favour of the petitioner. However, in appeal the Division Bench of the High Court dismissed the writ petition holding that the entire amount having not been paid, no right, title or interest had passed in favour of the deceased allottee; that under the provisions of the Act, and the Rules framed thereunder, the writ petitioner or the heirs of the deceased allottee had no right to allotment of flat; that the heirs nominated after expiry of the stipulated period could not derive any right; and that no writ petition would lie against the respondent Society. Aggrieved, the writ petitioner filed the present appeal. B C D

On the questions: whether the right of the ownership of a flat in the multi-storied building under the West Bengal Co-operative Societies Act, 1983 is inheritable and transferable; whether, in the event of death of the member leaving no more nominee any person to inherit the interest of the deceased member, his interest should be inherited by all the legal heirs or can it be inherited by any one of the legal heirs if other legal heirs have given their rights in favour of such single legal heir; and whether the writ petition against the Society was maintainable, E

Allowing the appeal, the Court

HELD: 1. Sub-section (3) of Section 87 of the West Bengal Co-operative Societies Act, 1983 makes it abundantly clear that a plot of land or a house or an apartment in a multi-storied building shall constitute a heritable and transferable immovable property within the meaning of any law for the time being in force provided that notwithstanding anything contained in any other law for the time being in force such heritable and transferable immovable property shall not be partitioned or sub-divided for any purpose whatsoever. In terms of the Act and the Rules, the heirs of a deceased person are, therefore, entitled to inherit the flat allotted to the deceased. In the instant case, admittedly, the flat in question was allotted to the father of the appellant who died thereafter and as a consequence thereof, the heirs of the said deceased became and would be F G H

**A** entitled to the estate and as a result thereof to the said flat with proportionate interest in the land. [370-F-H; 371-A]

**B** 2.1. In view of Section 80(1)(c) of the Act, transfer of shares or interest can be made only by a Society and not by the legal heirs because if it is read 'by a Co-operative Society' after the word "*transfer*" then the meaning and application becomes clear which means that it is an obligation of the Society to transfer the share or interest of the deceased member within the stipulated period referred to in Section 80 of the Act. The provision clearly indicates that while disposing of deceased member's share or interest the preferential claim always goes to the heirs and legal representatives of the deceased member in absence of any nominee.

**C** [371-C-F]

**D** 2.2. In the instant case, the question of admission of membership, becomes absolutely immaterial; and the real question is of transfer of devolution of interest of a deceased member. The appellant being one of the heirs of the deceased member was and still is entitled to succeed to the estate of the deceased member as per the mandatory provisions of the statutes and that being so the right, title and interest of the deceased member in the apartment of the Society devolves upon his heirs; and in that background, Section 85(3) and Rule 135(5) neither have nor can have any application in the instant case because there cannot be any manner of doubt that on the death of a member of a Society his share or interest in the Society shall, in the absence of a nominee, be transferred, in view of s.80, to a person who appears to the Board to be entitled to in accordance with Rules, possession of such interest as part of the estate of the deceased member. In the instant case the son, who himself is admittedly not a member of the Society in question or any other Housing Society and became entitled to be considered for such allotment, immediately gave notice to the appropriate authority about the death of his father and also intimated the Society that steps were being taken under the Act to get their father's interest transferred to one of them - brothers or sisters.

**E** [371-H; 372-A-C]

**F** 2.3. The order passed by the Special Officer, who is a statutory functionary, re-allotting the flat to a stranger, even after he had received letter regarding transfer of ownership in favour of legal heirs, without giving any opportunity of being heard and without deciding the question as to who was entitled to the said flat in accordance with law, was not only improper but also illegal, arbitrary and motivated. However, it has

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been brought to the notice of the Court that the flat has not been allotted to a third party and remains vacant. [372-D-E; G]

3. In the instant case, the subject matter of the writ petition is the order passed by the Special Officer in discharge of his statutory functions and therefore, the writ petition is maintainable in law. The Special Officer is appointed under the provisions of the Act and as such he is a statutory Officer and, therefore, he should be regarded as a public authority. Apart from that, Art.226 of the Constitution is not confined to issue of writ only to a public authority, the bar extends also to issue directions to any person. In a case where the Co-operative Society is under the control of a Special Officer, a writ would lie. [374-E-F]

*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Ors.*, [2002] 5 SCC 111; *Ram Sahan Rai v. Sachiv Samanaya Prabandhak and Anr.*, [2001] 3 SCC 323; *U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey and Ors.*, [1999] 1 SCC 741 and *S.R. Tewari v. Dist. Board, Agra*, AIR (1964) SC 1680, relied on.

*General Manager, Kisan Sahkari Chini Mills Ltd. Sultanpur, U.P. v. Satrughan Nishad and Ors.*, [2003] 8 SCC 639 and *G.Bassi Reddy v. International Crops. Research Institute and Anr.*, [2003] 4 SCC 225, referred to.

*Kannan P.Tamilarasan, H.and Ors. v. The Director of Sugars, Office of the Director of Sugars etc.*, (1991) 2 Law Weekly Madras 409 and *Ajay Hasia v. Khalid Mujib Sehravardi*, [1981] 1 SCC 722, cited.

4. The prayer made in this appeal by the appellant deserves to have consideration and, therefore is accepted. A mandamus is issued directing the respondents and, in particular, the Secretary of the respondent-Society, to take immediate steps for transfer of the flat in question in favour of the appellant and also hand over the flat to her upon payment of the required amount. [377-B-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3523 of 1998.

From the Judgment and Order dated 15.12.97 of the Calcutta High Court in F.M.A. No. 285 of 1996.

V.R. Reddy, Tapas Ray, S.B. Sanyal, Mainak Ghosh, Raja Chatterjee,

**A** Sachin Das, G.S. Chatterjee, Satish Vig, N.R. Choudhury and Somnath Mukherjee for the appearing parties.

The Judgment of the Court was delivered by

**B** **DR. AR. LAKSHMANAN, J.** This appeal involves several interesting questions as will appear from the facts set out hereunder:

**C** The appellant herein filed a writ petition before the High Court of Calcutta praying, *inter alia*, for cancellation of the letter dated 1.11.1988, issued by the Special Officer of the Society, for declaration that the possession of the Flat being No. A- 2 on 5th Floor should be given to the legal heirs of late Sati Prasanna Bhowmick, the deceased member, upon receipt of all dues in respect of the said apartment by the said Society and for an interim order of injunction restraining the society and the Special Officer from alienating transfer of the said apartment No. 2 to anybody other than the legal heirs of the deceased member and for other reliefs.

**D** The father of the appellant/writ petitioner - Sati Prasanna Bhowmick - has died intestate in August, 1985 leaving being him the following legal heirs:

- |          |                          |   |                  |
|----------|--------------------------|---|------------------|
| <b>E</b> | (a) Smt. Gayatri De      | - | Married daughter |
|          | (b) Smt. Atri Das        | - | -do-             |
|          | (c) Smt. Maitry Roy      | - | -do-             |
|          | (d) Smt. Anita Sarkar    | - | -do-             |
| <b>F</b> | (d) Sri Subrata Bhowmick | - | son              |
|          | (e) Smt.Mita Das         | - | Married daughter |

**G** The said legal heirs, namely, the four daughters and the son have separately, by letters, given their consent thereby authorising the appellant to take possession of the flat being No. A-2/5 from the respondent-Society. The appellant has been authorised by all the legal heirs of late Sati Prasanna Bhowmick to take possession of the flat stands in the name of their deceased father.

**H** The appellant's father, owner of rent free land at 15 B Ballygunge, Calcutta-700 019, entered into an agreement on 18.10.1977 for sale of the land in question on which the said Society desired to make the apartment. On

27.10.1980, an indenture was entered into between the father of the appellant and the Housing Society. The total price was Rs. 13,90,069.28 against which the earnest money amounting to Rs. 7,30,000 was paid towards part payment of the price. Clauses 10 and 12 of the agreement of 1977 runs as follows: A

“10. The purchaser shall construct a multi-storied building on the plot of land to be purchased by them as aforesaid. The vendors shall have the right to purchase at least 8 flats in the said building either in the name of themselves or in the name of their nominee or nominees each flat to contain a floor area of about 1268 sq. ft. The purchase price to be paid by the vendors in respect of the said flats be at the same rate as those payable by other purchasers of similar flats in the same building occupying the same position. The purchaser shall not sell any of the said 8 flats unless the same are first offered to the vendors by 60 days previous notice in writing by registered post. In case the vendors do not signify their willingness to purchase *within* the said period of 60 days the purchaser will be entitled to dispose of the flats to any other person or persons.” B C D

“12. Subject to the approval of the general meeting of the purchaser the name of the building to be constructed by the purchaser shall be “Priti Court” and the said name shall not be changed by the purchaser without the previous written consent of the vendors.” E

It is worth mentioning, in this connection, that Priti was the name of the pre-deceased wife of the said Sati Prasanna Bhowmick and the late mother of the appellant herein. By letter dated 29.11.1982, the Society intimated the father of the appellant that they had favourably considered the application and accepted the membership under the terms and conditions contained in the said letter. The father of the appellant had been informed by the said letter that the Society had allotted him a three bed rooms flat on facing flat No.A-2 having covered area of 1268 sq.ft. approximately (including common area) on 5th floor in the project of the society. The estimated cost of the flat was mentioned at Rs. 2,53,600 @ Rs. 200 per sq.ft. inclusive of proportionate land value. F G

Clause 13 of the said letter runs as follows:

“13. Your right and interest in the society will be governed by the provisions of the West Bengal Co-operative Societies Act, West Bengal Co-operative Societies Rules and the bye-laws of the Society. H

**A** You will also be liable to discharge your obligation as a member of the Society in accordance with the above mentioned Act, Rules and bye-laws. You are at liberty to inspect the bye-laws of the society.”

**B** On 13.10.1980, the Society issued two share certificates bearing Nos. 51 and 52 in favour of Sati Prasanna Bhowmick, since deceased and a flat being No.A-2 on the 5th floor at the said multi storied building had been allotted to him under their letter dated 29.11.1982. The Secretary of the society made demands of payments for the flat in question and the other flats allotted to other members. Series of correspondences went on and the father of the appellatant took time to clear all the dues. Some trouble arose which

**C** hampered the progress of the said society and other litigations were cropped up. One Mr. Arun Prakash Sarkar, an advocate of the High Court at Calcutta, had been appointed as a Special Officer. The Special Officer intimated this under his signature that the High Court had authorised him to take immediate steps to have the construction work continued and also to give liberty to him

**D** to consider the question of allotment of applications etc. The father of the appellatant, since deceased, who was an aged ailing octogenarian became ill and could not take any further steps regarding his own flat namely, A-2/5 which had been allotted to him as already mentioned hereinabove. It is worth mentioning, in this connection, that since after the early part of 1983, there was neither any demand for money nor of any communication regarding his

**E** liability in respect of the said flat from the end of the said Society during the life time of Sati Prasanna Bhowmick.

By letter dated 6.12.1986, Dr. Subrata Bhowmick, son of Sati Prasanna Bhowmick, since deceased, the erstwhile allottee in respect of flat No. A-2/5 wrote a letter to the Special Officer of the Society intimating him about the demise of his father and mentioning therein that they had since found that their father did not leave any nominee for the flat mentioned above. It was also mentioned therein that they were taking such action under the West Bengal Cooperative Societies Act, 1983 (hereinafter referred to as “the Act”) and the laws to get their father’s interest transferred to one out of all brothers and sisters and as some of them were outside Calcutta and even outside India

**G** and it was likely to take time. No reply was sent by the Society to the letter dated 18.12.1986. The Special Officer, for the first time, on 1.11.1988 wrote a letter to Dr. Subrata Bhowmick that in accordance with the Act, the Rules made thereunder and the bye-laws of the Society, a claim for transfer of interest is required to be made within a stipulated time and as no claim for

**H** transfer of the interest of their late father has been made in time, the flat in

question has already been re-allotted and the Society will make payment of the amounts made after deduction in accordance with law. A

The appellant filed a writ petition in the High Court of Calcutta for a mandamus commanding respondents 2 and 3 to withdraw, cancel and not to give effect to the purported letter dated 1.4.1988 issued by the Special Officer of the Society and to forbear from acting on the basis thereof and pursuant thereto. Other consequential reliefs/prayers were also made. B

The writ petition was resisted by the Special Officer of the Society submitting therein that the said writ petition was not maintainable in law and sustainable on facts and should be rejected *in limine*. The appellant filed an affidavit in reply denying and disputing the correctness of the statements, contentions and submissions made in the affidavit-in-opposition. It was specifically stated that the Special Officer having been appointed by the High Court and the decision and action of the Special Officer could not be assailed in any Court subordinate to the High Court and as such the High Court was moved against the wrongful and illegal action of the Special Officer. In spite of availing the remedy of reference of the dispute to the Registrar under the Act, which according to the appellant, was no bar to the maintainability of the writ application, it was asserted that the appellant was ready and willing to pay the balanced amount in respect of the said flat and also prepared to comply with all the formalities in respect of the said flat. The writ application was heard and disposed of on 2.7.1992 by a learned single Judge. The ordering portion of the said judgment is reproduced hereinbelow: C D E

“Considering the facts and circumstances of the case, in my view, the petitioner should succeed in this writ application. There will be an order quashing and cancelling the said letter dated 1.11.1988 issued by the Special Officer, Mousumi Co-operative Housing Society Ltd.-respondent No.3. There will be a further direction to take appropriate steps in accordance with law for transfer of the flat in question in favour of the writ petitioner and also to hand over possession of the same to her upon payment of balance amount due and payable after adjusting the said sum of Rs.1,00,000 paid by her father, Sati Prasanna Bhowmick. F G

The application is accordingly disposed of. There will be no order as to costs.”

Against the aforesaid judgment and order, the Society preferred an H

A appeal before the Division Bench. The Division Bench allowed the appeal filed by the Society and dismissed the writ petition filed by the appellant. It reads thus:

B “(a) Since the entire amount has not been paid, no right, title and interest had passed in favour of the father of the appellant Sati Prasanna Bhowmick ; (b) The provisions of the Act and the Rules made thereunder leave no manner of doubt that the appellant does not have any right to allotment of a flat nor the heirs of the deceased could claim title in relation to the flat in question in violation of the provisions of Chapter IX of the said Act; (c) The heirs nominated after the expiry of the stipulated period could not derive any right contrary to or inconsistent with the provisions of the Act. The writ petition was not maintainable for non-impleading the necessary party and no writ will lie against the respondent-Society.”

D Being aggrieved by and dissatisfied with the judgment of the Division Bench, the appellant filed this appeal by way of special leave petition.

E We heard Shri V.R. Reddy and Shri Tapas Ray, learned senior counsel, appearing for the appellant and Shri S.B. Sanyal, learned senior counsel assisted by Shri Somnath Mukherjee, learned counsel, appearing for the respondents.

Shri V.R. Reddy took us through the pleadings, affidavits filed before the High Court as well as before this Court and the annexures. He made the following submissions:

F He submitted that in the event of death of a member, the legal heirs of such deceased member are entitled to inherit and give allotment of the flat which the deceased member was entitled to. In the instant case, the deceased member died leaving no more nominating any person to inherit the flat. According to Shri V.R. Reddy, in the event of the deceased member dies leaving no more nominating any person to inherit the flat, the interest of the deceased member could be inherited by all the legal heirs or by one of the legal heirs in the event other legal heirs give their rights in favour of such single legal heir. He submitted that the Cooperative Society is not competent to re-allot a valid allotment in favour of the deceased member even when all financial obligations are complied with, ignoring the rights of legal heirs of such deceased member. He invited our attention to Sections 79, 80, 82, 85, 87 and the corresponding Rules.

Mr. V.R. Reddy further submitted that the writ petition was maintainable since the order impugned was passed by the Special Officer, appointed under the provisions of the Act and as such he is a statutory officer and, therefore, he should be regarded as a public authority and, therefore, the writ petition filed by the appellant is maintainable in law.

Mr. V.R. Reddy also submitted that the right and interest of the legal heirs of the deceased member could not be denied in the event of time taken in nominating, particulars legal heirs for the same could not be done within three months from the date of the death of the member because of certain unavoidable circumstances as the legal heirs were not available immediately in giving their consent and giving up their rights in favour of the single legal heir in whose favour the property desired by all the legal heirs to be transferred. More so, when the Cooperative Society was intimated well in advance seeking extension of time in providing particular name in whose favour the property, the legal heirs desired to be transferred. Shri V.R. Reddy contended that the valid membership in favour of deceased member could not be cancelled only because the name of the nominee in whose favour of the property was to be transferred had taken some time for selecting such nominee by all the legal heirs.

Countering the arguments, Shri S.B. Sanyal, learned senior counsel appearing for the respondents, submitted as under :

(a) The judgment and order impugned in this appeal is unexceptionable;

(b) The father of the appellant paid only Rs. one lakh against the title cost of the flat of Rs.2.60 lakhs despite several reminders during his life time and as such, acquired no right, title or interest in his allotted flat No. A-2/5 under Section 87 of the Act and under Rule 153 of the Rules framed thereunder;

(c) The present appellant cannot claim any such title or interest over the same by way of inheritance. The modality for such devolution by inheritances are stipulated under Section 80(1)(a), (b) and (c) of the Act. The appellant having failed to comply with such formalities of the claim, automatic entitlement to the right, title and interest in the flat was no longer available to the appellant.

As per the directions of this Court dated 13.4.1998, the nomination register along with the zerox copy thereof was submitted. The said register

**A** is a statutory register under Section 79 of the Act and Rule 127 of the Rules and is conclusive evidence that late Sati Prasanna Bhowmick did not appoint any nominee in respect of his flat.

**B** (d) The writ petition filed by the appellant is not maintainable as the respondent-Society is not a State or even the instrumentality of the State within the meaning of Article 12 of the Constitution of India. According to Shri S.B. Sanyal, the Society is an autonomous body, duly governed by an elected Board under the provisions of the Act and the bye-laws of the Society and the Society is not recipient of any State assistance in the form of shares, subsidy loans, working capital etc. and there there is no State control or State nominee or Government Officers on deputation to the service of the Society. **C** Therefore, he would submit that since the Society is governed by the Act, Rules and bye-laws devoid of any elements of public law warranting remedy in the form of mandamus, the writ petition is not maintainable.

**D** (e) The appellant forfeited her right to the shares and interest of late Sati Prasanna Bhowmick because of her negligence to prefer the claim with probate, letter of administration or succession certificate before the Board within the period of 90 days as stipulated in Section 90(1)(b) and (c) of the Act. The appellant has also discharged her onus for preferring he claim within the stipulated period. It was submitted that sub-Section (3) of Section **E** 85 of the Act being a special statute would govern the relationship of the parties and thus the question of his heirs and successors being automatically entitled thereto does not arise and the membership which was heritable could be claimed in the manner laid down under the Act and Rules framed thereunder.

**F** (f) The appellant being allottee of Flat No. A-2/4 in the same building is not entitled to a second flat being No. A-2/5 under Section 85(3) of the Act and Rule 135 (2) of the Rules.

(g) The third party allottee was not made a party to the writ petition.

**G** (h) Concluding his arguments, Shri S.B. Sanyal submitted that the appellant is a stranger so far as Flat No. A-2/5 is concerned. She is neither the nominee of late Sati Prasanna Bhowmick nor the one claiming right, title and interest of late Sati Prasanna Bhowmick-under Section 80 (1)(b) and (c) of the Act within 90 days of his demise to the satisfaction of the Board and thus forfeited her right to succession to the subject flat under Section 72 and **H** Section 87(2) of the Act and Rule 153 of the Rules.

(i) Mr. S.B. Sanyal further submitted that even though the appellant is not entitled to any right, shares and interest of late Sati Prasanna Bhowmick, the respondent-Society is ready and willing to refund the amount to the appellant. A

We have given our thoughtful consideration to the arguments advanced by the learned senior counsel appearing on either side with reference to the pleadings, records, annexures and the case laws. B

Before we proceed to deal with the issues in question, it is beneficial to consider the relevant provisions of the Act and the Rules made thereunder.

Section 2(8) of the Act defines a Co-operative Housing Society to mean Co-operative Society, the object of which is to provide its member with dwelling house, apartment or lands for construction of dwelling houses of apartments, and maintenance of common services in connection therewith and includes a federation of such societies. C

Sections 2(28), defines a member in the following terms: D

“Member means a person joining in an application for registration of a co-operative society which is subsequently registered or a person admitted to the membership of a co-operative society after its registration under this Act, and includes a joint member. E

“Explanation - For the purpose of this clause, joint member shall any one of the person (including husband and wife and father and son or unmarried daughter) jointly admitted to the membership of a Co-operative society.”

Section 2(32) of the Act defines “prescribed” which reads thus: F

“Prescribed means prescribed by rules made under this Act.”

The word relative has not been defined but in terms of section 2(38) of the Act it has the same meaning as in the Companies Act. G

Section 79 provides for a nomination of transferee which is in the following terms :-

“Subject to the bye-laws of a Co-operative Society, any member of such Co-operative Society may in accordance with the rules nominate a person in whose favour the Co-operative Society shall H

A dispose of he share of interest of such member on his death."

Clauses (b) and (c) of section 80 read thus:

B "80(b) If there is no nominee or if the existence or residence of the nominee cannot be ascertained by the Board or if, for any other cause, the transfer cannot be made without unreasonable delay, to the person who (subject to the production by such person or probate, letter of administration or a succession certificate) appears to the Board to be entitled in accordance with the Rules to the possession of such share or interest as part of the estate of the deceased member; or

C (c) on the application of the person referred to in clause (b) *within three months from the date of death of the member, to such person, as may be specified in the application.*"

Section 82(b) provides:

D "When the membership of a member of a Co-operative Society referred to in clause (a) terminates by reason of death, expulsion, resignation of insanity or any other cause, his possession of, or interest in any land held by him under the Co-operative Society shall vest in his heir executor or administrator or in the person, if any, nominated by him under section 79, if such heir executor administrator or person is E Willing to be admitted as a member of the Co-operative Society and is eligible for membership under section 69."

Chapter 1X provides for special provision for Co-operative Housing Society. Sub-section (3) of Section 85 reads thus:

F "A person shall not be a promoter or admitted as a member of a Co-operative Housing Society until he has made a declaration and sworn before an Executive Magistrate to the effect that he is not a member of any other Co-operative Housing Society in West Bengal and that he or any member of his family does not own any house or G apartment or plot of land in the city, town or village where the Co-operative Housing Society is located."

Sub-Section(2) of Section 87 provides that a member of a Co-operative Housing Society shall not be entitled to any title or interest in any plot of land or house or apartment in a multi-storied building untill he has made such H payment as may be prescribed towards the cost of such plot of land or

construction of such house or apartment or both, as the case may be, to the Co-operative Housing Society. A

Sub-Section (3) of Section 87 reads thus:

“A plot of land or a House or an apartment in a multi-storied building (including the undivided interest in the common areas and facilities) shall constitute a heritable and transferable immovable property within the meaning of any law for the time being in force: B

Provided that notwithstanding anything contained in any other law for the time being in force, such heritable and transferable immovable property shall not be partitioned or sub-divided for any purpose whatsoever.” C

Rule 128 deals with the disposal of the member's share or interest and procedure for calculation of value of shares which reads thus :-

“(1) When upon the death of member of a Co-operative Society, the question of transferring the share, or paying interest of such deceased member arises, and the Board of such Society finds that the deceased member did not make any nomination in accordance with the provisions of Section 79, or that the existence or residential address of the person nominated cannot be ascertained, or that for any other sufficient cause such transfer of payment cannot be made without unreasonable delay, the Board may transfer the share or pay interest of such deceased member in favour of or to any person who presents in writing his or her claim for the said share or interest and produces, in support of such claims, probate, letter of administration or succession certificate issued by a competent Court having jurisdiction, and makes a written declaration in an affidavit before the Magistrate that he or she is the rightful claimant, being the legal heir or representative of the deceased. D E F

(2)(a) Where a Co-operative Society has to make a refund of the value of a share, the value of the share shall be deemed to be equal to the amount paid upon the share: G

Provided that where a portion of the asset is estimated to be bad or doubtful in the latest audited balance sheet, and is not covered by funds created out of profits, the Board may, for the purpose of such payment, reduce the value of the share, in the same proportions as the H

A aggregate amount of assets which are not bad or doubtful, less the amount of outside liabilities, bears to the paid up share capital.

(b) Where a transfer of share or interest is made, the value of the share or interest shall be deemed to be the sum actually paid by the member for the acquisition of such share or interest.”

B Rule 153 provides that a member of a Co-operative Housing Society shall not be entitled to any title or interest in any land, house or apartment unless he has made full payment towards the cost of such land, house or apartment as may be finally apportioned by the Society.

C Sub-Rule(2) of Rule 185 reads thus :-

“In a Co-operative Housing Society, the number of members shall not exceed the total number of plots, houses or apartments proposed by a Society to be allotted to members under any Scheme or project of such Society:

D Provided that a member shall be eligible for the allotment of one plot house or apartment in a Co-operative Housing Society.”

We shall now deal with the question as to whether the right of ownership of a flat in multi-storied building under the Act is inheritable and transferable.

E The other question as to whether in the event of the deceased member dies leaving no more nominee any person to inherit the interest of the deceased member for such apartment should be inherited by all the legal heirs or by one of the legal heirs in the event other legal heirs give their rights in favour of such single legal heir may also arise.

F Section 87 of the Act deals member’s right of ownership and sub-Section(3) of the said Section makes it abundantly clear that a plot of land or a house or an apartment in a multi-storied building shall constitute a heritable and transferable immovable property within the meaning of any law for the time being in force provided that notwithstanding anything contained in any other law for the time being in force such heritable and transferable immovable property shall not be partitioned or sub-divided for any purpose whatsoever.

H In terms of the Act and the Rules, the heirs of a deceased person are, therefore, entitled to inherit the flat allotted to the deceased as in the instant case. Admittedly, the flat in question was allotted to the father of the appellant

who died thereafter and as a consequence thereof, the heirs of the said deceased became and would be entitled to the estate and as a result thereof to the said flat with proportionate interest in the land. A

Section 80 of the Act deals with disposal of the deceased member's share or interest and clause (b) of sub-Section (1) of the said Section speaks that if there is no nominee or if the existence or residence of the nominee cannot be ascertained by the Board or if, for any other cause the transfer cannot be made without unreasonable delay to the person who appears to the Board to be entitled in accordance with the Rules, possession of such shares or interest as part of the estate of the deceased members; or sub-Section (c) on the application of the person referred to in clause (b) within three months from the date of death of member to such person as may be specified in the application which clearly indicates that while disposing of deceased member's share or interest the preferential claim always goes to the heirs and legal representatives of the deceased member in absence of any nominee. B C

Section 82(b) of the Act is very specific that notwithstanding anything contained elsewhere in this Act or any other law for the time being in force when the membership of a member by a cooperative society referred to in clause (a) terminates by reason of death or any other cause his possession of, or interest in, in land held by him under Cooperative Society shall vest in his heirs or in the person, if any, nominated by him under Section 79, if such heir is willing to be admitted as a member of the Society. D E

Section 80(c) of the Act makes it clear that on the death of the member of the Society, his share or interest in the Society shall be transferred on the application of the person referred to in clause (b) within three months from the date of the death of the member of such person as may be specified in the application. Therefore, transfer of shares or interest can be made only by a Society and not by the legal heirs because if it is read by a Cooperative Society after the word "*transfer*" then the meaning and application becomes clear which means it is an obligation of the Society to transfer the share or interest of the deceased member within the stipulated period referred to in Section 80 of the Act. F G

While disposing of the appeal, the learned Judges of the Division Bench of the High Court gave much stress on sub-Section (3) of Section 85 of the Act as also Rule 135 of the Rules taking the present case to be a case for admission of membership which is not in the instant case. In the present case, the question of admission of membership becomes absolutely immaterial, the H

A real question, however, is of transfer of devolution of interest of a deceased member. The appellant being one of the heirs of the deceased member was and still is entitled to succeed to the estate of the deceased member as per the mandatory provisions of the statutes and that being so the right, title and interest of the deceased member in the apartment of the Society devolves upon his heirs and in that background, Section 85(3) and Rule 135(5) neither have nor can have any application in the instant case because there cannot be any manner of doubt that on the death of a member of a Society his share or interest in the Society shall, in the absence of a nominee, be transferred to a person who appears to the Board to be entitled to in accordance with Rules, possession of such interest as part of the estate of the deceased member and herein in the instant case the son who himself is admittedly not a member of the Society in question or any other Housing Society became entitled to be considered for such allotment immediately he gave notice to the appropriate authority, which too, long before the alleged re-allotment was said to have been made.

D In our opinion, the order passed by the Special Officer re-allotting the flat to a stranger even after he had received letter regarding transfer of ownership in favour of legal heirs in December, 1986, long before such alleged re-allotment, claimed to have been made in April, 1988, that is, more than 16 months from the receipt thereof when giving any opportunity of being heard and without deciding the question as to who was entitled to the said flat in accordance with law. The said action of the Special Officer who is a statutory functionary was not only improper but also illegal, arbitrary and motivated.

F In fact, the respondent-Society has informed that the allotment in favour of the deceased allottee stood cancelled because of no appropriate person could be named as legal heir of the allottee in whose favour respondent-Society was to make the allotment and as such the Society has been threatening of re-allotting the earmarked flat for the deceased allottee to a stranger ignoring the rights of the legal heirs.

G It is now brought to our notice that the flat has not been allotted to a third party and remains vacant. The allotment letter of membership of the flat to the father of the appellant (Annexure P-4) dated 29.11.1982 clearly stipulates that the right and the interest in the Society of the member will be governed by the provisions of the Act, the Rules made thereunder and the bye-laws of the Society and that the members will also be liable to be discharged his

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obligations as the member of the Society in accordance with the above mentioned Act, Rules and the bye-laws. A

It was then argued by Shri S.B. Sanyal that the appellant being allottee of Flat No. A-2/4 in the same building is not entitled to a second flat being No. A-2/5 under Section 85(3) of the Act and Rule 135 of the Rules. This argument cannot be countenanced. A letter dated 6.12.1986 written by Dr. Subrata Bhowmick (son of the deceased) to the Special Officer reads thus: B

“Ref: Flat No. A-2/5th Floor

I am the son of late Mr. S.P. Bhowmick who held share certificate Nos. 51 and 52 and to whom the flat mentioned above was allotted by your Co-operative Housing Society. He expired in August, 1985 C

We have since found out that he did not leave any nominee for the flat. We are, therefore, taking such action under the West Bengal Co-operative Societies Act, and laws to get out father's interest transferred to one of us-brother or sisters. As some of them are outside Calcutta and outside India, it is likely to take time to observe all legal processes before submission of the case of the interest transference to the Managing Committee of the Co-operative Society. Please bear with us for the delay. D

Thanks. E

Yours faithfully,

Sd/-

(S. Bhowmick)” F

The letter is self explanatory.

Dr. Subrata Bhowmick, son of late Sati Prasanna Bhowmick brought to the notice of the Society about the death of his father in August, 1985 and also by intimating the Society that, they are taking such action under the Act and laws to get their father's interest transferred to one of them-brothers or sisters. This letter has not been noticed by the Division Bench. Therefore, the argument of Mr. S.B. Sanyal that the appellant is not entitled for another flat has no force at all. G

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A Now, we come to the maintainability of the writ petition. We have already elaborately extracted the arguments advanced by both the senior counsel on the question of maintainability of the writ petition and hence, we are not repeating the same again.

B In the instant case, the Division Bench authorised Mr. Arun P. Sarkar, an advocate, to act as Special Officer and to take immediate steps to have the construction work continued and while taking steps to try and negotiate with M/s Mukhje and Associates to have the work done through them. In discharge of his statutory function, the Special Officer of the Society issued letter dated 6.4.1985 (annexure P-7) to all the members to clear their dues in respect of the flat allotted to them as soon as possible. The very same Special Officer, C exercising his statutory function, issued a letter dated 1.11.1988 (Annexure P-10) to the father of the appellant herein that since no claim for transfer of the interest of late Sati Prasanna Bhowmick has been made in time by the legal heirs, the flat in question has already been re-allotted and since no claim for payment of the value of the share or interest has been made by any D person entitled in law to receive the payment lying in the deceased member's account after deduction of the amount, if any, payable to the Society. The Society will make payment in accordance with law.

E The appellant herein filed a writ petition in question in the nature of mandamus commanding the respondent therein not to give effect to the letter dated 1.11.1988 issued by the Special Officer of the Society and to forbear from acting on the basis thereof and pursuant thereto: Thus it is seen that the subject matter of the writ petition is the order passed by the Special Officer in discharging of his statutory functions, the writ petition is maintainable in law. The Special Officer is appointed under the provisions of the Act and as F such he is a statutory Officer and, therefore, he should be regarded as a public authority. Apart from that Art. 226 of the Constitution is not confined to issue of writ only to a public authority, the power extends also to issue directions to any person. In our opinion, in a case where the Cooperative Society is under the control of a Special Officer, a writ would lie.

G In support of his submissions, Mr. S.B. Sanyal cited a decision of the Full Bench of the High Court of Madras in the case of *Kannan P., Tamilarasan, H. and Ors. v. The Director of Sugars, Office of the Director of Sugars etc.*, (1991) 2 Law Weekly Madras 409.

H In the case of *G. Bassi Reddy v. International Crops Research Institute and Anr.*, [2003] 4 SCC 225, this Court dealt with the case of the Society by

name, International Crops Research Institution and as to whether a writ under Article 226 is maintainable in law. This Court held that the Institute was neither set up by a statute nor are its activities statutorily controlled nor does it perform a public or statutory duty or a public function. This Court, therefore, held that a writ petition filed against the Society by its employee was not maintainable.

In the case of *General Manager, Kishan Sahkari Chini Mills Ltd., Sultanpur, U.P. v. Satrughan Nishad and Ors.*, [2003] 8 SCC 639, this Court dealt with a case of Co-operative Sugar Mill. The Bench held that the form in which body is constituted, namely, whether as a Society or Co-operative Society or Company is not decisive and the real status of the body with respect to the control of the Government to be looked into. Applying the principles laid down in the case of *Ajay Hasia v. Khalid Mujib Sehravardi*, [1981] 1 SCC 722, to the facts of the present case, the Bench held that the appellant-Mill was neither an instrumentality nor an agency of the Government and hence was not an “other authority” under Article 12 of the Constitution. However, the Bench also held that in different facts/situations, different factors could be found to be overwhelming and indicative of whether the body is an “other authority”.

In the case of *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Ors.*, [2002] 5 SCC 111, this Court, by majority, was of the opinion that the Council of Scientific and Industrial Research is an authority within Article 12 of the Constitution. On facts and on the material available, this Court recorded a positive finding that CSIR is a Society owned and controlled by the Government.

The decision in the case of *Ram Sahan Rai v. Sachiv Samanaya Prabandhak and Anr.*, [2001] 3 SCC 323, can also be usefully followed and applied to the case on hand. In this case, the appellant, who was a Clerk in the Co-operative Bank was removed from services for a certain act of misconduct without affording any opportunity to defend himself. His suit challenging the order of removal was decreed by the lower appellate Court. However, the High Court while agreeing with the findings of the lower appellate Court that the impugned order was without jurisdiction and contrary to Regulation 85, set aside the decree on the ground that the suit was essentially one for enforcement of a contract of personal service and was, therefore, not maintainable. Allowing the appeal, this Court held that the status of the District Co-operative Bank is of a co-operative Society, registered under the

- A U.P. Co-operative Societies Act, 1965 and constituted under the U.P. Co-operative Land Development Bank Act, 1964. The Bench held that on an examination of different provisions of the rules, bye-laws and regulations, unequivocally indicates that the State Government exercises all-pervasive control over the Bank and its employees are governed by the statutory rules prescribing the entire gamut of procedure of initiation of disciplinary proceedings etc. Therefore, the Bench held that the respondent-Bank is undoubtedly an instrumentality of the State and hence amenable to jurisdiction under Article 226 of the Constitution.
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- C In the case of *U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey and Ors.*, [1999] 1 SCC 741, the maintainability of the writ petition against U.P. State Co-operative Land Development Bank Ltd. was in question. This Court, on consideration of the provisions of the Act and the Rules, held that the Bank is an instrumentality of the State or an authority as mentioned under Article 12 of the Constitution and that the service conditions of its employees, particularly, in regard to disciplinary proceedings are statutory in nature and hence writ petition filed by its dismissed employees to challenge the order of their dismissal was maintainable.
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- E In the case of *S.R. Tewari v. Dist. Board, Agra*, AIR (1964) SC 1680, this Court held that the powers of statutory authorities were always subject to the statute which has constituted it and must be exercised consistently with the statute, and the Courts have, in appropriate cases, the power to declare an action of the body illegal or *ultra vires*, even if the action relates to determination of employment of a servant.

- F We have, in paragraphs supra, considered the judgments for and against on the question of maintainability of writ petition. The judgment cited by the learned senior counsel appearing for the respondents are distinguishable on facts and on law. Those cases are not cases covered by the appointment of a Special Officer to manage the administration of the Society and its affairs. In the instant case, the Special Officer was appointed by the High Court to discharge the functions of the Society, therefore, he should be regarded as a public authority and hence, the writ petition is maintainable.
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- H The appellant being one of the heirs of the deceased member, in our opinion, is entitled to succeed to the estate of the deceased and that being so, the right, title and interest of the deceased member in the apartment of the Society devolves upon his heirs and the aforesaid Section 85(3) and Rule 135(3) cannot have any application in the instant case.

It is unfortunate that the Society made the project and constructed the flats on the land owned by the appellant's father and sold by him to the Society. The Society has taken such a rigid and technical stand to deprive the allottee's own daughter to get the flat that was originally booked by her father, even after complying with all necessary formalities. We, therefore, hold that the prayer made in this appeal by the appellant deserves to have consideration and, therefore, we accept the prayer of the appellant and allow the appeal and issue a mandamus directing the respondents and, in particular, the Secretary of the Mousumi Co-operative Housing Society, Calcutta to take immediate steps for transfer of the flat in question in favour of the appellant and also hand over the flat to the appellant upon payment of the balance amount and payable after adjusting the amount paid by her father, Sati Prasanna Bhowmick.

The appeal stands allowed. Though this case is eminently a fit case to award exemplary cost, we, by taking a lenient view of the matter, say no costs.

R.P.

Appeal allowed.