**Special Leave Petition seeking Stay Order from Operation of Impugned Judgment**

In the Supreme Court of India

[Order XVI Rule 4(l)(a)] Civil Appellate Jurisdiction

Petition for Special Leave to Appeal (Civil) No……...................of 2010 (under Article 136 of the Constitution of India).

Between.................Position of the parties

In the Mumbai.................In this Court

High Court

Shri.................son of..................................Respondent No. I Petitioner

AND

1. Cooperative Housing Society Ltd. Appellant.................Respondent No. 1

of.................Mumbai

2.................Mumbai.................Respondent No. 2 Respondent No. 2

State of Maharashtra Service.................Respondent No. 3 Respondent No. 3
through.................

Registrar of Cooperative Societies, Respondent No. 4 Respondent No. 4
Maharashtra, Mumbai

To

The hostage the Chief Justice of India

and His Companion Justices of the hostage Supreme Court of India

The Special Leave Petition of the Peti­tioner above-named

Most Respectfully Sheweth:

That your petitioner desires to move the instant Special Leave petition before the hostage Supreme Court of India against the judgment and order passed by the hostage Division Bench of the hostage Mumbai High Court dated.................in FMA No.................of.................

Questions of Law

(a) Whether the right of the Ownership of an apartment in the multistoried building under the Maharashtra Co-operative Societies Act 1960 is heritable and transferable?

(b) Whether in the event of death of a member the legal heirs of such deceased member are entitled to inherit and get allotment of the apartment which the deceased member was entitled to?

(c)Whether in the event of the member dies without nominating any person to inherit the apartment interest of the deceased member for such apartment could it be inherited by all the legal
heirs or by one of the legal heirs or by one of the legal heirs in the event other legal heirs give up their rights in favour of such single legal heir?

(d) Whether the right and interest of the legal heirs of the deceased member could be forfeited in the event of time taken in nominating particular legal heir for the same exceeded 3 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?

(e) Whether on the issue of transfer of share of the deceased member any consideration in respect of admission of a member is relevant?

(f) Whether the valid membership in favour of the deceased member could be cancelled only because the name of the nominee in whose favour the property was to be transferred had taken some time for selecting such nominee by all the legal heirs?

(g) Whether the Cooperative Society is competent to re-allot a valid allotment in favour of the deceased member even when all financial obligations are complied with and the allottee was not a defaulter?

(h) Whether the Cooperative Society can re-allot the duly allotted apartment of a valid member in the event of death to a stranger ignoring the rights of the legal heirs of such deceased member?

(i) Whether the question of re-allotment on expiry of 3 months could arise when admittedly the court was moved when allotment was made and in view of specific term of the hostage High Court dated.................by which the Society was specifically directed not to allot the earmarked apartment being Flat No. 2 and could the Society ignoring such direction reallot the flat to a stranger?

3. Declaration in terms of rule 4(2). The Petitioner states that no other petition seeking leave to appeal has been filed by him against the impugned judgment and order.

4. Declaration in terms of rule 6. The Annexures produced alongwith the Special Leave Petition are true copies of the documents which formed part of the records of the Case in the Court below against whose order the leave to appeal is sought for in this petition.

5. Grounds

(a) For that s. 87 of the Maharashtra Co-operative Societies Act 1960 (hereinafter referred to as the said Co-operative Societies Act) deals in member's right of ownership and sub-sec. 3 of the said section which makes it abundantly clear that a plot of land or a house or an apartment in a multistoried 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 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 Maharashtra Co-operative Societies Act and 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 said vendor father of petitioner who died thereafter and as a consequence thereof the heirs of the said deceased became and would be entitled to succeed to the estate and as a result thereof to the said flat with proportionate interest in the land.

(b) For that s. 80 of the said Co-operative Societies Act deals with disposal of the deceased member's share or interest and cl. (b) of sub-sec. (1) 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 (subject to the production by such person of probate or letter of administration or succession certificate) appears to the Board to be entitled, in accordance with rules, possession of such shares or interest as part of the estate of the deceased members, or sub-sec, (c) on the application of the person referred to in cl. (6) within 3 months from the date of death of member to such person as may be specified in the application, which clearly indicate 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)For that s. 82 of the said Co-operative Societies Act is very specific that notwithstanding anything contained elsewhere in the Act or any other law for the time being in force when the membership of a member of a Co-operative Society referred to in cl. (a) terminates by reason of death or any other cause his possession of, or interest in land held by him under Co-operative Society shall vest in his heirs or in the person,, if any, nominated by him under s. 79, if such heir is willing to be admitted as a member of the Co-operative Society.

(d) For that on a careful reading of the said cl. (c)of s. 80 of the said Co-operative Societies Act, it is clear that on the death of the member of the Co-operative Society his share or interest in the Co-operative Society shall be transferred on the application of the person referred to in cl. (b) within three months from the date of death of the member to such person as may be specified in the application. Therefore transfer of share or interest can be made only by a Co-operative Society. It is an obligation of the Society to transfer the share or interest of the deceased member within the stipulated period referred to in s. 80 of the Act.

(e) For that while disposing of the appeal the hostage Court of Appeal below gave much stress on sub-sec. (3) of s. 85 of the said Act as also sub-rule (5) of rule 135 taking the present case to be a case for admission of membership which is not in the present case. In the instant case the question of admission of membership becomes absolutely immaterial, the real question is of transfer or devolution of interest of a deceased member. The applicant/ petitioner herein being one of the heirs of a deceased member was and still is entitled to succeed to the estate of the deceased member as per the mandatory provision of the statutes and that being so the right, title and interest of the deceased member in the apartment of the Co-operative Society devolves upon the heirs and in that background the aforesaid s. 85(3) and rules 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 Co-operative Society his share of interest in the Co-operative 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.

(f) For that it was not only improper but also highly illegal, arbitrary, motivated and unconstitutional for the Special Officer to re-allot the flat to a stranger even after he had received letter regarding transfer of ownership in favour of legal heirs in long before such alleged re-allotment, claimed to have been made in.................i.e. more than 16 months from receipt thereof, 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.

(g) For that on proper construction of the statute that a member of a Co-operative Society shall cease to be such member if he dies and upon his death his share or interest, in absence of any nomination to that effect, may be transferred by the Board of the Society in favour of any person who presents in writing his or her claim for the said share or interest and in this background the alleged re-allotment of the apartment of the deceased member to a stranger not being the legal heirs of the deceased member is without jurisdiction, unconstitutional, and not maintainable in law and as such is liable to be set aside due to the reason that the Special Officer in the instant case had taken the decision to re-allot the said apartment without considering the case of the legal heirs of the deceased member and without giving them any opportunity of hearing which decision manifestly appears to be contrary to the principle of natural justice.

(f) For that the hostage Division Bench was wrong in dismissing the writ application holding infer alia that the petitioner thus having failed to show that any of the mandatory provisions of statute has been violated by the appellant society, the writ petition was not maintainable because the ground taken hereinabove show that most of the mandatory provisions of the statute had been violated by the said society and as such in that view of the matter the impugned judgement deserved to be set aside.

(g)For that the learned court below erred in law in dismissing the writ petition holding inter alia. In fact, the writ petition ought to have been dismissed also on the ground that the special officer rightly or wrongly had re-allotted the flat as far back as in the year.................in favour of a 3rd party. By reason of allowing the writ petition the right of the 3rd party would be affected but despite the same he had not been impleaded as a party therein.

In this view of the matter also the writ petition was not maintainable for non-impleading a necessary party. It is not a case where the question of ownership was required to be considered vis-a-vis the right of a 3rd party without considering that on the date of filing of the said writ petition i.e.................the writ petitioner was not aware of allotment of the flat in question to any 3rd party not a heir of the deceased member. The society revealed for the first time in their letter dated.................that they would submit to the Division Bench of their Lordships the hostage Mr. Justice ................. and the hostage Mr. Justice ................. (as their Lordships then were), a proposal for allotment of flat No. 2 that is the flat already allotted to late vendor on .................to Mr. Z. This letter was written to.................on .................a respondent in FMA No.................Moreover by their order dated ................. Their Lordships gave the Special Officer of the Society liberty to deliver all other flats on the terms and conditions except the said flat No. 2. Therefore, the dismissal of the writ petition by the Division Bench on the ground of non-impleading the said allotee in the writ petition could not be held to be justified or made in accordance with law.

6. Ground for interim relief

(i) That the respondent No. 1 Society has informed that the allotment in favour of the deceased allottee stood cancelled because no appropriate person could be named as the legal heir of the deceased allottee in whose favour the respondent No. 1 Society was to make the allotment and as such the Society has been threatening of re-allotting flat No. 2 of the deceased allottee to a stranger ignoring the rights of the legal heirs. The petitioner understands till date no such allotment has been made and even if the some steps have been taken by the Society it will be wholly against the direction given by the Mumbai High Court as early as on ................. by which the society was specifically directed not to allot the earmarked apartment No. 2 to any stranger and in such a position it is extremely essential for your petitioner to obtain appropriate order from this hostage Court restraining the respondent No. 1 to make such irregular and illegal allotment.

(ii) Your petitioner submits that not only by the impugned judgement and order dated……………passed in FMA No…………..the fundamental right of the heirs and legal representatives of the vendor since deceased, the erstwhile owner in respect of the flat No. 2 in the 5th floor of premises No.................has been seriously prejudiced

but also there has been grave miscarriage of justice because of the fact that the said right to property is right in rem as guaranteed under the Constitution of India and the said right to property has been denied by the impugned judgement for which the petitioner has been constrained to prefer the instant Special Leave Petition and petitioner prays that the Society respondent No. 1 should be restrained from taking any steps to real lot the earmarked apartment till the disposal of the petitioner's present appeal otherwise the petitioner will suffer irreparable loss and injury.

7. Main Prayers. Under the circumstances stated hereinabove your petitioner most humbly and respectfully prays that Your Lordships would graciously be pleased to grant Special Leave to your petitioner to Appeal under Art. 136 of the Constitution of India against the judgement and order passed by the hostage Division Bench of Mumbai High Court in FMA No.................of.................and/or to pass such other or further orders as to this hostage Court may deem fit and proper.

8. Interim Relief

(a) Under the circumstances set forth above, it is therefore prayed that Your Lordships may graciously be pleased to pass an order staying operation of the impugned judgement and order dated.................in FMA No.................thereby restraining the Co-operative Housing Society Ltd., respondent No. 1 herein, from making allotment of the Flat No. 2 to any stranger till the disposal of the petitioner's present appeal before this hostage Court.

(b) pass such other order or orders as Your Lordships may deem fit and proper.

And for this your petitioner shall ever pray.

Drawn by…………………………………………………….................Filed by

Advocate for the Petitioner

Requisite Certificate

Certified that the Special Leave Petition is confined only to the pleadings before the court whose order is challenged and the other documents relied upon in those proceedings. No additional facts, documents, or grounds have been taken therein or relied upon in the Special Leave Petition. It is further certified that the true copies of the documents have been annexured and/or attached to the Special Leave Petition for consideration of this Hon'ble Court. This certificate is given on the basis of the instructions given by the petitioner whose affidavit is filed in support of the Special Leave Petition.

Filed by
Filed on:..................................Advocate for the Petitioner

In the Supreme Court of India Civil Appellate Jurisdiction

Special Leave Petition (Civil) No.................of 2010

Sri.................son of................. Petitioner

.................Co-operative Housing Society Ltd................. Respondents & Ors.

**AFFIDAVIT**

I, Sri.................son of.................aged about………….years residing at.................presently in New Delhi do hereby solemnly affirm and say as follows:

That I am the petitioner in the present Special Leave Petition and am fully conversant with the facts and circumstances of the present case and am fully competent to swear the present affidavit. That the facts stated in the Synopsis, List of Dates and the petition for Special Leave are all true to my knowledge and the rest are all submissions before the Hon'ble Supreme Court of India.

That the Annexures filed with the Special Leave Petition are all true copies of their Originals and the same formed part of the records in the court below.

That the contents of this affidavit are true to my knowledge.

Deponent

Verified at Mumbai, this the
.................day of.................2010