

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C) No. 1715/2001**

Reserved on: 30th July, 2010

Pronounced on: 4th August, 2010

RAJDHANI CO-OPERATIVE GROUP
HOUSING SOCIETY LTD.

.... Petitioner

Through: Mr. V.P.Chaudhary, Sr. Advocate
with Mr. Nitinjya Chaudhary and
Ms. Sushma, Advocates

VERSUS

THE PRESIDING OFFICER, DELHI
COOPERATIVE TRIBUNAL & ORS.

....Respondents

Through: Mr. Rakesh Munjal, Sr. Advocate
with Mr. Ankur Arora and
Mr. Aakash D.Pratap, Advocates for
the respondent No.3.
Ms. Sujata Kashyap, Advocate for
Respondent No.4 with Mr. Surender
Kumar, LDC (Zonal Officer RCS).

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

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JUDGMENT

VALMIKI J. MEHTA, J

1. By this writ petition under Article 226 and 227 of the Constitution of India, the petitioner Rajdhani Co-operative Group Housing Society Ltd. seeks quashing of the

Award dated 31.5.2000 passed by the Arbitrator and the order dated 17.11.2000 passed by the Delhi Co-operative Tribunal dismissing the appeal of the petitioner and upholding the Award dated 31.5.2000.

2. The dispute in the present case is with regard to the denial of membership by the petitioner to the respondent No. 3 herein, namely, Sh. S.K. Sharma. Disputes were referred for arbitration between the petitioner and the respondent No. 3 by the following order:-

“Arb. No.05/JR-II/GH/94-95/1217

Dated: 16-1-95

In the matter of:

*Sh. S.K.Sharma
E-1/219, Lajpat Nagar-I
New Delhi.*

..... CLAIMANT

Vs

*Rajdhani Co-op. G/H Society Ltd.,
94, Patparganj, Delhi*

.....DEFENDANT

ORDER

The present petition has been filed by Sh. S.K.Sharma, against Rajdhani Cooperative G/H Society Ltd. on 12.4.94 U/s 60 of the Delhi Cooperative Societies Act, 1972. In the petition it has been stated that claimant is a bonafide member of the society and has paid the entire amount as demanded by the society, even though the defendant society has not allotted flat to the claimant.

Notice to the respondent society was issued for 2.5.94. Sh. R.N.Bhardwaj, Advocate appeared on behalf of the society and filed reply on 1.8.94. In the reply it has been stated that claimant is not a bonafide member of the society as the transfer of membership which he claims is not within the blood relation of Sh. S.K.Govil who was the bonafide member of the society. The transfer of membership in the name of claimant was not legal and in accordance with the provisions of Delhi Cooperative Society Act and Rules.

Sh. Rakesh Munjal, Advocate for the claimant appeared on 3.10.94 and filed rejoinder. Arguments were also heard, on the same day.

I have considered the arguments put forth by both the parties and I am satisfied that the points raised by the claimant touches the business and management of the society and, therefore, the dispute raised by the claimant fulfils the provisions of Section 60 of the DCS Act, 1972 and it is a fit case for arbitration U/s 61. The Arbitrator shall examine as to whether transfer of membership in the name of claimant was legally justified and under what circumstances same was transferred in the name of claimant.

The claimant is directed to deposit a sum of Rs. 750 as arbitration fee within 15 days of issuance of this order through demand draft/pay order drawn in favour of Recovery Officer, Cooperative Societies, Delhi Administration, Delhi otherwise the case will be dismissed for want of arbitration fee.

Given under my hand and seal on this day of 11th January, 1996.

*(C.P. TRIPATHI)
JOINT REGISTRAR (ARB)''*

3. The underlined portion of the aforesaid order dated 16.1.1995 shows that the issue in the arbitration proceedings only was as to whether transfer of membership in the name of the respondent No. 3 was legally justified and under what circumstances the membership was transferred in the name of the respondent No. 3.

4. The original member of the petitioner Society was Sh. S.K. Govil and his son Sh. Rakesh Govil, Secretary, was controlling the affairs of the Society. There is no dispute that Sh. S.K. Govil was a bona fide and regular member of the petitioner Society. Sh. S.K. Govil with membership at serial No. 75 transferred to the respondent No. 3 his membership and the necessary papers in this behalf including the share certificate were signed by the then Secretary of the petitioner Society,

namely, Sh. Rakesh Govil. A letter was also given to the respondent No. 3 for creation of the mortgage of the flat and consequently loan was taken by the respondent No. 3 from his employer M/s. Engineers India Limited. This loan was repaid by deductions from the salary of the respondent No. 3 with his employer. Respondent No. 3 thereafter regularly paid all the amounts demanded by the Society and there is no dispute as to any dues pending against the respondent No. 3. Problems arose for the respondent No. 3 when a new management took over the reins of the petitioner Society. The transfer of membership to the respondent No. 3 was challenged because it was alleged that respondent No. 3 was not a blood relation of the then member Sh. S.K. Govil and since the respondent No. 3 was not a blood relation of the then member Sh. S.K. Govil, therefore, the membership could not have been transferred by Sh. S.K. Govil to respondent No. 3. Reliance was placed by the Society on the Circular dated 31.5.1984 issued by the Registrar of Co-operative Societies (RCS) as per which, transfer cases of membership can be allowed only within the 1st degree blood relation. As already stated above, the disputes were ultimately referred to arbitration vide order dated 16.1.1995 as per which the only issue which was to be decided was whether the transfer of membership to respondent No. 3 was legally justified.

5. The Arbitrator in his Award dated 31.5.2000 after referring to the fact that the necessary share certificate was issued and the respondent No. 3 paid the amount demanded, has also referred to the letter entitling the respondent No. 3 to create a mortgage and the consequent taking of loan by respondent No. 3 from its employer by creating a mortgage of the flat in favour of his employer. The Arbitrator then

noted that the respondent No. 3 acted on the basis of the documents issued to him and has since paid all the amounts demanded by the Society from time to time. It was thus held that the Society has no valid basis to challenge the membership of the respondent No.3. The basic issue which has been decided by the Arbitrator was that the directive issued by the RCS under Rule 77 of the Delhi Co-operative Societies Rules, 1973 (hereafter referred to as “the said Rules”) regarding the transfer of membership only to the blood relations is beyond the powers of RCS as per the judgment in the case of *R.P. Dubey vs. Lt. Governor & Ors., ILR (1977) I Delhi 79*. The Arbitrator, therefore, held that it was not required that the transferee should be a blood relation and consequently the petitioner society cannot refuse to recognise the respondent No. 3 as a member. The Arbitrator also proceeded on an additional basis that the respondent No. 3 can be treated as a new member (i.e. not a transferee member) from the date of applying of the membership in 1988. The Co-operative Tribunal in an appeal, by a brief order dated 17.11.2000 adopted the reasoning in the Award and upheld the same.

6. Before us the learned senior counsel on behalf of the petitioner has urged the following grounds of challenge in respect of the concurrent decisions of the authorities below:

- (i) A fraud has been played upon the petitioner society by the then Secretary Sh. Rakesh Govil in collusion with the respondent No. 3 inasmuch as not only was the respondent No. 3 not a blood relation of Sh. S.K. Govil, but also, there is no resolution of the Managing

Committee accepting the membership of respondent No. 3 and the minutes of the meeting of the Managing Committee dated 17.9.1988 contain an illegal interpolation for transferring of membership from Sh. S.K. Govil to the respondent No. 3.

- (ii) The respondent No. 3 cannot take up and the authorities below could not have accepted alternative stands of transfer of membership and a new membership which are mutually inconsistent.
- (iii) The directive of the RCS under Rule 77 of the said Rules was valid and since respondent No. 3 Sh. S.K. Sharma is not a blood relation of Sh. S.K. Govil, there could not have taken place any valid transfer of membership and consequently respondent No. 3 is not a valid member of the petitioner society.

7. We will take up first the third issue of the disentitlement of the respondent No. 3 to be a member of the petitioner Society as he was not a blood relation of Sh. S.K. Govil. Reliance in this regard, as already stated above, is placed on the circular of the RCS dated 31.5.1984 and as per which transfer of membership is allowed only in case of first degree blood relation.

To determine this issue it is necessary to determine whether the circular dated 31.5.1984 issued by the RCS purportedly exercising its power under Rule 77 is valid or not. The learned Singh Judge in the case of **R.P. Dubey** (supra) held as under:

“..... In view of the specific provision made under Sections 60 and 61 with regard to the adjudication of these matters, any general power to

issued directions would exclude from its ambit matters for which there is a specific provision. Even otherwise, the expression “the successful conduct of the business of a co-operative society or class of co-operative societies” in Rule 77 is not wide enough to include any directions with regard to the management of the society otherwise the expression “successful conduct of business” would be given a meaning which will be wholly unjustified on the language of the Rule. To hold to the contrary would amount to making the Registrar a repository of wide powers to entertain and decide all types of disputes with regard to the constitution, management and business of the Society and interfere in the management of the society without any such decision, orders or directions being made subject to any appeal, revision or review because the directions that may be made under Rule 77 are not made justiciable either by the Act or by the Rules. To concede such powers to the Registrar would amount to elevating him to the position of a despot with absolute and unregulated power to make drastic orders that may affect the vital interests of the societies and their members and would not be justified either with reference to the scheme of the Act or the language of the Rules. It must, therefore, be held that Rule 77 merely empower the Registrar to issue directions for the successful conduct of the business of the society and such directions would not include matters which fall within the provisions of Section 60 and 61 of the Act.”

8. It is also at this stage necessary to reproduce Section 25 of Delhi Co-op Societies Act, 1972 (hereinafter ‘the Act’) and Rule 25 of the said Rules and which read as under:

“Section 25. Disqualification for Membership

1. No person shall be eligible for admission as a member of a co-operative society if he-----

(a)

(b)

(c) in the case of membership of a housing society:-

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

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

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

(ii) he deals in purchase or sale of immovable properties either as principal or as agent in the Union Territory of Delhi; or

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

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9. We are not reproducing Rule 34 as it only lays down the procedure for transfer of the share of a member subject matter of Section 25. It has been canvassed by the learned senior counsel for respondent No. 3 that a direction under Rule 77 cannot supersede the contents of a specific section and Rule which deals with subject of restriction of transfer of membership and for disqualification of membership. He argued that there is a disqualification of membership only if ingredients of Rule 25(i) are made out and there cannot be additional restrictions on transfer than as provided in Section 25 of the Act. He has canvassed that there is no disqualification of the petitioner either as per Section 25 read with Rule 34 or as per Rule 25(i) and, therefore, the Registrar could not have issued directions under Rule 77 to add to the provisions of Section 25 or Rule 25 and it was urged that the same was beyond the powers of the Registrar inasmuch as the same is in conflict with a specific section

and Rule on the subject. Reliance is also placed by the learned senior counsel for respondent No. 3 on the observations in ***R.P. Dubey*** (supra) that the general powers to issue directions under Rule 77 would exclude from its ambit matters for which there is a specific provision. He has also argued that the ‘business’ of a society is different from ‘management’ of a society and the power under Rule 77 is not for issuing of directions for ‘management’ of a society and that the transfer of membership pertains to management and not ‘business’.

10. We agree with the contentions of the learned senior counsel for respondent No. 3 inasmuch restriction on transfer and the disqualification for being a member have been provided specifically by Section 25 and Rule 25 and as per these provisions there is no disqualification for being a member merely because the transferee is not a blood relation of the original member. In fact, the second proviso to Rule 25(i) (c)(i) makes it clear that the disqualification of a member from becoming a member of the Society will not apply if a transferee of the flat/plot/property on basis of the Power of Attorney and Agreement to Sell after conversion to freehold applies for membership of the Housing Society i.e., a transferee member is not debarred from being a member on grounds which are disqualification for an original member. We however do not say one way or the other on the aspect of transfer of membership being only a ‘management’ and not a ‘business’ of a society.

11. In view of the above discussion, we hold that the petitioner Society cannot refuse to recognise the transfer of membership from the original member Sh. S.K. Govil to the respondent No. 3 on the ground that the respondent No. 3 is not a blood

relation of Sh. S.K. Govil. The transferee need not in law be a blood relation of a member in order for transfer of a membership to take place.

12. Taking up the argument of the petitioner that the respondent No. 3 cannot take up alternative pleas with regard to being an original member and a transfer member, all that we need to say is that the dispute which was referred to arbitration by the order dated 16.1.1995 was with regard only to examining as to whether the transfer of membership in the name of the claimants/respondent No. 3 was legally justified. There was, therefore, no reference to arbitration of the claim of membership except through transfer. However even on holding of this issue in favour of the petitioner, the same would make no difference inasmuch as we have already held above that the petitioner Society is not entitled to refuse membership to the respondent No. 3 merely because the respondent No. 3 was not a blood relation of the original member Sh. S.K. Govil.

13. The third and the last argument which was strongly urged by the learned senior counsel for the petitioner was the aspect of fraud. Two aspects of fraud were alleged. First, of the respondent No. 3 being not a blood relation and, therefore, having misled the petitioner Society and the second aspect with respect to there being no resolution of the Managing Committee accepting the respondent No. 3 as a member because the minutes of the meeting dated 17.9.1988 showing the respondent No. 3 as a member are fabricated so far as the interpolation part of accepting the membership of the respondent No. 3 is concerned.

Taking the second aspect first, we find that at no point of time before any of the two authorities below i.e. the Arbitrator or the Delhi Co-operative Tribunal, any plea was specifically taken up by the petitioner Society that the respondent No. 3 cannot be a member because the Managing Committee had not accepted him as a member. In fact, not only there are no pleadings, but also both the orders of the authorities below show that there was no argument predicated by the petitioner on this basis. We, therefore, refuse to allow the petitioner to take up totally a new ground for the first time at the third stage of the filing of the present writ petition. In any case, we fail to understand why the respondent No. 3 should be at all prejudiced as per these facts argued because how could have respondent No.3 presumed that the documents of transfer in his favour and other documents including of creation of mortgage issued by the then Secretary of the Society Sh. Rakesh Govil were in any manner not on the basis of authorisation inasmuch as Rakesh Govil was admittedly the secretary of the petitioner society. A member cannot be prejudiced on an assumption that there is some alleged collusion inasmuch as there is absolutely nothing on record to establish any alleged collusion and knowledge of the respondent No. 3 that the then Secretary Sh. Rakesh Govil did not act for and on behalf of the petitioner Society. Not only that once it is held that there is no dispute as to the validity of the original membership of Sh. S.K. Govil (and who, in any case, is not challenging the transfer) and that the respondent No. 3 has acted as per the documents issued to him and paid all the moneys to the petitioner Society, the petitioner Society is estopped from alleging any fraud against the respondent No. 3. If the petitioner Society is, in any manner, aggrieved it may take action against the then Secretary, however, we are of the firm

opinion that the respondent No. 3 who has acted upon his membership and to his detriment and paid all the dues should not be prejudiced and deprived of a flat. The learned senior counsel for respondent No. 3 has vehemently disputed that his client has committed any fraud. He has also contended that he simply acted on the basis of documents furnished to him by the Society and which were signed by the Secretary of the Society. It is contended that respondent No.3 had no reason to disbelieve any action of the Society acting through its secretary. As already stated above, we agree with the submissions made by the learned senior counsel for the respondent No.3.

We may note that the present is not a case where there are members existing on the waiting list and if the flat of the respondent No. 3 is cancelled there are other persons who would get the same. Thus cancellation of the flat of the respondent No.3 does not benefit anyone. This fortifies our view that the Society is acting unfairly, merely because it may have some disputes with the then Secretary Sh. Rakesh Govil.

14. So far as the first aspect of fraud alleged viz. all documents executed by the then member Sh. S.K. Govil showing the respondent No. 3 to be a blood relation is concerned, we are of the view that once the directive of the RCS under Rule 77 itself goes, nothing at all comes out of the false representation that the respondent No. 3 was a blood relation of Sh. S.K. Govil. Fraud to be of any effect is a fraud which can affect the ultimate decision of a case. Since the issue of fraud is only with regard to blood relation aspect, and this aspect, as we have already held cannot be a ground to deny membership to the respondent No. 3, there cannot be any fraud which will affect

the entitlement of membership of the respondent No. 3. At best there is a wrong statement in the documents executed by the then member Sh. S.K. Govil that respondent No.3 is a blood relation, however, that wrong statement is not of any purport and affect because in spite of wrong statement the membership cannot be denied to the respondent No. 3 inasmuch as membership can also be transferred to a person who is not in the first degree blood relation.

We may also note that we are adverting to this plea of fraud only in deference to the argument raised in this behalf, however, this argument with respect to fraud is also an argument of desperation because fraud is something which has to be specifically alleged and specifically proved. Fraud is a very serious charge and unless specific ingredients are pleaded and proved, the same cannot be used as basis to prejudice an opposite party. One needs only to refer to Order VI Rule 4 of the Code of Civil Procedure, 1908 (CPC) that no plea of fraud or any other similar ground cannot be pleaded until necessary particulars are given. A reference to the written statement filed in the arbitration proceedings shows that there is no pleading whatsoever of any fraud on the ground that no managing committee resolution was passed accepting the respondent No.3 as a member, and also there is no other allegation of fraud except of averments of disentitlement of a transferee to be a member unless he is a blood relation. We, therefore, refuse to allow the petitioner to raise this plea of fraud, which, in any case, is of no effect as observed above.

15. As a result of the above, we find no reason to interfere with the concurrent decisions of the authorities below being the Award dated 31.5.2000 and the

Appellate Tribunal's order dated 17.11.2000. The present is not a fit case for interference and exercise of our powers under Article 226 of Constitution of India. The powers under Article 226 are not only discretionary but are meant to further the ends of justice. We find that the ends of justice are heavily tilted in favour of the respondent No. 3 who has acted as a member of the Society, taken loans on that basis from his employer, repaid the loans and has also paid all the moneys/dues as claimed by the petitioner Society.

The writ petition is, therefore, dismissed, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

AUGUST 04, 2010
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SANJAY KISHAN KAUL, J.