

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

% Date of decision: 15th December, 2010

+ WP (C) No.1702/2008

**SUPREME COOPERATIVE GROUP
HOUSING SOCIETY LTD.**

...PETITIONER

Through: Mr. Ajit Pudussery and Mr. Dinesh
Khurana, Advocates

Versus

FINANCIAL COMMISSIONER AND ANR.

...RESPONDENTS

Through: Mr. Satya Sahrawat and
Mr. Amandeep Joshi, Advocates for
Ms. Jyoti Singh, counsel for R-1.
Mr. Rakesh Munjal, Sr. Advocate with
Mr. Rajiv Vig, Advocate for R-2 along
with R-2 in person.
Ms. Renuka Arora, Advocate for R-
3/DDA.

CORAM:

**HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE M.L.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 Reporter or not? | Yes. |
| 3. Whether the judgment should be
reported in the Digest? | Yes. |

M.L.MEHTA, J. (Oral)

1. The petitioner, by this writ petition under Article 226 of
the Constitution of India, seeks to challenge the order

dated 20th November, 2007 passed by the Financial Commissioner, Delhi in Case No.05/2003-CA dismissing the appeal of the petitioner against the order dated 8th October, 2002 of the Registrar, Co-operative Societies.

2. The facts leading to the dismissal of appeal of the petitioner by the Registrar regarding approval of expulsion of respondent No.2 (hereinafter, for short 'R-2') and the passing of impugned order by the Financial Commissioner are these. The father of R-2 was one of the members of the petitioner society which was to construct flats for its members on the land allotted by DDA. On account of non-payment of dues by some of the members including R-2's late father, the petitioner society split up the construction in two phases. Those who cleared their dues by the given dates, were included in the first phase of the construction and who did not, were relegated to the second phase of society. Father of R-2 being a defaulter in payment of the dues was relegated to the second phase. The petitioner issued notices of demand to his late father. Vide show cause notice dated 28th February, 1992 he was called upon to pay the dues and interest on the said amount. Vide notice dated 23rd April 1992 also he was called upon

to pay the dues and interest failing which it was stated that he shall not be allowed to participate in the draw of lots.

3. In the meantime, father of R-2 expired on 23rd April, 1992 and present R-2 became the member in his place with full owner of the share, being the legal heir of his father. It is averred by the petitioner that notices dated 15th June, 1992 followed by reminder dated 12th August, 1992 were sent to R-2 for paying the arrears with interest failing which he was not to be allowed to participate in the draw of lots. It is averred that a show cause notice dated 17th December, 1992 was issued to R-2 informing him that his name was placed before the Management Committee on 14th December, 1992 which decided to place his name before the General Body to be held on 11th January, 1993 for his expulsion from the society under Rule 36 of Delhi Cooperative Society Rules 1973 (hereinafter, for short 'Rule'). It is averred that R2 issued two cheques totaling Rs.1,00,000/- in favour of petitioner society which got dishonored on account of insufficient funds. The general body could not take any decision and was called off with

the suggestion given by the President that the defaulting members may pay their dues by 28th February, 1993.

4. Subsequently, the matter of defaulting members was placed before a Sub-Committee for giving personal hearing to the defaulting members as to why they should not be expelled. Vide its letter dated 27th May, 1993, the Sub-committee extended the time for payment uptill 15th June, 1993 and informed R2 that if dues were not paid by this date his name would be recommended to general body for expulsion from the society.
5. On 26th November, 1993, R-2 was alleged to have been informed vide a notice of a general body meeting to be held on 6th December, 1993 for considering the matter of his expulsion under Rule 36. Ultimately on that date he was expelled by the general body from the membership of the society. It is petitioner's case that R-2 had sought two month's time to clear the dues vide his letter dated 6th December, 1993.
6. The resolution of the general body dated 6.12.1993 whereby the R-2 was expelled was sent to Registrar on 9th December, 1993 for his approval.

7. On 30th December, 1993, R-2 filed application under Section 60(1)(b) of Delhi Co-operative Societies Act, 1972 (for short the Act) before the Registrar praying therein for setting aside the proceedings dated 6th December, 1993 of general body meeting. This application came to be disposed of by way of an award dated 14th July, 1995 under Section 61 of the Act by the Joint Registrar/Arbitrator who simply recorded that the R-2 may not be charged interest if the society has not charged the interest from other members placed in similar circumstances. He also noted that so far no expulsion order of the R-2 has been approved by the Registrar.
8. It appears that since there were no findings recorded in the award dated 14th July, 1995, R2 filed another claim petition under Section 60(1)(b) of the Act praying for a direction to the society to hand over the flat bearing no.217 to him and also to restrain it from allotting the same to anyone else. This petition came to be disposed of by the Joint Registrar/Arbitrator vide award dated 19th May, 1998. The Joint Registrar/ Arbitrator recorded the finding that the R-2 is a bonafide member of the society and is entitled to flat bearing no.217 in terms of award

dated 14th July, 1995 and the allotment letter in this regard. The society was directed to issue a demand letter in respect of outstanding dues. While recording these findings it was observed that the award dated 14th July, 1995 of the Joint Registrar/Arbitrator was not challenged by the society and had become final. It was also noted that the society had not filed the proofs regarding the resolution of the society and the communications made to the Registrar in this regard.

9. Being aggrieved of these orders as noted above the petitioner/society filed appeal being 61/1998-DCT under Section 76 of the Act before the Delhi Cooperative Tribunal (for short the 'Tribunal') against the last award dated 19th May, 1998 of the Joint Registrar/Arbitrator. The Tribunal also recorded that the previous award dated 14th July, 1995 had attained finality. The Tribunal found no ground to interfere with the award dated 19th May, 1998 and consequently the appeal was dismissed vide order dated 21st August, 1998.
10. The matter did not rest at that. The petitioner filed writ petition being CW no.511/99 before the Division Bench, where the main grievance of the petitioner was that both

the awards had overlooked the fact that the Registrar was yet to take a decision on expulsion of the R-2 pursuant to the general body resolution dated 6th December, 1993.

11. The Bench noted that no decision had been taken by the Registrar till date on the expulsion of R-2 pursuant to general body resolution dated 6th December, 1993 and also on the claim petition dated 30th December, 1993 filed by the R-2 for setting aside the said decision of general body meeting. The Court consequently directed the Registrar to consider general body resolution dated 6th December, 1993 and to pass an appropriate order thereon.
12. On 8th October, 2002, the Registrar vide his order dropped the expulsion proceedings against R2 with immediate effect. The Registrar recorded that the expulsion of R-2 was in blatant violation of the mandatory provision as stipulated in Rule 36 as well as directive dated 26th March, 1990 as issued by the Registrar Cooperative Societies. He noted that no mandatory one month notice was issued or served upon the respondent by the society before passing resolution of his expulsion. It was noted that the alleged notice of GBM scheduled to be held on 6th December, 1993 was allegedly issued to R-2 only on 26.11.1993. He also

noted that no acknowledgment of the registered notice showing service of the same on R-2 was produced by the society.

13. Registrar also recorded that the society has wrongly and illegally invoked the provisions of Rule 36 since R-2 has never been a persistent defaulter and was ready and willing to pay the dues as payable by him to the society. He further noted that the society also did not challenge the first award dated 14th July, 1995 which had become final. It was also observed that the society was not maintaining its record properly and legally which is evident from the fact that at some places the total deposits of R-2 have been shown as Rs.2,25,000/- and at other places as Rs.3,25,000/-. He went on record to say that the enrolment of new members by the society in the year 1993-94 is totally invalid and illegal as there was no vacancy in the society at that particular time since the alleged resolution of expulsion was never approved by the Registrar. He recorded that there are still two vacant flats bearing nos. 155 and 156 in the society.
14. On a perusal of record, the Registrar had also recorded that a number of notices are alleged to have been issued

by the society to R-2 but the same were not proved to be received by him since there is no documentary evidence in support thereof. So much so, there was no proof of receipt of alleged notice dated 26.11.1993 of general body meeting by R2. He noted that even if it is assumed that show cause notice dated 26.11.1993 was served upon R2, though denied by him, the required time of 30 days before expulsion was not given to him as the notice was issued only 10 days before his expulsion in the GBM held on 6th December, 1993. Further while recording that as R2 was willing to pay the outstanding amount, the Registrar chose to drop the expulsion proceedings with the direction to R2 to clear the dues as prescribed under the law.

15. Still the petitioner did not rest here and filed an appeal against this order dated 8th October, 2002 of Registrar before the Financial Commissioner vide case no. 05/03-CA. This was disposed of by the Financial Commissioner vide impugned order dated 20th November, 2007. The stand of the appellant/petitioner before the Financial Commissioner was not with regard to non-issue of notice within the parameters of Rule 36, but based on the fact that R-2 was a persistent defaulter and was aware of the

same. The Financial Commissioner vide impugned order recorded that notice of 30 days as prescribed under provisions of Rule 36 being statutory was required to be given before proceeding for expulsion by the general body. While noting that no such notice was given and there was no documentary proof to show that any such notice was served upon R-2 the Financial Commissioner dismissed the appeal.

16. It is this impugned order of the Financial Commissioner which has been challenged in the present writ petition.
17. Having noted the sequence of various rounds of litigation, as above, it comes out to be an admitted case of the parties that father of R-2, and after his death R-2 also defaulted some amount payable to the society and that the expulsion of R-2 from the membership of the society, by resolution dated 6th December, 1993 was never approved by the Registrar of the Societies. All the forums below have recorded absence of documentary proof with regard to the issue of service of notice and further that, in any case, there was no notice issued as per Rule 36(2) which mandated a period of thirty days before proceeding with expulsion of R-2.

18. Learned counsel for the petitioner urged before us that even though the requisite statutory notice of thirty days may not have been given, R-2 was given several opportunities for payment but he proceeded with default. He submitted that this being only a procedural default, the action of the society could not be invalidated only because of this reason. He invited our attention to Section 34 of the Act in this regard.
19. He relied upon a judgment of this Court reported in **Satish Chandra & Anr. v. The Registrar Cooperative** 1993 II AD (Delhi) 81. On the other hand, learned counsel for R-2 submitted that the statutory provisions have to be given primacy and the pleas based on Section 34 of the Act would not be of any avail as the 'defect in procedure' cannot justify transgression of the statutory provisions of Rules. He further submitted that the resolution of General Body was not approved/confirmed by the Registrar Cooperative Society. He also relied upon the judgment of a Division Bench of this Court reported as **R.K. Aggarwal v. Registrar Coop. Societies, Delhi & Ors.** 45 (1991) DLT 105 (DB).

20. Before dealing with these contentions it is necessary to refer to provisions of Section 34 of the Act and Rule 36(2) and 36(3) of the Rules.

Section 34 reads as under:-

“34. Acts of co-operative societies not to be invalidated by certain defects:-

No act of co-operative society or of any committee or of any officer shall be deemed to be invalidated by reason only of the existence of any defect in procedure or in the constitution of the society or of the committee or in the appointment or election of an officer or on the ground that such officer was disqualified for his appointment.”

Rule 36(2) and (3) reads as under:-

“36. Procedure for expulsion of members

(1) ...

(2) Where any member of a co-operative society proposes to bring a resolution for expulsion of any other member, he shall give a written notice thereof to the President of the Society. On receipt of such notice or when the committee itself decides to bring in such resolution, the consideration of such resolution shall be included in the agenda for the next general meeting and a notice thereof shall be given to the member against whom such resolution is proposed to be brought, calling upon him to be present at the general meeting, to be held not earlier than a period of one month from the date of such notice

and to show cause against expulsion to the general body of members. After hearing the member, if present, or after taking into consideration any written representation which he might have sent, the general body shall proceed to consider the resolution.

(3) When a resolution passed in accordance with sub-rule (1) or (2) is sent to the Registrar or otherwise brought to his notice, the Registrar may consider the resolution and after making such enquiry as to whether full and final opportunity has been given under sub-rule (1) or (2) give his approval and communicate the same to the society and the member concerned within a period of 6 months. The resolution shall be effective from the date of approval.

...”

21. We do not see the applicability of **Satish Chandra & Anr.**

v. The Registrar Cooperative (supra) in the present case,

wherein it was held as under:-

“14. ...It must be made clear that from the language of this Section it is amply clear that the legislative intentions are to validate acts of society or its committee or of any officer which may otherwise ought to have been invalid on account of any defect in the procedure or in the constitution of the society or of the committee. This has been incorporated with the view that if a committee or any officer authorized on that behalf takes a decision, spends money of the members of the society in the construction of building or flats or other activities as per the objects of the Society subsequently it cannot be said that because that committee or the officer there was any defect in the appointment of such officer or the election of

such committee on account of any defect in procedure in the constitution of the society or its committee, the building or the flats so constructed be demolished because the ultimate sufferers in the process will be a larger members of the society. ..."

22. We are in agreement with learned counsel for the respondents that the statutory provisions of Rule 36(2) and 36(3) are mandatory and are to be given primacy. The non issuance of mandatory notice of thirty days under Rule 36(2) cannot be said to be only a defect in procedure, since that being mandatory and non-compliance whereof was to entail serious consequences on the rights of a Member.
23. This Rule 36(2) and 36(3) came to be interpreted by a Division Bench of this Court in the case of ***R.K. Aggarwal v. Registrar Coop. Societies, Delhi & Ors.*** (supra), wherein it was held as under:

"That rule 36 has to be strictly complied with and adhered to by a cooperative society before it chooses to expel a member. We are not in agreement with the learned counsel for the respondents that rule 36 is directory. In our opinion, it is incumbent upon the Society to follow the letter of law and to comply meticulously with the provisions of Rule 36. This admittedly has not been done in the present case. Even if it be assumed though it is denied by the appellant that show cause

notices dated 10th August, 1974 were served on the appellant, the infirmity is not cured. The notice was required to be of not less than 30 days before but no such notice was given. The learned Single Judge did not advert to this requirement of Rule 36 and has merely proceeded to decide the question as to whether the notice dated 10th August, 1974 was served on the appellant or not. Having come to the conclusion that the notice dated 10th August, 1974 was served on the appellant, the learned Single Judge should have then proceeded to decide whether such service fulfilling the requirement of Rule 36 or not. In our opinion, the mandatory requirement of 30 days as provided by Rule 36(2) was not fulfilled. Therefore, the action taken by the respondent Society was not est.”

24. In case of ***P.K. Gupta v. Gold Craft Coop. G/H Society Limited & Others*** CW No. 2753/1995 decided on 4th February, 1996, the Division Bench of this Court held as under:

“8. ... ‘Sub-Rule(3) casts an obligation on the Registrar not only to make an enquiry as to whether full and final opportunity has been given to the member, but he has also to ‘consider’ the resolution.

8.1...

8.2...

8.3 It is clear that the scope of the jurisdiction exercised by the Registrar under Sub-Rule (3) is much wider; he has to go deep into the matter, examine the resolution carefully, deliberate upon it and then to form an opinion whether to approve the same or not.”

25. Both the Joint Registrars/Arbitrators in their awards dated 14th July, 1995 and 19th May, 1998, respectively, though have not dealt with regard to the validity or otherwise of expulsion of R-2, but have categorically recorded R-2 to be a bonafide member of the Society and entitled to allotment of flat.
26. Since, both these claim petitions filed under Section 60(1)(b) of the Act were disposed of by the Joint Registrar/Arbitrators without referring to the aspect of validity of expulsion, on the directions of this Court in CW no.511/99, the Registrar examined requirements of Rule 36(2) and vide his order dated 8th October, 2002 crystallized the things and dropped the expulsion proceedings of R-2, being based on non-compliance of the mandatory provisions of this Rule. Though, the resolution of expulsion of R-2 could not be said to ineffective, in the sense that R-2 was entitled to challenge the same but it was to be treated as effective only after the approval of Registrar which was mandatory as per Rule 36(3). It was also held in the case of **R.K. Aggarwal v. Registrar Coop. Societies, Delhi & Ors.** (supra) that the applicability can take effect only when the approval was granted by the

Registrar under Rule 36(3) which was not to be taken as a formality, since while granting approval the Registrar was duty bound to consider and make an enquiry as to whether the resolution has complied with Sub-Rule (1) and (2) of Rule 36 or not. The Registrar had to satisfy that the final opportunity as contemplated by these two Sub-Rules has been granted. In the present case, it is noted that the Registrar has applied his mind before arriving at the decision of dropping of proceedings of expulsion on account of non-compliance of Rule 36(2).

27. The Financial Commissioner also did not find any infirmity in the aforesaid order of the Registrar and thus dismissed the appeal as filed by the petitioner society.
28. It may also be noted that the Registrar had also recorded about the R-2 being ready and willing to pay the outstanding dues to the society. The case of the petitioner society has however been that the flat no. 217 which was allotted to the R-2 has been allotted to Sh. L.N.Gupta and there is no vacant flat available with the society. In this regard we notice that R-2 had taken the plea regarding two vacant flats before the Registrar in the year 2002 when also the society had stated that there was no vacant flat

available with the society. Before us also learned counsel for the petitioner stated on 3rd March, 2008 that there are no vacant flats available with the society as all allotments have already been made. R-2 filed an RTI application to DDA and as per letter dated 10th August, 2009, DDA informed him about the existence of two vacant flats bearing nos. 155 and 156 as per their records. The letter further indicated that DDA has not permitted the society or its office bearers to use the vacant flats as club or common room. Even then the learned Counsel for the petitioner disputed this fact as recorded on 31st August, 2009. Consequently, it was directed that these flats be locked and the key deposited with the Registrar of this Court. However, subsequently one of the flats being flat no. 156 was released to the society vide order dated 27th January, 2007 of this Court.

29. Now confronted with the fact of R-2 being willing to pay the dues with interest and this Court having come to know of two vacant flats, the learned counsel for the petitioner stated before us that the construction of these two flats was beyond the sanctioned plan though the same may be permissible within the FAR. On 6th May, 2010 we directed

the petitioner society for demolition of these additional constructions or bring constructed area in accordance with the sanctioned plan or must apply to the competent authority seeking regularization of the additional construction if permissible within the FAR. The society was directed to do the needful within one month with the direction given to DDA to process the same. It was also recorded that in case of regularization, the flats would be made available to the members who are still waiting for the allotment or otherwise in accordance with the law. We understand that the aforesaid position remains the same and no steps have been taken by the petitioner society in this regard.

30. We are in complete agreement with the concurrent findings of the forums below that the failure of the petitioner-Society to comply with the requirements of the Act and the Rules framed thereunder in the expulsion proceedings initiated against R-2 entitles the said respondent to the allotment of a flat. The defence of there being no flat available also has no legs to stand as the order dated 27.01.2010 clearly records that while utilizing one of the flats which was locked up under the directions

of this Court, flat no.155 shall be kept vacant and unallotted to await the decision of the writ petition. It is clearly directed that in case the writ petition is dismissed, the said flat would be allotted to R-2 on payment of balance charges etc. Flat no.156 already stands released to the petitioner-Society in terms of the same order. Insofar as the issue of the Society utilizing the said two flats being flat nos.155 and 156 for its functions is concerned or the plea that the same have been constructed beyond the FAR, the petitioner-Society cannot hold these functions and enjoy the flats to the detriment of R-2. The petitioner-Society seeks to plead that so long as the flat is not made over to R-2, it is fine with the utilization of the same by the Society but in case it has to be made over to R-2, then the construction becomes beyond FAR. We had already directed that the steps should be taken for regularization of the flat especially as greater FAR is available under the MPD-2021.

31. In the end we may note that on the conclusion of hearing on 09.12.2010, counsel for R-2 in order to settle the matter, had given an alternative suggestion that the said respondent would be willing to pay the equalization

charges/interest at the rate of 18 per cent per annum in terms of Rule 36A of the Delhi Cooperative Societies Rules, 1973 framed under the Act. On this suggestion, learned counsel for the petitioner/Society took some time to obtain instructions as to whether the petitioner would like to invite a judgment or was willing to settle the matter in view of what had been stated on behalf of R-2. However, today learned counsel for the petitioner states that the petitioner-Society would like to stick by its stand that the expulsion of R-2 was valid and that he was not entitled to a flat. In it is under these circumstances that we have penned down this judgment.

32. We thus find no merit in the writ petition filed under Article 226 of the Constitution of India which is not a second appeal remedy. There is no illegality, perversity or infirmity in the impugned order. However, certain directions are necessary while dismissing the writ petition.
33. Thus, we accordingly dismiss the writ petition with costs of Rs.10,000/- but simultaneously issue the following directions to ensure that R-2 gets fruits of success in the these proceedings:

- i) The petitioner-Society will raise a demand for the balance amount against R-2 in accordance with the Act and the Rules framed thereunder within a maximum period of one month from today.
- ii) R-2 will deposit the said amount within a maximum period of two months thereafter.
- iii) The keys lying in this Court of Flat No.155 will be released to the petitioner-Society through its Secretary forthwith. It shall be the responsibility of the petitioner-Society to collect the keys and put the flat in the same condition as was for the other allottees of different flats. In case, any sanction or permission is required from the DDA for extra FAR or otherwise, the same shall be applied by the petitioner-Society at its own costs within a maximum period of one month from today and the R-3/DDA is directed to accord sanction in accordance with law within a period of one month thereafter.

34. Ordered accordingly.

SANJAY KISHAN KAUL, J.

DECEMBER 15th 2010

Vld/AK

M.L.MEHTA, J.