

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on : 27.09.2010
% Date of decision : 01.10.2010

+ WP (C) No.588/2009

THE NAV NIRMAN COOPERATIVE GROUP HOUSING SOCIETY
LTD.

... ..PETITIONER

Through : Mr.Rakesh Munjal, Sr.Adv. with
Mr.Maneesh Goyal and Ms.Diksha
Munjal, Advocates.

- V E R S U S -

A.K.MURARKA & ORS. RESPONDENTS

Through : Mr.Nalin Tripathi, Advocate for R-1
and R-2.

AND

+ WP (C) No.9002/2009

VIJAY GUPTA & ORS. PETITIONERS

Through : Mr.Rakesh Kumar Garg, Advocate for
the Petitioners

- V E R S U S -

THE NAV NIRMAN COOPERATIVE GROUP HOUSING SOCIETY
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Through : Mr.Rakesh Munjal, Sr.Adv. with
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Munjal, Advocates for R-1.

Mr.Nalin Tripathi, Advocate for R-2
and R-3.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE VALMIKI J.MEHTA

Whether the Reporters of local papers
may be allowed to see the judgment? YES

To be referred to Reporter or not? YES

Whether the judgment should be
reported in the Digest? YES

SANJAY KISHAN KAUL, J.

1. The Nav Nirman Cooperative Group Housing Society Ltd.('the Society' for short), a registered society and now governed by the provisions of Delhi Cooperative Societies Act, 2003 was allotted 4.4 acres of land being Plot No.7, I.P.Extension for construction of residential flats for its members. The Society has 264 members and flats were constructed for the members. There were only 118 covered car garages available against those flats. Applications were invited from the members on 26.06.1990 estimating the cost of each garage at Rs.30,000/-. In view of there being less garages than the applicants, a draw of lots was held on 24.02.1991 and the successful persons were allotted garages. Soon thereafter, one of the members surrendered a car garage which was allotted to the first member on the waiting list since the waiting list was maintained of the members who had not been allotted garages.

2. Flats allotted by DDA and by societies in Delhi were sold on a power of attorney basis in large numbers. This modus was adopted on account of there being restriction on transfer of such flats (or plots) and thus agreement to sell, GPA, SPA, Will etc. were a set of documents which were executed for transfer of such flats/plots. In order to regularize such transfers, a scheme was propounded for conversion of leasehold rights into freehold on payment of certain premium. The premium was 33 per cent larger for flats sold on a power of attorney basis.
3. Some of the members of the Society sold the flats. The car garages were also sold where a member had been allotted such a garage. R-1 to R-4 in WP(C) No.588/2009 challenged the sale of garages by filing a claim petition under Section 60 of the Delhi Cooperative Societies Act, 1972. These claim petitions were dismissed by the arbitrator vide an order dated 10.06.2004. The said respondents, R-1 to R-4, preferred an appeal before the Delhi Cooperative Tribunal. This appeal was allowed on 08.06.2007 in terms whereof the Society was directed to take legal action against original allottees of parking spaces who had sold their flats to others, recover the parking spaces from them and then allot them to the waitlisted members of the Society. The General Body

of the Society passed a resolution on 30.09.2007 resolving that in modification of the earlier resolutions on this subject, allotment of covered car and scooter garages, be treated on ownership basis with heritable and transferable rights at par with the flats and simultaneously resolved to file a review application in respect of the order dated 08.06.2007. The review application was thereafter filed, but the same was dismissed as barred by time in terms of the order dated 24.03.2008.

4. The Society has filed a WP(C) No.588/2009 under Articles 226 and 227 of the Constitution of India seeking quashing of the orders dated 08.06.2007 and 24.03.2008 passed by the Delhi Cooperative Tribunal. Simultaneously, three transferees of the flats, who got the benefits of the garages also filed a writ petition being WP(C) No.9002/2009 challenging the same very orders.
5. The impugned orders are predicated on a reasoning that the Society while deciding to allot parking spaces on licence basis had not anticipated the result of future sales of flats on power of attorney basis. The appellants before the Tribunal (original claimants) were members of the Society who had not raised the issue in the General Body Meetings when deliberations took place and allotments were made. The lump sum

amount recovered from the allottees was stated to be a security deposit to be refunded at the time of surrender of parking spaces. It was thus concluded that the arbitrator had fallen into an error in holding that the power of attorney purchasers had stepped into the shoes of the original members as parking space was not a part of the space of the flat. It is in these circumstances that the directions referred to aforesaid were issued.

6. We have heard learned counsel for the parties and perused the record before us.
7. In our considered view, the first aspect which must be taken into account is that these garages (which are called by the original claimants as stilt parking) are incidental to the allotment of flats. It is not as if these car parking spaces have been sold as separate spaces, but since the parking spaces were not sufficient in number, matching the number of flats, a draw of lots was held to allot the parking spaces. This is the fairest method and no doubt has been cast on such allotment of parking spaces. The minutes of the Special General Body Meeting held on 24.02.1991 placed before us show the drawing up of a list of 118 successful members and 68 members were placed on the waiting list. The original claimants also did not

challenge the same and thus everybody was satisfied with the process of allotment of the garage spaces.

8. The sale of flats through power of attorney basis has not only received judicial recognition but statutory recognition as per Section 91 of the Delhi Cooperative Societies Act, 2003 which reads as under:

“Special provision for regularisation of occupancy right of persons who have acquired such a right through the instrument of power of attorney or agreement for sale.

91. Any person who has acquired property on occupancy right in a co-operative housing society through the instrument of power of attorney or agreement for sale shall have the opportunity to become member of the concerned co-operative housing society where the property exists by getting the property converted from leasehold to freehold and on paying the transfer fee to the concerned co-operative housing society along with dues, including the dues of the apex or financial institution, if any :

Provided that a power of attorney holder or purchaser of property through agreement of sale and purchase in a co-operative housing society shall get the said property converted from lease hold to free hold within a period of three hundred and sixty days at the commencement of this Act and all subsequent sales and purchases of such property after the commencement of this Act, the property shall be converted from lease hold to free hold within three hundred and sixty days, failure to do so shall be deemed to be an offence under section 118 :

Provided further that any such person can have access to the paid services provided by the committee, namely the use of community hall, swimming pool or any other common facilities available to the members or the use of common parking spaces provided by the co-operative housing society only in the event of his becoming member as aforesaid and the transfer

fee for becoming member shall be ten thousand rupees or as may be revised by the Registrar from time to time.”

9. In view of the aforesaid provisions, there can be little doubt over the rights of the purchasers of the flats and that is not even a dispute before us. The only question to be examined is whether a member who is an allottee of the flat and has also got the allotment of the garage, is entitled to transfer the rights in respect of the garage while transferring the rights in the flats. In our considered view, the answer to this question is in the affirmative.
10. It cannot be lost sight of that the enjoyment of the garage is incidental to the flat. The garages were never sold or given on a licence basis by the Society separately to third parties. These garages were allotted through a draw of lots to the successful parties who were occupants of the flats. Thus, it cannot be said that the purchasers of the flats on a power of attorney basis can be deprived of the enjoyment of the parking space.
11. We may notice at this stage that both the Society as well as the other set of petitioners before us do not dispute the fact that there can be no separate sale of these garage spaces to third parties who are not allottees/occupants of the flats. It is thus

not permissible for the owners to enjoy garages dehors the enjoyment of their flats.

12. The decision taken to allot these garages was in a General Body Meeting of the Society which is binding on all members including the original claimants, who participated in the meeting. Not only that, the subsequent resolution of a General Body has been brought to our notice albeit after the initial decision of the Appellate Tribunal dated 08.06.2007 when on 30.09.2007 the following resolution was passed.

“ Resolved that in modification to all earlier resolutions on the subject, allotment of covered car and scooter garages be treated on ownership basis with heritable and transferable rights at par with flats.”

13. The aforesaid resolution to the extent it is treating the covered car garages as heritable and transferable at par with the flats is thus also collective decision of the members of the Society and binding on all the members. No doubt, the endeavour of the Society to seek review of the order of the Tribunal failed on the ground of limitation.

14. Learned counsel appearing for R-1 and R-2 in WP(C) No.588/2009 who are the same as R-2 and R-3 in WP(C) No.9002/2009, are the only contesting parties before us ('the contesting respondents' for short), sought to contend that there were several

apprehensions that if the impugned judgment of the Delhi Cooperative Tribunal was set aside an anarchy would prevail as outsiders/non members living in adjoining unauthorized colonies would purchase covered car parking spaces. Such an apprehension, in our considered view, is misplaced since it had been conceded by the Society, and rightly so, that the enjoyment of the garage spaces can only be by an owner/occupant of the flat and not by any third party as the enjoyment and occupation of the garage space is incidental to the flat.

15. Similarly, an apprehension expressed that there would be confusion on account of the fact that in multi storied flats, each flat owner is entitled to proportionate share in the land beneath the flat while purchasers of covered car parking space may claim proportionate rights, thereby reducing the rights of the flat owners, is misplaced. Learned counsel for the contesting respondents submits that the covered car parking spaces may not be beneath the flats in question. The misconception arises from a premise as if the undivided share in the land of the flat owners are beneath their tower. This is not so as all members have proportionate undivided share in the land for all the covered and common area. The enjoyment of the car parking space is being given on certain conditions

and does not create any extra rights in the proportionate share in the land.

16. Learned counsel for respondents 1 & 2 also seeks to rely upon the decision taken by the GBM vide Resolution No.4 dated 28.6.1992 in the following terms:

- “(a) members shall use the allocated parking space only for the purpose of parking their vehicles;
- (b) the allocation of parking space shall be only on license basis and not on ownership basis;
- (c) the deposit for one parking space as enumerated below shall be treated as non-interest bearing deposit only;
 - (i) covered car parking space (big) - Rs.30,000/-
 - (ii) covered car parking space (small) - Rs.26,250/-
 - (iii) covered scooter parking space (big) - Rs.7,500/-
 - (iv) covered scooter parking space (small)- Rs.5,200/-
 - (v) open car parking space - Rs.7,000/-
- (e) An annual license fee of Rs.5/- for covered car parking, Rs.2/- for covered scooter parking and Re.1/- for open car parking space shall be paid by the members to whom these parking spaces are allotted for each financial year or part thereof on or before 30th April each year.
- (f) The members, who have been allotted parking space on license basis, shall not transfer this right to any other person or organizations.”
(emphasis supplied)

Learned counsel, thus, submits by reference to Clause (f) aforesaid that the members who have been allotted parking space on license basis have no right to transfer the same to any other person or organization as per the decision of the GBM.

17. In our considered view, a proper meaning has to be given to this decision and the objective is clear that

the restriction on transfer is to “any other person or organization”. This would imply that a person cannot hold the flat and transfer the car parking space/garage separately and create rights in the same. Third parties who are not members and who do not own a flat are not entitled to hold a garage. The space is only capable of being used for car parking of vehicles as per Clause (a) of the Minutes of the GBM held on 28.6.1992. This would not imply that if the flat itself is transferred the car parking space cannot be transferred with the transfer of the flat.

18. Learned counsel for the contesting respondents also sought to draw strength from a recent judgment of the Supreme Court in Civil Appeal No.2544/2010 Nahalchand Laloochand Pvt.Ltd v. Panchali Cooperative Housing Society Ltd. decided on 31.08.2010 to contend that stilt car parking is common to all flat owners. A close scrutiny of the judgment, however, shows that the same has no application to the present case. Firstly, it is not the case of R-1 and R-2 that the area should be used common to all flat owners rather R-1 and R-2 claim exclusive rights to the car parking spaces. Secondly, the judgment of the Supreme Court is in the context of statutory provisions in question dealing with apartments in Maharashtra. The factual matrix of that

case is that the promoter sought to claim the rights to sell the stilt car parking spaces separately. The conflict was between the promoter and the Society. The Society pleaded that a promoter had no right to sell or dispose of the space. The claim of the promoter was based on the plea that stilt parking space being a garage was an independent unit under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. It was held that the stilt car parking space could not fall within the definition of a flat and was part of common area and could not be sold separately. The promoter thus did not have a right in the same and the very purpose of enacting the aforesaid Act would be defeated since the flat purchasers would continue to be exploited indirectly by the promoters.

19. In the facts of the present case, a collective decision was taken by the members of the Society itself by passing a resolution to allot car parking space to certain members through a draw of lots to which the contesting respondents were a party. There have been subsequent resolutions to give heritable right to the space again in a General Body Meeting. Even if the private respondents are not happy with the same, it is a collective decision of the majority so the

whole basis is that an occupant who was originally successful in the draw of lots for the garage should be able to transfer the rights of enjoyment of the car parking space along with transfer of the flat when it so occurs.

20. In the end, learned counsel for the contesting respondents sought to contend that there were some transfers made not to the same person who purchased the flat on a power of attorney basis but to another flat owner in the Society. Such a course of action could have been doubtful but in view of the resolution of the Society passed in the General Body Meeting held on 30.09.2007 to treat the covered garages on ownership basis with heritable and transferable right at par with the flats, no grievance even in that behalf can be made. It is, however, without doubt that the garage space has to go only to a flat owner in the Society and not to any third party who is an outsider.

21. We thus set aside the impugned orders dated 08.06.2007 and 24.03.2008 of the Delhi Cooperative Tribunal making the Rule absolute directing that in case of sale of the flats on power of attorney basis, rights in the car parking can also be transferred but the same cannot be transferred to an outsider who is not an owner of the flat.

22. The petitions are allowed in the aforesaid terms
leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

October 01, 2010
dm

VALMIKI J.MEHTA, J.