

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

+ **W.P.(C) No. 6402/2007**

% 2nd December, 2010

ANIL BHALLA AND ANR.

..... Petitioners
Through: Mr. Rakesh Munjal, Senior
Advocate with Mr. Ankur
Arora, Advocate, Ms. Salu
Lal, Advocate and Mr.
Aakash D. Pratap.

VERSUS

INDIAN AIRLINES COOPERATIVE GROUP HOUSING SOCIETY LTD. AND
ORS. Respondents

Through: Mr. Rajiv Vig, Advocate
for the respondent No.1.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

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

SANJAY KISHAN KAUL, J (ORAL)

1. The petitioner No.1 became a member of the respondent No.1 society and was allotted flat No.264 in a draw of lots held by the Delhi Development Authority (DDA) on 19.5.2002. The said petitioner was at the relevant time the Secretary of the society. It is the claim of the petitioner No.1 that the construction of the blocks of the flats in question was in such a manner that there was an open space in front of their flat and a decision was taken by the Managing Committee that if

such allottees wish to utilize the open space without carrying out any construction, a fixed sum of Rs.1,25,000/- should be paid to the society within 45 days from the date of allotment. This decision of the Managing Committee is stated to have been placed before the general body on 19.5.2002 and approved.

2. The petitioner No.1 claims to have deposited the sum of Rs.1,25,000/- within stipulated time on 1.1.2003. However, respondent Nos.3 to 5 filed a claim petition under Section 60 of the Delhi Cooperative Societies Act, 1972 (hereinafter referred to as the 'said Act') on account of this decision of giving the extra space to petitioner No.1. An Award was passed by the Arbitrator under Section 61 of the said Act on 12.7.2004 holding that the space in question was the roof/terrace which was a common area and could be used only for the purposes as permitted by the DDA and that the Managing Committee and a general body could not have directed appropriation of the space by the petitioner No.1 alone. It was further directed that action should be taken against such beneficiaries of the space.

3. The petitioner No.1 filed an appeal against the Award which appeal was dismissed by the Delhi Cooperative Tribunal on 23.8.2006. We may also note that the petitioner No.1 has in fact sold the flat on power of attorney basis to the petitioner No.2 on 26.6.2004 but this fact has come to light only during the proceedings before the Tribunal.

4. The petitioners now seek to impugn the aforesaid decisions by filing the present writ petition under Articles 226 and 227 of the Constitution of India.

5. We have heard the learned counsel for the parties who have taken us through the impugned decisions. A reading of the Award of the Arbitrator sets out the controversy quite succinctly. The claim before the Arbitrator was predicated on the plea that petitioner No.1 under the garb of a decision of the Managing Committee of which he was the Secretary sought to appropriate exclusive use of the open roof of the others' flats for his own exclusive personal use. Not only that, he also constructed the wall of his drawing room and extended the same on the roof of the other flat i.e. bearing No.253. The said terrace/roof was stated to be a common place which was meant for use of all members and no construction was permitted on the same. There were also disputes raised by the petitioner No.1 about the position at site and thus the Arbitrator made a personal visit and verified that the photographs filed by the original claimants to tally with the position at site. Thus, it was found that there have been deliberately false facts stated in the affidavits filed by petitioner No.1.

6. The Arbitrator has rightly set forth the main dispute-whether the society has the power to allot/sell roof/terrace against consideration and whether any construction was permissible on the roof. The finding arrived at by the Arbitrator needs to be reproduced as under:

“The officials from DDA stated that roof is common area and no construction can be done on it without permission. Even society has not stated that construction on roof is legal. Therefore in the resolution dt. 19.5.2002 it was clearly mentioned that no permanent construction shall be allowed on roof. However, the respondent No.2, who was secretary, was first one to violate the said decision by encroaching upon the roof of Flat No. 253. He demolished the side-wall of his drawing room and extending it on the said roof of Flat No. 253 as shown in the photographs. The respondent is also cycling upon the corridor in front of his house by putting a wooden frame on it. He also changed the water pipelines on the roof to use it more conveniently. Still the society and respondent No.2 filed false affidavits falsely deposing on oath that no illegal construction is on the said roof. The society in order to save respondent no.2 intentionally filed that false affidavit. It is thus clear that both respondents are in collusion perhaps because respondent No.2 is in the management for a long time.

It is true that the General Body is supreme authority but it is not above law. Allotments of flats are being done by the DDA on the recommendation of the Registrar. Roof/terrace are common area and can not be allotted/sell to any individual. Therefore the decision of the society to allot/sell common roof to individual members even against consideration was bad, malafide, illegal and without jurisdiction. The argument of respondents that by the society has been benefited from said decision is totally false. Under the grab of said illegal decision, the allottees are give free hand to carry illegal construction and encroach upon the common roof as already done by the respondent No.2 by paying a small amount.

I therefore quashed the decision of the society dt. 19.5.2002 whereby roof of flat No.253 allotted to respondent No.2 and hold that roof/terrace is a common area and can be used by allottees only for the purpose as permitted under the DDA guidelines and other laws. The respondent No.2 shall remove the encroachment done on the roof of Flat No. 253 and wooden frame installed in the

corridor in front of his flat and bring them back to their original position on his costs. The society shall also take legal action against the allottees of other three flats to whom common roofs were allotted under above decision. And the defendants do pay Rs.1,0000/- to claimants as a cost of this claim to also directed to comply this award with in 15 days. After this the competent authority take action against the defendants.”

A reading of the aforesaid thus shows that not only did the petitioner No.1 appropriate the roof for his own use but expanded his constructed area of the flat by constructing on the same.

7. It cannot be lost sight of that though there may be a number of areas for common use by the society members and the society may for consideration permit appropriation of certain spaces for specified users such as for example parking of car etc., there is a distinction to be carved out from normal common area as to extra common areas and fundamental common areas like the stair case, the roof etc. which cannot be appropriated by anyone even if some amount is paid for the same. It is not also the case where a society short of funds sought to raise funds in this manner. It does appear that petitioner No.1 taking advantage of his position in the Managing Committee of the society sought to create an extra room for himself by appropriating the roof and then constructing on the same. This is completely impermissible.

8. We are also of the view that petitioner No.1, contrary even to the terms of the resolution of the Managing Committee and the

governing body, sought to construct on the same which was in any case not permissible. The affidavits filed by the petitioner No.1 are also found to be false and in fact the Arbitrator directed necessary proceedings to be initiated against petitioner No.1 for filing false affidavits.

9. The appeal order is equally lucid and clear while upholding the Award of the Arbitrator. The Tribunal has noticed the fact that petitioner No.1 had sold the flat to the petitioner No.2 prior to the Award but failed to bring this fact to the notice of the Arbitrator. The findings of the Tribunal are as under:

“We also do not accept the arguments that General Body is supreme and that it can do whatever it likes even if its action is totally un-lawful and unfair to most of the members of the society. It is apparent that the appellant being the Secretary of the society at that time had manipulated the decision of the Managing Committee and the General Body to his own advantage. It is also important to note that the resolution was only for allowing open use of the adjoining terrace and no permanent construction was to be allowed whereas the appellant had carried out permanent construction unauthorisedly which he has not been able to deny though he has argued that the photographs produced by the respondent were fabricated. He has not produced any other photographs before the arbitrator to prove his contention that the respondents’ photos were false and fabricated. There is also no reason to doubt the arbitrator’s site inspection where he has himself verified the unauthorized construction. The mere fact of the arbitrator visiting the site alone cannot be taken as a mis-conduct on his part and motives cannot be attributed to the arbitrator. Further, the fact that the respondent No.1 (society) has absented itself during the hearing of the appeal by the

Tribunal and has also passed a resolution dated 23.07.2004 accepting the award of the arbitrator shows that the new Managing Committee has indirectly admitted the mistake of the previous committee and, therefore, also there is no reason for us to interfere with the award of the arbitrator. We also accept the respondent's arguments about the appellant having concealed the fact of the sale, as the appellant has not denied the sale. This concealment of sale does amount to fraud. We, however, do not think the issue regarding his right to file this appeal as an ex-members is relevant as we are not aware if and when his membership has been ceased by the Society. In fact, he seems to be a part of the Managing Committee even on 23.07.2004, when it decided to accept the award of the arbitrator. Similarly, the argument about the other three members is also irrelevant as they have not come in appeal and the Managing Committee of the society has decided to implement the award. Lastly, so far as the plea that the arbitrator cannot exercise the powers of the MCD is concerned; we feel that the arbitrator has not exercised the jurisdiction of the MCD by carrying out the demolition of the construction, but has merely pointed out the fact that the construction is unauthorized and illegal and it is the Managing Committee who should initiate action for getting the construction removed. We agree that no authority including the General Body has any right to allot the terrace space and to allow illegal construction thereon. "

The findings of the Arbitrator are in fact a reiteration of the findings by the Arbitrator with which we are in complete agreement.

10. We have already stated as to why we are of the view that even the general body has no right to allot such fundamental common area/space to anyone and the allotment amounted to illegal exclusive use by the petitioner No.1 of the terrace of another flat owner. This would be inappropriate appropriation of the space meant for use of

everyone. We also note that water tanks, T.V. antenna, dish antennas and such other common use items are installed on the roof and thus inconvenience is caused to other allottees by such appropriation by one person. The petitioners have gone far beyond even what was permitted by general body by constructing on that roof.

11. We may also note that a party, who does not come with clean hands before the Court, files false affidavits before the Arbitrator, in any case, is not entitled to any discretionary relief. We find no reason to interfere with the concurrent findings of the Courts below and exercise our extraordinary jurisdiction under Article 226 of the Constitution of India.

12. The society will refund the amount of Rs.1,25,000/- paid by the petitioners, within four weeks subject to the petitioners demolishing and removing all encroachments on the roof which shall remain for the user of every one. The removal will be carried out by the petitioners within eight weeks from today.

13. The petition is accordingly dismissed with the aforesaid directions, leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

DECEMBER 02, 2010
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VALMIKI J. MEHTA, J.