

THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 30.05.2011

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W.P. (C) 2550/2011

BINDYA AGARWAL

..... PETITIONER

Vs

REGISTRAR OF CO-OPERATIVE SOCIETIES
& ANR.

..... RESPONDENTS

Advocates who appeared in this case:

For the Petitioner	:	Mr. A.K.Mishra and Mr. Sanjay Parikh, Advocates
For the Respondents:		Mr. Anjum Javed with Mr.Nirbhay Sharma, Advocates for the Respondent No.1. Mr. Sandeep Kumar, Advocate for respondent No.2.

CORAM :-**HON'BLE MR JUSTICE SANJAY KISHAN KAUL****HON'BLE MR JUSTICE RAJIV SHAKDHER**

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

SANJAY KISHAN KAUL, J (ORAL)

* This is a case where the petitioner has been seeking to get allotment of a flat, now, for nearly quarter of a century. Petitioner became a member of the respondent No.2 Society on 03.04.1984 and deposited the share money. The society was allotted land at Patparganj, which is now known as Jagriti Enclave. There were,

however, disputes about the enrolment of members, which gave rise to various legal proceedings.

It is a case of the petitioner that due to disputes amongst the members of the society a petition was filed under Section 60 of the Delhi Co-operative Societies Act, 1972 by some members, against the other 102 members of the Society, where the petitioner was one of the respondents. The dispute related to the unauthorized enrolment of waitlisted members which included the petitioner. The arbitrator, however, dismissed the claim on 01.08.1991 on the ground that it was not maintainable. A Revision Petition filed against this order also met the same fate by virtue of its dismissal on 15.10.1991. These orders were then challenged in WP(C) No. 2170/1992. The writ petition was also dismissed on 07.05.1993. Thus, the list of members containing 102 names including that of the petitioner stood confirmed.

Civil Writ Petition No. 4808/1997 was filed before this court on account of failure to make allotment in favour of waitlisted members including the petitioner. This writ petition was disposed of on 11.10.2000 where the aspect of three list of 102 members were considered where the name of the petitioner was at Sr.No.94 and a direction was issued for allotment of land to 102 members as per the vacant plots available.

The facts set out in the petition show that the petitioner and her sister-in-law had acquired interest in a residential flat by

execution of agreement for sale on 31.10.1994 in respect of the Ground Floor at 5/1, Kalkaji Extension, New Delhi-110019. This was followed up by sale deed dated 19.12.1996. The flat in question is one of the seven flats built on a two storey building constructed over a plot admeasuring 250.83 sq. meters and the sale deed, as is usual, provided for proportionate indivisible/impartible/undivided interests in the land. The share of the petitioner in the land thus came to 35 sq. meters.

The various members did not get the allotments and further proceedings were held, and administrator of the society by an order dated 04.01.2005 held that the petitioner was not entitled to a plot on account of disqualification as member of the Society w.e.f. 31.10.1994 as per Rule 25 of the Delhi Cooperative Societies Rules, 1973. The recommendation made by the administrator to the Registrar was objected to by the petitioner by filing objections under Rule 25(4) of the said Rules.

In the meantime, the Contempt Case (Civil) No.378/2005 was filed before this court by some of the petitioners on account of failure to make allotments despite the orders passed in the writ proceedings referred to earlier. Learned Single Judge of this court in those contempt proceedings vide order dated 01.05.2006 considered it appropriate to appoint Justice P.K.Bahari (Retd.) as a Court Commissioner to scrutinise claims of members of the

Society. The claim of the petitioner was examined and order was passed on 26.10.2006 and report was given by the Commissioner, in terms whereof petitioner was held to be disqualified.

Further endeavour of the petitioner to raise this issue by filing an application in contempt proceedings ultimately resulted in leave being granted to the petitioner to file substantive writ proceedings for redressal of her grievance as per order dated 27.09.2010.

Aforesaid facts have been set out only to show the long history of the disputes, though the question to be examined before us is reiterated i.e., whether by acquiring of interest in the flat the petitioner has become disqualified to be allotted a flat on the land of the society?

In order to appreciate the aforesaid plea, Rule 25 of the said Rules would have to be examined. The relevant portion is being reproduced hereinunder:-

“25. Disqualification of 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 on 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-sharers 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; (Amended on 6.8.97)

(ii) he deals in purchase or sale of immovable properties either as principal or as agent in the national Capital 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.

2. Notwithstanding anything contained in the rules or the bye-laws of the co-operative society, if a member becomes, or has already become, subject to any disqualification specified in sub-rule (1), he shall be deemed to have ceased to be a member from the date when the disqualifications were incurred."

We may notice that the proviso to Clause (c) sub-Rule (1) of Rule 25 of the said Rules was incorporated vide a notification dated 06.08.1997.

It is the submission of the learned counsel for the society that the petitioner incurred a disqualification by acquiring of interest in the flat prior the proviso being inserted and in lieu of sub-Rule (2) of Rule 25 of the said Rules. The said disqualification took effect on the date when such interest was acquired i.e. in 1994. Learned counsel thus submits that the benefit of the proviso is not available to the petitioner.

It is, however, not disputed that insofar as the facts in the case of the petitioner are concerned, if this proviso is applicable, the petitioner would be entitled to the benefit of the proviso since the land share of the petitioner is less than 66.72 sq. meters of the land. We may also note that this Sub-Rule is identical to Delhi Cooperative Societies Rules, 2007 framed under the Delhi Cooperative Societies Act, 2003; which are now the governing Act and the Rules.

On the other hand, learned counsel for the petitioner submits that the proviso being beneficial in nature, on the proviso coming into force, the benefit of the proviso should be made available to the petitioner. It is further submitted that the case of the respondent, as reflected in the proceedings before the administrator and as reflected in the report of Justice P.K.Bahari (Retd.), proceed on the basis that the proviso applies but Justice Bahari has proceeded on the basis that the area of the flat exceeds 66.72 sq. meters.

We find force in the contention of learned counsel for the petitioner. The area of the flat being more than 66.72 sq. meters is not the basis on which the proviso has to apply. The proviso excludes those members from the disqualification contained in the main part of the said Rule only if their interest "in land" and not the flat exceeds 66.72 sq. meters. Therefore, in other words

where a co-sharer of a property has acquired interest in a flat built on a piece of land, in which, his proportionate share is less than 66.72 sq. meters, the disqualification contained in the main part of the Rule will not get attracted, notwithstanding the fact that the flat area is more than 66.72 sq. meters. It is thus the share of land which is material which in the present case is undisputedly 35 sq. meters ie., less than 66.72 sq. meters.

Since the other aspect is being raised by learned counsel for respondent No.2, we also want to make it clear in the absence of any complaint or formal order of disqualification, the benefit of proviso on its coming into force, must be made available to the petitioner, specially when the question of allotment of flat has arisen after proviso was inserted in the Rules, i.e. in the year 2000.

We may note that on applicability of the proviso the report of Justice P.K.Bahari upholds the contention of the petitioner that the expression co-sharer will also apply to a co-owner of the property. We are in agreement with this view expressed in the impugned order.

We are thus of the opinion that the acquisition of interest by the petitioner in the flat would not disqualify the petitioner if the proviso to Rule 25(1)(c) of the said Rules or Rule 20 of the Delhi Cooperative Societies Rules, 2007 is interpreted in the manner

indicated above. Result would be that petitioner would be entitled to the flat.

We are fortified in our view by the judgment of the Supreme Court in *DDA Vs. Jitender Pal Bhardwaj (2010) 1 SCC 146*. The observation made in paragraph 7 of the said judgment being apposite are extracted hereinafter:

“When a person acquires a flat in a multi-storeyed building, what he gets is co-ownership of the land on which the building is constructed and exclusive ownership/long-term lease of the residential flat. As per Clause i(ii), where the individual share in the land on which the building stands, held by the allottee is less than 65 sq. m, he is not barred from securing allotment from DDA. The other interpretation is that if the measurement of the flat is less than 65 sq. m and the allottee owns only an undivided share in the land, corresponding to such flat, the benefit of exemption would be available to the applicant.”

We may note that despite opportunities having been granted, respondent failed to bring on record its counter affidavit. It is, however, stated today that the matter can proceed without the counter affidavit.

The petitioner to submit the requisite documents within fifteen days. Respondent no.2/Society to process the case of the petitioner and forward it to the Registrar within two weeks thereafter. Registrar thereafter to process the case of the petitioner within one month from date of receipt of papers from the Society and to forward the names to the DDA for holding

draw of lots. DDA to hold draw of lots within fifteen days on intimation by the Registrar Cooperative Society.

The writ petition is allowed leaving the parties to bear their own costs.

CM No.5420/2011

In view of the disposal of writ petition, the application stands disposed of.

SANJAY KISHAN KAUL, J.

MAY 30, 2011
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RAJIV SHAKDHER, J.