

R-5.

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

+ **W.P.(C.) No. 1701/2012**

NEW ASHIANA COOPERATIVE GROUP
HOUSING SOCIETY LTD.

..... Petitioner

Through: Mr. Rakesh Munjal, Senior Advocate along
with Mr. Rakesh Kumar Dudeja, Advocate.

versus

RAJNI KAK & ORS.

..... Respondents

Through: Mr. Sumesh Dhawan, Ms. Vatsala Kak &
Ms. Ruhi, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER

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11.10.2012

1. Respondents No. 1 & 2 before us are members of the society occupying flats in the plot developed by the society bearing Plot No. 10, Sector-6, Dwarka, New Delhi – 110 075. The land was allotted by the Delhi Development Authority (DDA), on which the flats were constructed. The dispute inter se the parties pertains to the stilt car parking.

2. It is the case of respondents No. 1 & 2 that in terms of letter dated 29.09.1996, the decision of the General Body Meeting held on 25.02.1996 was communicated which, inter alia, had resolved that stilt area reserved car parking will be allotted to those members who will deposit a sum of

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Rs.60,000/- on first come-first serve basis. However, it appears that there were possibly sufficient funds available to the society at the relevant time even to cover the cost of stilt parking and, thus, as per the letter dated 09.12.1996, it was informed to the members that the cost of the HIG and MIG flats would be kept within the money demanded and even the cost of car parking under the stilt in the ground floor will be covered. This communication was issued in view of the Special General Body Meeting scheduled for 15.12.1996. The meeting was held and what was resolved was communicated vide letter dated 26.02.1997 in the same terms that no separate charges would be collected for stilt car parking and, thus, members who had deposited money to reserve the car parking were requested to indicate their willingness for adjustment of the amount towards construction/development deposits.

3. A Special General Body Meeting was scheduled to be held on 10.12.2006, for which a notice was issued on 21.11.2006. The agenda for the meeting was as under:

- (i) Confirmation of proceedings of the last General Body Meeting.
- (ii) Hurdle in obtaining completion certificate of the society.
- (iii) Confirmations and approval of audited account Report for the year 2005-2006.
- (iv) Any other matter with the permission of the chair.

4. When the meeting was held and the agenda pertaining to obtaining Completion Certificate for the society was taken up, the members were

informed that the DDA has taken a strong view of the inordinate delay to comply with the objections raised by them qua the Completion Certificate and had even threatened to cancel the provisional Occupancy Certificate. The most important objection raised by the DDA was regarding non-installation of the second lift in each block as per the sanctioned plan and also provided in the Building Bye-Laws and despite the undertaking given by the society, the needful had not been done. Thus, the General Body was asked to consider ways & means to raise funds for installation of lift, the anticipated expenditure for which was Rs.30 Lakhs. Two alternatives were suggested:

- (i) The amount to be shared by all members equally; and
- (ii) In terms of the opinion of some members in the last General Body Meeting experiencing difficulty in collection of such huge funds from each members, the parking rights in the stilt be given to members against some fixed amount to be deposited by the General Body.

5. There were 53 single and 24 double parking slots available in the stilt and after some discussion in the House, it was unanimously decided that the parking slots be allotted on first come-first serve basis against payment of Rs.30,000/- for a single parking slot and Rs.50,000/- for double parking slots with the instruction that a member could apply for one slot. Certain other restrictions were also placed including that if any slot remain unallotted, no one would be allowed to park their vehicle in such slots. These facts are recorded in the Proceedings Register of the meeting held on the said date.

The aforesaid gave rise to a grievance of respondents No. 1 & 2, who were of the opinion that since the cost of stilt parking was included in the cost of the flats, there can be no question of charging once again for these stilt parking.

6. We may hasten to, however, add that actual costs have not been recovered for stilt parking. As noticed aforesaid, the stilt parking was made available free within the cost of the flats.

7. Respondents No. 1 & 2, thus, invoked Section 70 of the Delhi Cooperative Societies Act, 2003, which application was taken up by the Deputy Registrar (Arbitration), who gave a decision on 15.11.2007. After noticing all the relevant facts, the Deputy Registrar (Arbitration) found that respondents No. 1 & 2 had not placed on record any application made for allotment of parking space to the Committee and had never raised question of parking policy of the society. Since the General Body Meeting held on 14.12.2006 has duly authorized the Managing Committee for installation of second lift, the respondents No. 1 & 2's case was found without merits and was rejected. While concluding that the application under Section 70 of the said Act was not maintainable, an observation was, however, made that the parking slots could not have been auctioned.

8. The respondents No. 1 & 2 aggrieved by this order preferred an appeal before the Delhi Cooperative Tribunal (DCT) under Section 112 of the said Act. The appeal was accepted with the direction for reference of the dispute to arbitration under Section 71 of the said Act vide an order

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dated 29.08.2008.

9. This order was further assailed by the society in C.M.(Main) 1175/2008 and the learned Single Judge of this Court set aside the order of the DCT dated 29.08.2008 and remanded the matter back for fresh adjudication by the Tribunal. It is thereafter that a fresh order has been passed by the Tribunal on 30.12.2011.

10. We may notice that as per the practice in almost all orders passed by the Tribunal at the relevant stage of time, after reproduction of appeal and reply, if any, conclusion was penned down in one paragraph, which reads as under:

“11.0 THE CONCLUSIONS AND THE FINDINGS OF THE BENCH

After considering all facts and circumstances of the case the appellants plea that in the interest justice to accept the appeal and set aside the order passed by the Deputy Registrar (Arb.) Sh. Satnam Singh dated 15.11.07 which is arbitrary and illegal in view of the fact that the issue touches constitution business and the society is directed to cancel the illegal allotments made by them and to form and formalize an equitable scheme for the said allotments so that maximum number/all the members shall be accommodated.. The argument that they are defaulter hence cannot be given parking space is totally illogical which is parking needs are linked to occupancy of the house. So long they have right to occupy the house the parking rights are inalienable and cannot be denied. The allotment arrangements are also look illogical that a few members are given double space than the others. This need close examination of their actual needs and proxy to house. No doubt the issue of charges who occupy extra more space for additional vehicle after satisfying every one's one space requirement, require to pay

more charges is logical after keeping one car space free. Therefore, considering all facts and circumstances, the society may allot parking space by consensus and if that is not achieved evolved an equitable policy and allot to all residents, if no agreement reach finally be allotted based on proxy cum lottery system and settle the issue in the spirit and objective of cooperation.

The impugned Resolution of the society which was approved by the order cum award dated 15.11.2007 is set aside."

11. A reading of the aforesaid order shows that it is not really a question of arbitrability of dispute which was examined but a final conclusion reached that the right over the parking space was inalienably linked to the enjoyment of the flat and, thus, parking space may be allotted by consensus, failing which an equitable policy may be adopted through a lottery system or otherwise. It is, thus, this order, which is now sought to be assailed in appeal by filing the present writ petition under Article 226 of the Constitution of India.

12. At the stage when the matter came up before this Court, a question was posed to learned counsel for the petitioner/society as to whether, while allotting the car parking offer had been made to all members in writing specifying the time period within which the option has to be exercised. This was more so since the issue of allotment of car parking was not specifically on the agenda of the General Body Meeting and was discussed under the heading "*The issue of obtaining Completion Certificate*". An affidavit was, thus, filed by the society affirmed on 27.03.2012 setting out the notices, which were sent to all members including respondents No. 1 & 2 with the acknowledgement receipts. Thus, when the matter was taken up on

28.03.2012, learned counsel for the parties including respondents No. 1 & 2 suggested that the appropriate method to resolve the controversy, acceptable to the parties, was to hold an Extraordinary General Body Meeting (EGM) where members of the society would have a chance to debate the whole issue as to how the members should resolve the controversy. We, thus, appointed an Observer at request of the parties for the EGM to be held. The EGM was held where members voted overwhelmingly for the present status to continue qua the car parking. It is, however, at that stage learned counsel for the respondents No. 1 & 2 pleaded that the decision of the EGM was not acceptable to them and we would contest the petition on merits.

13. We may note at the threshold that the object of the order passed on 28.03.2012, which was at the suggestion and consent of learned counsel for the parties, was to resolve the controversy. Once the EGM had resolved by overwhelming majority that the present arrangement should not be disturbed qua the stilt parking issue, the matter ought to have come to rest and it was not really open for respondents No. 1 & 2 to once again start pleading their case. It is not, as if, only in case of a favourable resolution acceptable to respondents No. 1 & 2, was the matter to come to an end.

14. Despite our view as reflected aforesaid, we have heard learned counsel for the parties even on the merits of the controversy.

15. In our view, the decision of the society cannot be faulted. It has to be kept in mind that while earlier an extra amount was to be charged for stilt parking, these charges were given up by the society possibly because at that stage funds were available and, thus, within the existing cost of the flat, the

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cost of stilt parking was also sought to be adjusted. However, subsequently the society was faced with the requirement of additional funds and was even faced with cancellation of provisional Occupancy Certificate issued by the DDA on the ground of certain infirmities, the major one being non-construction of the second lift for each block. In the General Body Meeting, clearly both these options were put forth, i.e., all members to contribute equitably, or such of the members who wanted a car parking in the slots to pay so that the funds for second lift could be financed. It was the own decision of the members that the second option would be better. The respondents No. 1 & 2 at no stage opted for the stilt car parking or to pay the amount towards it. It can't be that only the methodology favourable to respondents No. 1 & 2 should be followed, and it was the collective decision of all the members, which was binding on the respondents No. 1 & 2 as well.

16. It may also be added that there is no dispute or doubt that no money had, in fact, been specifically charged for the open car parking. Thus, really the premium was put on stilt car parking. The funds thus raised were to be utilized for the second lift. No specific allocation or reservation had been made earlier for the stilt parking slots, as no charges had been levied and one cannot say that the methodology adopted by the society for raising funds was illegal or irregular. This position, in fact, has been reiterated in the EGM called at the request of learned counsel for the parties after filing of the petition to resolve the issue, which overwhelmingly opined in favour of continuation of the present arrangement.

17. We are, thus, of the view that the impugned order of the DCT cannot

be sustained which held that the course of action adopted by the society was impermissible and only the lottery system could be allowed. It cannot be said that the stilt car parking is intrinsically linked to the enjoyment of the flat as open car parking has been made available to respondents No. 1 & 2. In fact, earlier even amounts were supposed to be charged from such persons, who wanted to purchase the rights of stilt car parking, which were actually not charged and not recovered and, thus, no one has paid for the stilt car parking.

18. The last aspect urged by learned counsel for the respondents No. 1 & 2 arises from the agreement entered into between the members of the society, where clauses 12 & 13 read as under:

“12. Without prejudice to the society’s right to allot appropriate parking areas to the members on an equitable manner it may consider appropriate as per the rules and regulations to be framed by the society, the stilted areas immediately falling under the plinth area of a particular block will be deemed to be the restricted common area of that block and all the apartment owners of that block shall remain to have exclusive undivided interest over it with respect to its usage for car parking etc. and nothing else. Use of the said space for storing of items or for any other activity is not permissible. Any manner other than this intended use by any apartment owner not having his apartment in the said block will be construed as trespassing and the society will have the right to remove such unauthorized encroachment at the risk and liability of such encroacher.

13. That it is expressly understood that no member/owner of any apartment in any particular block who the exclusive undivided interest as described in the aforesaid para on the restricted common area of a particular block shall be permitted to avail the facility of parking more than one car within that

restricted common area. However, parking outside the restricted common area will be permitted where no such obstruction for the free pathway to vehicles is caused by such parked cars. "

19. We fail to appreciate how the aforesaid come to the aid of respondents No. 1 & 2. Clause 12 begins with a non-obstante clause than what is set out in the latter part of clause is subject to the first part of the clause, i.e., without prejudice to the society's right to allot appropriate parking areas to the members on an equitable manner. We have already found that the methodology adopted by the society of charging a premium on stilt car parking, while making it one car parking available to each member, stilt or otherwise, cannot be faulted, especially as the society was in need of funds. It is also no restriction on the common area which would make clause 13 applicable.

20. We are, thus, of the view that the writ petition deserves to be allowed and the impugned order set aside, making the rule absolute. Ordered accordingly. The parties to bear their own costs.


SANJAY KISHAN KAUL, J.


VIPIN SANGHI, J.

OCTOBER 11, 2012
'BSR'

For
- RP 675/12 by P-2