

RESERVE JUDGMENT

Court No. - 7

Case :- WRIT - C No. - 1002512 of 2010

Petitioner :- Rajendra Kumar Gupta S/O Late J.K. Gupta

Respondent :- U.P. Cooperative Tribunal Indira Bhawan Lucknow

Counsel for Petitioner :- D.D. Chopra, Shailesh Verma

Counsel for Respondent :- R.K. Tiwari, Apoorva Tewari, B S Yadav, K S Pawar, N C Mehrotra, Nirankar Singh, Paavan Awasthi, Parmanand Ashthana, Piyush Mani Tripathi, Rakesh Kumar Chaudhary, Rakesh Srivastava, Rishad Murtaza G.A., Vijay Vikram Singh

Hon'ble Alok Mathur, J.

1. The brief facts of the case are that the petitioner enrolled as a member of respondent no. 2 Aasha Pushp Vihar cooperative housing society, had applied for Type 3 MIG flat in the said society. The petitioner had deposited the initial deposit and 8 installments before the date of draw. Subsequently the petitioner was allotted a flat numbered 11A, Block II, through the lottery system on 07.05.2000. The petitioner did not take possession of the flat since construction of the flat was not up to the mark and certain necessary repairs were required. He also requested for being given a flat on ground floor considering his health condition. Further, through a letter dated 12.11.2003, the petitioner had informed the secretary of the society that the flat was not handed over to him and further requested him to give possession of the flat within 15 days, but possession was not given to him.

2. Society released another list of allottees in 2004 and in the said list all the flats were renumbered. The petitioner claims that the flat allotted to petitioner earlier was renumbered as flat no. 78. On enquiry, the petitioner found out that the said flat was allotted to the opposite party no. 5 on 07.07.2002.

3. The petitioner had filed an arbitration case before the arbitrator who partly allowed his claim and directed the society to allot another flat to the petitioner after depositing the remaining amount. The petitioner being aggrieved by the award challenged the same before the U.P. Cooperative Tribunal. The Tribunal, while dismissing the appeal, upheld the award through the impugned order dated 30.12.2009 which has been challenged before this Court.

4. The petitioner being aggrieved by not handing over of the flat by the Aasha Pushp Vihar Sekhari Awas Samiti Ltd (hereinafter referred to as society) had invoked provisions of Section 70 Of the UP Cooperative Societies Act, 1965 for resolution of disputes through the process of arbitration and accordingly made an application to the Housing Commissioner/Registrar, Cooperative Housing Societies. The case of the petitioner was numbered as case No. 17210 of 2006.

5. In his claim/application the petitioner has stated that the petitioner had become a member of the said society, and a certificate in this regard was issued to him. He further made all the deposits within the time prescribed for being allotted a flat, and the said allotment was carried out on 07/05/2000 when the petitioner was allotted flat No. 11-A Category III block II. The letter of allotment was also annexed along with the application. All the details of the deposit made by the petitioner were also enclosed. It was submitted by him that despite all efforts, Society had failed to give the possession of the said flat to the petitioner, and in this regard he had also given notice to the Society on 01/09/2003. It was also mentioned that the Secretary of the Society had directed the employees by means of letter dated 09/09/2001 to hand over the keys of the said flat to the petitioner, but despite the said letter the possession of the flat was not handed over. In this regard complaint was also made to the housing Commissioner on 23/11/2004, 26/09/2005 and 10/03/2006, and in the aforesaid

circumstances had prayed for a direction to the society to hand over the possession of the flat which was allotted to the petitioner.

6. Respondent No. 5 to the present writ petition, the subsequent allottee of the flat has submitted that though he was made respondent no.1 in the arbitration proceedings but no allegations were made against him and also that no relief was sought from him.

7. In the arbitration proceedings before the Assistant Commissioner, Housing/Assistant Registrar notices were issued to the opposite parties and only opposite party no.5 appeared in the said proceedings and opposed the claim made by the petitioner. In his reply opposite party no.5 has stated that he had become a member of the Society on 22/03/2001 and was given membership number A-453. He had taken a loan from GIC Housing Finance Ltd, New Delhi for an amount of Rs. 4,50,000/-and thereafter on 28/07/2002 he was given the allotment of Flat No. 78, Block-II, Sector 14, Vasundra. From the date of possession he is living in the said Flat and has also obtaining electrical connection and is paying house tax to the Nagar Nigam.

8. The Tribunal has returned a finding that from examination of the evidence adduced by the petitioner it was established that he had deposited an amount of Rs.04,68,353/- and was allotted Flat No. 11 – A Category III Block 2. It had not accepted the contention of the petitioner that the said flat had been renumbered as Flat No. 78 as no evidence in this regard was adduced by him. Respondent No. 5 had deposited the full consideration of the said flat against which he was allotted Flat No. 78. A finding was also returned that respondent No. 5 had not purchased the said flat malafidely and in fact his purchase was bonafide for adequate consideration, and accordingly the claim of the petitioner was partially allowed directing the society to make available a flat to the petitioner and if required seek further consideration from the petitioner. Further the petitioner and the

Society were restrained from interfering in the peaceful possession of respondent No. 5.

9. The petitioner being aggrieved by the order of the Assistant Registrar dated 22/06/2007 preferred an appeal before the U.P Cooperative Tribunal. It is for the first time, in paragraph 10 of the appeal it was stated that the Society had changed number of the Flat 11 – A and renumbered it as Flat No. 78. It was also pleaded that Flat 11 - A has been allotted to respondent No. 5 without cancellation of allotment of the petitioner and accordingly the said re-allotment was illegal. Before the Tribunal it was prayed that the award dated 22/06/2007 be set aside and respondent no. 5 be directed to hand over the possession of Flat No. 11 – A (renumbered as Flat No. 78) to the petitioner and to quash the allotment made in favour of respondent no. 5.

10. The Tribunal by means of the order dated 30/12/2009 dismissed the appeal holding that there was no doubt that the petitioner was a member of the Society and had also paid due consideration of the flat which was allotted by the society in his favour. They were of the view that in the aforesaid circumstances there was no doubt that the Society was bound to give a flat to the petitioner, and by not giving possession of the flat the Society has acted arbitrarily and fraudulently and were of the view that there is no infirmity in the direction given in the award, where the arbitrator had directed the Society to allot a flat in favour of the petitioner. It rejected the prayer made by the petitioner that they may be given the Flat No. 78, inasmuch as no such prayer was made in the claim before the Arbitrator nor any averment was made by the petitioner to the effect that respondent no. 5 had prior knowledge that the flat was previously allotted in favour of the petitioner and despite the same he purchased the said flat. The Tribunal was of the view that no such directions as prayed for by the petitioner could be passed against respondent no. 5, inasmuch as he

was bonafide purchaser for value and was in possession of the said flat and had also taken electricity connection and was paying taxes.

11. In the present writ petition the petitioner has challenged the order dated 22/06/2007 passed by Assistant Registrar in the arbitration proceedings as well as the order dated 30/12/2009 passed by the U.P Cooperative Tribunal.

12. During the pendency of the aforesaid writ petition this Court had directed The Registrar of Cooperative Housing Society to conduct an enquiry into the matter through a responsible officer and to submit its report to the Court. An affidavit of compliance was filed along with an affidavit of one Hari Narain, Cooperative Housing Officer according to which the allotment was made in favour of the petitioner on 07/05/2000, while the allotment was made in favour of respondent no. 5 on 28/07/2002. It was stated that no documents pertaining to re-allotment of the said flat were available. A new list of renumbered flat was issued on 12/09/2004 where the name of the petitioner was missing while respondent no. 5 was shown to have allotted the Flat No. 78. It had also been stated that there was no material indicating that the flat of the petitioner had been cancelled prior to its allotment to respondent no. 5 and lastly that Flat No. 11-A is the same flat which has been the renumbered Flat No. 78 and allotted to respondent no. 5.

13. A short counter affidavit has also been filed on behalf of opposite party No. 3 namely Badri Das Bansal who was elected as the President of the Society in July/August 2000 and held the said post till July 2005. He submitted that one K.L. Kadamb worked as Secretary of the Society till October 2003. According to him on 09/09/2001 an employee of the Society was directed to hand over the keys of Flat 11-A to the petitioner but since the petitioner was not satisfied with the size and the floor of the flat and therefore declined to take possession. This fact is also corroborated from paragraph 13 of the writ petition

where the petitioner himself has stated that he declined to take possession of the said flat. According to Mr Bansal the petitioner wanted some other flat of bigger size preferably on the ground floor and the Secretary of the society Mr Kadamb had given an assurance to the petitioner that whenever any other flat becomes available it shall be given to him. He has further stated that from 2001 to 2003 the petitioner never raised any grievance and this was the period during which Mr Kadamb was the Secretary of the Society. He has denied that the alleged notices sent by the petitioner was ever received in the office of the Society and also denied the signatures of receipt, and the seal of the Society affixed on the receipt of the said letters which according to him are false and fabricated. The election of the Society were held in February 2006 and it is only subsequently that the petitioner preferred a complaint to the Housing Commissioner and also referred the matter for arbitration. He has further submitted that some irregularities were committed by the Committee elected in 2006 as number of flats were allotted to new members despite the fact that the old members were on the waiting list and the erstwhile Secretary Mr Kadamb had made a complaint to the Housing Commissioner in this regard.

14. Sri DD Chopra Senior Advocate appearing on behalf of the petitioner submitted the petitioner had deposited the entire sale consideration of the flat, and he was in fact allotted the flat on 07/05/2000 and was also offered the possession of the flat, but due to certain deficiencies he has not taken possession of the flat. He submitted that the Society should have removed the deficiencies prior to handing over the possession of the flat to the petitioner which they have failed to do and accordingly the Society should be directed to hand over the flat of the petitioner. He submitted that Flat No. 11-A was subsequently allotted to respondent were 5. It was vehemently submitted that without cancellation of the flat allotted to the

petitioner, subsequent allotment made in favour of respondent no. 5 was illegal, arbitrary and the Society has acted in collusion with the respondent no. 5 and accordingly sought interference of this Court in the impugned orders.

15. The writ petition has been vehemently opposed by the respondents. It has been submitted that there is a concurrent finding of fact by both the authorities below that respondent no. 5 is a bonafide purchase for consideration and has been in possession since 28/07/2002 and after such a long time his possession cannot be disturbed. It was further urged that the petitioner himself has abandoned his claim, when he refused to take possession of the said flat and did not make any efforts in the interregnum period and complaint was made only in 2006 to the Housing Commissioner. It was further submitted that the petitioner has not made any claim against the respondent No. 5 before the arbitrator in the proceedings under Section 70 of the U.P Cooperative Societies Act, and there was no mention of the fact as to whether Flat No. 11-A was renumbered as Flat No. 78. He further submitted that no evidence in this regard has been filed by the petitioner, and even in the enquiry report submitted by the Registrar, Cooperative Housing, the finding in this regard has been made without there being any available evidence and accordingly the said finding is perverse and cannot be relied upon. He submitted that the grievance of the petitioner, if any, is against the Society, and this was the stand of the petitioner in the complaint filed by him, on which the arbitration proceedings were initiated, and now he cannot change his stand and seek remedy against the respondent no. 5, against whom no relief was sought by him and accordingly prayed for dismissal of the writ petition.

16. This Court had considered the rival submissions as well as perused the record. Consideration in the present writ petition is with regard to the main relief sought by the petitioner which is in regard to

cancellation of allotment of Flat number 11-A renumbered as Flat no. 78 in favour of respondent no. 5 and a direction to the Society to hand over possession of the said flat in favour of the petitioner.

17. A perusal of the claim filed by the petitioner before the Housing Commissioner under Section 70 of the U.P. Cooperative Societies Act, 1965 would indicate that the opposite party no. 5 had been made a party but there were no pleadings, and even the prayer was limited to a direction to the Society to hand over the possession of the flat to the petitioner. His claim was allowed and the Society was directed to hand over any available flat to the petitioner.

18. The petitioner was aggrieved by the award dated 22/06/2007 and accordingly filed an appeal before the UP Cooperative Tribunal. It is in the appeal that for the first time averment was made by him with regard the fact that the Society had changed the number of Flat No. 11 A as Flat No. 78. Though the said averment was made by him but no evidence in this regard was adduced by him. It is in the appeal that he made categorical allegations against the respondent no. 5. The Tribunal rejected the appeal preferred by the petitioner, holding that respondent no. 5 was bonafide purchaser for value without notice, and there was no allegation with regard to collusion between respondent no. 5 and the office bearers of the Society, no evidence in this regard was even submitted by the petitioner. It further held that no prayer was made by him in his claim before the arbitrator for cancellation of allotment of respondent no. 5, and found no infirmity in the award dated 22/06/2007.

19. This Court after carefully considering the rival contentions and the pleadings, is of the considered view that there is no infirmity in the award passed by the Tribunal for the following reasons:-

A. The claim is initially made by the petitioner before the arbitrator in proceedings before the Tribunal under Section 70 of the UP Cooperative Societies Act, 1965, where the prayer was limited against

the Society for handing over the flat allotted to the petitioner. Despite the fact that opposite party no. 5 was made a party in the said claim, but there were no pleadings that Flat No. 11 A had been allotted to respondent no. 5. There were no pleadings that allotment to respondent no. 5 was illegal and arbitrary. In absence of pleadings and without there being any prayer in this regard, the claim could not have been allowed in the terms sought by the petitioner.

B. Even though the petitioner did not adduce any evidence with regard to the fact that Flat No. 11 A was renumbered as Flat No. 78, but in the enquiry conducted by Cooperative Housing Officer a finding has been returned that both the flats are the same. This Court has gone through the entire enquiry report and finds that the enquiry officer has stated that the documents pertaining to the allotment of the flat of respondent no.5 were not available, and therefore we do not find any basis for returning the finding that Flat number 11 A and Flat No. 78 are one and the same, and accordingly in absence of any credible evidence in this regard the prayer made by the petitioner that he be handed over Flat No. 78 by canceling allotment of respondent, cannot be allowed.

C. Both the authorities below have returned a concurrent finding of fact that the Society has in fact taken the consideration for the flat, but have not handed over the said flat to the petitioner which is illegal and arbitrary and accordingly the arbitrator had partially allowed the claim of the petitioner directing the Society to hand over an alternative flat to the petitioner. The direction that Flat no. 11A be handed over to the petitioner cannot be passed, considering the fact that all the flats in the Society had been renumbered on 12/09/2004 and a list was issued wherein the name of the petitioner was missing and respondent no. 5 was shown to have been allotted Flat No. 78. As discussed above in absence of any cogent evidence that Flat no.78 was in fact Flat

number 11-A allotted previously to the petitioner, no such directions can be given.

D. Even on the grounds of equity, the prayer as made by the petitioner for being handed over the possession of Flat No. 78 cannot be granted in light of the facts which have come on record. The petitioner himself has stated that the Secretary of the Society had directed its employee Naresh to hand over the keys of Flat number 11-A, but the petitioner refused to accept the same stating that the flat was not up to the mark and the construction was not as per the plans, accordingly in September 2001 admittedly the petitioner himself refused to accept the possession of the house. The petitioner did nothing between 2001 and 2006 to take possession of the house. For a period of 5 years between 2001 and 2006 he has mainly written 3 letters all of which have been denied by the Society stating that they have not been received, and also that the signatures on receipt of the Society was forged.

20. Aforesaid facts indicate that conduct of the petitioner himself has not been above board where firstly, he admittedly has refused to accept the possession of the flat when the same was offered to him in 2001 and subsequently, he did not approach any forum or Court for redressal of his grievance till 2006 when he made an application under before the Housing Commissioner, U.P. Lucknow. There seem to be credence in the affidavit filed by the former President of the Society Sri Badri Das Bansal who has stated that there was some arrangement between the petitioner and erstwhile Secretary Sri Kadamb that petitioner would be allotted bigger flat on convenient floor as and when same would be available. It seems that it is for this reason till Mr. Kadamb was Secretary of the Society, the petitioner did not raise any grievance before any forum or Court. Accordingly, it cannot be denied that petitioner has himself abandoned his claim regarding Flat No. 11-A and facts on record also seem to confirm the facts disclosed

by Sri Bansal. Accordingly, on this count also claim of petitioner for handing over possession of Flat No. 11-A cannot be allowed.

21. Lastly, considering the entire conspectus of the facts there is no doubt that the respondent – Society has acted in most illegal, arbitrary and fraudulent manner with the petitioner, where they have accepted full sale consideration of the flat but have failed to provide alternative accommodation. This Court was informed that no other flat is available in the Society and accordingly only relief which can be granted to the petitioner is refund of the consideration deposited by him with the Society alongwith interest.

22. This Court also does not find any infirmity in the impugned orders dated 22.06.2007 and 30.12.2009 and accordingly finds no reason to interfere with the same.

23. Accordingly, for the aforesaid reasons, the writ petition is **dismissed**.

24. However, it is provided that the Society shall refund the amount of Rs.04,68,353/- alongwith interest at the rate of 6% per annum till the date of payment. To secure the aforesaid amount the petitioner will also be at liberty to initiate execution proceedings before the appropriate Court/forum and the executing Court will be at liberty to attach and sell any movable or immovable asset of the Society for satisfying the claim of the petitioner.

Order Date :- 21.09.2024

A. Verma

(Alok Mathur, J.)