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

\+ **WRIT PETITION (CIVIL) No. 8435/2005**

Reserved on: 14th July, 2016

% **Date of Decision:** 14th September**,** 2016

RITU SAHU JAIN ....Petitioner

Through Mr. Jayant K. Mehta & Mr. Anshuman Sahni, Advocates.

Versus

ASHOK SARDANA AND OTHERS .....Respondents

Through Mr. C. Mohan Rao & Mr. Lokesh Kumar Sharma, Advocates for respondent No. 1 along with respondent No. 1 in person.

Ms. Rushi Jain, Advocate for respondent-UOI.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE SUNITA GUPTA

SANJIV KHANNA, J.

Ritu Sahu Jain, the petitioner in this writ petition, impugns the order dated 12th April, 2005 passed by the Financial Commissioner holding that she was disqualified from being a member of the Nav Sansad Vihar Cooperative Group Housing Society Limited (Cooperative Society, for short) under Rule 25 of the Delhi Cooperative Societies Rules, 1973 (Rules, for short) as she was the owner of 1000 square metres of land in the extended village *abadi* in the village Kapashera, New Delhi.

2. The contentions raised by the petitioner are as under:-

(i) Rule 25 being a disabling provision should be strictly interpreted. Rule 25(1)(C)(i) of the Rules was not violated as the petitioner did not own any residential house or plot of land for construction of a residential house.

(ii) The Financial Commissioner erroneously reversed the finding of the Registrar, Cooperative Societies that 1000 square metres of land in the extended abadi area of village Kapashera was non-residential land. The Financial Commissioner ignored and did not appreciate the fact that a godown had been constructed on the land and was rented out for commercial purposes in the year 1995-96 to M/s Emery Worldwide, Singapore.

(iii) The Financial Commissioner, in reversing the factual findings of the Registrar, Cooperative Societies, had exceeded the revisional power conferred under Section 80 of the Delhi Cooperative Societies Act, 1972 (Act, for short). The distinction between the revisional and appellate power is striking but has been overlooked.

(iv) The Lieutenant Governor and not the Financial Commissioner could have exercised revisional power under Section 80 of the Act. The Lieutenant Governor can s*uo motu,* or on an application by a party, call for and examine the records of the proceedings before the Registrar of Cooperative Societies. Ergo, the order of the Financial

Commissioner under Section 80 of the Act is void ab initio for lack of authority.

3. The present writ petition was allowed by the judgment dated 8th February, 2011, recording that the Financial Commissioner had failed to discuss, much less decide, the foremost contention relating to his authority. The revisional power under Section 80 of the Act which stands vested in the Lieutenant Governor of the Union Territory of Delhi was erroneously exercised by the Financial Commissioner. The power and jurisdiction of the Financial Commissioner as an appellate authority was restricted to Section 76 of the Act. Therefore, the revision petition preferred before the Financial Commissioner by Ashok Sardana, the respondent No. 1 herein, was not maintainable.

4. This order dated 8th February, 2011, was, however, reviewed and recalled vide order dated 27th February, 2015 after referring to Section 3 (1A) of the Delhi (Delegation of Powers) (Amendment) Bill, 1994, as per which the power under Section 80 of the Delhi Cooperative Societies Act, 1972 stands delegated to the Financial Commissioner. The recall order records that the issue raised in the review petition was germane and yet was not addressed at the time of disposal of the writ petition. The review petition, therefore, was allowed and the writ petition was directed to be listed before the roster bench.

5. Section 3 of the Delhi (Delegation of Powers) Act, 1964 states that any power, authority or jurisdiction or any duty which the Administrator may exercise or discharge by or under the provision of any enactment mentioned in column 1 of the Schedule, may also be exercised or discharged by (a) any officer or authority mentioned in relation thereto in Column 2 of the Schedule and (b) any other officer or authority as may be specified in this behalf by the Central Government by notification in the official gazette. Section 3 of the 1964 Act was amended by the Delhi (Delegation of Powers) (Amendment) Act, 1994, and sub-section (1A) was inserted. The Schedule was also amended and by way of an addition at serial No.6, the following was inserted:-

"

Delhi Local Laws **THE SCHEDULE** (See Section 3)			
	Name of enactment	Provisions vesting powers powers in the Administrator exercise the powers	Officer of authority who may also
6.	Delhi Co-operative Societies Act, 1972 (No. 35 of 1972).	Sections 31(7), 76(2)(b) & (c) and Section 80	Financial Commissioner

"

6. It is clear from the aforesaid amendment that the power under Section 80 of the Act which vests with the Lieutenant Governor, i.e., the Administrator, could henceforth, also be exercised by the Financial Commissioner. This being the legal position, the petitioner's challenge to the authority of the Financial Commissioner to adjudicate the revision petition and pass an order under Section 80 of the Act, would fail and has to be rejected. This was also the apparent reason why the petitioner had not pressed or raised this contention when the revision petition was heard and decided by the Financial Commissioner.

7. Faced with the said legal position, learned counsel for the petitioner had submitted that the Delhi (Delegation of Powers) (Amendment) Act, 1994, passed by the Legislative Assembly of the Government of National Capital Territory of Delhi, by which Sub-section 1A to Section 3 was amended and serial No. 6 was added to the Schedule, was invalid and unconstitutional for the said Legislative Assembly lacked the authority and power to amend the Central legislation, i.e. the Delhi (Delegation of Powers) Act, 1964 which was enacted by the Parliament. We would not examine the said contention for the simple reason that the validity of Sub-section 1A to Section 3 and the insertions made to the Schedule of the Delhi (Delegation of Powers) Act, 1964 by the Delhi (Delegation of Powers) (Amendment) Act, 1994 is not an issue or contention raised in the

present writ petition. The petitioner has not challenged the constitutional validity of the Delhi (Delegation of Powers) (Amendment) Act, 1994 consequent to which the amendments were made. The inserted provisions are also not challenged. The constitutional validity of a provision cannot be examined and gone into without there being any specific pleadings and a prayer to the said effect. Therefore, in the given circumstances, the writ petition has to be decided on the basis of the statute as it exists.

8. This brings us to the core issue i.e. whether there was a violation of Rule 25(1)(C)(i) of the Rules. The relevant portion of Rule 25 reads as under:-

> "**25. Disqualification of Membership**
>
> 1. No person shall be eligible for admission as a member of a co-operative society if he...
>
> (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."

The Rule, in plain and simple words, states that a person is not eligible for admission as a member, and would also suffer disqualification and cease to be a member, if he owns a residential house or a plot of land for construction of a residential house in any approved or unapproved colony or other localities in the National Capital Territory of Delhi, either in his name or in the name of his spouse or any of his dependent children. In the present case, we are concerned with the question whether the petitioner was the owner of a residential house or a plot of land for construction of a residential house and had, therefore, suffered the disqualification.

9. It is an accepted and admitted position that the petitioner had, vide sale deed dated 5th July, 1989, purchased 1000 square metres of land in the village Kapashera. The sale deed dated 5th July, 1989 describes the said plot of land plot No.139/140, village Kapashera, as an agricultural land on which there was no poultry farm, warehouse, cattle or raising of grass. The land was within the extended *lal dora* or *abadi* of the village Kapashera. After the said purchase vide sale deed dated 5th July, 1989, the petitioner had made an application for enrolment as a member of the Nav Sansad Vihar Cooperative Society, and was thereupon enrolled as a member on 25th January, 1995. On 6th May, 2003, a complaint was made against the petitioner before the Registrar, Cooperative Societies questioning the grant of membership to the petitioner on account of violation of Rule 25(1)(C)(i) of the Rules. Pursuant to the complaint, the Registrar, Cooperative Societies appointed the Inspecting officer to inquire into the matter and on receiving the report of the Inspecting Officer, the show cause notice dated

1st July, 2003, was issued by the Registrar, Cooperative Societies as to why the petitioner's membership should not be cancelled. The petitioner replied vide letter dated 5th August, 2003, inter alia, accepting that a building was raised by her on the extended *lal dora* land in 1996, but contended that the commercial building so constructed was leased out on a monthly rent of Rs.1,21,500/- vide lease deed dated 1st August, 1996 to M/s Emery Worldwide Singapore for a period of three years.

10. A copy of the Lease deed placed on record mentions that the built up area was 9000 square feet. Regarding the usage, the lease is not specific and merely states the lessee had agreed to use the premises for its own activities only. The building plan was annexed but the same has not been produced and brought on record.

11. The petitioner relied upon the certificate dated 5th December, 1999 issued by M/s Emery Worldwide Singapore that an area measuring 2225 square feet was being used as a godown (commercial) in the building bearing No. 139/140, Kapashera, New Delhi-110037.

12. The Registrar, Cooperative Societies by his order dated 6th November, 2003 discharged the show cause notice, and accepted the defence of the petitioner, inter alia, recording as under:-

> "In response to the above said Show Cause Notice, Shri J.N. Gupta, Advocate appeared on behalf of the

respondent. During the course of proceedings, the counsel of the respondent filed a detailed reply to the Show Cause Notice with supporting documents, which inter alia, includes as under:-

1) That the member had purchased agricultural land, within extended Laldora of Village Kapashera, bearing Khasra/Kaymi No.139/140, in the year 1989.

2) That a warehouse was constructed on the land for commercial use in the year 1995-96, in pursuance to execution of lease agreement dated 1-8-96 with M/s Emery World Wide, Singapore, for providing a built up area of 9000 sq. ft. to the lessee on monthly rent for use as Godown-cum-Office.

3) That the said premises is commercial and the same is being used for the commercial purpose, as the commercial activity is permissible in extended Laldora.

4) The rental income from the said premises is being reflected in the income tax returns.

5) That the commercial rates are being charges for the electric connection at the premises.

The Secretary of the Society also filed the reply to the Show Cause Notice, which endorsed the stand taken by the member and it was stated therein that there is no violation of Rule 25 of DCS Rules, 1973 by the member.

I have gone through the reply filed by the respondent member as well as the Society, the material placed on record and also heard the oral arguments. The respondent has given sufficient evidence to prove that the property owned by her is a commercial unit. Moreover, the Secretary of the Society has also confirmed that there is no violation of Rule 25 of DCS Rules, 1973 by the member. Thus, I hold that there is no violation of Rule 25 of DCS Rules, 1973 in the instant case.

In view of the facts stated above, I, N. Diwakar, Registrar, Co-operative Societies, Govt. of NCT of Delhi, hereby withdraw the show cause notice dated 1-

> 7-2003 issued to Mrs. Ritu Sahu Jain, a member of the Nav Sansad Vihar CGHS Ltd., membership No. 449, under rule 25 of DCS Rules, 1973, with immediate effect."

13. Mr. Ashok Sardana, respondent No. 1 herein, then filed a revision petition under Section 80 of the Act, which was heard and disposed of by the impugned order passed by the Financial Commissioner. The Financial Commissioner has held as under:-

> "5. The counsel for the petitioner stated that there was only one limited issue viz., whether lal dora land is residential or commercial property. He stated that the respondent no. 2 owned plot no. 139-140, Kapashera, New Delhi which is in the extended lal dora. He stated further that this fact has also been admitted by the respondent no. 2 in the reply to the notice dt. 1.7.03 issued by the RCS. He also drew attention to a copy of the lease agreement entered into between respondent no. 2 and Emery World Wide, Singapore wherein it has been stated that the respondent no. 2 is the exclusive owner of land/building/apartment/godown at plot no.139-140, Kapashera, New Delhi. Hence, according to him it was established beyond doubt that the respondent no. 2 owned an apartment at Kapashera. The counsel for the petitioner also drew attention to the order no.TP/61/683/04 dt. 3.2.04 issued by the Commissioner, MCD wherein it has been clarified as under:-
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>> "Lal Dora is basically the abadi, the residential area, where the land owners of agricultural land around, dwell. The extension of the Lal Dora is also meant for meeting the residential needs of the land owners. Any activity contrary to above, cannot be regarded as permissible activity in the Lal Dora."
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> It has further been stated therein as under:-

"It is further clarified that only a building, residential in character, and not going beyond 2-1/2 storeys and owned by the original resident/his descendant is to be permitted. Any other building in Lal Dora/extended Lal Dora requires prior approval and sanction of the Building Plans from the Municipal Corporation of Delhi, as per the provisions of MPD-2001, Zonal Plan and Building Bye-laws."

6. In view of this fact, the counsel for the petitioner stated that it was clearly established that the respondent no. 2 had land in extended abadi, that was meant for residential purpose and that she owned an apartment there. Hence, she was disqualified to become a member of the respondent no. 3, society as provided under rule 25 of the DCS Rules, 1973. Hence, he requested that the impugned order be set aside and the membership of the respondent no. 2 of the respondent no. 3 be ceased.

7. The counsel for the respondent no. 2 contended that a per section 80 of the DCS Act, the Lt. Governor may suo moto or on application of a party to a reference call for and examine the record ……… . Since the petitioner was not a party before the Registrar, Cooperative Societies, he has no locus standi to file the present revision petition. He also contended that that as per Rule 25(4) of the DCS Rule, 1973, the question as to whether a member has incurred a disqualification referred to in sub rule (i) of Rule 25 is to be considered by the Registrar and that his decision shall be final and binding on all concerned. He, therefore, contended that the petitioner has no right to challenge the decision of the RCS. The counsel for the respondent no.2 stated further that the respondent no.2 had purchased agricultural land within extended lal dora of village Kapashera in 1989 and construction of a warehouse for commercial purposes was done thereon in the year 1995-96. The same was let out to M/s Emery Worldwide, Singapore. He contended that the premises were commercial in nature and were being used for the same purpose. He also contended that commercial activity within the lal dora was legally permissible. He also mentioned about the highest commercial rate bing

paid for electricity in the said premises in support of his contention that the property was commercial in nature.

8. I have carefully considered the submissions made by both the counsels. In view of the admission by the counsel for the respondent no.2 as well as the lease agreement produced by the counsel for the petitioner, it is established beyond doubt that the respondent no.2 owns 1000 sq. mtrs. land in the extended abadi area in the village Kapashera, New Delhi. It is also firmly established in view of the order of the Commissioner, MCD dt. 3.2.04 that land in extended lal dora is meant for residential purposes and that the respondent no.2 besides owning a godown also owned an apartment constructed on the land in question. In short, it is clearly established that the respondent no.2 owns a residential plot of land and an apartment thereon. Mere existence of a commercial property on the land in question and the same having being let out for commercial purposes and commercial rates of electricity being paid do not make the land commercial. actually that is unauthorized as is clearly shown in the order dt. 3.2.04 of the Commissioner, MCD. Further, the contention of the counsel for the respondent no.2 that the petitioner has no locus standi to file this petition as he was not a party before the lower court is not tenable as even suo moto action could be initiated by the Financial Commissioner. Further, I also find that the complainant in the case before the Registrar, Cooperative Societies was never given an opportunity of putting forth evidence that he had against the respondent no.2. Had such opportunity been given, perhaps the truth could have come out and helped the RCS take a proper decision in the matter.

9. Rule 25(1)(C)(i) reads as under"-

" No person shall be eligible for admission as a member of a cooperative society if he

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 that (sic) 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."

10. As the respondent no. 2 clearly owns residential land and an apartment thereon, she is not eligible to be a member of a Cooperative Society.

11. In view of the above, I set aside the impugned order passed by the RCS and allow the petition. I also hold that the respondent no. 2 is disqualified to be a member of the respondent no. 3 society."

14. Rule 25(1)(C)(i), as noticed above stipulates that a person would not be eligible for membership of a cooperative society if he owns a residential house or a plot of land for construction of a residential house, either in his own name, or in the name of his spouse or dependent children. The petitioner certainly did not own a residential house but was the owner of a plot of land located in extended *lal dora* of village Kapashera, measuring 1000 square meters. The use of the expression "a plot of land for construction of a residential house" in the aforesaid clause of Rule 25 would mean, and in simple language refers to, land on which a residential house was/is intended to be or could be constructed as per law. Residential

buildings can be constructed in the *lal dora* and extended *lal dora.* (see ***Municipal Corporation of Delhi versus Dalmia Dairy Industries Ltd. and Anr***, (1987) 32 DLT 390 (DB) , ***Municipal Corporation of Delhi versus Dalmia Industries Pvt. Ltd.*** (2002) 62 DRJ 1 (FB) and order dated 23rd August 2004 in CM No. 6904/2004 in Writ Petition (C) No. 2710/1998, ***B.L. Wadhera versus Government of NCT of Delhi & Ors***.) The petitioner does not dispute the said position or that the petitioner could have constructed a residential building on the plot of land in question, after the same was purchased vide sale deed dated 5th July, 1989. The petitioner claims that a commercial building and not a residential house was constructed on the plot of land in question and, therefore, the disqualification under Rule 25(1)(C)(i) is not attracted.

15. The date on which construction had begun, is significant in the present case, for the petitioner was enrolled as a member of the cooperative society on 25th January, 1995. If on the said date, a residential building had or could have been constructed on the plot bearing No. 139/140, the bar and prohibition under Rule 25(1)(C)(i) quoted above would be attracted. On the other hand, if on the said date, a commercial building had been built or was under construction, the position may have been different and the matter would have required further consideration and interpretation of Rule 25(1)(C)(i) of the Rules. This is not required in the present case.

Regarding the construction on the plot of land in the extended *lal dora*, the date on which the construction began in not on record. The petitioner has also not filed the site plan of the construction as it existed on the plot of land on 25th January, 1995, to show and establish that the building so constructed could not have been used for residential purposes. Orally, it was stated that the construction was made sometime in 1995-96. The assertion is unsupported and not verifiable in the absence of any documentary or other evidence. As per the certificate dated 5th December, 1999 an area measuring 2225 square feet was then being used as a godown (commercial). Pertinently, the lease deed dated 1st August, 1996 refers to built up area leased out as 9000 square feet.

16. Once it had been established and accepted that the petitioner was the owner of 1000 square meters of land in extended *lal dora* area, then the onus was on the petitioner to show that she had not incurred the disqualification. The petitioner should have produced exculpatory evidence and not withheld the relevant material. The petitioner was aware of the facts and had the evidence. As is apparent, the petitioner has withheld the evidence and did not make any categorical and assertive statements before the authorities. Failure of the petitioner to produce relevant evidence would thus, in the given circumstances, lead to an adverse inference being drawn.

17. As noted above, the petitioner had acquired membership of the Cooperative Society subsequently on 25th January, 1995. For acquiring the membership of the Cooperative Society, the petitioner was required to furnish an affidavit affirming that she had not incurred the aforesaid disqualification at the relevant point of time. In the present case, on examining the entire gamut of evidence and material placed on record, we have to agree with the Financial Commissioner that the petitioner was disqualified from being enrolled as a member or continuing as a member at the initial stage itself under Rule 25 (1)(C)(i) of the Rules. The contention of the petitioner that Rule 25(1)(C)(i) should be strictly interpreted though acceptable, does not warrant reading of the plain and simple language of the Rule in a manner such as to obliterate the provisions and make the said Rule redundant. We have strictly construed Rule 25(1)(C)(i) and inspite of the said construction, have to hold that the petitioner has incurred disqualification under the said Rule and had ceased to be or was rather ineligible to be a member of the Cooperative Society. No other conclusion is possible.

18. The contention of the petitioner that the Registrar, Cooperative Societies having passed a cogent and reasoned order, the same could not have been interfered with or set aside by the Financial Commissioner in exercise of the power of revision under Section 80 of the Act, is misconceived. We have quoted the relevant portion of the order passed by

the Registrar, Cooperative Societies, which, in the first paragraph records the contention raised by the petitioner herein and accepts that the petitioner had purchased agricultural land within the extended *lal dora* in the year 1989. Thereafter, it records that the petitioner had claimed that a warehouse was constructed on the said land in the year 1995-96 and a lease deed was executed on 1st August, 1996 and the built up area of 9000 square feet was given on lease to a third party. The Registrar had thus recorded the contention of the petitioner that the premises were being used for commercial purpose as godown-cum-office and income of the premises was reflected in the income tax returns of the petitioner. Further, commercial rates were being charged for the electricity connection (The electricity bill enclosed with the writ petition would show that it was a domestic connection and misuse charges were being levied. Thus, the petitioner had initially applied for and secured a domestic connection). The Registrar, Cooperative Societies after noting the contentions of the petitioner, did not elucidate any reason or ground, but proceeded to record his conclusion that the property owned, i.e., the land in the extended *lal dora* owned by the petitioner was a commercial unit. The reason and basis for recording the finding arrived at, with reference to the date on which the petitioner had applied for membership and enrolled as a member, was not indicated, elucidated or disclosed. The succeeding paragraph records that the Secretary of the Society had confirmed that there was no violation of Rule 25(1)(C)(i) of the Rules. This cannot be a ground or reason to decide the controversy whether or not Rule 25(1)(C)(i) was violated. Opinion formed by the Secretary of the Society was ardently relied on and formed the basis and foundation of the order. This opinion of the Secretary of the Society was not infallible. The Registrar had in fact erred in failing to examine the core issue in the matter. The reasoning given by the Secretary of the Society was not determinative and no finality could be attached to it.

In these circumstances, it cannot be said that the Financial Commissioner had erred and faulted in exercising the revisional jurisdiction under Section 80 of the Act. The Financial Commissioner has elucidated and rightly stated that *lal dora* land was an abadi and residential area where the land owners of the agricultural land dwell. Extension of *lal dora* is also meant for meeting the residential needs. On this basis, he has observed and rightly held that the land in question was meant for a residential purpose and, therefore, the petitioner was disqualified under Rule 25(1)(C)(i) of the Rules.

19. In view of the above, we do not find any merit in the present writ petition and the same is dismissed. There will be no order as to costs.

-sd-
(SANJIV KHANNA)
JUDGE

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(SUNITA GUPTA)
JUDGE

SEPTEMBER 14, 2016
VKR