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

+ **W.P.(C) 3087/2014**

Date of decision: 21st September, 2016

SURAKSHA SADAN C.G.H.S. LTD. Petitioner
Through Mr. R.K. Gupta, Advocate.

versus

REGISTRAR, COOP. SOCIETIES & ORS. Respondents
Through Mr. Santosh Kumar Tripathi, ASC,
GNCTD.
Mr. Rajiv Nanda, Advocate for R-4.

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

SANJIV KHANNA, J. (ORAL)

The petitioner-Suraksha Sadan Cooperative Group Housing Society Ltd. in this writ petition impugns the order dated 3rd February, 2014 passed by the Assistant Registrar (South), Cooperative Societies in the Execution Case No. AR/South/GH/Coop No.100. The impugned order allowed the review application filed by Dr. (Mrs.) S.P. Parashar on the ground that the objections filed by her are maintainable and holds as under:-

“21. That the objector has mainly raised two-fold arguments. Firstly, the Objector says that he is a bonafide purchaser against valid consideration who had no knowledge and notice of any kind of legal

proceeding pertaining to the disqualification of the original member Dr. Jitender Rai and therefore, has got a legal right an(sic) title in the Flat No. 210 and is in continuous and undisturbed possession therefore for last many years.

22. Secondly, the order dt. 19.11.2001 passed by the then Registrar ceasing the membership of the original member Dr. Jitender Rai itself was unjustified and void ab initio as the same was completely contrary to the law laid down by a series of judgments passed by the Hon'ble High Court of Delhi in the case of "O.P. Sethi v. Lt. Governor", "Navjeevan Cooperative House Building Society Ltd. V. Delhi Cooperative Tribunal", "Shri Sita Ram Jain v. Registrar of Co-operative Societies", "Alimuddin Vs. RCS" and latently, in "Jagdish Chander Vs. Lt. Governor". It is further submitted that the Registrar being a party to the said judgment was fully aware of the said judgments and had in fact applied and followed those judgments in number of cases. However, in the case of Dr. Jitender Rai, the same Registrar just avoided referring to and following those binding judgments for the reason best known to him and wrongly cased the membership on the wrong ground of wife of the member owed one flat in Panchshila Enclave.

23. I have carefully read the aforesaid judgments and the order dt. 19.11.2001 passed by the Registrar. All the aforesaid judgment clearly lay down that the disqualification under Rule 25 of DCS Rules, 1973 shall be applicable only in those cases where the member was some immovable property out of his/her funds only. It is clear from the reading of those judgments of the High Court that the same were squarely applicable in the case of Dr. Jitender Rai as there was no allegation or proof on record to show that Dr. Jitender Rai was owning that flat in Panchshila Enclave benami in the name of his wife or had contributed to the purchase of the said flat. In fact the wife of Dr. Jitender Rai was admittedly working and had her own source of income/funds through which she had purchased the said flat in her name. Thus,

there was no valid reason or material on record against the member/Dr. Jitender Rai to indicate that they had incurred any disqualification u/s 25 of DCS Rules, 1973.

24. That the objector has argued that since the orders dt. 19.11.2001 and dt. 18.10.2010 passed by the Registrar as well as Financial Commissioner ceasing the membership of the original member Dr. Jitender Rai were contrary to the settled law laid down in the above mentioned judgments of the Hon'ble High Court (one of the judgment of alimuddin was also upheld by Hon'ble Supreme Court by dismissing SLP filed against that judgment) the same are per incuriam and as such not valid and binding and are liable to be ignored. The objector has filed the judgment of SC to show that if an order is passed in ignorance of some law or settled precedents of superior court the same is called per incuriam and is not of binding effect.

25. After considering all the submission and documents on records that I am of the considered view that the orders dt. 19.11.2001 and dt. 18.10.2010 passed by the Registrar as well as Financial Commissioner ceasing the membership of the original member Dr. Jitender Rai cannot be legally executed as the same said orders are contrary to the law laid down by the Hon'ble High Court and thus per incuriam to the said binding judgments. Such Court cannot be executed against the objector who is a bonafide purchaser against consideration without any knowledge of any previous proceedings."

2. Learned counsel for the Cooperative Society has submitted that the aforesaid reasoning and findings have the effect of setting aside and quashing the order dated 18th October, 2010 passed by the Financial Commissioner dismissing the appeal of the original member Dr. Jitender Rai and holding that Dr. Jitender Rai had ceased to be, and was disqualified from being a

member of the Cooperative Society for violation of Rule 25 of the Delhi Cooperative Societies Rules, 1973 (1973 Rules, for short). An executing Court cannot go behind a decree and that too, a decree which has been affirmed by a superior forum i.e. a Financial Commissioner. It is highlighted that the order for cancellation and holding that Dr. Jitender Rai was disqualified under Rule 25 of the 1973 Rules was passed by the Registrar, Cooperative Societies on 19th November, 2001, who is a superior officer in the hierarchy. The impugned order is passed by the Assistant Registrar (South).

3. Learned counsel appearing for Dr. (Mrs.) S.P. Parashar submits that in view of Section 47 of the Code of Civil Procedure, 1908 (Code, for short), the executing Court could have passed the said order. He relies upon the following passage from ***Dhurandhar Prasad Singh Vs. Jai Prakash University and Ors.***, AIR 2001 SC 2552:-

“23. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing. In the case on hand, the decree was passed against the Governing Body of the College which was the defendant without seeking leave of the court to continue the suit against the University upon whom the interest of the original defendant devolved and

impleading it. Such an omission would not make the decree void ab initio so as to invoke application of Section 47 of the Code and entail dismissal of execution. The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant absented himself from the proceeding of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.”

4. Dr. Jitender Rai was enrolled as a member of the petitioner Cooperative Society and was allotted Flat No.210 in Suraksha Sadan, Dwarka. Subsequently, information was received that wife of Dr. Jitender Rai was the owner of a residential property bearing No.A-1/35, Panchshila Enclave, New Delhi. This fact had been concealed and not mentioned in the affidavits filed by Dr. Jitender Rai. A show cause notice was issued to Dr. Jitender Rai on 19th November, 1999 and a reply dated 9th December, 1999 was filed. The Registrar, Cooperative Societies by his order dated 19th November, 2001 has held that Dr. Jitender Rai was disqualified under Rule 25 of the 1973 Rules and should not have been enrolled as a member, for his wife was the owner of a residential property in her name. He rejected the contention that Dr. Jitender Rai's wife had acquired the flat from her own or independent sources of income and nothing was paid by Dr. Jitender Rai for the reason that Dr. Jitender Rai had failed to produce a copy of the lease deed of the property in the name of his wife. The Registrar also referred to the

declaration on oath made by Dr. Jitender Rai, that in case he or his spouse acquire a residential plot or flat during the membership of the Society from any other source, he would inform the society and the Lieutenant Governor about the same within one month. The order also records that wife of Dr. Jitender Rai had been the owner of the said residential plot since 1974, on which construction was raised by them (Dr. Jitender Rai and his wife) and both of them have been residing in the said property since 1974.

5. Dr. Jitender Rai thereafter filed an appeal under Section 76 of the Cooperative Societies Act, 1972 (Act, for short) before the Financial Commissioner. By an interim order, operation of the order dated 19th November, 1999 was stayed. The appeal was finally dismissed after nearly 10 years vide order dated 18th November, 2010. This order specifically records that Dr. Jitender Rai had refused to file a copy of the lease deed dated 25th June, 1973 of the property No.A-1/35, Panchshila Enclave, New Delhi on the ground that Dr. Jitender Rai cannot be compelled to produce evidence against himself, but he had accepted the copy of the lease deed on record. The Financial Commissioner held that it has to be accepted that wife of Dr. Jitender Rai was the owner of property No.A-1/35, Panchshila Enclave, New Delhi. The Financial Commissioner thereafter quoted Rule 25 (1) (c) of the 1973 Rules, which 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.....

(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 metres of land;

Provided further that the said disqualification shall not be applicable in case of a person who has (sic) 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 applied for the membership of the Housing Society concerned;”

Thereupon, the Financial Commissioner went into the question whether there was any violation of the said Rule, and it was held as under:-

“Therefore, it is clear that the disqualification provided by the said Rule is squarely attracted to the case of the appellant. The argument of the appellant that the property was acquired by his wife, out of her own funds, without any kind of assistance/help from the appellant, is of no avail. The argument of the appellant, in fact, is that his wife is not dependent on him. However, the exception of not being dependent is available only in the case of children. Same is not available in the case of spouse. The plain reading of Rule 25 admit to no other interpretation. It has already

been noted that the property measures 216 sq. mtrs., therefore, the case of the appellant is not covered by the proviso to Rule 25, either.

It is already noticed that the appellant, during the course of proceeding before Respondent No. 2, refused to file the relevant document on the plea that he could not be compelled to produce evidence against himself. The refusal of the appellant attracts an adverse inference against him. Therefore, in my view, the appellant has even failed to prove that the property in question was not a “benami” property of the appellant.

There is nothing on record to persuade this Court to come to a conclusion other than the conclusion arrived at by the Respondent No. 1. For the aforesaid reasons, the petition is found meritless. Same is hereby rejected.”

6. Dr. Jitender Rai did not question and challenge the order dated 18th November, 2010.

7. Dr. (Mrs.) S.P. Parashar claims and professes that on 25th November, 2003, Dr. Jitender Rai had executed a Special Power of Attorney in favour of her husband Dr. C.D. Parashar. Subsequently, the said Attorney Dr. C.D. Parashar had executed an Agreement to sell and purchase dated 15th June, 2006 against the sale consideration of Rs.13,90,000/- in favour of the said respondent. It may be noted that the said transactions were after the Registrar, Cooperative Societies had already passed the order dated 19th November, 2001 holding that Dr. Jitender Rai was disqualified and had ceased to be a member of the petitioner Cooperative Society for violation of Rule 25 of the 1973 Rules. Dr. C.D. Parashar and Dr. (Mrs.) S.P. Parashar

claim that they were not aware of the said order and they are bona fide purchasers for value. It is also stated that Dr. C.D. Parashar and Dr. (Mrs.) S.P. Parashar were not aware of the appeal preferred by Dr. Jitender Rai. These facts are disputed. However, it is accepted that both of them are residing in the flat in question within the Cooperative Society. The Society, it is stated, had written letters to Dr. (Mrs.) S.P. Parashar asking them to make payment of Rs.2,94,837/- and thereafter, a No Objection Certificate (NOC) dated 30th November, 2015 was issued. [Learned counsel for the Cooperative Societies relies upon the language of the certificate/NOC and submits that no right accrues in favour of Dr. (Mrs.) S.P. Parashar in view of what is stated in the said certificate/NOC].

8. Be that as it may, it is clear to us that the impugned order in paragraphs 22 to 25 has the effect of erasing and setting aside the order dated 18th November, 2010 passed by the Financial Commissioner. The Assistant Registrar (South) as an executing court could not have set aside or held that the order dated 18th November, 2010 passed by the Financial Commissioner dismissing the appeal of Dr. Jitender Rai was fallacious and contrary to law. An executing court cannot go behind the decree and re-examine the merits of the judgment under execution. The present case is not one where the assertion was that the decree was void *ab initio* for want of subject matter jurisdiction. When a Court passes a decree and decides issues on merits, and also decides the question whether or not any relief is to be granted, the said

decision and the findings recorded on merits bind the parties or those claiming through the parties. The said decree or decision cannot be made the subject matter of challenge and questioned before the Recovery Officer or the executing court. The executing court is bound by the decree and should follow and abide by the same and not question or state that the decree should not have been passed on merits. A person aggrieved can question and challenge the decision in appeal or appropriate proceedings by filing a writ petition.

9. The law in this regard is well settled as has been laid down by the Supreme Court in the case of *Ittyavira Mathai vs Varkey Varkey and Anr.* AIR 1964 SC 907, wherein it has been held as under:-

“8... But it is well settled that a court having jurisdiction over the subject-matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject-matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said, courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities...”

10. The judgment in the case of *Dhurandhar Prasad Singh* (supra) does not support the submissions made by the learned counsel for Dr. (Mrs.) S.P. Parashar. Rather, it would show that the Supreme Court had observed that an executing court can allow objections under Section 47 of the Code as to

executability of the decree if the decree is found to be void *ab initio* or a nullity. A decree can become inexecutable for the reason that the decree was passed in ignorance of such a provision of a law or the law was subsequently promulgated making a decree inexecutable after its passing. The aforesaid observations do not lay down a ratio that a decision passed on merits would be held to be inexecutable because as per the executing court the decision was incorrect and contrary to law. The word “inexecutable” referred to in paragraph 23 in the case of ***Dhurandhar Prasad Singh*** (supra) would mean and refer to a decree passed by a court which is *non est* or a nullity on account of the fact that such a decree could not have been passed for want of subject matter jurisdiction. This can happen when the decision is in ignorance of a provision of law by a forum or a court lacking jurisdiction. Subsequent legislation may also render a decree inexecutable. The Financial Commissioner admittedly had jurisdiction to decide the appeal filed by Dr. Jitender Rai under Section 76 of the Act. The jurisdiction was invoked by Dr. Jitender Rai, himself. A wrong or erroneous decision is not *non est* or a decision without jurisdiction. The plea of Dr. (Mrs.) S.P. Parashar is completely fallacious and contrary to law and, therefore, has to be rejected. To this extent, the observations and findings made in the order dated 3rd February, 2014 are set aside and deleted. The Assistant Registrar (South) as an executing court will proceed in accordance with law.

11. Dr. (Mrs.) S.P. Parashar has filed objections to the execution of the

decree. She has right to press her objections as per the provisions of the law and the applicable Act/Rules. Dr. (Mrs.) S.P. Parashar can claim her rights in an individual capacity, predicated as purchaser under the purported Agreement to sell dated 15th June, 2006 and also on the basis that she is in occupation of the flat in question. Questions of bona fides etc. may arise and if required, would be decided. We would not like to go into and examine the said aspects. The objections, if any, by Dr. (Mrs.) S.P. Parashar will be confined to the aforesaid and cannot pertain to the merits or correctness of the orders of the Registrar, Cooperative Societies and the Financial Commissioner. The order dated 18th November, 2010 passed by the Financial Commissioner cannot be challenged or questioned by Dr. (Mrs.) S.P. Parashar in the executing proceedings.

12. The writ petition is allowed in the aforesaid terms. We clarify that the observations made above, would not in any manner affect the challenge made to the order dated 18th November, 2010 by Dr. (Mrs.) S.P. Parashar in W.P.(C) No.6435/2016. We observe that the ambit and scope of W.P. (C) 6435/2016 is different.

SANJIV KHANNA, J.

SUNITA GUPTA, J.

SEPTEMBER 21, 2016
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