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

+ **WRIT PETITION (CIVIL) NO. 4268/2015**

Date of decision: 10th August, 2016

THE MEDIA COOPERATIVE GROUP HOUSING SOCIETY
LIMITED Petitioner

Through Ms. Namita Roy, Advocate.

versus

MS. NOOR JAHAN SARWAT Respondent
Through Mr. Anil Kumar, Advocate.

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

SANJIV KHANNA, J. (ORAL):

The Media Cooperative Group Housing Society Limited, by way of the present writ petition, impugns order dated 16th February, 2015 passed by the Delhi Cooperative Tribunal (Tribunal, for short) whereby two applications filed by Akmal Shah dated 4th February, 2014 have been allowed condoning the delay and recalling the order dismissing the appeal filed by Noor Jahan Sarwat for default on 25th November, 2010. For the

sake of convenience and clarity, the reasoning given in the order passed by the Tribunal, is reproduce below:-

“17. In view of the above facts, instead of dismissing this application on the ground of limitation or on the ground of the applicant having no locus standi, we deem it proper to take the appeal to its logical conclusion. We repeat that passing of an order in favour of the applicant does not ipso-facto establish the genuineness of the will. A prima facie view is being taken by us in favour of the applicant to decide the appeal on merits.

18. The delay in filing the application is therefore, condoned subject to cost of Rs.5,000/-.

19. Since the delay in filing this appeal has now been condoned and we find from the record that on these very grounds the applicant is seeking restoration of the appeal, therefore, there is no need to reiterate the facts and the contentions as to whether there is justification to restore the appeal or not. The appeal is ordered to be restored subject to payment of cost of Rs.2,500/-. The payment shall be precondition for proceeding further.

20. For payment of cost, the matter shall be taken up on 23/03/2015.”

A reading of the aforesaid reasons elucidates that the Cooperative Tribunal has observed that the order would not establish genuineness of the Will propounded by Akmal Shah and a *prima facie* view has been taken.

2. Noor Jahan Sarwat was a member of the petitioner-cooperative society. The cooperative society had acquired land from the Delhi

Development Authority and constructed a residential complex on plot No. 18A, Sector-7, Dwarka during years 1989-2008.

3. As Noor Jahan Sarwat was a defaulter and had failed to make payments, she was issued notice under Section 86 of the Delhi Cooperative Societies Act, 2003. By order dated 19th September, 2008, the Registrar Cooperative Societies had directed that all defaulting members including Noor Jahan Sarwat, should clear dues along with interest and penal interest by within a month. In case of non-payment, the defaulters would lose their right to membership. Noor Jahan Sarwat was personally served with a demand notice of Rs.23,54,008/-. Noor Jahan Sarwat did not make the payment within the period stipulated. Noor Jahan Sarwat had filed Writ Petition (C) No. 472/2009 in the High Court, which was not entertained and she was advised to approach the office of the Registrar of Cooperative Societies. Noor Jahan Sarwat thereupon approached the office of the Registrar of Cooperative Societies with a request for extension of time and that the payment should be accepted, but the said request was disallowed and rejected vide order dated 21st July, 2009. Against the rejection order, Noor Jahan Sarwat preferred the appeal in question before the Cooperative Tribunal. The said appeal was dismissed in default on 25th November, 2010 as none was present and had appeared for Noor Jahan Sarwat.

4. In the meanwhile, the petitioner cooperative society had sought and were granted approval by the Registrar of Cooperative Societies to enrol

new members in the place of the defaulting members, including Noor Jahan Sarwat. Assistant Registrar (South) by his communication dated 2nd June, 2010 had approved filling up of the vacancies as per the procedure prescribed in Rules 19 and 20 of the Delhi Cooperative Societies Rules, 2007. On 7th January, 2011 the petitioner cooperative society had written a letter to the Registrar of Cooperative Societies for filling up of the said vacancies, 13 in number. The Assistant Registrar (South) vide letter dated 10th March, 2011 conveyed their approval for filling up of the vacancies. New members have been enrolled, who have made payments and flats have been allotted to them.

5. Akmal Shah son of Ashgar Shah states that he is the nephew of Noor Jahan Sarwat, who had expired on 7th April, 2010. He proclaims that in December 2011, i.e. nearly 17-18 months after the death of Noor Jahan Sarwat, he had come across an unregistered Will written by Noor Jahan Sarwat, as per which she had bequeathed her rights in the flat/membership to him. Accordingly, Akmal Shah had written the letter dated 17th December, 2011 to the petitioner cooperative society staking his claim. On 4th February, 2014 upon ascertaining full facts, Akmal Shah filed the two applications for condonation of delay and restoration of the appeal. Earlier Akmal Shah had filed an application under Section 28 of the Delhi Cooperative Societies Act, 2003 before the Registrar of Cooperative Societies and had then learnt on 17th December, 2011 that late Noor Jahan

Sarwat had filed an appeal, which was dismissed in default on 25th November, 2010.

6. It will be noted here that no application for setting aside abatement of the appeal and substitution were filed.

7. We have quoted the reasoning recorded by the Tribunal allowing the two applications. The Tribunal in the earlier paragraphs had specifically noted that the membership of Noor Jahan Sarwat had been cancelled and the flat had been already allotted to a third party as per law and the procedure. The said aspect has not been dealt with and considered while allowing the application for condonation of delay. Condonation of delay would affect third party rights, which have been created in the meanwhile. Enrolment of new members was after following the proper procedure. This aspect was never challenged and questioned. Substantial and long delay when the situation has changed with creation of third party rights was an important facet, which has been ignored and completely discounted.

8. We have noted the facts of the present case and have recorded that Noor Jahan Sarwat was in default and had to make payment of Rs.23,54,008/- as on 21st September, 2008. The default and failure and the quantum of the demand are undisputed. Noor Jahan Sarwat had not made the said payment in spite of time granted to her by the Joint Registrar. The appeal filed by her was dismissed in default on 25th November, 2010. For more than a year thereafter, Akmal Shah had not taken any steps. In the

meanwhile, the petitioner cooperative society had inducted new members, who have paid money and taken possession. It is stated by the counsel for the petitioner cooperative society that late Noor Jahan Sarwat had paid about Rs.3.5 lacs approximately. Counsel for the respondent-Akmal Shah states that late Noor Jahan Sarwat had paid about Rs.4 lacs. It would be unjust and unfair to allow the belated and after time applications without reflecting on the payment made, unpaid amount and the quantum of payment made by the third parties.

9. The Tribunal was not justified in condoning the delay without even dealing with the issue and question whether the story put up by Akmal Shah that he had suddenly and fortuitously discovered the unregistered Will 17-18 months after death of Noor Jahan Sarwat, is probable and believable. The assertion was creative but pigeon-holed and fishy. The Will has not been probated. Under the applicable personal laws, Akmal Shah's claim of inheritance by way of a Will would be debatable. To accept Akmal Shah's assertion would be unjust and unfair to the third person.

10. The writ petition is accordingly allowed and the impugned order dated 16th February, 2015 is set aside. The application for condonation of delay will be treated as dismissed. We clarify that the observations made above would not in any way affect any claim by Akmal Shah to seek recovery of the amounts stated to have been paid by late Noor Jahan

Sarwat. We do not comment on the same.

(SANJIV KHANNA)
JUDGE

(SUNITA GUPTA)
JUDGE

AUGUST 10, 2016
VKR