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

\+ **WRIT PETITION (CIVIL) NO. 9185/2016**

Date of decision: 5th October, 2016

SADBHAWNA COOPERATIVE GROUP HOUSING SOCIETY LTD. ..... Petitioner

Through Mr. Ankur Arora, Advocate.

versus

SALIL AGARWAL ..... Respondent

Through Nemo.

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

SANJIV KHANNA, J. (ORAL):

This writ petition arises from the second round of litigation between the Sadbhawna Cooperative Group Housing Society Limited and the respondent Salil Agarwal.

2. In the first litigation, vide the award dated 26th March, 2007 it was held that Salil Agarwal being a valid member of the Cooperative Society was entitled to allotment of a category-A flat. Salil Agarwal was required to pay the dues on reconciliation of accounts with the Cooperative Society, within a period of thirty days from the date of the award. The Cooperative Society was also directed to pay costs of Rs.15,000/-.

3. Aggrieved, the Cooperative Society had filed an appeal before the Delhi Cooperative Tribunal, which was dismissed vide the order dated 11th

April, 2008. Writ Petition (C) No. 5265/2008 challenging these orders was dismissed by the Division Bench of this Court on 25th August, 2009. Special Leave to Appeal (C) No. CC 18472/2010, filed by the Cooperative Society, was dismissed on 10th December, 2010. Thus, the first round of litigation ended. Salil Agarwal was successful.

4. Salil Agarwal thereafter had to initiate the second round of litigation as the Cooperative Society raised a demand of Rs. 57,13,523/-. Further, the Cooperative Society had offered to allot a category-C flat measuring 1700 square feet, instead of a higher category-A flat.

5. The Arbitrator, vide the impugned award dated 2nd September, 2013, considered the vagaries of the factual matrix. The award elucidates that initially category A, B and C flats measuring 1408, 1508 and 1166 square feet respectively were to be constructed. However, the plans underwent three modifications and changes in 1998, 2003 and 2010. The changes were summarised in the award. The relevant portion of the award reads as under:-

"

Type/size in sq ft	A	B	C	A1	D
1997 at booking time	1408	1508	1166	nil	nil
1998 change plan	1643	1693	1579	nil	nil
2003 1st Administrator	2145	1930	1700	2215	nil

2010-revised plan	2145	1930	1700	2215	1600

”

6. The award also records that the respondent had initially applied for a category-B flat in 1997, but was allotted category-A type flat in 1998 which he accepted. The Arbitrator’s award dated 26th March, 2007 in the first round, while referring to the category-A flat mentions the area as 1643 square feet, i.e. the area of category-A flats as in the drawing plan of 1998.

7. Learned counsel for the petitioner submits that Salil Agarwal was entitled to a flat measuring 1643 square feet in accordance with the award dated 26th March, 2007. The category-C flats, as constructed, measure 1700 square feet and the category-A flats measure 2145 square feet. Thus, the Arbitrator and the Tribunal have erred in holding that Salil Agarwal would be entitled to a category-A flat measuring 2145 square feet and not a category-C flat measuring 1700 square feet.

8. We have considered the said contention, but do not agree with the submissions made by the Cooperative Society. The award dealt with the said submission and records as under:-

> “ Availability of above flats was altered by the defendants within two weeks on 31.08.2013 hearing (sic) dramatically to only two flats, one each in A1 and C category. This development negated claimant’s allotment to category ‘A’ flat. The argument posed by the defendant to go for category ‘C’ flat-1700 sft in size on the ground that it is bigger than the original allotment of category ‘A’ sized 1643 sft, , did not hold water. The benefit of revisions in

> size of various categories of flats will apply to claimant as well as also to other members. The defendant Society having failed to abide by the various courts' directions, now played truant by suggesting to go in for category 'C' type just on the ground of it's size was mischievous. The defendant society was legally bound to reserve a category 'A' flat which it failed to do compromising on the interest of the claimant.
>
> Thus now under these circumstances it is left to the claimant to exercise his choice from among the options made available. During the hearing of 31.08.2013 the claimant opted for A1 type sized 2215 sq. ft against his entitlement of 'A' category sized 2145 sq. ft as allotted by the defendant society itself. The Claimant also committed to pay the charges that will be genuinely due from him, for Type A1 flat. The charges committed to be borne by him shall be equivalent to members of his seniority."

9. The award dated 2nd September, 2013 notices that during the course of arbitration proceedings, on 17th August, 2013, the Cooperative Society had stated that 2 category-A1, 3 category-A and 4 category-C flats were available. The award further records that on 31st August, 2013 the Cooperative Society had stated that there were only two flats; one each in category-A1 and category-C. In the aforesaid, a change in stance was adversely commented. It is reiterated before us that no category-A flat is available and one flat each in category-A1 and C are vacant and available.

10. This finding of the Arbitrator has been upheld in the appellate order dated 3rd June, 2016 passed by the Delhi Cooperative Tribunal. The appellate order holds that the Arbitrator was right in accepting the claim of

Salil Agarwal for the size of flats was increased between 1997 and 2010. Salil Agarwal having applied for a category-A flat, was entitled a flat admeasuring 2145 square feet, the revised area of a category-A flat. The Tribunal affirmatively holds that it was not the case of the Cooperative Society that the members of the Cooperative Society were asked to exercise a fresh option with regard to their category of preference on the change of area of the category-A flats. No such argument was raised. Once the Cooperative Society was not in a position to hand over a category-A flat, then the option had to be given to Salil Agarwal to exercise and choose a vacant flat from those available. The reasoning given by the Arbitrator and the Tribunal that the size of the category-A flats was increased from 1643 square feet to 2145 square feet, and upon the non-availability of a category-A flat, the respondent would be entitled to a category-A1 flat, has merit and substance. We cannot reject or reverse the said reasoning, when we examine and consider the award and the order of the tribunal in exercise of the power of judicial review under Article 226 and 227 of the Constitution.

11. The other grievance raised by the petitioner-Cooperative Society relates to payment of interest. The enrolment of Salil Agarwal as a member was wrongly cancelled. Salil Agarwal had successfully challenged this cancellation and the membership was treated as legal and valid vide the award dated 26th March, 2007. His membership and

entitlement was upheld by the Tribunal, the High Court and then when the SLP was dismissed. In the said situation, equities had to be balanced on the question of payment of interest. The award dated 2nd September, 2013 has undertaken the said balancing exercise. The finding of the Arbitrator is that Salil Agarwal had in 1997-98 paid Rs.3,40,780/- to the Cooperative Society. Thereafter, the Cooperative Society failed and did not raise any further demand from 1998 till 7th May, 2012. Thus, Salil Agarwal inspite of the payment which was not refunded, was denied allotment and possession of the flat.

12. In these circumstances, the Arbitrator has rightly held that the respondent would not be liable to pay any penal interest, etc. as a notified defaulter.

13. On the question of the demand raised vide the letter dated 7th May, 2012 we have examined the basis and computation of Rs. 54,13,523/- made by the Cooperative Society. Salil Agarwal was asked to pay interest of Rs.23,25,656/- over and above the cost of the land and construction of Rs.25,87,867/-. Equalisation charges of Rs.5 lacs were also demanded. Thus, making a total sum of Rs.54,13,523/-. Referring to the said aspect, the Arbitrator held as under:-

> "Since the last/latest demand notice dated 7.5.2012 was not transparent with regard to the category/size of the flat for which the demand was raised, it is improper to seek penal interest etc. as dues between period 1998 till 31.08.2013 as put up during hearing

of 31.08.2013.

> I therefore hold that the claimants liability is limited to interest payable subsequent to notice dated 7.5.2012 and that too limited to the construction costs payable by him as applicable to any other regular not having defaulted member of his seniority.
>
> Without any prejudice to the claim of interest on the construction/any other enhanced cost as also borne by other honourable members of this CGHS, of similar seniority as that of the Claimant, the claimant is bound to pay such dues as raised by the Society but in a transparent manner."

14. Apropos, the equalisation charge and if it could be levied and charged, the Arbitrator has held that the membership of Salil Agarwal had continued uninterrupted in terms of the earlier award, and therefore he would not be liable to pay equalisation charges. To this extent, the finding has not been disputed by the petitioner-Cooperative Society. Indeed the finding cannot be disputed and the demand made was unjustified.

15. The Arbitrator has taken a reasonable view on the question of interest. The Arbitrator has held that Salil Aggarwal would be liable to pay interest subsequent to the notice dated 7th May, 2012 and that would be limited to the construction cost payable by him as was or would be applicable to any other regular and non-defaulting member of the society. The Tribunal in the impugned order has observed that it was a legal obligation and the duty of the cooperative society to have allotted a flat to Salil Aggarwal as other members and the category of flat could not be

changed. Thus, Salil Agarwal would be liable to pay interest with effect from 7th May, 2012.

16. It is not for this Court to override the view taken, for we could have taken another view in light of the aforesaid facts. It is obvious that Salil Agarwal has suffered as the allotment and possession of the flat was denied. Salil Agarwal had made payment of Rs. 3,40,780/- in 1997-98, on which no interest has been paid. In this background, we do not think that in the facts of the present case, this Court in exercise of the power of judicial review is required to interfere with the impugned award or the appellate order passed by the Tribunal.

17. Accordingly, we do not find any merit in the present writ petition and the same is dismissed. No order as to costs.

SANJIV KHANNA, J.

SUNITA GUPTA, J.

OCTOBER 05, 2016
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