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

\+ **W.P.(C) 6730/2015**

Date of decision: 19th October, 2016

SUSHIL NARANG ..... Petitioner

Through Mr. Praveen K. Singh, Advocate.

versus

THE REGISTRAR OF COOPERATIVE SOCIETIES & ORS ..... Respondent

Through Ms. Manika Tripathy Pandey, Advocate for R-1.
Mr. Sandeep Bajaj and Mr. Pratap Parmar, Advocates for R-2.

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

SANJIV KHANNA, J. (ORAL)

Sushil Narang, the petitioner is a member of Jhang Cooperative Society Ltd., the second respondent before us.

2. He has filed the present writ petition seeking direction that his name should be included in the list of members who are to be included in the draw of lots for allocation of flats. He objects to the list of members dated 19th November, 2013 sent by the Cooperative Society to the Registrar, Cooperative Societies, as per the notification published on 29th April, 2013.

3. The petitioner is an original member of the second respondent Cooperative Society. However, he had paid about Rs. 2,00,000/- till 7th September, 1997. Thereafter, he had defaulted in payments. He had paid Rs.4,00,000/- on 13th November, 2011 and Rs.7,89,534/- as interest on belated payment on 27th November, 2011.

4. The Cooperative Society submits that the petitioner was a defaulter and had not paid for the cost of construction which had commenced in the year 1990, and had continued till 1998/1999 and, therefore, cannot be given preference and seniority over others who had paid the instalments on or before 22nd December, 2010 and 17th February, 2011 when the list of 12 and 4 members was sent to the Registrar, Cooperative Societies. The two payments by the petitioner mentioned above were made thereafter. The initial cost of the flat was Rs.4,95,000/- which was enhanced by Rs.1,00,000/- on account of the enhanced cost of construction. On 6th December, 2008, the draw of lots were held and the members had paid Rs. 6,00,000/- per flat. The petitioner was not included in the draw of lots held on 6thDecember, 2008, for he had defaulted. The petitioner is a chronic defaulter, and he cannot be given preference over the members who were originally junior, but had made timely payments and had contributed and

whose money was spent on the cost of construction of the flats.

5. We find merit in the contention raised by the counsel for the Cooperative Society. In the present case, the Administrator appointed by the High Court had, vide letter dated 22nd December, 2010 forwarded a list of 12 members for clearance of membership and the draw of lots. Another list of 4 members was sent on 17th February, 2011. By these dates the petitioner had not cleared the dues, as Rs. 4,00,000/- and Rs. 7,89,534/- were paid in November, 2011. The members of the Cooperative Society, who had made payments towards the cost of construction, and whose money was used for the construction of the flats cannot be denied and yield to the petitioner, who was in default and had failed to pay the cost of flat when the lists for allotments were sent. Subsequent payments by the petitioner would not justify recall or modification of the said lists and deletion of a name.

6. This list of 16 eligible members, who had made full payment of the cost of construction was prepared in October, 2010-February, 2011 pursuant to the order dated 20th July, 2010 passed by the High Court in W.P. (C) No. 1272/1999 and other connected matters. The lists were sent to the Registrar, Cooperative Societies vide letters dated 22nd December, 2010 and 17th February, 2011. The relevant portion of the said order dated 20th July, 2010

reads as under:-

> "The respondent society has a chequered history as a result of which one set of members have been allotted the flats and are in occupation. The disputes relating to the remaining persist as the flats have not been allotted. There are flats available for allotment but they may not suffice for all the members. It is also not disputed that there is every possibility of making further construction of flats as per the current FAR available to the society including the area pertaining to the Community Hall.
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> It cannot be disputed that in view of payments having been made and the membership of members restored where the society and earlier sought to take action for expulsion, the seniority of the members would have been to be drawn as per their enrolment. The members will be entitled to the flats as per their seniority. If despite this, some members are not allotted flats on account of their shortage, the Administrator/society would have to take a decision as to how further flats can be constructed and in what manner they are to be financed. The Administrator would also look into the aspect as to whether any members have been illegally enrolled who would not be entitled to any flat.
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> The Administrator present in the Court states that the complete exercise should be over within one month from today.
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> On the exercise being completed, the next step to be taken would be to forward the names of the eligible members as per the seniority depending on the flats available to the Registrar for verification and thereafter to the DDA for holding the draw for allotment of the flats. The exercise should also be undertaken within a maximum period of two months after the finalization of the list by the Administrator so that within a total period of three months, the vacant flats are occupied by the eligible members as per

their seniority.

We have already observed above that in this period of time, the Administrator will also carry out an exercise in consultation with the DDA/MCD as to how many further flats can be constructed depending upon the current FAR available and both the MCD and DDA will render all assistance to the Administrator.

The members then, entitled to flats, would naturally have to carry out the necessary formalities for purpose of allotment of drawn of lots."

7. Demand letters were issued to all members and those who made payment were included in the list as per seniority. The petitioner had failed to pay the amount due, even after the court order and the demand letter. He was a defaulter on 22nd December, 2010 and 17th February, 2011 when the lists were sent. The Registrar, Cooperative Societies had subsequently pointed out deficiencies in the two lists which were procedural and formal. These were removed and set right. This had taken time and thereafter public notice was issued. However, this procedural delay would not revive and infuse the petitioner's claim predicated on his original membership, for he had made payments several months after the list of members were sent. Pertinently, this list of 16 members has not undergone a change. No member has dropped out, and no new member has been included. If the contention of

the petitioner is to be accepted, it would create difficulties and cause unacceptable anomalies. A senior member can wait until after the list of members who have made payments is prepared and sent to the Registrar, Cooperative Societies, and pending consideration come forward to make payment and stake his claim. This would make the process never-ending. A cut-off date to ascertain the eligible members who have made payment has to be fixed. In the facts of the case, the petitioner had missed the cut-off date, for the payments were made 8-10 months after the list of eligible members who had made payments, was sent to the Registrar, Cooperative Societies for clearing their names for allotment.

8. Learned counsel for the petitioner had initially submitted that the list of 12 members sent on 22nd December, 2010, and the other list of 4 members which was sent on 17th February, 2011, is not the same list which was published and released on 29th April, 2014.

9. During the course of hearing learned counsel for the respondent No.2 Cooperative Society had submitted that the members in the said lists have not undergone a change, though their seniority position may have changed. He points out that the list dated 22nd December, 2010 and 17th February, 2011 were signed by the administrator, Mr. Vivek Kumar Tandon after verifying

facts. The said lists consists of members who had made full payment of the construction costs etc. and no other dues were payable by them. This factual position was thereafter accepted and not contested by the counsel for the petitioner.

10. The petitioner had paid Rs.4,00,000/- and Rs.7,89,534/- in November, 2011. It is obvious that the petitioner had made the said payments after he came to know that the list of 16 members had been sent for allotment of flats.

11. In these circumstances, we are not inclined to interfere with the list of 16 members sent for allotment of flats on 22nd December, 2010 and 17th February, 2011. The petitioner's name may have been included at Sr. No.13 of the list which was published by the Administrator on 29th April, 2013, but the petitioner's inclusion was erroneous and wrong for the reason that the petitioner had failed to make full and complete payment before the lists of 16 members were sent. The erroneous position was corrected.

12. During the course of hearing, learned counsel for the petitioner had relied upon the decision of this Court in ***P. Bhandari Vs. Retreat Cooperative Group Housing Society Ltd.***, 1999 (48) DRJ (DB) in support of his contention that seniority has to be maintained even if the member has

defaulted in payment. He would not lose his seniority, rights and entitlement to allotment of flat and be superseded by his juniors. The principle laid down by the said decision is not exactly that being mooted by the petitioner. The relevant portion of the said judgment reads:-

> "12. For deciding this question it is of utmost importance to keep in mind that we are dealing with a co-operative society. Co-operation means mutual help, mutual adjustment, mutual give and take. Pure commercial approach has no place here. Each member is expected to work for common good. When there are several members, all cannot be expected to be similarly placed. There are bound to be some who at a given time may not be able to keep pace with the rest. Are such persons to be left behind? It cannot be so. Effort has to be to take along such persons. The strong cannot be allowed to push out the weak. They have to carry the weak along. From this it follows that the seniority principle has to be respected and followed. This principle fits in the co-operative ethos. Nothing else will work. If a senior member is unable to meet the deadline regarding payment at a given time, he/she cannot be pushed aside. If this is permitted, societies may abuse this power. The managing committees will keep on shuffling members back and forth. As it is experience has shown that there are often allegations against the managing committees of co-operative societies of corruption. But this should not mean to encourage defaulters. It should not be understood that members can pay as per their sweat (*sic.* sweet) will. They have to maintain discipline. If members stop paying their dues as per schedule fixed by the Society, how will the construction work proceed? The funds for construction of flats in a group housing co-operative society have to come from the members. Defaulters cannot stall the progress of the works, thereby holding everyone else to ransom.

> 13. The emphasis has to be on finding out genuine cases of hardship where accommodation may have to be given. If, however, it is felt that a member is misusing the accommodation shown to him, his expulsion from the Society may have to be resorted to. The final say in matters of expulsion of members is left with the Registrar of Co-operative Societies. A defaulter can be expelled from membership of the Society. The action has to be with the approval of the Registrar. A lesser action can be to charge interest on delay in payment of instalments.
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> 14. The learned counsel for the Society submitted that expulsion is only an enabling provision and is not mandatory and, therefore, it need not be resorted to. This may be so, but what follows from it. If you do not expel a member, he/she continues to be a member and on what basis you deny to him/her the flat booked by such a member. One who remains a member retains his/her membership - meaning thereby maintains the seniority as a member. The Act does not envisage any other action against a member."

The first portion of paragraph 12 states that cooperative societies should not have a commercial approach towards members and each member was expected to work for the common good. Merely because some members were economically weak and could not make payment, they would not lose their seniority. At the same time, it has been held that discipline has to be maintained and if a member stops paying his dues as per the schedule fixed, the construction cannot proceed and this would delay and stall construction. Paragraph 13 of the judgment draws a distinction between genuine hardships and where members have failed to make payment, wanting to secure and reap benefit of payment by other members. The fact that defaulting members can be expelled need not be resorted to in all cases.

13. More affirmative is the reasoning and ratio in the judgment of the Supreme Court in ***Myurdhwaj Cooperative Group Housing Society Ltd. Vs. Presiding Officer, Delhi Cooperative Tribunal and Ors.*** (1998) 6 SCC 39, wherein Rule 36 of the Delhi Cooperative Rules, 1973 was considered and it was held that expulsion is an alternative and is not the only way the defaulting member is to be dealt with. The relevant portion of the said judgment reads as under:-

> "9. Returning to Rule 36, submission for the respondent is, when a statute provides a thing to be done in a manner it has to be done in that manner alone and not in any other manner. Other modes are excluded. The counsel for the respondent referred the cases in *A.K. Roy* v. *State of Punjab* [(1986) 4 SCC 326 : 1986 SCC (Cri) 443] paras 10-11 and *State of Mizoram* v. *Biakchhawna* [(1995) 1 SCC 156] paras 7, 8 and 9. This proposition has not been disputed by learned counsel for the appellant. The question is, when a member is in default then is it that power of a society is concretised within this Rule to expel such defaulting member or can it within its peripheral jurisdiction resolve to take recourse to any other policy decision, to enable such defaulting member to deposit the balance amount either by extending time or giving any such incentive as it deems fit and proper or to take recourse to such consequential measures as it deems fit and proper. The present case is similar to the cases which arose in the Delhi High Court. The question is, in the matter of allotment of flats, can a society not lay down its own policy as to how

instalments are to be paid, within what time and in doing so can it not place certain conditions under it. In other words, can or can it not resolve that members must pay the stipulated amount by fixing any cut-off date. If, in spite of that, any member defaults, can it not cancel the allotment. Similarly, can it not decide instead of cancelling the allotment to give him an offer to get the flat in the next phased construction clearing ways for non-defaulters. The question is, can it be said that the society has no option except to allot strictly by seniority rule in spite of such members defaulting in making the payment. If power could be said to be limited then it means, let seniors default, let juniors wait as long as seniors do not pay but in no case cancel or even modify preferences in their allotment. In our considered opinion, such an interpretation would be squeezing the power of the general body of a society within the limits of Rule 36 belying all the objectives of the cooperative spirit of the Act. Thus by this, if this be so, either bear with the defaults of such members at the cost of non-defaulting members or expel them from membership. Such an interpretation would be too harsh even on senior members if the only recourse could be the latter. Even a senior member may have financial stresses resulting into default of not being able to pay for a flat even the minimum fixed amount within the stipulated time, then will it be fair to expel him? The option has to be left with the society to deal with different situations as may arise from time to time. Taking away this discretion and binding it to exercise powers under Rule 36 would be interpreting against the very objective of the Act, leaving no option with the cooperative society. The cooperative society is formed with laudable objective to inculcate spirit to work in a group freely for rendering benefit to its members through the cooperative contributions. This is only possible by conferring wide range of discretion on a society, not restricting its discretions by interpreting a law otherwise. This has to be for furthering the cause of cooperative movement. That is why various rigours of laws including taxes and fees are diluted for enhancing the spirit of the cooperative movement. We have no hesitation to hold that the power of society cannot be circumvented within Rule 36 in a case of default by its member of any of his dues. Such an interpretation would be contradictory to the very cooperative spirit or objectives of the creation of cooperative societies. Rule 36 is quoted hereunder:

"36. *Procedure for expulsion of members*.—(1) Notwithstanding anything contained in the bye-laws, any member who has been persistently defaulting in payment of his dues or the payment of claims made by a housing society for raising funds to fulfil its objects, has been failing to comply with the provisions of the bye-laws regarding sales of his produce through the society or other matter in connection with his dealings with the society or who, in the opinion of the committee, has brought disrepute to the society or he has done other acts detrimental to the interest or proper working of the society, the society may, by a resolution passed by a majority of not less than three-fourths of the members entitled to vote who are present at a general meeting, held for the purpose, expel a member from the society:

Provided that no resolution shall be valid, unless the member concerned has been given an opportunity of representing his case to the general body and no resolution shall be effective, unless it is approved by the Registrar.

(2) Where any member of a cooperative society proposes to bring a resolution for expulsion of any other member, he shall give a written notice thereof to the President of the society. On receipt of such notice or when the committee itself decides to bring in such resolution, the consideration of such resolution shall be included in the agenda for the next general meeting and a notice thereof shall be given to the member against whom such resolution is proposed to be brought, calling upon him to be present at the general

meeting, to be held not earlier than a period of one month from the date of such notice and to show cause against expulsion to the general body of members. After hearing the member, if present, or after taking into consideration any written representation which he might have sent, the general body shall proceed to consider the resolution.

(3) When a resolution passed in accordance with sub-rule (1) or (2) is sent to the Registrar or otherwise brought to his notice, the Registrar may consider the resolution and after making such enquiry as to whether full and final opportunity has been given under sub-rule (1) or (2) give his approval and communicate the same to the society and the member concerned within a period of 6 months. The resolution shall be effective from the date of approval.

(4) Expulsion from membership may involve forfeiture of shares held by the member. The share shall be forfeited with the prior permission of the Registrar. In that event, the value of the share forfeited shall be credited to the reserve fund of the society.

(5) No member of a cooperative society who has been expelled under the foregoing sub-rules shall be eligible for readmission as a member of that society or for admission as a member of any other society of the same class for a period of three years from the date of such expulsion:

Provided that the Registrar may, on an application either by the society or the member expelled and in special circumstances, sanction the readmission or admission, within the said period, of any such member as a member of the said society or of any other society of the same class, as the case may be. Before giving such sanction for readmission or admission by the Registrar, an opportunity of hearing may be given to both the society and member concerned."

10. This Rule deals with the procedure for the expulsion of members. In case a society decides to expel its member who is persistently defaulting in making the payment of his dues, the procedure to be followed could only be what is provided under this Rule and no other. The principle referred earlier that if a thing is required to be done in a manner as provided under the law has to be done in that manner alone and no other manner will apply with equal force under Rule 36, when a society decides to expel its member. In case of expulsion, the procedure provided under it and the expulsion has to be only under the mode provided therein and no other which is mandatory in nature. But this is only after decision is made to expel its member. This Rule does not take away the discretion of the society to expel a member or not which is preceding the exercise of power under Rule 36. For this, there is nothing under this Rule which either circumscribes or webs this discretion. Since this Rule is for the expulsion of its members, it is stringent in its application. Even after giving opportunity and even after the general body passes such a resolution, it requires approval of the Registrar. Outside this, there is nothing which restricts a society to act freely and to lay down its own policies. It is always open to it to decide on a fact to expel him or not. Its discretion to act is curtailed only by a statutory provision or any order having force of law. A policy may depend on various factors, its planning, projects, undertakings including its financial capacity etc. One society may be in a sound position and the other in a limping position thus may give to its member larger or lesser benefits as the case may be. Thus it is always open to a society to lay down its own principle for making such allotments. So consideration of prompt payment in shaping its policy which helps it to complete its project to confer on its member its fruits at the earliest may be justified exercise of its discretion. To what extent a default is going to affect a society will depend on the facts and circumstances of each case which has to be left at the discretion of each society. It is not proper even for the

> courts to interfere with such a discretion, except when it is arbitrary, irrational, mala fide, against any statutory provisions or against orders having the force of law. This will not be possible if a strict principle of seniority is followed. However it is open for a society to give weightage to seniority depending on the facts of each case. Within permissible limits, it is always open to lay down a principle which is just, fair and proper. When a society could decide the manner of allotment by instalments or other modes, there is no inhibition to it to modify it in case conditions are not complied by its members. Thus it is not possible to uphold that the society has no option but to proceed under Rule 36 to expel its member. Hence once a society has a discretion, it cannot be said its power is restricted to allot only under the strict rule of seniority."

14. We had asked the counsel for the petitioner to take instructions whether the petitioner is ready and willing to accept refund of money paid with a reasonable rate of interest. Counsel for the petitioner submits that the petitioner wants commercial rate of interest and not the normal market rate of interest. Counsel for the respondent no. 2-Cooperative Society states that this is not acceptable.

15. It is noticed that some flats are still under construction and because of litigation with the contractor, the construction has not been completed. Once the construction of the said flats is carried out, the petitioner and other members of the Cooperative Society, who have made part payments, on making the requisite payments would be allotted the said flats. A meeting of

members who are yet to be allotted flats is being called for examining the question and issue of construction of flats.

16. The petitioner may seek refund of payment made from the respondent no.2-Cooperative Society. On the question of rate of interest, we do not decide and leave it open to the petitioner to make the said claim in appropriate proceedings. Further, in case, the petitioner only wants a refund of the cost of construction of Rs. 4,00,000/- and interest of Rs. 7,89,534/-, his membership would not continue and would not be treated as cancelled. In the said event when the construction of unfinished flats begins, the petitioner can claim his entitlement to a flat upon fulfilling necessary requirements and payment. As far as the cost of land etc. is concerned, the said cost has already been paid. That amount i.e. Rs. 2,00,000/- cannot be refunded to the petitioner in case he wants to continue as a member of the Cooperative Society.

17. With the aforesaid observations and directions, the writ petition is dismissed.

SANJIV KHANNA, J.

SUNITA GUPTA, J.

OCTOBER 19, 2016/NA