

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

**APPEAL NO.819 OF 2004
IN
WRIT PETITION NO.68 OF 2003**

Kishore Daryanomal Talreja
(legal heir of Shanti Talreja, orig. petitioner)

... Appellant

Vs

1. R.D. Javkar & Ors.

... Respondents

Mr.S.C. Naidu with Mr.G.D. Talreja i/b M/s.G.D. Talreja &
Associates for the Appellant

Mr.uday Warunjikar for Respondent No.1

Mr.N.A. Ghatte for Respondent No.2

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

DATED: OCTOBER 10, 2019

ORAL JUDGMENT (PER AKIL KURESHI, J.):

1. This appeal is filed by the original petitioner. She has challenged the judgment of the learned Single Judge dated 15.10.2004 passed in Writ Petition No.68 of 2003. By the said judgment, the learned Single Judge confirmed the decisions of the Cooperative Court and Cooperative Appellate Court.

2. Brief facts are as under:

Respondent No.2 is a cooperative housing society whose members were belonging to economically weaker section of the society. Respondent No.1 R.D. Javkar and one Nandkishor Dattaram Pednekar were the society's founder members. The society was formed in the year 1983. On or around 15.8.1989, Nandkishor Pednekar for his personal reasons resigned from the membership of the society. The appellant herein was, therefore, inducted as a member of the society from the list of eligible persons belonging to economically weaker section. The fact that the appellant was inducted vice the outgoing member Shri Nandkishor Pednekar would be clear from the share certificate issued by the society in favour of the outgoing member on 15.8.1983. This share certificate was transferred in the name of the appellant Shanti Talreja on 4.10.1993. This was pursuant to the resolution of the managing committee of the society in its meeting dated 4.10.1993. Thereupon, flat No.22 of the said society was allotted to the appellant Shanti Talreja.

3. Respondent No.1 herein, Shri R.D. Javkar was originally allotted the same flat No.22. He was however expelled by the society under a resolution dated 23.8.1994 on the ground that despite repeated reminders, he had failed to make the payment for cost of construction. On 9.10.1994, one Ms.Surekha Akre was admitted to the membership of the society vice Shri R.D. Javkar. This is evident from the resolution of the managing committee of the society dated 9.10.1994 in which the resolution No.3 reads as under:

“Resolution no.3.

“Resolved that Shri Karande Advocate High Court has been appointed as legal Advisor and to deal with court cases”.

The Secretary brought to the notice of the Meeting that the following three persons have applied for getting membership in our society

Sr.No.	Name
1)	Mrs.Priya Haresh Ahuja
2)	Mrs.Surekha Akhare
3)	MR.Himat J. Mundhwa

The membership applications of the above referred members have been scrutinised and as per Bye-Laws all the three applications found in order. After detail discussion over the said issue it is unanimously resolved to admit them as member of the society subject to the Approval of social welfare and ratification of General Meeting against the ex-member shown as under:

**Name of Incoming
Member**

**Name in whose place
admitted as member**

- | | |
|---------------------------------|-----------------------------------|
| 1) Mrs.Priya H. Ahuja | Late Shri Gopal s. Gujaria |
| 2) Mrs.Surekha P. Akhare | Shri R.D. Javkar |
| 3) Mr.Himat J. Mundhwa | Shri Manesh Solanki |

“Resolved that Mrs. Priya Hareesh Ahuja Mrs.Surekha P. Akhare and MR.H.J. mundhwa have been admitted as members of the society.

Proposed by K.D. Gohil
Seconded by P.D. Gohil”

4. This also emerges from the communication dated 12.10.1994 made by the society to the Divisional Social Welfare Officer seeking his approval for the said proposal, the relevant portion of which reads as under:

“

Find enclosed the Xerox copies of notices sent to the expelled members. Advocate final Notice and Resolution No.2 passed in Special General Body Meeting held on 23.08.1994 for your information.

S.No.	Names of expelled members	Names of New Members Admitted
1.	Shri Manish Harji Solanki	Shri Himat Jethalal Mundhwa
2.	Shri Ramraja D. Javkar	Smt.Surekha Pralhad Akre

You are requested to grant approval to our above proposal.”

5. A similar communication was also made on 12.10.1994 to the Deputy Registrar of Cooperative Societies, Mumbai.

6. Shri R.D. Javkar disputed his expulsion as a member of the society before the Cooperative Court. He filed his dispute application contending *inter alia* that his so called expulsion was by an invalid resolution. He also disputed the allegations of non-payment of cost of construction. He prayed for a declaration that the purported resolution and cancellation of allotment of flat No.22 are invalid and illegal. He prayed for a further declaration that he was entitled to possession of the said flat.

7. The society filed a written statement dated 26.11.1996 in which apart from defending its resolution of expulsion of said Shri R.D. Javkar from the membership of the society, it was stated that the allotment of flat No.22 was only tentative, made at the time of registration of the society subject to payment of construction cost and on account of default on the part of the member concerned, in making such payment, the allotment has been cancelled.

8. Initially, the disputant Shri R.D. Javkar had joined Ms.Surekha Akre as opponent No.2. The present appellant Shanti Talreja was the opponent No.3. Shanti Talreja filed a written statement contending that she was a bonafide purchaser of the property. She had paid construction charges of Rs.1,14,980/- and

also paid BMC taxes. The society had issued receipt on 4.10.1993.

9. Ms.Surekha Akre also filed written statement in which she had agreed that she was allotted flat No.22. She later on, however, filed an affidavit dated 30.4.1997 clarifying that her earlier declaration was under mistake and that actually, she was allotted flat No.17 and not flat No.22. She also requested that under the circumstances, she may be deleted as an opponent. The learned Judge of the Cooperative Court thereupon passed an order on 2.5.1997. In such order, it was recorded that -

“On this application, the disputant filed his reply and stated that he has no objection to delete the name of opponent No.2 from present proceeding on filing declaration to the effect that she is the allottee of flat No.22 and she has no any right title and interest over the said flat No.22. He further stated that, if the Opponent No.2 not furnishes such declaration, he strongly opposed, the deletion of the name of the opponent No.2.”

10. Thus, the disputant did not object to Ms.Surekha Akre being deleted as opponent in the said dispute petition. However, the order also records that the present appellant Shanti Talreja put up a strong resistance. She pointed out that Ms.Surekha Akre was the proper and necessary party. The learned Judge held that

Ms.Surekha Akre had no concern with the dispute on hand and she is, therefore, not a necessary party. This was only on the basis that as per the society's stand also, Ms.Surekha Akre was allotted flat No.17 and not flat No.22. Resultantly, Shanti Talreja was shown as opponent No.2. Eventually, the dispute petition of Shri R.D. Javkar came to be disposed off by the cooperative Court by an order dated 17.4.2002. In such order, he held that Shri R.D. Javkar was allotted flat No.22 by the society and further that his expulsion was illegal. Insofar as the present appellant is concerned, the learned Judge noticed certain discrepancies in the share certificate of the society and consequential allotment of the flat, namely, whether what was allotted to her was flat No.22 or flat No.23. He was also influenced by the fact that the appellant had not produced receipts of payment of Rs.1,65,920/- for allotment of the flat. In the result, the following order was passed:

“AWARD

- 1) The dispute is allowed as follows:-
- 2) The Opponent No.2 is hereby ordered to quit, vacate and handover the possession of flat No.22, to the disputant within three months, through Court Receiver.
- 3) The disputant is hereby ordered to resume the possession of flat, as his own from the Court Receiver after making full and final payment, as per operative order clause No.5.

- 4) The Court Receiver is hereby discharged after handing over the possession of flat to the disputant.
- 5) The disputant is hereby ordered to pay remaining construction costs of Rs.1,65,000/- with 12% interest from the date of filing of the dispute, to the society within three months from today.
- 6) The disputant is hereby ordered to pay regularly monthly outgoings, after taking possession of flat.
- 7) In the peculiar circumstances, no order as to the costs.”

11. Shanti Talreja challenged the said order before the Cooperative Appellate Court. The Court substantially confirmed the view of the Cooperative Court. With respect to allotment of flat No.22 in favour of Shri R.D. Javkar, the Appellate Court confirmed the finding of the Cooperative Court. It also found that his expulsion was not legal.

12. Shanti Talreja thereupon filed Writ Petition before this Court. The learned Single Judge by his judgment dismissed the Writ Petition. With respect to the allotment of flat No.22 to Shri R.D. Javkar, the learned Single Judge found that the same was a finding of fact and even otherwise correctly considered by the Courts below. The legality of the declaration that the expulsion of Shri R.D. Javkar was not valid, was not seriously questioned by the petitioner. The learned Judge, therefore, was of the opinion that once the expulsion is set aside, the same cannot be without

any consequences. Regarding the absence of Ms.Surekha Akre from the proceedings, the learned Judge fleetingly also remarked that even the petitioner had not challenged the order under which she was dropped from the litigation.

13. These orders the appellant has challenged before us. We have heard the learned Counsel for the parties at a considerable length. A few facts clearly emerge from the record. First significant fact is that the appellant was inducted as member of the society vice an outgoing member Shri Nandkishor Pednekar. As noted, this is borne out from the transfer of the share certificate in favour of the appellant which share certificate was initially issued in favour of the outgoing member Shri Nandkishor Pednekar. The second equally significant fact is that Ms.Surekha Akre was inducted as a member of the society vice Shri R.D. Javkar. There is unshakable documentary evidence of this fact. As noted, the very resolution dated 9.10.1994 under which Ms.Surekha Akre was inducted as a member of the society records this fact. Even the communications dated 12.10.1994 issued by the society to the authorities of the cooperative societies for approval of this decision record this fact. These facts are virtually undisputed. Neither

before the lower Courts nor before us either the society or the advocate of Shri Javkar have raised any dispute about these facts.

14. It was hotly disputed before us by the learned Counsel for the appellant but we find the fact that flat No.22 was allotted to Shri R.D. Javkar is also established. The consistent finding of facts by the Cooperative Court, the Appellate Court and the learned Single Judge is unassailable. Quite apart, even the society in its written statement filed before the Cooperative Court had admitted that flat No.22 was allotted to Shri R.D. Javkar. Notice issued by the society through a lawyer on 7.12.1992 also referred to allotment of flat No.22 to him for which he had not made payment for the cost of construction. Reference in the written statement of the society that such allotment was tentative, would not change this position. The written statement merely suggests that the allotment was tentative subject to payment of cost of construction. Thus, the allotment of flat was not tentative but that its enjoyment by the allottee would be subject to payment of cost of construction. This is vitally different from the suggestion that the allotment itself was subject to change for reasons anything other than non-payment of cost of construction.

15. The legality of findings of Cooperative Courts and the learned Single Judge regarding the expulsion of Shri R.D. Javkar by the society is not seriously disputed before us. Perhaps, it is not even under challenge. The society has in any case, not carried the issue in appeal. We must, therefore, proceed on such basis. Despite such conclusion, serious question arises whether as a consequence of such a declaration, can the appellant herein be evicted as a member of the society and the consequent cancellation of allotment of flat in her favour. This issue arises in the background of the facts noted above, namely, that Shanti Talreja was made a member of the society on the membership which was vacated by the outgoing member Shri Nandkishor Pednekar and a consequence of expulsion of Shri R.D. Javkar was induction of Ms.Surekha Akre as a member of the society. The question that would immediately arise is as to which member should vacate the membership upon the expulsion of Shri R.D. Javkar being declared illegal. In this context, in our view, the answer is clear, namely, the person who was inducted in the membership of the society vice Shri R.D. Javkar must suffer the consequences. For various reasons, the appellant herein cannot

be evicted from the membership of the society even if Shri R.D. Javkar were to be reinducted. In plain terms, as noted, the appellant was not inducted as a member of the society on the membership which was vacated by Shri R.D. Javkar upon his expulsion. She was inducted as a member under resolution dated 4.10.1993 whereas Shri Javkar was expelled under resolution dated 23.8.1994. Thus, the appellant had become member of the society even before the expulsion of Shri Javkar. How can the appellant be asked to vacate the membership when such expulsion is held to be illegal and consequently the membership of Shri R.D. Javkar revives.

16. In plain terms, this issue has been addressed in the context of allotment of a flat and not induction into the membership of the society. The appellant is asked to suffer adverse consequences of setting aside of the expulsion of Shri R.D. Javkar merely because she was allotted the same flat which was previously allotted to Shri R.D. Javkar, completely ignoring the fact that it was Ms.Surekha Akre who was inducted as a member because Shri R.D. Javkar was expelled. Merely because Ms.Surekha Akre was allotted flat No.17, would make no difference. Whether upon the membership

being revived, Shri R.D. Javkar would be allotted flat No.22 or some other flat, is of no great consequence. In any view of the matter, if the membership of Shri R.D. Javkar had to be revived, the effect thereof had to be felt by Ms.Surekha Akre. There is some ambiguity about allotment of flat No.22 to the appellant. Had it been allotted at the time of her induction as the member of the society which is what ordinarily should have happened, it was plainly irregular since Shri Javkar was still the member of the society enjoying allotment of flat No.22 in his favour. However, in our opinion, not the allotment of a particular flat in favour of any member but the induction of the member itself was of essence.

17. Ms.Surekha Akre was, therefore, not only proper but a necessary party in the dispute application filed by Shri R.D. Javkar. If Ms.Surekha Akre was a party to the said litigation, the cooperative Court could have passed an effective order in favour of Shri R.D. Javkar and not merely stopped at giving a declaration that his expulsion is illegal and that his membership automatically revives, the order which would not be executable as long as Ms.Surekha Akre retained her membership of the society and the consequential allotment of the flat. Strangely, even Shri R.D.

Javkar accepted the request of Ms.Surekha Akre for being deleted as an opponent in the dispute petition. Her ground as noted, was that she was not allotted flat No.22 though she had stated so earlier, but flat No.17 and that, therefore, she had no concern with the litigation. Accepting her stand amounted to narrowing down the question of consequences of setting aside expulsion of Shri R.D. Javkar to the allotment of a particular flat in favour of the member of the society, ignoring the crucial question of which member was inducted qua Shri R.D. Javkar when he was expelled and who, therefore, would be ejected out of the membership of the society.

18. Strangely, as noted earlier, the Co-operative Court had directed the appellant herein to vacate flat No.22 and hand it over to Shri Javkar. These directions completely ignore two vital aspects. One, that as a consequence of it, the appellant would become a member of the society without allotment of a flat and second that the construction cost paid by her would remain with the society. Even if the Court had problem with allotment of flat No.22 to the appellant which was originally allotted to Shri Javkar, the direction should have been for handing over flat No.22 by the appellant to Shri Javkar and handing over flat No.17 by Ms.Akre to

the appellant. This direction naturally cannot be issued in absence of Ms.Akre. The disputant himself agreed to her deletion from the dispute petition and thereby brought his own downfall. This was his fatal mistake.

19. Strangely, the learned Single Judge has criticized the appellant for not challenging the order of the Co-operative Court deleting Ms.Surekha Akre as an opponent. We fail to see how the appellant should suffer because of this. Firstly, disputant was Shri Javkar, respondent No.1 herein. He agreed to deletion of Ms.Akre. In fact, the appellant had strongly objected to the application. She owed no duty to challenge the said order. Learned Counsel for respondent No.1 had suggested that we should join her as additional respondent in this appeal. We find it is too late in the day now to bring Ms.Surekha Akre on record of these proceedings.

20. Under the circumstances, we are clearly of the opinion that even if the expulsion of Shri R.D. Javkar has to sustain, the appellant herein cannot be elbowed out from the allotment of the flat or any flat and consequently effectively from the membership of the society. She had paid full consideration to the society at the

relevant time. She was inducted as a member of the society by passing a valid resolution in her favour by the Managing Committee of the society. The share certificate of Nandkishor Pednekar in whose place she was inducted as a member of the society was duly transferred in her favour. We simply cannot see any logic for the appellant to vacate her allotted flat that too without providing any other flat in exchange and thereby effectively ending her membership in the society because the Courts have found the expulsion of Shri R.D. Javkar illegal.

21. Under the circumstances, the impugned judgement and orders with regard to the present appellant to vacate the flat No.22 are set aside. Ms.Surekha Akre is not a party to these proceedings and she is, therefore, not before us. We would, therefore, not make any observations with respect to her possession and the right of Shri R.D. Javkar in view of the declaration we just made. We leave it to respondent No.1 herein to take his legal options as may be available.

22. Before closing, we may make few observations. The learned Counsel for the appellant has tried to point out that respondent No.1 herein has so far not cleared the deficient payment to the

society as directed by the Courts below and the learned Single Judge. In the facts of the case, we are not required to go into these details. We are informed that the society has already executed agreement for redevelopment of the property in question. Nothing stated in this order will come in the way of respondent No.1 from claiming his right in such redevelopment, as may be available in law.

23. With these directions, the appeal is disposed of.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)