

(2016) 05 DEL CK 0092

In the Delhi High Court

Case No : W.P.(C) 6635 of 2014, CM Nos. 15773 of 2014 & 15775 of 2014

Meenu Tomar

APPELLANT

Vs

Registrar, Cooperative Societies & Others

RESPONDENT

Date of Decision : 24-05-2016

Acts Referred:

Constitution Of India, 1950 — Article 226, 366(29A)(d)
Delhi Cooperative Societies Act, 1972 — Section 28, 30, 31, 32, 33, 39, 60, 66, 70, 71, 84, 88, 104, 105(a), 105, 110, 112, 114, 115, 116
Delhi Cooperative Societies Rules, 2007 — Rule 1, 2, 2(1)(e), 2(1)(k), 3, 4, 36, 98(2), 124, 124(2), 124(3), 124(4), 125(5), 151
Delhi Cooperative Societies Act, 2003 — Section 116
Armed Forces Tribunal Act, 2007 — Section 14, 15, 30, 31
Uttar Pradesh State University Act 1973 — Section 68

Citation : (2016) 230 DLT 479

Hon'ble Judges : Manmohan, J.

Bench : Single Bench

Advocate : Mr. Abhimanue Shrestha, Advocate, for the Appellant; Mr. Tarique Siddiqui and Mr. Vishwendra Verma, Advocates., Mr. S.K. Kaushik, Advocate and Mr. Rajat Aneja and Ms. Shifa Nagar, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Gita Mittal, J.—The present matters relate to the Delhi Co-operative Group Housing Society Ltd. (hereinafter referred to as "the society"). The private parties are admittedly members and flat owners in the said Society.

2. Before dealing with the rival contentions, we propose to note some salient facts about the Society. The Society was registered under the provisions of the Delhi Co-operative Societies Act, 1972 (hereinafter referred to as "DCS Act") on the 17th of January 1980 with the sanctioned strength of 212 members.

3. It is also an admitted position that on 8th of April 1984, the society applied to the Delhi Co-operative Housing Finance Corporation (hereinafter referred to as "DCHFC") for grant of loan of Rs. 1.5 crores for construction of flats. A loan of

Rs. 1.26 crores was sanctioned on 17th November, 1985 pursuant to a loan agreement. The society also executed a mortgage deed whereby the land allotted to the society was mortgaged with the DCHFC. A further loan of Rs. 18 lakhs was sanctioned and released to the society against a supplementary loan agreement and a further mortgage deed was executed with the DCHFC in November, 1987.

4. It is essential for us to note that out of the total strength of 212 members, the loan was granted for the benefit of only 162 members. The society admits that 50 of its members did not take any benefit of the loan sanctioned and released by the DCHFC. On the other hand, these 50 members were beneficiaries of financial facilities taken by them from the Government departments where they were employed.

5. The private respondents in W.P.(C)No.8751/2015 did not take any facility from DCHFC. However, Shri P.L. Jain, predecessor-in-interest of Smt. Meenu Tomar (petitioner in W.P.(C)No.6635/2014) did take the loan. The loan of some members, including that of Shri P.L. Jain, was secured by a group insurance with the Life Insurance Corporation.

6. On 10th of April 1986, the society obtained possession of the Plot No.74, I.P. Extension, Patparganj, Delhi admeasuring 3.533 acres from the Delhi Development Authority for construction of 212 flats for its members.

7. In 1988, construction of the flats was completed. By a draw of lots held on the 27th of March 1988, the constructed flats were allotted to the members. While handing over the charge on the 4th of October, 1990 to the newly elected managing committee, the Secretary of the outgoing Managing Committee duly noted that construction jobs and fitting of the flats stood completed and keys of the flats have been handed over to the members. These facts establish that on these dates, construction of the flats stood completed.

8. Mr. Rajat Aneja as well as Mr. Abhimanue Shrestha, learned counsels for the private parties have asserted that this material factor would clearly show that therefore, after these dates, there was no occasion for requirement of any additional funds or diversification of any funds of the Society towards construction activities for the reason that the same stood completed.

9. We propose to decide the issues pressed before us in the following manner :

I. Liability of the private members in these petitions (paras 10 to 18)

II. Misappropriation of Societal funds and Mismanagement of financial affairs by managing committees (paras 19 to 25)

III. Redressal action taken by DCHFC and recovery proceedings (paras 26 to 34)

IV. Resolutions of the Society (paras 35 to 48)

V. Individualisation Scheme (paras 49 to 52)

VI. Recovery from whom? (paras 53 to 63)

VII. Execution of what and against whom? (paras 64 to 78)

VIII. Legal objection (paras 79 to 80)

IX. Diversification of funds (paras 81 to 87)

X. Objection to the maintainability of the writ petition W.P.(C)No.6635/2014 under Article 226 of the Constitution of India on the ground of availability of an alternate remedy under the Delhi Cooperative Society Act (paras 88 to 97)

XI. Submission that the DCHFC is having a first charge over the entire project of the Society (paras 98 to 100)

XII. Challenge to conveyance deed (paras 101 to 104)

XIII. The decision of the General Body Meeting is binding on all members (paras 105 to 114)

XIV. Conclusion (paras 115 to 120)

XV. Result (para 121) We now propose to discuss the above issues in seriatim :

I. Liability of the private members in these petitions

(a) No liability of the private respondents in W.P.(C) No. 8751/2015

10. It is an admitted position before us that the respondents in W.P. (C)No.8751/2015 are the nine members of the society who did not take any benefit of the loan taken by the society from the DCHFC. They had taken financial assistance from their employers and have duly repaid the same.

11. We are informed that so far as these private respondents are concerned, most of them are holding title under registered conveyance deeds in their favour, completing the transfer of all rights in the flats in their favour.

(b) Why no liability of Meenu Tomar

12. So far as Smt. Meenu Tomar ? petitioner in W.P.(C)No.6635/2014 is concerned, the facts, though undisputed, are a little truncated, and require to be noted. One Shri P.L. Jain was enrolled as a member in the society against membership No. 528. Shri P.L. Jain unfortunately expired on the 24th of April 1988 and his wife, Smt. Bhagwati Devi Jain, as his nominee became a member of the society. On 7th of April 1988, Smt. Bhagwati Devi Jain was informed by the society about the allotment of Flat No.116 in A-1 category of the society against her membership. An allotment letter dated 1st March, 1989 was issued in this behalf.

13. As Smt. Bhagwati Devi Jain also expired on 26th December, 1998, this flat was transferred by the society in the name of her son ? Shri C.P. Jain. This transfer was duly mutated on 11th January, 2000 in the records of the Delhi

Development Authority as well in his favour.

14. It is also an admitted position that Late Shri P.L. Jain had taken benefit out of the loan which was sanctioned and disbursed by the DCHFC. Against this loan, a group insurance was taken from the LIC.

15. Upon demise of Shri P.L. Jain, the loan amount against the membership and flat allotted to Shri P.L. Jain was duly settled by the LIC on 18th May, 1989. This fact stands admitted by the society in several documents placed before us. The annual report of the society for the year 2002 notes that LIC had duly settled the loan account of Shri P.L. Jain. The Society has also placed before us a list dated 21st December, 2015 of loanee members whose accounts stood duly settled as full and final which includes the name of Shri P.L. Jain at Sr.No.127 as having been duly settled by LIC on 18th of May 1989. The Society also admits this fact in its counter affidavit filed before us as well.

16. The fact that complete repayment of Shri P.L. Jain's loan amount stood made was ratified by the Society on 31st of January 2004 when it issued a no objection certificate in favour of Shri C.P. Jain clearly stating thus :

"2. He has paid the outstanding dues of the society as follows :

I. Loan of DCHFC settled.

II. Maintenance charges is paid upto Jan. 2004."

17. Shri C.P. Jain transferred the flat in favour of Smt. Meenu Tomar on 11th of March 2004 against execution of the documents as per general practise which inter alia included a General Power of Attorney; Indemnity Bond; Special Power of Attorney; Surrender Deed etc. The Society has admittedly duly transferred the flat in the name of Smt. Meenu Tomar.

18. The factual assertions with regard to the repayment of the loan by Shri C.P. Jain; issuance of the no objection certificate and Shri C.P. Jain having sold the flat free from any encumbrance to the petitioner ? Meenu Tomar in the year 2004 have been set out in paras 2.8 to 2.10 of the W.P.(C)No.6635/2014. The Society admits these assertions in its counter affidavit. Based on the above factual position, on 16th of November 2004, a registered Conveyance Deed was duly executed by the Delhi Development Authority in favour of Smt. Meenu Tomar of the subject flat completing vesting of title in the property in her favour.

II. Misappropriation of Societal funds and Mismanagement of financial affairs by managing committees

19. At this stage, it becomes necessary to note certain background facts relating to the management of the affairs of the society, and the resultant liability.

20. On the 24th of September, 1990, the then Secretary of the Managing Committee ? Shri M.C. Gupta handed over charge to a newly elected managing committee along with a list of loanee members against whom loan was due. This

list does not contain the name of Late Shri P.L. Jain or any of his legal heirs.

21. It is on record that there was misappropriation of a large sum of money to the tune of Rs. 35,00,000/- by the Managing Committee of the Society. As a result, while handing over the charge on 24th September, 1990 to a newly elected Managing committee, Shri M.C. Gupta, Founder Secretary of the outgoing Committee gave an undertaking dated 14th June, 1990 to repay the same.

22. The private parties before us i.e. the members of the society have heavily relied upon the resolution dated 25th September, 2005 passed in the Annual General Body Meeting of the Society, when the managing committee headed by Shri D.S. Malik as its President, resolved to take appropriate action for recovery of this amount. This resolution is of import and relevant portion is extracted below :

"Agenda Item No. 7

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Regarding DCHFC loan Mr. Malik, President RWA requested all member to adopt a resolution so that the default amount of the Society, if any may be recovered from defaulters only and others are not pressurised to part with their money for no fault of their own. Accordingly, the House adopted the following resolutions :

In view of the compliance of the two subsequent awards in respect of DCHFC Ltd. Loan passed against the Society in the courts of G.G. Saxena and U.R. Kapoor respectively in the year 1998 and 2002, the present M.C. resolved that any such member can not be asked to pay extra amount than declared amount of loan even after the default by the Society towards payment of DCHFC loan if :

- a) A member if regularly paying the society such amount conveyed to him by the Society;
- b) A member who has made a full and final payment of loan to DCHFC Ltd.
- c) Those who have not taken the loan from DCHFC Ltd.
- d) The MC will recover the amount from the defaulted members."

Thereafter Mr. Roy raised the point of unrealised amount of Rs.35 lacs from late Sh. M.C. Gupta. After discussion the House requested Sh. R.K. Kapoor to take up the matter with Sh. Angrish so that a claim could be lodged with the heirs of late Sh. M.C. Gupta and the same could be pursued. ?"

23. The society thus rightly recognised that any person who had either not taken the loan or had effected full and final payment of the loan to the DCHFC could not be burdened with any amount of loan. Admittedly, no action for recovery of the amount from Shri M.C. Gupta was taken as well as no claim was lodged against his legal heirs. On the 6th of December 2009, elections to the Managing Committee of the Society were held which has generated much disputes. The record placed before us establishes that it is this unrecovered amount with

interest thereon which has created the DCHFC liability.

24. We may also note that the society has written letters dated 11th of October 2009 and 17th December, 2009 to the Commissioner of Police complaining against the illegal activities and the said misappropriation of funds by Shri M.C. Gupta pointing out that the liability of the society for these acts had escalated to Rs. 2 crores as on that date. Having regard to the nature of the controversy, we may set down paras 3, 7 and 8 of the complaint dated 17th December, 2009 in extenso which really sum up the basis of the case of the parties before us as well :

"3. That in July, 1990 late Mr. Gupta had handed over his charge to Mr. S.C. Angrish as Secretary along with the "Undertaking" dated 14.06.1990 owing all financial liabilities of DCHFC loan dues and other deficits pertaining to the account of society besides other documents.

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7. That Mr. S.C. Angrish kept this undertaking in his conscious physical possession till date. He neither handed over it to the next Secretary nor took timely action to recover the amount of Rs.35.00 lacs from late Mr. M.C. Gupta. Had this amount been recovered from him the society would have not been put in financial loss. This proves that Mr. Angrish was in league with Mr. M.C. Gupta to save his skin. Para 2nd of an important message/appeal dated 25.10.1990 circulated by Sh. S.C. Angrish is self explanatory and incriminating that the said undertaking was handed over Mr. S.C. Angrish.

8. That Sh. Angrish with dishonest intention misappropriated the valuable document to cause wrongful gain to late Mr. Gupta or himself and wrongful loss to the society. The said amount of Rs.35.00 lakhs with interest thereon almost reaches about Rs. 2.00 crores till date and on account of that the society is suffering financial obligation of about Rs. 2.00 crores which has to be repaid to DCHFC Ltd. which had released loan mentioned above to the society in the year 1985 to 1987."

(Emphasis by us)

25. There is no dispute at all that no action, civil or criminal, was taken for recovery of the huge amount of Rs. 35,00,000/- or for that matter to fix the liability, either against Shri M.C. Gupta or against Shri S.C. Angrish. It is also not disputed that it is this very liability which had escalated to about Rs. 2 crores when the above complaints were made by the Society to the police. Clearly, persons who took upon the task of managing the affairs of the society, either misappropriated the funds of the Society, or shielded them. Looked at from any angle, they would be guilty of criminal offences of misappropriation, conspiracy or criminal negligence.

III. Redressal action taken by DCHFC and recovery proceedings

26. It appears that in the above circumstances, there was a huge default by the Society of the payment of the loan to the DCHFC which was constrained to initiate arbitration proceedings under Section 60 of the DCS Act, 1972. The private respondents in W.P.(C)No.8751/2015 were not parties to these proceedings inasmuch as they were not included in the 162 loanee members against whom the complaint was filed.

27. Mr. Abhimanue Shreshtha, learned counsel for Meenu Tomar has drawn our attention to the list of 162 members who were shown as borrowers in these proceedings. The name of either Shri P.L. Jain, his heirs or for that matter of Smt. Meenu Tomar does not feature in this list.

28. These arbitration proceedings culminated in the first arbitral award dated 20th November, 1998 by Shri G.G. Saxena, the learned Arbitrator, the material extract whereof reads thus :

"As regards non payment of principal amount, interest or dues in respect of those members who are claimed to be members by DCHFC Ltd. but allegedly not admitted by the society, which numbers around 60, defaulting amount is to be calculated and shown against them and society shall dig its own records to trace out such persons and take proper action on the basis of affidavits submitted by those members and settlement of accounts at the time of expulsions or resignation of those members. If present Management Committee fails to trace out whereabouts of those persons or it is not possible to settle their accounts, Management Committee shall resort to proper provision under Rules and Cooperative law to fix liability on those Secretaries and Presidents and Management Committee members who are responsible for accepting resignations of those members or settling the accounts while inducting fresh members in view of those persons. However, the present Management Committee cannot be bailed out merely by taking the plea that details of those persons are not available unless it takes either criminal action or civil action against those persons or those ex-Management Committee members."

(Emphasis by us)

The Arbitrator had thus in 1998 itself clearly set out the responsibility of the Society to effect recoveries and take action against the persons responsible for mismanagement of the affairs of the society.

29. Our attention is drawn to the second arbitration proceedings initiated by the DCHFC against the society and 162 loanee members which resulted in a second Arbitral Award dated 21st May, 2002 by Shri U.R. Kapoor, the learned Arbitrator. This Award explicitly notes that the loan of Late Shri P.L. Jain had been settled by the LIC as a death case and that his heirs were not arrayed as a party. In the Award dated 21st May, 2002, the Arbitrator has also noted the admission by the Society in his Award in the following terms :

"4. In the reply it is also stated that LIC has not been made a party to the

proceedings since 10 beneficiary loaning members had died and five cases have been settled by LIC and five are still pending. It is also stated that an earlier award is pending with the Hon'ble High Court in the case of Mrs. Renu Malhotra v. Delhi Cooperative Society & Ors. The respondent No.1 submitted list of loaning members, list of members whose account have been settled and as on 31.1.02 list of members who have been paying their loan regularly and the list of defaulters as on 31.1.02. As per this list there are 17 defaulters."

(Emphasis by us)

The case of Shri P.L. Jain (from whom Meenu Tomar derives title) was one of the five settled cases which are noted here. Clearly he was not one of the defaulters of the loan to DCHFC.

30. We find that this is also admitted as a fact by the Society in its counter affidavit before us.

31. Matters did not end here. Arbitral proceedings were initiated by the DCHFC which resulted against the Society and only 162 other members yet another time. A third Arbitral Award dated 24th of April 2009 was passed by Mr. Surjan Singh, Arbitrator under Section 71 of the DCS Act, 1972. So far as responsibility to settle its claims is concerned, the Society alone was responsible for payment to it. In this Award also, the Arbitrator has noted as follows :

"... Since the loan agreement and other related documents have been executed between the claimant and the defendant society hence the defendant society is solely responsible for making the payment of the loan dues along with interest etc. to the claimant.

The beneficiary members who have already cleared there loan dues by depositing the same with the society or depositing with the claimant directly cannot be forced to pay any extra amount in default from the beneficiary members who defaulted in making payment of their dues in time or to convince all the members to cooperate with them in coming out of the situation before them. ..."

(Emphasis supplied)

32. It appears that based on the third Arbitral Award dated 24th April, 2009, the DCHFC initiated the first recovery execution proceedings against the Society and the 162 loanee members which resulted in the issuance of a recovery certificate dated 23rd June, 2009 for the sum of Rs. 2,37,70,006/-. We are informed that reconciliation of amounts was effected and the amount stands reduced to Rs. 1,68,97,343/-.

33. On 14th January, 2010, the DCHFC issued a second demand for the reconciled amount of Rs. 1,68,97,343/- against the Society.

34. The execution proceedings in respect of the third Arbitral Award dated 24th April, 2009 resulted in reconciliation of the accounts and issuance of the second

demand for this amount. There is merit in the contention of the private members/ flat holders that the second recovery proceeding in respect thereof would not lie.

IV. Resolutions of the Society

35. We may now briefly examine the some decisions taken by the Society with regard to the recovery of the amounts due to the DCHFC from members of the Society.

36. Mr. Tarique Siddiqui, learned counsel has also drawn our attention to the Minutes of the Annual General Body Meeting held on 25th of October 2009 which has been extracted in the Arbitration Award dated 16th December, 2011. This extract notes the anguish expressed by one Dr. C.L. Mehra to the effect that "Shri S.C. Angrish flat No.70 had promised the residents in a meeting held on 28.6.2009 that he is in possession of original undertaking of Rs.35.00 lacs which was given to him by late Shri M.C. Gupta but later on he denied the commitment. Had the said amount been recovered at that moment the society would have been got rid of this liability and every resident would have been breathing in fresh air and friendly atmosphere with dignity and honour. The Committee succeeding late Shri M.C. Gupta is entirely responsible for this lapse." After discussion, it was resolved that "each flat including that of defaulters has to contribute Rs.1.00 lac to meet the liability of the DCHFC loan dues. This is in addition to the recovery of defaulted amount as land and revenue arrears. Defaulted amount as and when recovered shall be refunded to the members proportionately, as the case may be. The amount of Rs.1,00,000/- shall be charged in three instalments i.e. Rs.30,000/- by 31.12.2009, 2nd instalment Rs.30,000/- by 31.3.2010 and last one Rs.40,000/- by 30.6.2010."

37. This resolution unequivocally declares that so far as the payment of loan was concerned, a huge and whopping amount of Rs. 35,00,000/- had to be recovered by the Society from its erstwhile office bearers for which no steps have been taken. The effect of the decision of 25th October, 2009 was to burden the persons who had not taken the loan or repaid the loan with a liability of Rs. 1,00,000/- each.

38. Elections to the Managing Committee were held on the 6th of December 2009. A Special General Body Meeting was thereafter called for on the 7th of March 2010 by this Managing Committee. In this meeting, in an attempt to cover up for the above deliberate negligence of the Managing Committee, Mr. D.S. Malik for the first time advanced an explanation that the society underwent in default of DCHFC loan by diverting the quarterly loan instalments of June, 1989 and March, 1990 towards the construction money. Inasmuch as this resolution is relied upon by the society in maintaining its claim against the private members, we extract hereunder the relevant portion relied upon by it :

"Special General Body Meeting

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- i. It is a hard fact that the society under went in default if, DCHFC loan dues by directing 2 quarterly loan instalment of June" 1989 and March" 1990 towards construction money.
- ii. That because of this irregularity the society faced to meet the demand of DCHFC loan of Rs.2,37,70,086/-
- iii. That the printed role of MC after the reconciliation, the above demand could be reduced to Rs.1,69,97,343/-.
- iv. That the difference of Rs.6872743/- was admitted by DCHFC and agreed on the demand of Rs.1,68,97,343/-.

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- vii. That as per Individualization Scheme the per flat amount in finally settled for Rs.1,79,48,814/- (divided) by 212 flats comes to Rs.84665/- which is approximately Rs.15000/- less than Rs.10000/- already resolved in AGM held on 25.10.2009.
- viii. That the settle amount does not include the defaulted amount recoverable from the defaulters in addition to payable DCHFC.
- ix. That the defaulted amount recoverable from the defaulters shall be equally refunded to the members except death cases as and when received to the society."

(Underlining by us)

These suggestions were passed in this Special General Body Meeting.

39. It is noteworthy that the amount payable to DCHFC was not divided amongst only those members who had availed the facility of loan and were still owing the money, but amongst the entire 212 members of the society. No reference was made to effect the recovery of Rs. 35,00,000/- from Shri M.C. Gupta or Shri S.C. Angrish or the heirs of Shri M.C. Gupta. In para No.(viii) and (ix), it is noteworthy that there is a clear reference to defaulters i.e. the persons who had not paid the loan amounts due and payable to the DCHFC. Thus, the liability was sought to be fastened upon persons who had either not taken the loan or having taken the loan as Shri P.L. Jain on whose behalf the LIC had paid the same. Most importantly, no reference stands made to the earlier resolution of 25th September, 2005 which has also not been overruled and binds the Society.

40. The resolution dated 7th of March 2010 is of no legal consequence and effect for another reason as well. The elections dated 6th December, 2009 were subject matter of challenge in the arbitral proceedings and were set aside by the order dated 9th July, 2010. On 6th September, 2010, the Registrar of Co-operative Societies appointed an Administrator for managing the affairs of the society. The challenge to the appointment of the Administrator was rejected on 3rd December, 2010 by the Delhi Co-operative Tribunal. On 13th December, 2010,

W.P.(C)No.8297/2010 assailing the order of the tribunal was withdrawn. A review petition was also filed before the DCT which on 15th of December 2010 was dismissed for non-prosecution.

41. The appointment of the Administrator by the Registrar on the 16th December, 2010 opened up yet another avenue for litigation by way of W.P. (C)No.416/2011. The challenge to this appointment by the society laid before the Financial Commissioner resulted in an interim order of stay, which proceedings were not finally heard for a long time.

42. W.P.(C)No.416/2011 with regard to the proceedings before the Financial Commissioner culminated in an order dated 21st of January 2011 allowing the writ petition holding as follows :

"10. The Award of the Arbitrator has attained finality and the Tribunal has clarified the effect of the Award. It is thus not in doubt that the elections to the earlier Managing Committee held on 06.12.2009 had been declared as invalid and thus there was no Managing Committee in existence. That being the position, no decision could have been taken on 15.12.2010 after all these proceedings were over, by the Managing Committee to hold elections itself.

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The order of the Financial Commissioner dated 23.12.2010, in our considered view, shows complete non-application of mind as he has not even cared to consider as to how he could have granted a stay in view of the orders passed by the Tribunal and the High Court earlier, the effect of which is that the revision petition filed on behalf of the R-1/Society could not be said to be maintainable. The members of the erstwhile Managing Committee of R-1/Society are like any other members of the cooperative society and thus enjoy the rights only in that behalf.

11. We thus consider this a fit case to exercise jurisdiction under Article 226 of the Constitution of India to dismiss the revision petition itself filed before the Financial Commissioner and to vacate the order passed on 23.12.2010 staying the letter of the Administrator to take over charge of R-1/Society communicated vide letter dated 22.12.2010 and direct the Administrator to forthwith take over charge of R-1/Society. xxx xxx xxx

12. Insofar as the other prayers made in the writ petition to initiate enquiry into the functioning of R- 1/Society, to hold a special audit or to disqualify existing members of the Managing Committee of R- 1/Society are concerned, it is for the RCS to take necessary action in accordance with law.

13. The writ petition is accordingly allowed with costs in view of the conduct of the Ex-Managing Committee of R-1/Society and thus the costs quantified at Rs.10,000/- will be paid by the Ex-President of R- 1/Society Sh. Rishi Dev equally to the petitioners which he can recover proportionately from other members of the Ex-Managing Committee who took the decision to hold elections."

(Emphasis by us)

Thus, costs were imposed on the Society recoverable from the members of the Ex-Managing Committee. This court has clearly not only recognised but also unequivocally reinforced the responsibility and liability of the members of the Managing Committee for the affairs of the Society.

43. In this background, the reliance by the Society on the resolution dated 7th of March 2010 is assailed by the private parties submitting that on that date there was no validly constituted Managing Committee which could have passed any resolution legally imposing financial responsibility on the other members of the society.

44. The Society has submitted that neither the resolution dated 25th October, 2009 nor the resolution dated 7th March, 2010 have been challenged. However, in view of the judgment dated 21st January, 2011, the very competence of the Managing Committee (which called for the meetings in which these resolutions were passed) stands rejected. As such all its actions are reduced ab initio illegal. We also find that the earlier resolution dated 25th September, 2005 wherein the society has clearly decided that the members who had not taken the loan could not be burdened with any portion of dues of the loan, has not even been referred to, let alone superseded. There are other grounds considered by us hereafter for which reason as well, no separate challenge is necessary.

45. Given the gross mismanagement with the affairs of the Society as well as the misappropriation of the funds of the Society, what was the course open to the Society? Was the Society required to take any action against the members of the Managing Committee responsible for the illegality qua these amounts or was it open to the Society to fasten liability thereon upon the members of the Society?

46. In the present case, it is an admitted position that the responsibility for the mismanagement stood clearly ascertained. It stood actually acknowledged in writing by the person concerned i.e. Mr. M.C. Gupta by way of the undertaking given to Sh. Angrish as noted above. The resolution of the Managing Committee dated 25th September, 2005 also clearly notes that steps have to be taken for recovery of this amount. In this background, the amounts which have been claimed from the members of the society do not relate to any expenditure incurred for the benefit of the members or default in payment by members but are actually amounts which have been misappropriated by the office bearers for which the society had decided to take action against the person concerned. The amounts have become due and payable not because of any default by the members or on account of any liability incurred upon the society, but because of failure to take the action despite the specific resolution.

47. In this regard, our attention has been drawn by Mr. Abhimanyu Shrestha to the pronouncement of the Supreme Court reported in (1997) 10 SCC 752, *Devi Singh v. State of Haryana & Ors.* Some reference to the facts noted in para 2 is important which is set out hereunder :

"2. The only question is whether the appellant as President of the Sardarajanti Kalan Cooperative Agricultural Service Society along with other two persons, namely, the Secretary and Treasurer, is liable to account for a sum of Rs. 65,726.59. It is an admitted position that Tara Chand is Ex-Secretary, the appellant, the Ex-President and Sardara Singh is the Ex-Cashier. The dispute arose from award proceedings under the Haryana Cooperative Societies Act. On a reference made to the Registrar, the matter was referred to the officer concerned for enquiry and necessary action. On the basis thereof, after notice to the parties and conduct of due enquiry, the award came to be passed wherein it was held that the three officers, namely, the appellant as President, Tara Chand as Secretary and Sardara Singh as Cashier were jointly and individually responsible for the unaccounted sum of Rs. 65,726.59. The Secretary and the Cashier had allowed the award to become final. The appellant carried the matter in appeal, which was confirmed; the writ petition filed consequently stood dismissed. Thus, this appeal by special leave granted by this Court.

3. Shri Maheshwari, learned counsel for the appellant, contends that the appellate authority proceeded on the premise that the appellant had admitted the misappropriation and accordingly it confirmed the award. This Court called for the record on perusal thereof, found that there was no such admission. Therefore, leave was granted. The appellant having not admitted the misappropriation, it must be proved that the appellant was a party thereto. It is argued that in the absence of such a proof, he cannot be saddled with any liability for the unaccounted money to the members of the Society. We find no force in the contention. It is true that the Registrar, who conducted the enquiry, had noted the admission. The admission was only in relation to the joint purchase of a tempo by the three persons for use as a public carrier and the income derived therefrom was required to be distributed to the members of the Society. That does not amount to admission by the appellant and others that they misappropriated the amount. It is seen from the evidence that certain amount, at the rate of Rs. 1500 to each of the members was credited towards purchase of tempo and there is an admission by the appellant and others that the tempo was purchased. Once it is proved that the tempo was actually purchased, the burden is on the said office-bearers of the society to account for the profits derived by its use as public carriage. The finding is that they have not accounted for. It is true that under the bye-laws of the Society, as placed before us, the responsibility is of the Treasurer and the Secretary. But the appellant being the President bears the overall responsibility. Being the President of the Society, he owes the collective responsibility with the Treasurer and the Secretary for its accounting. In the absence of accounting of the funds, the necessary inference is that there was improper management of the institution and thereby they are liable for making good the loss caused to the Society and the members. The crime registered against them is in respect of an offence; but the surcharge proceedings are for unaccounted money by the officers or the persons responsible therefor. Being the President of the Society, the appellant

bears the collective responsibility to have the accounting properly done of the funds of the Society. The omission thereof constitutes misappropriation."

(Emphasis supplied)

48. In the present case as well, it was the responsibility of the members of the Managing Committee to ensure proper accounting of the funds of the society to ensure that no person was able to misappropriate the same. Admittedly there was misappropriation of the money for which an identified office bearer of the society was admittedly responsible.

V. Individualisation Scheme

49. The Society has staunchly relied on the resolution dated 7th March, 2010 passed in the Special General Body Meeting fastening the liability of Rs. 84,665/- on all the 212 flat owners by apportioning Rs. 1,79,48,814/- upon all flats in the society. This action has been termed as application of the "Individualisation Scheme" by learned counsel for the society.

50 . Unfortunately, this submission is a complete misreading of the Individualization Scheme which actually is a scheme formulated by the DCHFC. The DCHFC manual gives an explanation for the scope and the intendment of the "Individualisation Scheme" in the following terms:

"The DCHFC started the loaning operation on all India pattern through a member co-operative Societies by executing Loan Agreement and Mortgage Deed of the land of the Society as a security for repayment of the loan. This system remained in vogue up to 1992-93. With the economic liberalisation in 1991-1921 and the problems being faced with the existing system of giving bulk loan to the societies and irregular recoveries from them a new concept of individual loaning was introduced in 1992-93.

The new scheme was broad-based to finance the members of co-operative group housing societies, the registrants of DDA's allottees and individuals owning plots in the approved colonies. Under the said scheme, the loan is sanctioned to an individual borrower. He is enrolled as a nominal member along with requisite sureties. In the case of co-operative group housing societies, though the loan is sanctioned in favour of individuals by executing Tripartite Agreement by including society also, the loan is disbursed to the society and the recovery is made from the individual. In case of DDA's registrants, payment is made through Bank Draft directly to the DDA; in case of plot holders, payment is made directly to him; in case of Power of Attorney Holders, the payment is made to seller and recovery is done from individual loanee."

(Emphasis supplied)

51. This scheme came into existence only in the year 1992-93 and was not in existence in 1985 when the loan was disbursed to the present society or 1987 when additional loan was granted. This agreement envisages a tripartite

agreement whereby the DCHFC grants a loan to individual members through the society. It certainly does not permit apportionment of the loan liability amongst all individual society members irrespective of whether they took the loan or not as has been done by the resolution dated 7th March, 2010 of Society before us. The individualization scheme recognises that the loan would be disbursed to the society on behalf of individual members.

52. The individualization scheme came into existence in the year 1992-93, long after the sanction of the loan in the present case. There was no tripartite agreement as envisaged under the Scheme but only a bipartite agreement between the DCHFC which granted the loan and the beneficiary thereof. The reference to the impugned demand of the Society as the "individualisation" scheme in the instant case is completely misconceived. This is also for the reason that the society is attempting to recover loan liability from persons who were not the beneficiary of any financial facility from the DCHFC and have not entered into any agreement in relation thereto with it. The Scheme as set out heretofore, does not create any such liability upon persons who have either not taken any loan or, if they had availed the facility, the loan stands repaid.

VI. Recovery from whom?

53. The question which arises is whether the DCHFC could have proceeded against the persons who are private respondents in W.P.(C)No.8751/2015 with whom it has no privity of contract or against the petitioner ? Meenu Tomar in W.P. (C)No.6635/2014 whose liability has admittedly been cleared by the LIC? The question which also requires to be answered is whether the society can utilise the agency of the General Body Meetings or Special General Body Meetings to create a liability against the persons who have not utilised the financial facility advanced by the DCHFC? It is also questioned whether coercive execution proceedings can be initiated to recover, an amount which is not the subject matter of an arbitration award, judgment, decree or order.

54. The above narration would show that according to the DCHFC in its claims, some of the persons who had taken the benefit of the loan were defaulters in repaying the loan given to it, compelling it to initiate arbitration proceedings culminating in the Award.

55. Admittedly the DCHFC initiated the recovery proceedings pursuant to the recovery certificate dated 23rd June, 2009 in the year 2009 and having quantified the recoverable amount at Rs. 1,79,48,814/- against the loanee defaulters.

56. On 31st December, 2012, the Society has submitted yet another list of what it termed as "defaulting members" to the DCHFC. These include the private parties before us who admittedly were not defaulters as per the loan agreement or the Arbitral Awards. These parties have been so bracketed now only for the reason that they had refused to comply with the demand of the Society in terms of the resolution dated 7th March, 2010 as they were not beneficiaries of the

loan from the DCHFC. These included the private respondents in W.P. (C)No.8751/2015 as well as Meenu Tomar (through her predecessor-in-interest).

57. The DCHFC and the Society confabulated and initiated coercive recovery proceedings including attachment, not against the persons in the defaulter list before the arbitration but against those persons who were on the list given by the society who were "defaulting" in respect of the amounts foisted by a resolution on them by the Society.

58. The private respondents in W.P.(C)No.8751/2015 (filed by the Society) raised claims under Section 70 of the DCS Act, 2003, that the Society was not entitled to recover such amounts claimed from them by virtue of the resolution dated 7th March, 2010. These were treated as arbitral disputes which was referred to arbitration and culminated in the Arbitral Award dated 16th December, 2011 holding that these private parties were not liable to pay the apportioned amount of Rs. 84,665/- which was being claimed by the society from them primarily for the reason that they were not privy to the contract between DCHFC and the Society or between the Society and the loanee members nor had they undertaken any liability on behalf of such members. It was therefore, held that the private respondents could not be burdened to make payment of the amount under the Individualization Scheme which was "being grossly misinterpreted by the respondent society".

59. This Arbitral Award was assailed by the society by way of Appeal No.21/2012 before the Delhi Co-operative Tribunal which came to be rejected by the impugned order dated 16th July, 2015. The Society has assailed the Arbitral Award dated 16th December, 2011 as well as the order dated 16th July, 2015 of the Delhi Cooperative Tribunal by way of W.P.(C)No.8751/2015 herein. Action taken against Meenu Tomar, owner of Flat No.116

60. DCHFC also initiated execution proceedings (premised on Society's list of 2012) against Shri C.P. Jain and the Society registered as Recovery Case No.1089/2009-10/958. In this case, on 19th August, 2014, the Assistant Collector passed an order for attachment of her Flat No.116. The order notes that an amount of Rs. 1,06,02,489/- as on 31st March, 2005 as well as interest thereon is recoverable from the Delhi CGHS Ltd. as arrears of land revenue for realisation of the "decretal amount". It clearly also states that the said "judgment debtor society furnished a list of defaulter members as on 31st December, 2013 wherein it is indicated that a sum of Rs.1,50,816/- is due against you" (Shri C.P. Jain). Admittedly, only the Society was the judgment debtor in accordance with law.

61. By this order, attachment of the Flat No.116 alleging that the same was belonging to the judgment debtor "Shri C.P. Jain and Smt. Meenu Tomar" was being attached.

62. Meenu Tomar submitted a reply to Mr. Ravi Kumar Jain, Assistant Collector (who had issued the summons to her) placing the copies of the documents in her

favour including the NOC issued by the Society; the registered Conveyance Deed and other relevant documents. On 3rd April, 2014, the petitioner-Meenu Tomar submitted further clarification before the Assistant Collector.

63. A stand was taken by the DCHFC that Meenu Tomar had failed to produce any NOC from the decree holder/mortgagee i.e. DCHFC.

VII. Execution of what and against whom?

64. Execution proceedings pre-suppose a valid determination, if not an adjudication, of a legal liability against a person. The Society is unable to point out before us any such determination or adjudication qua the private parties including Smt. Meenu Tomar before us.

65. So far as execution proceedings are concerned, Section 105 of the DCT Act and Rules 1 to 4 of the Rules framed thereunder are relevant. For expediency, these provisions of the statute and the relevant Rules are set out hereunder :

"105. Execution of orders, etc.

Every decision, award or order duly passed by the Registrar or the arbitrator or the Tribunal, or the Government under section 31, section 32, section 33, section 66, section 71, section 104, section 110, section 112, section 114, section 115, section 116 or any other provisions of this Act shall, if not carried out ?

(a) where the decision, award or order provides for the recovery of money, be executed according to the law for the time being in force relating to the recovery of land revenue :

Provided that an application for the recovery of any sum in the manner aforesaid shall be made to the Collector and shall be accompanied by a certificate signed by the Registrar or by any person subordinate to him and empowered by the Registrar in this behalf;

(b) in any other case be executed by the Registrar or any person subordinate to him and empowered by the Registrar in this behalf, in the same manner as is provided in the case of a civil court by the Code of Civil Procedure, 1908 (5 of 1908)."

"124. Procedure for execution by the Collector

(1) In case any decision, award or order providing for the recovery of money is executable by the Collector under clause (a) of section 105 of the Act, it shall be executed by a Revenue officer empowered by the Collector by-general or special order to do so (hereinafter referred to as the "Recovery Officer" which shall include his successors and assigns) in accordance with the provisions of the Punjab Land Revenue Act (Act XVII of.1887)- which shall include any other Act for the time being in force in the National Capital Territory of Delhi relating to recovery of land revenue, the rules, orders or regulations issued thereunder from time to time (hereinafter referred to as the "Land Revenue Code").

(2) In case any decree holder desires to have the decree executed through the Collector under clause (a) of section 105 of the Act, he shall apply to the Registrar in Form No. 27 for the issue of a certificate for the recovery of the decretal amount as arrears of land revenue. The application shall be delivered in the office of the Registrar personally and a receipt obtained or sent by registered post.

(3) Soon after the receipt of the above application, the Registrar shall call for original records and shall check up if the decision or the award had been given in accordance with the Act and the rules and shall check up contents of the application with reference to the relevant original records of the case. If the Registrar is satisfied about the correctness of the award or decision and the application, the Registrar or any officer authorised by him shall issue certificate in Form No. 28 to the decree holder. In case the Registrar is satisfied that the decision or award is in contravention of the provisions of the Act and Rules, the Registrar may refer the arbitration case back to the arbitrator for necessary rectification(s).

(4) Within a period of sixty days after the issue of the certificate referred to in sub-rule (3), the decree holder shall apply in Form No. 29 to the Recovery Officer, delivered in person and a receipt obtained or sent by registered post. The application shall be accompanied by:

- (a) A certified copy of the award;
- (b) original certificate issued by the Registrar under sub-rule (3) ; and
- (c) receipted pay-in-slip for deposit of execution fee in the Office of the Registrar.

Provided that the Registrar may extend the period of sixty days after hearing the reasons for delay by the decree holder.

xxx xxx xxx"

(Emphasis by us)

66. A bare reading of the statutory provisions makes it amply clear that it is only "decision, award or order", if passed by the "Registrar/Arbitrator/Tribunal/Government" in exercise of statutory powers, is executable under Section 105 of the DCS Act. Admittedly in the present case there is neither any decision nor award or any order by any of these authorities, execution whereof is sought.

67. Furthermore the "decree holder" must comply with the mandate of Rule 124 of the DCS Rules. There is a clear reference to a "decree holder" in sub-rule 2 of Rule 124 set out above.

68. No such compliance is placed before us.

69. As per Rule 124(4) of the DCS Act, an execution application can be filed only within 60 days after the issue of the certificate referred to in sub-rule (3) of Rule 124. NO such certificate was obtained. This was also admittedly not done. There

is no compliance with the mandate of Rule 124.

70. We find that Rule 124(5) refers to "suit" filed against a "judgment debtor". Where is the suit against the private respondents or against Meenu Tomar or, for that matter, Shri C.P. Jain?

71. So far as the cooperative societies are concerned, we find that both the expressions "defaulters" as well as "judgment debtors" are also clearly defined in Rules 2(1)(e) and (k) of the Delhi Co-operative Societies Rules, 2007. To facilitate consideration, we set down hereunder the statutory definitions of these expressions which read thus :

"2. Definitions.- (1) xxx xxx xxx xxx xxx xxx

(e) "Defaulter" means any co-operative society, member or other person committing default in payment of loan instalment, land money, construction money or annual subscription payable as provided in the bye-laws of co-operative society for which due notice for payment has been served on the member/cooperative society or an award has been passed for recovery of such sum;

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(k) "Judgment-debtor" means any co-operative society against which or any person against whom a decree has been passed;

xxx xxx xxx"

72. It needs no elaboration that an execution petition envisages adjudication by some authority or forum against the judgment debtor which has not been complied with by the person against whom it is filed. Neither Mr. Vishwendra Verma nor Mr. Tarique Siddiqui, learned counsels on behalf of the society are able to point out any order against the private respondents or Meenu Tomar (or her predecessor-in-interest) requiring her to make payment.

73. Can it be said that the private respondents are "defaulters" within the meaning of the expression under Rule 2(1)(e) afore stated; the society is not alleging default in "payment of a loan instalment, land money, construction money or annual subscription provided under the bye-laws of co-operative society" and against these private persons. The attachment can be issued only for execution of dues ascertained in arbitration or by any authority vested with the power to so determine. There is no award which has been passed for the recovery of any dues with regard to which the attachment order has been made.

74. Mr. Rajat Aneja, learned counsel for the private respondent Nos. 1 to 9 in W.P. (C)No.8751/2015 has placed strong reliance on our decision rendered by one of us (Gita Mittal, J.) on the 7th of May 2015 in decided W.P.(C)No.1454/2014, Praveen Mahajan & Ors. v. Registrar Cooperative Societies & Ors. We set out hereunder the relevant paras of this judgment in extenso for expediency and clarity :

"1. W.P.(C)No.1454/2014 has been filed by 24 persons who are admittedly regular and bona fide members of the Neelkamal Cooperative Group Housing Society Ltd. ? respondent No. 2 herein who had been allotted flats which they are occupying for a considerable period.

2. W.P.(C)No.2363/2014 has been filed by 23 persons who are admittedly regular and bona fide members of the Neelkamal Cooperative Group Housing Society Ltd. ? respondent No. 2 herein who have been allotted flats on different dates which they are occupying for a considerable period.

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6. The twenty four petitioners before us in W.P.(C)No.1454/2014 are those members of the respondent No. 2 society who did not take any amounts whatsoever from the amounts advanced by the respondent No. 4. This position is undisputed. The names of these twenty four persons do not feature in the list of 67 members of the society who are shown as the persons on whose behalf the respondent No. 2 society had availed the loan of Rs. 51.52 lakhs.

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11. The respondent No. 2 is categorical that the loan amount was never apportioned towards any liability which enured to the petitioners in W.P.(C)No.1454/2014 before us.

12. So far as the status of the borrower is concerned, it is trite that a person can be a defaulter only if he had availed a financial facility which he had not repaid.

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14. It is noteworthy that no liability at all was attributed by the society to the present petitioners. No notice of these proceedings was issued to the petitioners. There is also no admission by these petitioners to the effect that they were liable for any amount to the respondent No. 2 or respondent No. 4.

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16. Pursuant to the said order, it appears that the Lieutenant Governor of Delhi appointed respondent No. 3 herein (an employee of the respondent No. 4) as the Assistant Collector Grade I/recovery officer. The petitioners before us have objected that it was the respondent No. 3 who had been prosecuting or defending all litigation on behalf of the respondent No. 4 in respect of the loan advanced to the respondent No. 2 and consequently ought not to have been appointed as the recovery officer. It is submitted that no person can be a judge in his own cause, least of all be responsible for execution of such orders as well.

17. Despite the afore noted position, subsisting on record, the respondent No. 3 proceeded to pass an order dated 14th August, 2013 at the instance of the defaulting members of the respondent No. 2 society. It appears that the respondent No. 3 thereby apportioned the liability of the defaulting members

towards several members of the society as the petitioners who have either not obtained the loan at all or had duly repaid their dues at the appropriate time in accordance with demands raised by the respondent No. 2 i.e. the petitioners in these two writ petitions. In fact, the petitioners assail this order on grounds of malafide. It has been vehemently contended by Mr. Rajiv Dutta that this order was for the benefit of the chronic defaulters and was a malafide attempt to coerce the petitioners into making payments of loans for which they were not responsible. It is further submitted that the respondent No. 3 had acted negligently inasmuch as a huge liability was being attributed to the petitioners which had accumulated merely because no effective action for recovery of amounts against the defaulting members had been pursued by the respondent No. 4.

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22. So far as the observation that all parties were bound by the orders passed by this court are concerned, the same cannot be faulted. However, the petitioners had raised specific objections to the recovery action initiated by the respondent No. 3 against persons who had never availed the loan or having taken the same had duly repaid it. These objections had to be decided in accordance with the specific directions made by the court.

23. So far as the attribution of liability against petitioners is concerned, the same is completely without jurisdiction and basis. Before us Mr. Rajiv Dutta has placed a list of 67 members who have actually availed the loan and not paid their dues. The same list has been placed by the respondent No. 4 as well. The original record has been produced by the respondent No. 3 before us. There is not even the remotest suggestion anywhere that the petitioners in W.P.(C)No.1454/2014 availed even a penny out of the loan advanced by the respondent No. 4 or got any benefit thereunder. So far as the petitioners in W.P.(C)No.2363/2014 are concerned, the respondents have verified the no dues certificates after payments were made by these petitioners. In this background, so far as the petitioners in the writ petitions are concerned, no recovery action for the loan which was applied for by the respondent No. 2 from the respondent No. 4 can either be initiated or be proceeded with against the petitioners. The respondent Nos. 3 and 4 shall remain bound by this position recorded by us."

(Emphasis by us)

75. This judgment was assailed by the Society by way of SLP(C)No.25877/2015 entitled Delhi Cooperative Housing Finance Corporation v. Dinesh Sharma & Ors. which came to be dismissed by the Supreme Court vide its order dated 24th September, 2015.

The judgment in Praveen Mahajan had, therefore, attained finality.

76. No award or decree or order has been passed against either against private respondents in W.P.(C)No.8751/2015 or against Meenu Tomar or her predecessor-

in-interest Shri C.P. Jain.

77. Neither of them fall within the definition of either "defaulter" or "judgment debtor". Clearly, the execution proceedings against these persons are completely without jurisdiction.

Even if they could be held liable for paying the amount demanded by the Society by virtue of the resolution dated 7th March, 2010, such persons obviously were not "defaulters" so far as the loan of the DCHFC was concerned. The DCHFC has no authority at all to proceed against the persons with whom it has no privity of contract and have not taken any loan. If at all, only the Society could proceed under the DCS Act for recovery of dues, if legally payable dues to it.

It is submitted by Mr. Vishwendra Verma, learned counsel for the Society that so far as the Recovery Officer is concerned, he has no jurisdiction to question a decree or a certificate. It is submitted that a recovery certificate issued by the Registrar under Section 84 of the DCS Act read with Rule 98(2) of the DCS Rules, 2007 is conclusive of the matter. Mr. Verma has further contended that by virtue of Rule 151 of the Rules, it is not open to the Recovery Officer to examine the legality or correctness of the decree and certificate.

78. So far as the submissions premised on the bindingness of a decree and certificate are concerned, there can be no possible dispute thereto. However, in the instant case, the question is even more basic. We have repeatedly called upon Mr. Verma, learned counsel for the society to show us any arbitral award or a decree against Meenu Tomar - the petitioner or Shri C.P. Jain, her predecessor in interest. As noted above, he has been unable to point out the same. Nothing turns on this submission of the Society as well.

VIII. Legal objection

79. Mr. Abhimanue Shreshtha, learned counsel appearing for Meenu Tomar has taken strong objection to the fact that the execution against his client has been filed by one Shri Ravi Kumar Jain who was an Account Officer of the DCHFC. It is urged that he had also prosecuted the arbitration proceedings on its behalf. The submission is that therefore, his appointment as a Recovery Officer is completely without jurisdiction.

80. In this regard, our attention is drawn to the Award dated 24th April, 2009 wherein it is mentioned that R.K. Jain, Account Officer has appeared as a representative of DCHFC. The copy of the summon issued by Shri R.K. Jain as Assistant Collector to Shri C.P. Jain seeking to recover the disputed amount on behalf of the DCHFC. For the view we have taken, it is not necessary to go into this aspect.

IX. Diversification of funds

81. Mr. Tarique Siddiqui, learned counsel for the Society has urged that the flats were under construction between the period 1989-90 and that the loan

instalments paid by 157 loanees, instead of being deposited with the DCHFC, were utilised by the society for construction purposes. The submission is that there were no defaulters of payment of the loan. It is submitted that therefore, this amount which was diverted for construction purposes for the benefit of all members of the Society has to be recovered from all the members of the society and not from loanees alone.

82. Our attention has been drawn to the award dated 21st of May, 2002. The contentions of the Society have been noted in para 10 of the Award. No such plea was pressed before the Arbitrator in the first arbitral proceedings which culminated in the Award dated 20th November, 1998. It was also not raised in the second proceedings resulting in the Award dated 21st of May 2002 or Even in the third arbitral proceedings ending in the Award dated 24th April, 2009 it was not advanced. Each time, the Award was passed against the Society alone.

83. Our attention is also drawn to the resolutions of the General Body dated 29th of July, 1989 wherein the Secretary had informed the House that, members who had taken the loan from the DCHFC, did not pay interest in time and that the society had to face difficulty in payment of this interest of loan resulting in the Society becoming a defaulter and having to pay interest for the quarter ending June, 1989. A resolution was passed to the effect that the members would have to pay interest on the loan on the 15th of every month, failing which penal interest of 24% would be charged. In this meeting, a committee of expert of three members was appointed to give a report with regard to the maintenance expenditure. There was no reference to divergence of any amounts received by the Society towards the DCHFC loan.

84. Again in the meeting held on 12th of July 1990, reference was made only to non-payment of instalments of call money.

85. Mr. Rajat Aneja, learned counsel for respondent Nos. 1 to 9 in W.P. (C)No.8751/2015 has placed before this court a copy of the report dated 17th October, 1989 of the three member committee captioned "Accounts Committee" which examined the contracts and the demands which were made or required to be made with regard to the construction activity. There was no reference at all to any diversification of funds.

86. We have noted above that after completion of construction, admittedly the draw of lots was held on 27th March, 1988 and the allottees were permitted to occupy the allotted flats. In this background, there would be no occasion for utilising amounts recovered between 1989-90 towards construction purposes. Nor is it noted in any resolutions of the Society. There is not a single document to support the diversification claim being made by the Society before us. On the contrary, the same is falsified by the admitted facts noted above.

87. No defence that any instalment money was diversified for the purposes of construction was placed before the Arbitrator either in any of the arbitration proceedings. The plea of diversification is being asserted as a malafide and false

explanation for the liability being foisted on members who did not take any loan. The plea has to be rejected.

X. Objection to the maintainability of the writ petition W.P.(C)No.6635/2014 under Article 226 of the Constitution of India on the ground of availability of an alternate remedy under the Delhi Cooperative Society Act

88. Appearing against Meenu Tomar in W.P.(C) No.6635/2014, Mr. Vishwender Verma has vehemently urged that, by way of this petition under Article 226 of the Constitution of India, this petitioner has challenged only the recovery proceedings. He contends that the petitioner has available to her an equally efficacious alternate remedy by way of a revision petition under Section 116 of the Delhi Cooperative Societies Act, 2003. In support of this submission, reliance is placed on the pronouncements of the Supreme Court reported at (2004) 1 SCC 603, Commissioner of Income Tax & Ors. v. Chhabil Dass Agarwal and (2015) 6 SCC 733, Union of India & Ors. v. Major General Shri Kant Sharma & Anr.

89. In Union of India & Ors. v. Major General Srikant, the Supreme Court was concerned with the issue as to whether the right of appeal under Section 30 of the Armed Forces Tribunal Act, 2007 against an order of the Armed Forces Tribunal would bar the jurisdiction of the High Court under Article 226 of the Constitution of India regarding matters relating to the Armed Forces. Section 30 of the Armed Forces Tribunal Act, 2007 confers the right of a statutory appeal against an order of the Armed Forces Tribunal with the leave of the Tribunal under Section 31 of the Act. In this background, the court was of the view that the High Court entertaining the petition under Article 226 of the Constitution of India against an order passed by the Armed Forces Tribunal under Sections 14 and 15 of the Act by-passing the machinery of statute provided under Sections 30 and 31 of the Act, could result in the likelihood of an anomalous situation for an aggrieved person praying for relief from the Supreme Court. It was observed that by virtue of the statute, a person aggrieved could seek leave to challenge the same before the Supreme Court. If the order of the Tribunal was assailed before the High Court under Article 226 and resulted in an adverse adjudication, the person aggrieved could not challenge both orders ? one passed by the Armed Forces Tribunal and the other by the High Court in one joint appeal. It was consequently held that the High Court would not be justified in entertaining the petition under Article 226 of the Constitution of India.

The Supreme Court has noted that the power of judicial review vested in the High Court under Article 226 is one of the essential features of the Constitution and any legislation cannot override or curtail the jurisdiction of the High Court. Of course, it was cautioned that where a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory disposition. This of course was subject to the alternate remedy being effective and efficacious.

90. In (2004) 1 SCC 603, Commissioner of Income Tax & Ors. v. Chhabil Dass

Agarwal, the Supreme Court has reiterated the well settled principles thus in para 15 :

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [AIR 1964 SC 1419], Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

(Emphasis supplied)

91. We may also note certain precedents placed before us by Mr. Abhimanue Shrestha, learned counsel for Smt. Meenu Tomar. We find that in (1998) 8 SCC 1, Whirlpool Corporation v. Registrar of Trademarks, Mumbai & Ors. on the objection under consideration, the principles have been authoritatively and succinctly reiterated. We set out in extenso the relevant extract of this judgment :

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

(Emphasis by us)

92. The challenge to an order of the High Court dismissing writ petitions filed by the appellant in view of the availability of an alternate remedy of a statutory appeal against an order of assessment by the sales tax officer, was set aside by the Supreme Court vide its order in (1998) 4 SCC 90, Paradeep Port Trust v. Sales Tax Officers & Ors. for the reason that interpretation of sub-clause (d) of Clause (29-A) of Article 366 of the Constitution and the taxability of the transactions in question was involved.

93. Reliance has also been placed on the pronouncement in (1987) 4 SCC 525, Dr. (Smt.) Kuntesh Gupta v. Management of Hindu Kanya Maha-Vidyalaya, Sitapur (U.P.) & Ors. wherein a challenge was laid to an order of dismissal from service of a principal of a college by the vice-chancellor. The court held that a writ petition under Article 226 of the Constitution against such order was maintainable notwithstanding the existence of an alternate remedy under Section 68 of the U.P. State Universities Act observing thus :

"12. ??It is well established that an alternative remedy is not an absolute bar to the maintainability of a writ petition. When an authority has acted wholly without jurisdiction, the High Court should not refuse to exercise its jurisdiction under Article 226 of the Constitution on the ground of existence of an alternative remedy. In the instant case, the Vice-Chancellor had no power of review and the exercise of such a power by her was absolutely without jurisdiction. Indeed, the order passed by the Vice-Chancellor on review was a nullity; such an order could surely be challenged before the High Court by a petition under Article 226 of the Constitution and, in our opinion, the High Court was not justified in dismissing the writ petition on the ground that an alternative remedy was available to the appellant under Section 68 of the U.P. State Universities Act."

(Emphasis by us)

94. The above precedents recognise that the availability of an alternate remedy is not an absolute prohibition to maintainability of a writ petition and that the same is a rule of convenience. It is also clearly stated that in order to bar a remedy under Article 226, the alternate remedy has to be effective and efficacious. The Supreme Court has itself drawn exceptions to the prohibition if the action complained of in the writ petition is contrary to statutory provision or

is wholly without jurisdiction. It is thus well settled that in these two eventualities, availability of an alternate statutory remedy shall not bar maintainability of a writ petition under Article 226 of the Constitution of India. We have to test the maintainability of the writ petition on these well settled principles.

95. In the present case, Meenu Tomar has laid a challenge to the very initiation of the recovery proceedings by way of the execution petition in which an order dated 19th August, 2014 was passed.

96. We have found that recovery proceedings have not been initiated in respect of any liability determined by any award or decree or order but for enforcement of a liability claimed by the society under the resolution dated 7th March, 2010.

97. We have held that there has been no determination of liability of Meenu Tomar in arbitration proceedings or in any other legal proceedings. A recovery certificate has been issued without compliance of Section 105 of the DCS Act or the mandatory requirement under the statutory rules. As such the entire execution proceedings against Meenu Tomar and attachment of her flat are completely without jurisdiction. The recovery officer has claimed to exercise power under statute which he does not have. The action of the respondents being contrary to statutory provision and without jurisdiction is certainly amenable to correction by exercise of writ jurisdiction by this court. Clearly, in the facts and circumstances of the case, the objection to the maintainability of this writ petition is devoid of legal merit and justification. The same is hereby rejected.

XI. Submission that the DCHFC is having a first charge over the entire project of the Society

98. It has been vehemently urged by Mr. S.K. Kaushik, learned counsel appearing for DCHFC that his client had a first charge over the entire project and therefore, any right, title or interest of any other person is subject to the rights of the DCHFC.

99. In this regard, Mr. Rajat Aneja, learned counsel for the private respondent in W.P.(C)No.8751/2015, has drawn our attention to the letter dated 11th of September 1986 communicating the following decision of the Board of Directors of the DCHFC to all societies after considering the difficulties being faced by the employees of public sector undertakings and banks etc. who raise loans for their flats in group housing societies against the security of mortgage of their flats :

"The matter was examined by the Board of Directors in their meeting held on 28th Aug, 1986 and it was decided that as and when, such cases are referred to the DCHFS by the group housing societies DCHFS shall have no charge, lien or encumbrances over the flat of a such member in the group housing society although the land of the society would always remain mortgaged with the DCHFS. We request you to circulate this among the members for their benefit

and submit specific details in respect of such member in the enclosed draft letter."

(Emphasis by us)

100. The objection of Mr. S.K. Kaushik, learned counsel appearing for DCHFC is therefore, completely misplaced in view of the above decision of the DCHFC communicated as back as on 11th of September 1986.

XII. Challenge to conveyance deed

101. An objection never ever before pressed has been placed by Mr. S.K. Kaushik, learned counsel for DCHFC is to the effect that the conveyance deed conveying the flat absolutely and exclusively in favour of the flat owners (as Meenu Tomar and some of the private respondents in the other writ petition) was void ab initio and that it was in violation of the mortgage deed.

102. The copy of the mortgage deed dated 17th November, 1985 and a further mortgage deed dated 18th November, 1987 executed between the DCHFC and the Society, have been placed before us. A description of the property which has been mortgaged is contained in Clause 2 of the mortgage deed. We find that freehold property has been clearly excepted out of the purview of the mortgage.

103. It is an admitted position before us that there are valid and binding Conveyance Deeds executed by the DDA in favour of Meenu Tomar and most of the other private parties regarding their flats in the Society. The DCHFC has never challenged the conveyance in favour of these private parties by even a representation or a communication to any authority. The same has never been challenged in any legal proceedings in accordance with law. The back-handed challenge during the course of oral submissions before us is of no avail. It does not in law result in cancellation of duly registered conveyance deeds.

104. We also find that in view of the exception contained in Clause 2 of the mortgage deed (set out above), clearly these flats being freehold are not the subject matter of the mortgage. Therefore, the plea of the DCHFC before us is also contrary to the terms of the mortgage deed.

XIII. The decision of the General Body Meeting is binding on all members

105. Both Mr. Vishwendra Verma as well as Mr. Tariq Siddiqui, learned counsels for the Society have vehemently submitted that the decision of the General Body stands accepted by all members except by Meenu Tomar and other private parties. This submission finds endorsement by Mr. S.K. Kaushik, learned counsel for DCHFC as well. This very plea was also the main plank of the Society's case before the DCT.

106. It is contended on behalf of the Society that decisions taken by General Body Meeting and the Managing Committee are also binding on all members in view of Sections 30 and 88 of the DCS Act.

107. Learned counsels for the Society have also placed reliance on Section 39 of

the DCT Rules to submit that the decision of even a Managing Committee whose election has been successfully challenged cannot be overruled.

108. Mr. Tarique Siddiqui, learned counsel for the Society has placed reliance on the pronouncement of the Supreme Court reported at (1998) 6 SCC 39, Myurdhwaj Cooperative Group Housing Society Ltd. v. Presiding Officer, Delhi Cooperative Tribunal & Ors. in support of his contention that the decision of the General Body Meeting is supreme and would bind all members. In this case, the court was concerned with the legality of a decision by the General Body of the Society that only those who had deposited a minimum amount specified by the General Body towards the construction of the first phase of the flats would be accommodated in the first phase of the construction on the five acres of land and others would be accommodated on the construction to be raised on additional land in second phase. This decision was challenged by the respondent No. 3 who was one of the original members of the Society who had not paid the entire requisite minimum amount who contended that his membership seniority was the main criteria for seniority for the allotments, irrespective of default of payment made by any member. The submission of the defaulting member was that there was no provision except Rule 36 of the Rules under which the Society could have dealt with his case and that, under that Rule, a defaulting member could only be expelled following due procedure laid therein for his default. Therefore, the General Body Resolution directing the defaulters to be accommodated in second phase was illegal. This contention was rejected up to the Supreme Court observing as follows :

"9. xxx xxx xxx 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. xxx xxx xxx"

(Emphasis by us)

109. After these observations, in the following para 11, the court had concluded the parameter within which the power of the Society was circumscribed :

"11. We find that Section 28 of the Act vests final authority in the general body of a cooperative society. It has wide powers including residuary power except those not delegated to any other authority under the Act, the rules and its bye-laws. In other words, its power, if any, is only restricted by the Act, the rules, the bye-laws and any order having force of law. This exercise of power by the general body which is in issue cannot be said to be excluded by Rule 36."

(Emphasis supplied)

110. This judgment was rendered in the context of the challenge noted by us heretofore. The issue which was involved was with regard to the options available to the Society against its defaulters. The court has authoritatively laid down that the general body had wide powers limited only by "Act, Rules, Bye-laws of the Society and any order having the force of law". There was no issue before the court of foisting liability created by managing committees upon persons who were not defaulters for the defaults of the members of the Managing Committee of the Society as in the present case.

111. Mr. Tarique Siddiqui, learned counsel for the Society has also placed the Division Bench pronouncement of this court reported at 217 (2015) DLT 1 (DB), Balraj Singh Malik v. Govt. of NCT of Delhi & Anr. In this case, the court has noted the question raised before it in para 7 to the effect that whether a member of a cooperative society could challenge a decision taken in the General Body Meeting of the Society. The court had observed that the principle of courts not interfering in the internal affairs of the Society or a Club would be attracted. This observation cannot be read without reference to the factual matrix which was before the court. The petitioner in this case was not a member of the Society but was merely a tenant in a flat of one of the members. The court had held that this tenant fell in a distinct class as against members of the Society who had contributed to the cost of land and construction of the Society and were occupying the flats allotted to them. As such, it was held that the General Body of the respondent Society which was permitted by Rules to levy a higher rate of maintenance charges on tenants of flats in cooperative society could not be said to be inequitable. This judgment has no application to the factual matrix of the present case.

112. Reliance has been placed by Mr. Verma, learned counsel, on an order dated 18th May, 2010 in W.P.(C) No. 3384/2010 Dr. N.S. Chawla v. Delhi Cooperative Group Housing Society. The order placed before us was rendered in the facts of the case. The order of two pages placed before us does not set out the complete factual narration. It is not clear from the order with regard to what were the nature of the dues being apportioned between the members who were occupants of flats and what was the status of the member who was disputing his liability. It is also not clear as to what were the circumstances in which the amounts became due.

113. We have also perused the order dated 6th May, 2013 in W.P.(C) No. 281/2013, Sh. Inderjeet Seth & Ors. v. The Registrar of Cooperative Societies. This writ petition was filed by members of the respondent No. 2-society who were willing to clear any outstanding on account of the loan availed by the society from the bank. There was no issue of mismanagement or misappropriation of amounts of the society as in the present case. The order does not lay down any binding principle of law.

114. Before us, learned counsels for the Society are unable to source the power of the General Body of the Society to create such liability to any provision of the statute, the rules, the Bye-Laws of the Society or any lawful order. We are unable to hold that there is any absolute proposition of law that each and every decision of the General Body Meeting must bind the members, irrespective of its legality.

XIV. Conclusion

115. We therefore, conclude that neither the General Body of the society nor its Managing Committee have any authority to fasten or create liabilities which cannot be fastened by law or to burden the liability on a member which he had never incurred. A person who had never taken the benefit of a financial facility from the DCHFC cannot be burdened with default liability for the facility which was taken for the benefit of other specific members. Decisions illegally taken cannot be foisted on his clients taking the shelter of Sections 30 and 88 of the DCT Act as these statutory provisions do not vest legality in decisions which have no basis in law. There exists no privity of contract between DCHFC and those members (or their successors) who have never taken any loan or financial benefit from or through DCHFC. It was so held in Praveen Mahajan.

116. It is open to any member of the Society to volunteer to accept such liability or to make payment, even if he/she had not taken the loan. However, such payment cannot legally compel or bind such members/persons who had not taken the loan or had repaid their loan, if they were not agreeable to incurring the liability. It cannot also bind their successors-in-interest, unless they were willing to make such payment.

117. It is the prime responsibility of the Managing Committee to diligently discharge its duties and responsibilities, especially to ensure financial discipline. Mismanagement and misappropriation of the finances of the Society cannot be

permitted or tolerated at all. Liability for the same as well as failure to discharge its duties and responsibilities, remains that of the Managing Committee.

118. In the decision dated 16th of July 2015 impugned in W.P.(C)No.8751/2015, the Delhi Cooperative Tribunal has rightly held that none of the statutory provisions enabled even the General Body of the co-operative society to override the settled principles of law.

119. The private parties have been compelled to engage in fruitless and pointless litigation by the Society before the several forums as detailed above. The private respondents some of whom were old and retired did not have enough means to engage a lawyer and we were compelled to appoint an amicus curiae to assist us. Instead of pursuing claims against powerful members of the managing committee, hapless flat owners have been victimised with unlawful demands and coercive attachments. The Society must be burdened with costs of this litigation.

120. We also record the flawless assistance rendered by Mr.Rajat Aneja, Amicus Curiae in the matter. His preparation was thorough and presentation impeccable in a case where he was rendering pro bono service. But for him, our adjudication through the meandering facts and red herrings drawn by the Society as well as the DCHFC may not have been possible.

XV. Result

121. We consequently, direct as follows :

(i) W.P.(C)No.8751/2015 filed by the Society is hereby dismissed.

(ii) All proceedings in Recovery Case No.1089/2009-10/958 which are the subject matter of challenge in W.P.(C)No.6635/2014 initiated by the DCHFC and/or Delhi Co-operative Group Housing Society Ltd. against Smt. Meenu Tomar or her predecessors-in-interest (Shri P.L. Jain, Smt. Bhagwati Devi Jain and Shri C.P. Jain) in respect of Flat No.116 seeking recovery of amounts shall stand quashed.

(iii) The order of attachment dated 19th August, 2014 passed by the Assistant Collector, Grade-I against the petitioner - Smt. Meenu Tomar in W.P.(C)No.6635/2014 shall stand set aside and quashed.

W.P.(C) No. 6635/2014 is, therefore, allowed.

(iv) The Society shall pay costs of litigation to each of the private respondents in W.P.(C) No. 8751/2015 which are quantified at Rs. 2,500/- each. The total of this amount shall be paid to Mr. Rajat Aneja, Amicus Curiae within six weeks from today.

(v) The Society shall pay costs of Rs. 5,000/- to Smt. Meenu Tomar (petitioner in W.P.(C) No. 6635/2014).

(vi) The matter shall be placed before the Registrar (Appellate) on 30th August, 2016 for reporting on payment of costs.

(vii) The costs paid as at Sr.Nos. (iv) and (v) above shall be recovered by the present Managing Committee from the members of the Managing Committee of the Society as on 7th March, 2010.

122. In view of the above, the pending applications do not survive for adjudication and are disposed of.