

(2010) 10 DEL CK 0041

In the Delhi High Court

Case No : Writ Petition (C) No. 15741 of 2006 and C.M. No. 2298 of 2010

Sh. Rahul Kathuria

APPELLANT

Vs

The Registrar, Cooperative Societies and Another

RESPONDENT

Date of Decision : 06-10-2010

Acts Referred:

Delhi Co-operative Societies Act, 1972 — Section 24(2)

Citation : (2010) 173 DLT 590 : (2010) 119 DRJ 497 : (2011) 1 ILR Delhi 527

Hon'ble Judges : Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : D.K. Rustagi and B.S. Bagga, for the Appellant; Sujata Kashyap and Ashok K. Chhabra, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—The issues in both the petitions are same and the facts more or less similar, they are therefore being disposed of by this common judgment. The challenge in both these petitions is to the letter of the Registrar of Cooperative Societies (RCS) dated 21.9.2006 which reads as under:

Most Urgent

Out today

Office of the registrar Cooperative Societies

Government of NCT of Delhi

Old Court's Building Parliament Street: New

Delhi

No. F.47/27/GH/Coop./NW4211 Date 21/9/06

To

The President/Secretary

Bannu Biradari CGHS,
Bannu Enclave, Road No. 42,
Pitam Pura, Delhi-34.

Sub: Regarding approval of members against two
vacancies in the society.

Sir,

With reference to your letter dated 21.4.2006 for approval of filing of two vacancies in the society. In this connection it is stated that this request has been considered and rejected as the society did not fulfill the requirement of Section 24(2) of DCS Rule, 1973.

Yours faithfully

(Gurkirpal Singh)

asstt. Registrar (nw)

2. Rule 24(2) of the Delhi Cooperative Societies Rules, 1973 (hereinafter referred to as the 'said Rules') reads as under:

24(2) In case of vacancy in a housing society including group housing society the same shall be filled by the committee by notifying it in leading daily newspaper of Delhi in Hindi and English. In case the number of applications are more than the notified vacancies the membership shall be finalized through draw of lot in the presence of authorized representative of the Registrar.

3. By the impugned letter, the request of respondent No. 2 society for enrolling of the petitioners as members was rejected on the ground of violation of Rule 24(2) because the petitioners were enrolled as members through inviting of bids for the flats by the respondent No. 2 society when as per Rule 24(2) in case of vacancy arising in a cooperative society, then, such vacancies have to be filled pursuant to advertisement in the newspaper and transfer of the flat is at the rates fixed by the Delhi Co-op. Societies Act, 1972 and the said Rules, and not at market rates. In case, the number of applications are more than number of flats, then, the flats have to be allotted by draw of lots, but, it is not permissible for a society to sell the flats at market value including through auction of flats on bids being invited for the same. The cost to be recovered after allotment of plots by draw of lots is in terms of Rule 36 A which reads as under:

36A. Penalty for Belated Payment or Equalisation Charges for New Membership on Enrolment at the Advanced Stage of Construction, and Payment of Interest to a Member who has Resigned his Membership in a Group Housing Co-operative Society

1. In case of default in payment of demand in cooperative group housing society

by the members, equalisation charges on enrolment as a member against vacancy and payment of interest on resignation by member, the maximum rate of interest charges shall be as under, which shall be approved by a resolution of the general body of the society:

- (a) For default of payment of instalment upto six months-@ 12% per annum.
- (b) For default of payment of instalment upto one year-@ 15% per annum.
- (c) For default of payment of instalment for more than one year-@18% per annum.
- (d) Equalisation charges/interest to be charged from the member enrolled at the advance stage of construction-@24% per annum.
- (e) Interest to be paid by a group housing society to a resigned/expelled member on the amount deposited after deducting the administrative expenditure incurred by the society-@ 7% per annum.

2. The Registrar shall be competent to review the above rates periodically.

4. No doubt the letter of the respondent No. 1 is quite cryptic, however, it is obvious that the respondent No. 2 society which would have forwarded the names of the petitioners for memberships in the society would have stated that the flats have been auctioned and it is for this reason that the RCS refused permission for enrolment of the petitioners as members of the respondent No. 2 cooperative society. This aspect is not disputed that the respondent No. 2 society conducted auction of the flats in which two flats were put to auction, namely flat No. 92 on the second floor and flat No. 211 on the first floor. The reserve price was fixed at Rs. 22 lakhs each. Advertisement was published in the newspaper calling for the bids on 25.3.2006 and the offer alongwith the earnest money of 15% was to be deposited in the office of the respondent No. 2 society by 7.4.2006. With respect to flat No. 92, Sh. Rahul Kumar, the petitioner in W.P.(C) No. 15741/06 offered a consideration of Rs. 23,26,000/- and for flat No. 211 offer was made of Rs. 26,11,111/- by Sh. Sandeep Verma who is the petitioner in W.P.(C) No. 17218/06. The two petitioners were declared as the highest bidders entitled to flats, subject to inter-alia, payment of the balance of 85% of the offered price.

5. There are disputes between the respondent No. 2 society and the petitioners as the respondent No. 2 society has taken up a stand that after the petitioners were successful, they failed to deposit the requisite amount within a period of 30 days as fixed by the society vide its letter dated 11.4.2006. The petitioners thereafter asked for extension of time by letter dated 3.5.2006 and extension was granted for payment upto 8.6.2006 and still the petitioners did not deposit the amount. It is averred that since the allotment in favour of the petitioners was provisional subject to deposit of the balance amount in time, and since the petitioners failed to deposit the balance in time, the allotment stood cancelled.

6. Before us, the learned Counsel for the petitioners argued that the petitioners became valid members of the respondent No. 2 society inasmuch as not only were they successful in auction and their bids were accepted by the respondent No. 2 society, the petitioners had further filled the enrolment forms and filed affidavits as per rules. It is contended that the balance payment was not to be made to the respondent No. 2 society till approval was received from RCS for enrolling the petitioners as members of the society.

7. In view of the aforesaid, the arguments before us are raised under two heads. The first head of arguments is of the petitioners of being valid and existing members of the respondent No. 2 society on account of the society having accepted the bids and it was therefore bound to necessarily enrol the petitioners as members although they have defaulted in payment of the balance amount within the time as fixed by the society. The second head of argument is of the respondents, the RCS and the society, that assuming that there are no disputes between the respondent No. 2 society and the petitioners and the petitioners had paid all the dues in time, yet, since there was admitted violation of Rule 24(2), the petitioners could not be enrolled as members of the respondent No. 2 society.

8. We may note at this stage that various connected writ petitions were disposed of by a Division Bench of this Court on 2.7.2007. A reference to this judgment dated 2.7.2007 is necessary because both the petitioners and the respondents can succeed in their respective stands only if the petitioners fall in the category of persons who are exempted from application of Rule 24(2) by virtue of this judgment. The lead case was W.P.(C) No. 1403-14 titled as Rajib Mukhopadhyaya and Ors. v. Registrar Cooperative Societies. It has been held in this judgment that the though provision of Rule 24(2) of the said Rules was constitutionally valid, however, the operation of Rule was to be prospective in the sense that the requirement to call for advertisement in the newspaper was only to be after the allotment is made to the existing members of the society. The Division Bench has made it clear that if the society has existing members who have not got allotment of a plot/flat, then, such members shall be first allotted the plot/flat/premises before resort to Rule 24(2) of the said Rules. The Division Bench has further categorically stated that it is only when such existing members awaiting allotment have been given the allotment, would Rule 24(2) come into operation/being. The relevant paragraphs of the judgment are para 12 to 14 which reads as under:

12. Consequently, we uphold the constitutional validity of Rule 24(2) of the DCS Rules subject to the above interpretation of the law submitted by the learned Additional Solicitor General, which we accept and declare. The bye laws of the Society shall be fully followed in entertaining the claims of memberships set up by those applying through the medium of Rule 24(2) of the DCS Rules. Thus, if the society has any existing requirements in its bye laws about the characteristics required to be possessed by an intending member, only such persons possessing the requirements as stipulated in the existing bye laws and

regulations of the Society are entitled to apply pursuant to Rule 24(2) of the DCS Rules. We also make it clear that if the Society has any existing members who have still not got the allotment of a plot/flat, such members, in accordance with the bye laws, shall be first allotted the vacant plot/flat/premises before resort to Rule 24(2) of the DCS Rules. It is only when all such existing members awaiting allotment have been allotted the premises/plot/flats, shall the operation of Rule 24(2) of the DCS Rules come into being.

13. Consequently, while dispelling the challenge to the constitutional validity of Rule 24(2) of the DCS Rules, we nevertheless uphold the societies right to restrict its membership in accordance with the bye-laws, regulations and the rules of the society prospective candidates and further make it clear that any prospective entrant to a society, pursuant to the mandate of Rule 24(2) of the DCS Rules shall only be eligible to be allotted a plot after the requirement of the existing members are fulfilled.

14. The operation of Rule 24(2) of the DCS Rules requiring a draw of lots in the presence of the Registrar of the Cooperative Societies shall only apply to new prospective entrants who apply pursuant to the notification issued under Rule 24(2) of the DCS Rules. In order to further streamline the process of allotment and to expedite such process of allotment of residential accommodation in the city which is already very scarce, we make it clear that the Registrar, Cooperative Societies, if called upon by the Society in writing to conduct the draw of lots, shall do so not later than six weeks from the date of the receipt of the written intimation from the Society.

9. The present petitions which were tagged along with connected writ petitions with the lead case of Rajib Mukhopadhyaya (supra) were delinked vide the order of this Court dated 31.10.2008. The Division Bench which passed the judgment in the connected writ petitions on 2.7.2007 passed the following order on 31.10.2008 on a review petition filed by the petitioners herein, and which order reads as under:

The learned Counsel for the review petitioner has sought the following prayer:

In view of the above, it is mot respectfully prayed that this Hon?ble Court may kindly be pleased to recall/modify the judgment dated 02.07.2007 to the extent of consideration by peculiar issues raised in the present writ petition involving the interpretation of the word ?draw of lots? to include "the tender bid or not," in order to meet the ends of justice.

The above prayer cannot form the subject matter of the review petition.

The learned Counsel for the review petitioner has submitted that the Writ Petition (C) No. 15741/2006 may be detached from the case titled as Rajib Mukhopadhyaya and Ors. v. registrar Cooperative Societies decided on 2nd July 2007 and his pleas may be heard separately. Accordingly, the review petition is dismissed as withdrawn with the aforesaid liberty. List the writ petition before the

learned Single Judge as per roster for hearing on 17th November, 2008.

Interim orders passed in the review petition stand vacated. However, it will be open to the petitioner to seek interim orders from the learned Single Judge.

10. Thereafter, another Division Bench of this Court on 16.12.2008 passed the following order and which is relied upon by the learned Counsel for the petitioner to urge that the RCS/Respondent No. 1 has accepted the stand of the petitioners that the objection raised in the letter dated 21.9.2006 do not stand.

Ms. Sujata Kashyap, learned Counsel appearing for the RCS clarifies that subsequent to the decision in W.P.(C) 1403-14/2006 titled Rajiv Mukhopadhyaya and Ors. v. Registrar, Cooperative Societies, objections raised in the letter dated 21.9.2006 (annexure -P5) do not stand. She, inter alia, submits that it is still to be scrutinized whether there are any Members on the waiting list of the Society. We do not have advantage of representation from Society today.

Renotify on 17th February, 2009.

C.M. No. 10189/2008

Interim order passed on 25.7.2008 shall continue till the next date of hearing.

11. No doubt, the aforesaid order dated 16.12.2008 does show the stand of the RCS that the objections stated in the letter dated 21.9.2006 do not stand, however, it is quite clear that the counsel who appeared for the RCS made a statement without knowing the correct facts. Surely, a wrong statement cannot change the factual position in a case and the factual position is that petitioners were sought to be made members in violation of Rule 24(2) i.e. through auction of the flats and which is illegal and impermissible. There cannot be estoppel against RCS against the admitted factual position and the settled legal position referred to in the said order dated 16.12.2008 itself by reference to the case of Rajib Mukhopadhyaya. Since the petitioners are not enrolled on the basis of the procedure under Rule 24(2), hence their claim of membership (assuming them to be members) clearly violates Rule 24(2). The impugned letters of the RCS dated 21.9.2006 are thus valid. Though, the learned Counsel for the petitioner has sought to urge that the letter of the RCS dated 21.9.2006 does not state the reason why Rule 24(2) was violated, however, the petitioners who would otherwise know of all the facts in that they themselves were parties to the auction proceedings of the sale of the flats, and thus they cannot claim ignorance of facts and the consequence thereof how the provision of Rule 24(2) of the said Rule was violated. In fact, the rationale for refusing auction sale of the flats is given in the counter-affidavit which has been filed by the respondent No. 1 in this Court. The relevant para II of the counter-affidavit of the respondent No. 1 reads as under:

The society has not followed the Rules 24(2) in letter as well as spirit. The Practice/Method of allotting flats and enrolment of members by the tender system is not in confirming with DCS Act/Rules. The Tender System is not

applicable in such matter because it should be ensured that the benefits of cheap land and subsidized housing is given only to genuine members.

On factual aspects, the reason for refusing the enrolment of the petitioners is given in the following paragraph 2 of the preliminary submission of the counter-affidavit and the same reads as under:

2. The Bannu Biradari Cooperative Group Housing Society is registered at S. No. 27 in the department of the answering respondent. As per letter dated 21.4.2006 from the President of Society General Body of the Society on 29.01.2006 resolved to fill up the two vacancies of the membership of the society by advertising the same in two leading newspapers and inviting the applications/offers for the membership of the society and allotment of flats to the members to be enrolled. The offers were opened in public and applicants, who fulfilled all the requirements of the membership of the society and those who offered the highest bids after were taken out. Subsequently, the managing committee of the society resolved to enrol the names of Shri Sandeep Kumar Verma and Shri Rahul Kathuria but approval for filling up two vacancies was considered and rejected by answering respondent as the society did not fulfil the requirements of Section 24(2) of DCS Rules 1973, vide letter No. 4211 dt. 21.09.2006, copy of the same is Annexure R1 herein. Shri Sandeep Kumar Verma is one of the applicants whose case was recommended by the society however, the case was rejected by the answering respondent.

We therefore reject the argument of the petitioners that the RCS was not justified in issuing the letter dated 21.9.2006 and the order dated 16.12.2008 binds the RCS.

12. We now turn to the aspect whether the petitioners can claim membership although they are defaulters in payment of the balance amount of 85%. Two clauses of the terms of auction pursuant to which the petitioners sought to become members of the respondent No. 2 are relevant. The said clauses are Clauses 8 & 10 which read as under:

8. The highest offer who fulfil all the terms and conditions shall only be considered for membership and instalment of the flats of the society.

9. xxx xxx xxx

10. The earnest money of first and second highest offerers for each flat shall be retained and earnest money of the rest offers will be refunded. The first highest offerer shall be given time to make payment of offered and the second highest offerer be kept in reserve.

Therefore, in terms of the above clauses only when the person who gives the highest offer fulfils all the terms and conditions of the auction would such person be entitled to be a member and the person who makes the highest offer must make the balance payment within the time fixed by the society. The admitted facts here are that the petitioners did not deposit the amount within the time

granted by the respondent No. 2 society of 30 days intimated vide letter dated 11.4.2006. Not only that, the balance was not paid even thereafter by the petitioners within the extension of one month as prayed by the petitioners vide their letter dated 3.5.2006 and granted by the respondent No. 2 society vide its letter dated 8.5.2006. Clearly, the petitioners did not comply with the requirement of making the deposit of the balance amount in the time granted. Once they did not pay the requisite amount to the society, the society can justifiably take a stand that the petitioners were not 'existing members' of the society because 'existing members' mean those members who have cleared all their dues and the society has accepted them as members, and have issued the membership /share certificate to such persons and confirmed by a resolution of the managing committee/General Body of the Society. The only way not for the petitioners was to be 'existing members' as per the judgment in Rajib Mukhopadhyaya's case (supra). However, the petitioners do not fall in the category of those persons who have been protected by the aforesaid decision in Rajib Mukhopadhyaya (supra) inasmuch as the petitioners were not existing members of the respondent No. 2 society as on 2.7.2007. The existing members are those existing members who are awaiting allotment meaning thereby they have otherwise become valid members of the respondent No. 2 society but could not be allotted flats because flats were not available for one reason or the other. Such members who are awaiting allotment are in fact members in the waiting list and such members who are protected by the judgment of the Division Bench in Rajib Mukhopadhyaya's case on 2.7.2007. We have already reproduced the operative portion of the said judgment in the case of Rajib Mukhopadhyaya. The Division Bench only intended to protect these existing and enrolled members of a Cooperative Society who were awaiting allotment.

We, therefore, hold that the petitioners clearly do not fall within the category of persons who were exempted from the application of Rule 24(2) by the judgment in case of Rajib Mukhopadhyaya's case (supra).

13. In view of the above, the following conclusion emerge on the record:

(i) The provision of Rule 24(2) is constitutionally valid and was upheld in the Rajib Mukhopadhyaya's case. Only those persons were given protection, in spite of falling in the net of the Rule 24(2), were those who were existing members of the Cooperative Society who were awaiting the allotment i.e. those who are already valid existing members of a Cooperative Society on 2.7.2007 being in the waiting list, but, for one reason or the other were not allotted flats.

(ii) The petitioners are not those persons who were 'existing members' on the waiting list of the respondent No. 2 who were/are awaiting allotment after being enrolled as members, but, came through the route of auction sale proceedings which is illegal and impermissible in terms of the Delhi Cooperative Societies Act, 1972 and Delhi Cooperative Societies Act, 2003.

(iii) The respondent No. 1/RCS has rightly rejected the permission sought by the

respondent No. 2 society for enrolling the petitioners as members by its letter dated 21.9.2006 clearly specifying the violation of Rule 24(2) and which violation is that enrolment of petitioners as members without the due procedure of advertisement in newspapers and in terms of applicable rules.

14. In view of the above, we find that the writ petitions are liable to be dismissed inasmuch as the RCS/Respondent No. 1 was justified in rejecting the application of the memberships of petitioners as forwarded by the respondent No. 2 society to it on account of violation of Rule 24(2). The letter dated 21.9.2006 of the respondent No. 1 refusing enrolment of the petitioners as members on account of violation of the provision of Rule 24(2) is thus upheld. The petitioners are also not 'existing members' in terms of the judgment in Rajib Mukhopadhyaya's case and hence cannot fall in the exception carved out of Rule 24(2). The petitions are therefore dismissed, leaving the parties to bear their own costs.