

PETITIONER:
MYURDHWAJ COOPERATIVE GROUP, HOUSING SOCIETY LTD.

Vs.

RESPONDENT:
THE PRESIDING OFFICER, DELHI COOPERATIVE TRIBUNAL & ORS.

DATE OF JUDGMENT: 14/07/1998

BENCH:
G.B. PATTANAIK, A.P. MISRA

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Misra, J.

The short question raised in this appeal is, "whether in the allotment of flats to its members by the Cooperative Housing Society (hereinafter referred to as 'the society') the criteria is seniority irrespective of default in the payment of dues or whether it is payment- cum seniority?" The appellant is a registered Housing Cooperative Society, registered in the Office of Registrar, Cooperative Societies, Delhi, under the Delhi Cooperative Societies Act, 1972 (hereinafter referred to as "the Act") and the Delhi Cooperative Societies Rules 1973 (hereinafter referred to as "the Rules"). It was constituted for the purpose of allotment of flats to its members. At the relevant time 460 members were in roll. This society applied for allotment of land to the Delhi Development Authority (hereinafter referred to as "DDA") for the purpose of construction of flats for its members. This Society was allotted only 5 acres of land in Patparganj which was not sufficient for the construction of flats for the aforesaid members. However, later on, in view of relaxation to the ceiling limit DDA decided to make additional allotment as per actual requirement, that is to say, to the extent of 7.666 acres of land instead of 5 acres. The society was also directed to deposit a sum of Rs. 11, 87, 190.80p. towards the cost of additional land. In 1988, the Society raised demand for the construction of first phase of flats on the said 5 acres and also sent remainder notice to all its members through registered post including the main contesting Respondent No.3 Mrs. Veena Kumar vide notice dated 26th April, 1989 (the receipt of the notice was denied by Respondent No.3) As per the said notice the cost of construction of flat of each of its member was said to be Rs. 2,75,213/- approximately. The mode of payment as per the first notice was, to pay initially Rs. 2,21,705/- by each of such allottee but since only Rs. 85,100/- was paid hence through the aforesaid notice it was directed to pay the balance amount of Rs. 1,36,705/- within thirty days. Further it resolved those defaulting shall be expelled from the Society. A general body meeting was convened by the Society on 6th January,

1990. In this meeting the general body took a softer view, inspite of the said notice dated 6th April, 1989. It resolved, all its members who were allotted HIG(L) and HIG(S) category and had paid Rs. Two laks and Rs. 1,75,000/- respectively, their allotments have provisionally confirmed and all those members who have been provisionally confirmed and all those members who have paid the minimum credit balance of Rs. 1,32,221.50p. were accommodated at Plot No. 60, Patparganj, Delhi Subject to their qualifying requirement for being a member in the society and subject to their making payment of the balance amount, but those who failed to pay even Rs. 1,32,221.50p. would only be accommodated on the flats to be constructed on the additional land which were to come in phase II construction. Phase I construction is on the said 5 acres of land.

Respondent No. 3 filed a claim petition under Section b60 of the Act on the ground that the decision taken by the General Body on the 6th January, 1990 was illegal, malafide, discriminatory and without jurisdiction. The matter was referred to the Arbitrator under Section 61 of the Act. The Arbitrator gave the award in favour of the appellant-Society on the basis of a decision in Civil Writ Petition No. 955 of 1989 titled A.V. Ashokan & Others Vs. Registrar, Cooperative Societies and Others decided on 30th April, 1992. On appeal filled by Respondent No. 3 under Section 76 of the Act the Appellate Authority (Respondent No.1) set aside the said award by its order dated 299.92. It held that in a matter of allotment of flats in a Cooperative Society, seniority has to be the prime criteria notwithstanding the default made by a particular member. It also recorded so far as lapse of payment, it could be dealt with under separate provisions by charging interest including penal interest or by taking steps for expulsion of concerned member.

After coming to know of this order, the appellant filed review, which was dismissed. Thereafter the appellant filed a Writ petition which was also dismissed by the High Court. The main contention raised now by the appellant which was also raised before the High Court, viz., the Respondent No.1 wrongly held principle of seniority as the only criteria in the matter of allotment. It is urged, in view of the decision taken by the High Court in the case of A.V. Ashokan (Supra) and in Civil Writ Petition No. 1484 of 1991 titled S.C. Verma Vs. Lawyers Cooperative Group Housing Society Limited, dated 22.8.91, the decision of the Tribunal is liable to be set aside. These decisions hold that the allotment of flats should be on the principle of a payment-cum-seniority. The submission of the appellant is, High Court did not appreciate these decisions, hence committed grave illegality in dismissing the writ petition. The Case of A.V. Ashokan (supra) pertains to the allotment of flats by Saraswati Kunj Cooperative Society Ltd. with reference to category 'C' flats at Patparganj could not be accommodated hence they were shifted to another land where further flats were being constructed. The Court recorded:

" While some members contended that the list should be prepared according to the date of enrollment as a member, others submitted that the list should be prepared according to the date of payment of the amounts due. We may also note that the General Body had, in a meeting in March, 1987, decided that a list should be prepared of those members who had paid Rs.

1,50,000/- by 15th December, 1986 and thereafter the list should be prepared according to the date of payment..... It is not possible to ignore seniority of members while. at the, same time, we cannot ignore the fact that some members may have paid the amounts claimed from them while more senior members may not have met the payment schedule and they cannot take undue advantage of other members who have paid full amount..... Therefore, if, after considerable difficulty, payments have been made by the members it will be unfair to disregard the dates of payment completely. In our opinion, therefore, the most fair and equitable method of drawing up the list of eligible members for allotment of remaining 38 flats of category C could be to draw up the list according to the date of payment of the full call money by the members concerned... "

Thereafter an application was made for clarification of this order which is reported in 1992 Vol. 47 Delhi Law Times page 92 in which B.N. Kirpal, J. as he then was, held:

" We find that persons who paid the full amount after 15th December, 1986 really fall in a single category and it will not be fair to treat them separately. Furthermore, we find that some regard has also to be given to the seniority of the members.... In drawing up the list of members who made the payment after 15th December, 1986 we find that most of the money has been paid by the members within a period of two or three months. Merely because persons who is at serial No. 1, for example has paid money one week after a person who became a member many years thereafter should not be a reason for giving higher weightage to the date of payment. All members who paid money after 15th December, 1986 are defaulters. Therefore, the list of defaulters can be prepared on either of the two basis (1) according to the overall seniority (2) according to the date of the payment.... "

In the case of S.C. Verma (supra), it was a case of the Lawyers Cooperative Group Housing society Limited. In this case also, the dispute pertained to the allotment of flats in category 'C'. Here again was the same problem, the number of applicants were larger than the number of flats to be allotted . In this case also cut off date to make payment was fixed as 15th May, 1987. All members who paid the entire due as on this date, were to be included in the list. The amount required to be paid by this date was Rs. 1,11.000/-.

26 members paid this amount by this date. Here also number of flats were 30 for its 65 members. It was held:

" ... The society had to lay down a reasonable criteria for finalising the list of members. The criteria which the society adopted was that all payments having been made in accordance with the demand which has been raised and by keeping the options and the seniority into consideration, the list was prepared as on the cut-off date of 15th May, 1987. We cannot find any infirmity in the principle so adopted. It is essential for the Cooperative Society to decide as to what is the principle which it should follow in determining or finalising the list of the members to whom flats are to be allotted. Unless and until the principles laid down by the society are found to be arbitrary or irrational or unfair, the Court will not interfere with the same. We do not find any such infirmity in the procedure which has been adopted or established viz. to prepare a list of members as on 15th May, 1987 who had not committed any default... "

In this case the payment of the demand was regarded as an essential criteria for preparing the list of members. However, the said case also held:

".. Therefore, where the number of defaults committed being equal it is the seniority which must prevail.... "

Hence seniority was also given place in the matter of consideration for allotment.

Learned senior Counsel Mr. K.T.S. Tulsi appearing for the appellant submitted that the High Court did not properly apply its mind to the aforesaid decisions when it held contrary to the said decisions that it did not lay down any proposition as submitted by the appellant. It is urged, High Court relied upon few lines from paragraph 2 of the aforesaid clarificatory judgment in A.V. Ashokan (supra) without reference to the succeeding lines hence wrongly held that it supported the view taken by the Cooperative Tribunal (Respondent No.1). The submission made is, in this very paragraph, the Court categorised and graded how allotment is to be made, which is not purely in terms of seniority but payment-cum-seniority with due weightage of seniority. It clearly held that list of defaulters can be prepared on either of the two basis (1) according to the overall seniority; (2) according to the date of payment. In other words, it is left on the discretion of a Society depending on the facts and circumstances of each case.

On the other hand learned senior Counsel appearing for respondent No. Mr. Ashok Kumar Srivastava supported by interveners' counsel submitted that there is no provision except Rule 36 under which the society could have dealt with the present case and under this when a member defaults he could only be expelled following the procedure laid down therein. Thus the general body resolution, directing those who were defaulters to be accommodated in phase II is

illegal as it is based on no sanction conferred under the rules. In other words, Society is left with no other option but to expel such a member. However, where Society wants to confer benefit to its members the only criteria which it could adopt it to allot the accommodation according to their seniority, irrespective of their default. On facts, it is submitted that Respondent No.3 initially deposited a sum of Rs. 85,000 /-, thereafter sent a sum of Rs. 1, 83,000/- through cheque dated 8th November, 1990 making the total contribution to Rs. 2,68,000/- and gave an undertaking that she would pay all the reasonable amounts towards the interest for the defaulted period, if any. According to her, she came to know only on 3rd November, 1990 that she has been relegated from first phase to second phase by the General Body. She claims, she is one of the original members of the society and sent a letter dated 8th November, 1990 to the Society requesting for the restoration of her status as member of the first phase. However, the Society through reply dated 19.11.90 returned the said cheque and informed that through a registered notice dated 26.4.89, a demand was sent earlier for the payment of Rs. 1,36, 705/- and since the said amount was not paid till 6.1.90 thus as per the said resolution of the General Body, she was relegated to the second phase. The learned counsel for the respondent on the other hand further submits that neither additional land has been allotted nor there is any second phase of construction. To this, learned senior counsel for the appellant, Mr. Tulsi submits, Society has already made total payment for the additional land for the second phase and the possession of this additional land allotted is likely to be delivered shortly.

Returning to Rule 36, submission for the respondent is, when a statute provides a thing to be done in a manner it has to be done in that manner alone and not in any other manner. Other modes are excluded. The Counsel for the respondent referred the cases in A. K. Roy and Others Vs. State of Punjab (1986 (4) SCC 326 prs. 10-11) and State of Mizoram Vs. Baikchawane (1995 (2) SCC 156 prs. 7, 8 & 9). This proposition has not been disputed by learned counsel for the appellant. The question is, when a member is in default then is it that power of a Society is concretised within this Rule to expel such defaulting member or can it within its peripheral jurisdiction resolve to take recourse to any other policy decision, to enable such defaulting member to deposit the balance amount either by extending time or giving any such incentive as it deem fit and proper or to take recourse to such consequential measures as it deem fit and proper., The present case is similar to the cases which arose in the Delhi High Court. The question, is in the matter of allotment of flats, can a Society not lay down its own policy as to how instalments are to be paid, within what time and in doing so can it not place certain conditions under it? In other words, can or can it not resolve that members must pay the stipulated amount by fixing any cut off date. If in spite of that if any member defaults can it not cancel the allotment. Similarly, can it not decide instead of cancelling the allotment to give him an offer to get the flat in the next phased construction clearing ways for non-defaulters. The question is, can it be said, Society have 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 spirits 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 only recourse could be the later. Even a senior member may have financial stresses resulting into default of not 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 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 to 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, the power of Society cannot be circumvented within Rule 36 in a case of default by its member of any of his dues. Such an interpretation would be contradictory to the very cooperative spirit or objectives of the creation of Cooperative Societies. rule 36 is quoted hereunder:

" 36. Procedure for Expulsion of Members.

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

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

Registrar.

(2) Where any member of a cooperative society proposes to bring a resolution for expulsion of any other member, he shall give a written notice thereof to the president of the Society. On receipt of such notice or when the committee itself decides to bring in such resolution, the consideration of such resolution shall be included in the agenda for the next general meeting and a notice thereof shall be given to the member against whom such resolution is proposed to be brought calling upon him to be present at the general meeting, to be held not earlier than a period of one month from the date of such notice and to show cause against expulsion to the general body of members. After hearing the member, if present, or after taking into consideration any written representation which he might have sent, the general body shall proceed to consider the resolution.

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

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

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

Provided that the Registrar may, on an application either by the society or the member expelled

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

This Rule deals with the procedure for the expulsion of members. In case Society decides to expel its member who is persistently defaulting in making the payment of his dues the procedure to be followed could only be what is provided under this rule and no other. The principle referred earlier that if a thing is required to be done in a manner as provided under the law has to be done in that manner alone and no other manner will apply with equal force under rule 36, when a society decides to expel its member. In case of expulsion of procedure provided under it and the expulsion has to be only under the mode provided therein and no other which is mandatory in nature. But this is only after decision is made to expel its member. This rule does not take away discretion of the Society to expel a member or not which is preceding the exercise of power under Rule 36. For this there is nothing under this Rule which either circumscribes or webs this discretion. Since this Rule is for the expulsion of its members, it is stringent in its application. Even after giving opportunity and even after general body passes such a resolution, it requires approval of the Registrar. Outside this, there is nothing which restricts a Society to act freely and to lay down its own policies. It is always open to it to decide on a fact to expel him or not. Its discretion to act is curtailed only by a statutory provision or any order having force of law. A policy may depend on various factors, its planning, projects undertaking including its financial capacity etc. One Society may be in a sound position and other in limping position thus may give to its member larger or lesser benefits as the case may be. Thus it is always open to a Society to lay down its own principle for making such allotments. So consideration of prompt payment in shaping its policy which helps it to complete its project to confer to its member its fruits at the earliest may be justified exercise of its discretion. To what extent a default is going to effect a Society will depend on facts and circumstances of each case which has to be left at the discretion of each Society. It is not proper even for the courts to interfere with such a discretion, except when it is arbitrary, irrational, mala fide, against any statutory provisions or against orders having force of law. This will not be possible if strict principle of seniority is followed. However it is open for a Society to give weightage to seniority depending on facts of each case. Within permissible limits it is always open to lay down its principle which is just, fair and proper. When a Society could decide the manner of allotment by instalments or other modes, there is no inhibition to it to modify it in case conditions are not complied by its members Thus it is not possible to uphold that Society has no option but to proceed under Rule 36 to expel its member. Hence once a society has a discretion, it cannot be said its power is restricted to allot only under strict rule of seniority.

We find 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.

Rule 36 does not deal with every default for one to come under it. In fact, mere default itself is not covered under this Rule. Default has to be persistent. Even in a case of persistent, a society may or may not take recourse under it. Apart from this Rule there are other rules dealing with default. Under sub-rule (1) of Rule 39 a disability is provided for a defaulting member being in arrears exceeding three months in respect of loan taken for being appointed to represent the Society in any other cooperative Society. Sub-rule (2) similarly provides disability of defaulting member who is in arrears to the Society for the aforesaid period to represent the Society. Rule 59 also refers to a disqualification of such defaulting member who has defaulted to any Society of any sum due even in respect of any interest in any contract to which Society is a party etc. Then under Rule 60 a member ceases to be on the committee or to hold any office in case he continues to be in default in respect of any sum due. So there are rules laying down how to deal with defaulting member. One of them is, if society desires to expel one then it has to bring him under Rule 36. This itself shows defaulters can be dealt with in various ways and what is not provided, not covered by these rules, the field is open for the general body to exercise its discretion.

Reverting back to the facts of the present case, it cannot be said when respondent No. 3 or such other member, who defaulted by not even paying the minimum as resolved could claim as a right for allotment on the principle of seniority alone or that the resolution of the general body dated 6.1.90 could in anyway be said to be unfair, unjust, arbitrary, mala fide or irrational liable to be struck down. It may be where a very senior defaulting member paid the balance amount only one week after very junior member paid the full amount, it is open for a Society to resolve as it deem fit and proper by giving weightage to the seniority. It is within the permissible discretionary field of such Society.

So far giving notice to respondent No. 3 we find there is specific averment by the appellant that a registered notice dated 26th April, 1986 was sent to her, a copy of which has been filed in this appeal. The respondent's case is, she has not received any notice from the Society either of the default or laying down cut off date for the payment, including notice dated 26th April, 1986, further the decision of the general body dated 6.1.90 of relegating her or other such person to phase II was not on agenda. To this last argument we do not find any merit. A general body can always with the approval of the house in the meeting of its members take up any other matter not covered by the agenda and on that account no illegality could be held.

So far question of notice to respondent No. 3 whether given or not, is a question not adverted to or decided by Respondent No. 1 viz., Delhi Cooperative Tribunal or the High Court. Before treating any person to have defaulted, it is necessary to record that a notice proceeding such impugned decision is actually served on such member or there is deemed service under some applicable Rule depending on

the facts. We feel this question of notice to Respondent No. 3 has not been adverted to by any of the said authority or Court which requires consideration. For this we send back this case to the Tribunal for deciding this sole question whether there was notice to the respondent No. 3 or not as aforesaid. In case the Tribunal find she had notice she would not be entitled for any relief but in case she had no notice her claim for phase I flats cannot be defeated.

Accordingly, we hold that a principle of seniority alone cannot be said to be the correct criteria and the criteria resolved by the General Body being just, proper and fair does not call for any inference by this court. Accordingly, we quash the impugned judgment of the High Court dated 10.11.1995 and the ex-parte order dated 29.9.95 passed by the Delhi Cooperative Tribunal. The case is remanded back to Respondent No. 1, the Tribunal to decide on the limited question as aforesaid. This appeal is allowed in terms as aforesaid. Cost on the parties.