

A

SATISH CHANDRA

v.

REGISTRAR OF COOPERATIVE SOCIETIES, DELHI.

APRIL 21, 1994

B

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

C

Code of Civil Procedure, 1908 : S.11—Constructive res judicata—Expulsion of members from cooperative housing society—Held, omission to challenge the resolution of expulsion in writ petition before High Court operates as constructive res judicata—Writ petition under Art. 32 thereafter not maintainable—Delhi Cooperative Housing Societies Act 1972.

D

Constitution of India—Articles 32 & 226—Maintainability of Writ Petition—Held, membership of cooperative society is a right under a statute and not a fundamental right—Supreme Court does not encourage bypassing statutory remedy or remedy under Article 226—Delhi Cooperative Housing Societies Act 1972, Ss. 34 and 32.

E

Delhi Cooperative Housing Societies Act 1972—Sections 34 and 32—Resolution of expulsion from society not challenged before High Court—Constitutionality of Section 34 upheld by High Court, and not agued in Supreme Court—Hence not considered—Constitution of India, Articles 226 and 136.

F

By resolution dated 22 February, 1990 passed by the general body of a Housing Society the petitioners were expelled from its membership. The petitioners did not challenge their expulsion but the appointment of architect; the residential qualification for membership; the draw of lots; for appointment of an Administrator and consequential reliefs.

G

In a related appeal under Article 136, they challenged the constitutionality of Section 34 of the Delhi Cooperative House Societies Act 1972, and for appointment of an Administrator of the Respondent-Society under Section 32 of the Act.

H

The litigation had gone through two stages of writ petition in the High Court, and one in this court under Article 32. A writ petition filed by

the members of the respondent-Society had also been dismissed by a 3-judge bench of this court. A

Dismissing the petitions, this court

HELD : 1. The right to membership of a cooperative society is a right under a statute and not a fundamental right. If the petitioners have been removed otherwise than in accordance with law, they have to pursue the remedy as provided under the Act. This court does not encourage the filing of the writ petition under Article 32, bypassing the statutory remedy and the remedy of Article 226. [622-B-C] B

Raj Rani v. Delhi Administration, AIR (1977) SC 1980, distinguished and Tilokchand Motichand v. H.B. Munshi, CST, AIR (1970) SC 898, referred to. C

2. The petitioners might and ought to have raised the legality of their expulsion from membership of the society. The omission to raise it in the writ petition before the High Court operates as constructive *res judicata* to maintain the writ petition under Art. 32. [622-F-G] D

3. Despite the willingness of the High Court to direct the respondent-Society to withdraw the expulsion resolution subject to the petitioners paying the arrears with interest thereon, they had not availed of the court's indulgence. [622-A-B] E

4. The petitioners not having challenged the order of expulsion passed by the general body and approved by the Registrar, it was not necessary for the High Court to go into the question of expulsion. F

[623-D-E]

5. In view of the fact that no arguments had been addressed before this court on the question of the validity of Section 34 or the refusal to pass an order under Section 32 of the Act for appointment of an administrator, it is not necessary to go into those question. [623-F-G] G

6. The petitioners may make a representation to the society regarding refund of the amount they have deposited, which may be disposed of in accordance with law. [624-A-B] H

A CIVIL APPELLATE JURISDICTION : Special Leave petition (C)
No. 630 of 1994.

From the Judgment and Order dated 16.7.93 of the Delhi High Court
in C.W. No. 527 of 1990.

B WITH

Writ Petition (c) No. 20 of 1994.

(Under Article 32 of the Constitution of India).

C Sarat Chandra and Satish Chandra in-person.

The following Order of the Court was delivered :

IN WRIT PETITION NO. 20/1994

D The petitioners are the practising advocates. They were the mem-
bers of the Supreme Cooperative Group Housing Society Ltd., 110,
Lawyers Chamber, Supreme Court Compound, New Delhi, for short 'the
Housing Society'. By a Resolution dated February 22, 1990 passed by the
E general body of the Housing Society, the petitioners are expelled from
the membership of that society, that resolution is approved by the
Registrar on August 12, 1991. This writ petition under Art. 32 of the
Constitution is, therefore, filed by the petitioners seeking the following
reliefs :

F (a) to quash the said Resolution;

(b) to declare that the appointment of Architect as bad, arbitrary and
illegal;

G (c) to declare the dispensation of residential qualification for mem-
bership of society as arbitrary and illegal;

(d) to declare the draw of lots dated April 14, 1990 and July 18, 1992
concerning Phase I and Phase II respectively as arbitrary and illegal;

H (e) to appoint an Administrator forthwith and other consequential
reliefs.

When a question was put to the counsel for the petitioners as to how the writ petition is maintainable, it was contended that the expulsion was *per se* arbitrary and they are entitled to challenge on the ground of violation of Art. 14. It was also contended that in similar circumstances, this Court in *Raj Rani & Ors. v. Delhi Admn. & Ors.*, AIR (1977) SC 1900 had considered elaborately the scheme of the Delhi Cooperative Societies Act 1972 for short 'the Act' and that, therefore, the petitioners are entitled to seek the remedy. When a further question was put to the petitioners that when they had sought for the above reliefs in the High Court in a writ petition, but they were negatived and after it was negatived and a S.L.P. No. 630/94 was filed in this court against the order of the Division Bench of the High Court, how the present writ petition is maintainable, the counsel for the petitioner asserted that the order of the High Court does not operate as *res judicata* since it was not a speaking order and, therefore, the petitioners were entitled to seek the same reliefs by filing the present writ petition.

We are afraid that we cannot accede to any of the contentions raised by the petitioners. The petitioners filed Writ Petition No. 454 of 1989 in the High Court against the order of the Registrar under the Act made in respect of the arbitration proceedings initiated against the appointment of the Architect by the General Body of the Society, which came to be dismissed on April 7, 1989. Without filing any special leave petition under Art. 136, and suppressing the fact of dismissal of the above writ petition the petitioners filed W.P. No. 58/89 in this Court under Art.32 which this Court by order dated January 25, 1990 permitted the petitioners to withdraw the writ petition with liberty to pursue the remedy by way of writ petition in the High Court. Then they filed Writ Petition No.527/90 challenging the constitutional validity of s.34 of the Act and also sought for *mandamus* to appoint Administrator under s.32 and also challenging the appointment of Architect as illegal, the said Writ Petition was dismissed on July 16, 1993. While filing the special leave petition against the said order, the petitioners filed the present writ petition. It may also be relevant to note that when other members of the Society filed Writ Petition No. 561/90 etc. this Court comprised of a bench of three Judges ultimately dismissed the above writ petition by order dated

A April 25, 1990.

In the judgment, the Delhi High Court pointed out that despite the willingness of the court to give direction to the society to withdraw the expulsion, subject to the petitioners paying all the arrears with interest thereon, the petitioners had not availed of the indulgence, nor sought any amendment to the writ petition to challenge their expulsion, apart from non-availment of the statutory remedy. The conduct thus disentitle the petitioners of the remedy under Art. 32. That apart the right to membership of a Cooperative Society is a right got under a statute and not a fundamental right. If the petitioners have been removed otherwise than in accordance with law, the petitioners have to pursue the remedy as provided under the Act. This Court does not encourage the filing of the writ petition under Art. 32, bypassing the statutory remedy and the remedy of Art. 226. In *Raj Rani's* case, the question of maintainability of the writ petition under Art. 32 did not arise. That was the case where the writ petition was filed in a representative capacity under Order 1 Rule 8 C.P.C. and since a policy of the Act was involved therein, the writ petition was entertained to resolve the controversy in accordance with law. Therefore, the ratio therein is of little assistance to the petitioners. In *Tilokchand Motichand & Ors. v. H.S. Munshi, Commissioner of Sales Tax Bombay & Anr.*, AIR (1970) SC 898 relied on by the petitioners, far from assisting them, goes against them. This Court had expressly held that when the remedy under Art. 226 was invoked, the legality thereof should be decided under Art. 136 and that a writ petition under Art. 32 cannot be entertained and the order passed by the High Court under Art. 226 operates as a *res judicata* for the maintainability of the writ petition under Art. 32. The order in writ petition No. 527 of 1990 dated July 16, 1993 operates as constructive *res judicata*. The petitioners might and ought to have raised the legality of their expulsion from membership of the society. The omission thereof operates as constructive *res judicata* to maintain this writ petition. Considered from this perspective, we are of the view that the writ petition is not maintainable. Accordingly, the writ petition is dismissed with exemplary costs of Rs. 10,000. The costs of Rs. 10,000 will be paid to the Supreme Court Legal Aid Committee. On failure, the latter is entitled to have it executed as a decree of this court.

IN S.L.P. (C) No. 630/94.

The S.L.P. arises from the order of the Division Bench of the High Court of Delhi in W.P. No. 527/90 dated July 16, 1993. The petitioners sought the relief that s. 34 of the Act, as unconstitutional and *ultra vires* and a *mandamus* to the Registrar to appoint the Administrator of the respondent-Society under s.32 of the Act. The High Court negatived both the reliefs. Thus this S.L.P. has been filed.

The petitioners have not canvassed before us the grounds on which the validity of s.34 was assailed and upheld by the High Court or of the appointment of the Administrator under s.32 of the Act. On the other hand, the petitioners have contended that the Society had given a notice 'Annexure G' dated August 19, 1989 calling upon the petitioners to pay Rs. 1,50,000 on or before October 18, 1989 and for the default in payment thereto by the said Resolution, the petitioners have been expelled from the membership and that, therefore, in the pending proceedings, the High Court directed stay of the expulsion on September 19, 1991. The High Court was not justified in dismissing the writ petition on the ground that the petitioners were not willing to deposit the entire dues with interest upto date. We find no force in the contention. It is seen that the petitioners have not challenged the resolution of expulsion passed by the general body and approved by the Registrar. Therefore, it is not necessary for the High Court to go into the question of expulsion. What the High Court has stated was that before considering the case of the petitioners on the ground of default in paying the instalments, the High Court seems to have given an opportunity to the petitioners to deposit the arrears with interest upto that date so that it could give suitable directions to the society. Since the petitioners were not prepared to deposit the amount, the court was not inclined to give the relief in that behalf. However, the High Court has upheld the validity of s.34. In view of the fact that no arguments have been addressed before us on the question of the validity of s.34 or the refusal to pass an order under s.32 of the Act for appointment of an Administrator, it is not necessary for us to go into those questions. Since the expulsion of the petitioners was not the subject matter of the writ petition, we are not permitting the petitioners to argue in that behalf. The special leave petition is dismissed.

- A It is prayed that the Society may be directed to refund the amount which each of the petitioners had deposited and is stated to be Rs. 40,400. We cannot give any such direction in the absence of the Society. However, it is open to the petitioners to make the representation to the Society and the Society would dispose of the representation in accordance with
- B law for the refund of the amounts.

U.R.

Petition dismissed.