

Zoroastrian Co-Operative Housing ... vs District Registrar Co-Operative ... on 15 April, 2005

Equivalent citations: AIR 2005 SUPREME COURT 2306, 2005 (5) SCC 632, 2005 AIR SCW 2317, (2005) 4 JT 337 (SC), 2005 (4) SLT 334, 2005 (4) JT 337, 2005 (5) SRJ 337, 2005 (4) SCALE 156, (2005) 3 ALLMR 731 (SC), (2005) 2 GUJ LR 1530, (2005) 3 GUJ LH 571, (2005) 3 SCJ 590, (2005) 3 SUPREME 428, (2005) 4 SCALE 156, (2005) 2 WLC(SC)CVL 126, (2005) 125 COMCAS 235, (2005) 3 BOM CR 514, 2005 (3) BOM LR 120, 2005 BOM LR 3 120

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Bench: B.N. Agrawal, P.K. Balasubramanyan

CASE NO.:

Appeal (civil) 1551 of 2000

PETITIONER:

Zoroastrian Co-operative Housing Society Limited and Another

RESPONDENT:

District Registrar Co-operative Societies (Urban) and Others

DATE OF JUDGMENT: 15/04/2005

BENCH:

B.N. AGRAWAL & P.K. BALASUBRAMANYAN

JUDGMENT:

J U D G M E N T P.K. BALASUBRAMANYAN, J.

1. The Zoroastrian Co-operative Housing Society is a society registered on 19.5.1926, under the Bombay Co-operative Societies Act, 1925. The Society applied to the Government of Bombay for acquisition of certain lands in Ahmedabad District, then in the State of Bombay, under the Land Acquisition Act, 1894 for the purpose of erecting houses for residential use of its members and to further the aims and objects of the Society. On the Government of Bombay agreeing to the proposal, the Society entered into an agreement on 17.2.1928 with the Government under Section 41 of the Land Acquisition Act. Certain lands were acquired. From the lands thus acquired at its cost and given to it, the Society allotted plots of land to the various members of the Society in furtherance of the objects of the Society. On the re-organization of States, the Society became functional in the State of Gujarat and came within the purview of the Gujarat Co-operative Societies Act, 1961. Section 169 of that Act, repealed the Bombay Co-operative Societies Act, 1925 and in sub-section (2) provided that all societies registered or deemed to be registered under the Bombay Act, the

registration of which was in force immediately before the commencement of the Gujarat Act, were to be deemed to be registered under the Gujarat Act. The Gujarat Act came into force on 1.5.1962. Thus, the Society came to be regulated by the Gujarat Co-operative Societies Act, 1961 (hereinafter referred to as 'the Act').

2. On the scheme of the Bombay Co-operative Societies Act (hereinafter referred to as 'the Bombay Act'), the Society had applied for registration in terms of Section 9 of that Act. The application was accompanied by the proposed bye-laws of the Society. The Registrar of Co-operative Societies, on being satisfied that the Society had complied with the provisions of the Act and the Rules and that the proposed bye-laws were not contrary to the Act and the Rules, granted registration to the Society and its bye-laws and issued a certificate of registration in terms of Section 11 of that Act. As per the bye-laws, the objects of the Society were to carry on the trade of building, and of buying, selling, hiring, letting and developing land in accordance with Co-operative principles and to establish and carry on social, re-creative and educational work in connection with its tenets and the Society was to have full power to do all things it deemed necessary or expedient, for the accomplishment of all objects specified in its bye-laws, including the power to purchase, hold, sell, exchange, mortgage, rent, lease, sub-lease, surrender, accept surrenders of and deal with lands of any tenure and to sell by installments and subject to any terms or conditions and to make and guarantee advances to members for building or purchasing property and to erect, pull down, repair, alter or otherwise deal with any building thereon. All persons who had signed the application for registration, are original members by virtue of bye-law No.7. The said bye-law further provided that other members shall be elected by the Committee of the Society, provided that all members shall belong to the Parsi Community subject to satisfying other conditions in that bye-law. Bye-law No. 21 provided for sale of a share held by a member but with previous sanction of the Committee which had full discretion in granting or withholding such sanction. It was also provided that until the transfer of a share is registered, no right was acquired against the Society by the transferee, and no claim against the transferor by the Society was also to be affected. In short, the qualification for becoming a member in the Society was that the person should be a Parsi and that the transfer of a share to him had to have the previous sanction of the Committee of the Society.

3. Some of the relevant provisions of the Bombay Act may now be noticed. Under Section 3, the Registrar had the right to classify all societies under one or other of the heads referred to in that Section. Under Section 5 of that Act, a society which had as its object, the promotion of economic interests of its members in accordance with economic principles, may be registered under the Act with or without limited liability. Section 6 placed restrictions on the interests of the members of the society with limited liability. Section 6A enacted that no person shall be admitted as a member of a society unless he was a person competent to contract under Section 11 of the Indian Contract Act. Section 7 stipulated the conditions for registration and provided that no society could be registered under the Act which did not consist of at least 10 persons who were qualified to be members of the society under Section 6A and where the object of the society was the creation of funds to be lent to its members, unless all persons forming the society resided in the same town or village or in the group of villages or they belonged to the same tribe, class or occupation, unless the Registrar ordered otherwise and no person could be admitted to membership of any such society after its registration unless the persons fulfilled the two requirements as mentioned above. If the Registrar

was satisfied that a society has complied with the provisions of the Act and the Rules and that its proposed bye-laws are not contrary to the Act or to the Rules, under Section 10 he was to register the society and its bye-laws. According to the Society, it had submitted its duly filled in application under Section 9 of the Act accompanied by its bye-laws and the said bye-laws have been approved and registered by the Registrar on being satisfied that the proposed bye-laws were not contrary to the Act or to the Rules.

4. After the Society was formed and registered as indicated earlier, the Society got lands acquired by the State by invoking the Land Acquisition Act, 1894. The Society entered into an agreement in that behalf with the Government under Section 41 of the Act on 17.2.1928. The said agreement recited that the Government of Bombay was satisfied that the land should be acquired under the Land Acquisition Act "for the purpose of erecting houses thereon". It was also stated that the Government was satisfied that the acquisition of the land was needed for the furtherance of the objects of the Society and was likely to prove useful to the public and it consented to put in operation the provisions of the Land Acquisition Act. An extent of 6 acres 12 guntas was thus acquired and handed over to the Society, on the Society bearing the cost of that acquisition. The Society in its turn allotted portions of the land to its members for the purpose of putting up residential houses in the concerned plots.

5. One of the members of the Society sold the plot in which he had constructed a residential building, to the father of Respondent No.2 with the previous consent of the Committee of the Society. The father of Respondent No.2 was also admitted to membership of the Society, he being qualified for such admission in terms of the bye-laws of the Society. After the rights devolved on Respondent No.2, consequent on the death of his father, he became a member of the Society of his volition. Thereafter, he applied to the Society for permission to demolish the bungalow that had been put up and to construct a commercial building in its place. The Society refused him permission stating that the bye-laws of the Society did not permit commercial use of the land. Thereafter, Respondent No.2 applied to the Society for permission to demolish the bungalow and to construct residential flats to be sold to Parsis. The Society acceded to the request of Respondent No.2, making it clear that the flats constructed could only be sold to Parsis. It appears that, earlier, the Society had written to the Registrar that it was apprehending that certain members of the Society were proposing to sell their bungalows to persons outside the Parsi community only with commercial motive and in violation of clause 7 of the bye-laws. The Registrar replied that any transaction of sale should be in accordance with the bye-laws of the Society and any sale in violation of the bye-laws would not be permitted, thus, stressing the sanctity of the bye-laws. On 20.7.1982, the Government of Gujarat had also issued a notification declaring that persons or firms dealing with the sale and purchase of lands and buildings, contractors, architects and engineers were disqualified from being members of Co-operative Housing Societies. Though, permission was given to Respondent No.2 as early as on 17.5.1988 for construction of residential flats in the land, to be sold only to members of the Parsi community, he did not act on the permission for a period of seven years. Apprehending that Respondent No.2 intended to violate the bye-laws of the Society, the Society passed a resolution reminding its members that in accordance with bye-law No.7, no person other than a Parsi could become a new member of the Society and informing the existing members of the Society that they could not sell their plots or bungalows to any person not belonging to the Parsi community.

Respondent No.2 appears to have started negotiations with Respondent No.3, a Builder's association, in violation of the restriction on sale of shares or property to a non-Parsi. The Society, in that context, filed a case before the Board of Nominees under the Act for an injunction restraining Respondent No.2 from putting up any construction in plot no.7 and from transferring the same to outsiders in violation of bye-law No.7 without valid prior permission from the Society. Though, initially an interim order of injunction was granted, the Board informed the Society that the Society could not restrict its membership only to the Parsi community and that membership should remain open for every person. A clarification was also sought for from the Society as to why it had refused permission to Respondent No.2 to transfer plot no.7 belonging to him. Subsequently, the Board of Nominees vacated the interim order of injunction granted, inter alia, on the ground that the construction of a block of residential flats would not create disturbance and nuisance to the original members of the Society. Thereafter, Respondent No.2 applied to the Society for permission to transfer his share to Respondent No.3. The said application was rejected by the Society, since according to it, the application was contrary to the Act, Rules and the bye-laws of the Society. While the Society challenged the order of the Board of Nominees before the Gujarat State Co-operative Societies Tribunal, Respondents 2 and 3 challenged the rejection of the request of Respondent No.2 to sell his plot to Respondent No.3, by way of an appeal before the Registrar of Co-operative Societies under Section 24 of the Act. The Tribunal, in the revision filed by the Society, took the view in an interim order that the bye-law restricting membership to Parsis was a restriction on the right to property and the right to alienate property and, therefore, was invalid in terms of Article 300A of the Constitution of India. This order was challenged by the Society and its Chairman before the High Court of Gujarat in Special Civil Application No. 6226 of 1996. By judgment dated 16.1.1997, a learned Single Judge of the Gujarat High Court dismissed the writ petition essentially holding that the restriction in a bye-law to the effect that membership would be limited only to persons belonging to the Parsi community, would be an unfair restriction which can be validly dealt with by the appropriate authorities under Section 24 of the Act and Rule 12(2) of the Rules. It was also held that such a bye-law would amount to a restraint on alienation and hence would be hit by Section 10 of the Transfer of Property Act. The Society and its Chairman, challenged the said decision before a Division Bench, in Letters Patent Appeal No. 129 of 1997. By judgment dated 23.7.1999, the said appeal was dismissed, more or less, concurring with the reasoning and conclusion of the learned Single Judge. The decision of the Division Bench of the Gujarat High Court thus rendered, is challenged in this appeal by Special Leave.

6. Mr. Soli J. Sorabjee, learned Senior Counsel appearing for the appellants contended that under Article 19(1)(c) of the Constitution of India, Parsis had a fundamental right of forming an association and that fundamental right cannot be infringed by thrusting upon the association, members whom it does not want to admit or against the terms of its bye- laws. He submitted that the content of the right of association guaranteed by Article 19(1)(c) of the Constitution of India has been misunderstood by the High Court and the Authorities under the Act. He also contended that there was nothing in the Act or the Rules which precluded a society from restricting its membership to persons of a particular persuasion, belief or tenet and the High Court was in error in holding that membership could not be restricted to members of the parsi community for whose benefit the very society was got registered. Though, grounds based on Article 26 of the Constitution of India raised, were not pursued, it was pointed out that under Article 29, the parsis had the right to conserve their

culture. It was submitted that bye-law No.7 was perfectly valid and so long as it did not violate anything contained in the Act or the Rules, it could not be held to be invalid or unenforceable and the society cannot be compelled to act against the terms of its bye- laws. He also submitted that there was no absolute restraint on alienation to attract Section 10 of the Transfer of Property Act and the restraint, if any, was only a partial restraint, valid in law. There was nothing illegal in certain persons coming together to form a society in agreeing to restrict membership in it or to exclude the general public at its discretion with a view to carry on its objects smoothly. Mr. Bobde, learned Senior Counsel appearing for the contesting respondents, Respondents 2 and 3, contended that Section 4 of the Act clearly indicated that no bye-law could be recognized which was opposed to public policy or which was in contravention of public policy in the context of the relevant provisions in the Constitution of India and the rights of an individual under the laws of the Country. A bye-law restricting membership in a co-operative society, to a particular denomination, community, caste or creed was opposed to public policy and consequently, the Authorities under the Act and the High Court were fully justified in rejecting the claim of the Society. Learned Senior Counsel also contended that the High Court was right in holding that the concerned bye-law operated as a restraint on alienation and such a restraint was clearly invalid in terms of Section 10 of the Transfer of Property Act. He submitted that a co-operative society stood on a different footing from a purely voluntary association or a society registered under the Societies Registration Act and in the context of Sections 4 and 24 of the Act, the validity of the bye-laws of a society had to be tested, notwithstanding the fact that the bye-laws had been earlier approved by the Registrar of Co-operative Societies. Learned Senior Counsel also contended that under Section 14 of the Act, the Registrar had the power to call upon the Society to amend its bye-laws and in that context, the Registrar could direct the Society to delete the restriction placed on admission to membership by bye-law No.7 of the bye-laws of the Society. In reply, Mr. Sorabjee pointed out that the rights under Part III of the Constitution of India pertained to State action and an individual could always join a voluntary association or a cooperative society which placed certain restrictions on the right, he might have otherwise enjoyed. There was also no substance in the contention that public policy was being violated.

7. Before proceeding further, some of the relevant provisions of the Gujarat Act may be noticed in a little detail. The Society though originally registered under the Bombay Co-operative Societies Act, 1925 has to be deemed to be registered under the Gujarat Act by virtue of Section 169 of the Gujarat Cooperative Societies Act, 1961. Section 2(2) of the Act defines bye-laws as meaning, bye-laws registered under the Act. Section 2(13) defines a member as meaning a person joining in an application for the registration of a co-operative society which is subsequently registered, or a person, duly admitted to membership of the society after its registration. Section 4 of the Act, based on which considerable arguments were raised before us, reads as follows:-

"4. Societies which may be registered.- A society, which has as its object the promotion of the economic interests or general welfare of its members or of the public, in accordance with co- operative principles, or a society established with the object of facilitating the operations of any such society, may be registered under this Act:

Provided that it shall not be registered if, in the opinion of the Registrar, it is economically unsound, or its registration may have an adverse effect upon any other society, or it is opposed to, or its working is likely to be in contravention of public policy."

Section 6 insists that a society shall not be registered under the Act unless it consists of at least ten persons not belonging to the same family, who are qualified to be members under the Act and who reside within the area of operation of the society. This shows that the members of a family could not by themselves form into a society. There was no such embargo on persons belonging to a community or sex forming themselves into a cooperative society. Section 8 speaks of application for registration and Section 9 speaks of registration. As noticed, the Society was originally registered under the Bombay Act. Under Section 11 of the Act, the Registrar is given the power to decide certain questions. The said Section reads:

"11. Power of Registrar to decide certain questions.- When, any question arises whether for the purpose of the formation, or registration or continuance of a society or the admission of a person as a member of a society under this Act a person is an agriculturist or a non-agriculturist, or whether any person is a resident in a town or village or group of villages, or whether two or more villages shall be considered to form a group, or whether any person belongs to any particular tribe, class or occupation, the question shall be decided by the Registrar."

It may be noted that the power does not include the power to decide whether the refusal to admit a particular member on the basis that he is not qualified under the bye-laws is correct or not and the power is conferred only to decide the eligibility of a person to be a member, apparently in terms of the Act, the Rules and the bye-laws. Section 12 enables the Registrar to classify the societies. Section 13 provides that an amendment of the bye-laws of a society had to be approved by the Registrar before it could come into force. Section 14 of the Act confers a power on the Registrar to direct an amendment of the bye-laws of a society. The said Section reads as under:-

"14. Power to direct amendment of bye- laws .- (1) If it appears to the Registrar that an amendment of the bye-laws except in respect of the name or objects of a society is necessary or desirable in the interest of such society, he may call upon the society, in the prescribed manner, to make the amendment within such time as he may specify.

(2) If the society fails to make the amendment within the time so specified, the Registrar after giving the society an opportunity of being heard and with the prior approval of the State Co-operative Council, may register the amendment, and shall thereupon issue to the society a copy thereof certified by him. With effect from the date of the registration of the amendment in the manner aforesaid, the bye-laws shall be deemed to have been duly amended accordingly ;

and the bye-laws as amended shall be binding on the society and its members."

Section 22 provides that subject to the provisions of Section 25, no person shall be admitted as a member of a society unless he is an individual, who is competent to contract, a firm, company, or any other body corporate or a society registered under the Societies Registration Act, 1860, a society registered, or deemed to be registered, under the Act, the State Government, a local authority, or a public trust registered under Bombay Public Trusts Act, 1950.

Section 23 deals with removal of a member in certain circumstances. Section 24 speaks of open membership. Sub-Section (1) thereof, which is of immediate relevance, reads as follows:-

"24. Open membership. (1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act, the rules and bye-laws of such society."

Be it noted that admission to membership could not be refused only to a person who was duly qualified therefor under the Act, the Rules and the bye-laws of such Society. In other words, the bye-laws are not given the go-by in spite of the introduction of the concept of open membership as indicated by the heading of the Section. Section 29 of the Act restricted the right of a member other than the State Government or a society to hold more than one fifth of the total share capital of the society. Section 30 places restriction on transfer of share or interest. It reads "30. Restrictions on transfer of share or interest.-

(1) Subject to the provisions of section 29 and sub-

section (2) a transfer of, or charge on, the share or interest of a member in the capital of a society shall be subject to such conditions as may be prescribed.

(2) A member shall not transfer any share held by him, or his interest in the capital or property of any society, or any part thereof, unless.-

(a) he has held such share or interest for not less than one year;

(b) the transfer or charge is made to the Society, or to a member of the Society, or to a person whose application for membership has been accepted by the Society; and

(c) the committee has approved such transfer."

It can be seen that a restriction is placed on the right of a member to transfer his share by sub-section (2) of Section 30 and the transfer could be only in favour of the society or to a member of the society or to a person whose application for membership has been accepted by the society and the committee has approved such transfer. Section 31 provides for transfer of interest on death of a member. Even an heir or a legal representative, had to seek and obtain a membership in the society, before the rights could be transferred to him. The section also leaves a right to the heir or legal representative to require the society to pay him the value of the share or interest of the deceased member, ascertained as prescribed. Section 32 of the Act provides that the share or interest of a

member in the capital of a Cooperative Society is not liable to attachment. Under Section 36 of the Act, the society even has the power to expel a member and unless otherwise ordered in special circumstances by the Registrar, such expelled member does not have a right of re-admission to membership. Sections 44 to 46 place restrictions on transactions with non-members and the said transactions were to be subject to such restrictions as may be prescribed. Under Chapter V of the Act, any society duly registered under the Act would be entitled to State aid. Under Section 73 of the Act, the final authority of the society is to vest in the general body of the society, subject to it being delegated in terms of the bye-laws of the society. The powers and functions of the Committee in which the management of every society vested, are dealt with in Section 74 of the Act.

8. The Gujarat Co-operative Societies Rules, 1965 was framed in terms of the Act. Rule 12(2) provides that no Co-operative Housing Society shall, without sufficient cause, refuse admission to its membership, to any person duly qualified therefor under the provisions of the Act and its bye-laws, to whom an existing member of such society wants to sell or transfer his land or house and no such society shall, without sufficient cause, refuse to give permission to any existing member to sell or transfer his plot of land or house to another person who is duly qualified to become a member of that society.

9. A peep into the history of the legislation brought in to govern the co-operative movement in the country seems justified. The real first legislation touching the co-operative movement was the Co-operative Credit Societies Act, 1904. When that act came into being, there was no other act in force under which an association or a society could be formed for the purpose of promoting the economic interests of its members in accordance with the well recognized co-operative principles, though a co-operative society could be organized under the Indian Companies Act, 1882. Lacuna was found in the working of that Act especially in the development of rural credit. To remove the same, the Cooperative Societies Act, 1912 was enacted. Under Section 4 of that Act, a society which had as its object, the promotion of economic interests of its members in accordance with economic principles, could be registered under the Act. Under Section 6, no society could be registered which did not consist of at least 10 persons above the age of 18 years and where the object of the society was the creation of funds to be lent to its members unless such persons either resided in the same town or village or in the same group of villages or they were members of the same tribe, class, caste or occupation unless otherwise directed by the Registrar of Co-operative societies. Section 14 placed restrictions on the transfer of share or interest by a member and the transfer could be made only to the society or to a member of the society. What is relevant for our purpose is to notice that normally, the membership in a society created with the object of creation of funds to be lent to its members, was to be confined to members of the same tribe, class, caste or occupation. The Co-operative Societies Act, 1912 continued in force until the concerned States enacted laws for themselves. It was, thus, that the Bombay Co-operative Societies Act, 1925 was enacted. We have earlier noticed some of the relevant provisions of the Act and it is not necessary to repeat them here. Under Section 72 of the Act, a society registered either under the Co-operative Credit Societies Act, 1904 or the Co-operative Societies Act, 1912 was to be deemed to be registered under the Act. What is required to be noticed is that in this Act also, when the object of the society was the creation of funds to be lent to its members, the membership had to be confined to persons belonging to the same town or village or same group of villages or they had to be members of the same tribe, class (originally it was

caste) or occupation unless the Registrar ordered otherwise. It was this Act, under which the present appellant Society got itself registered, though it later came to be governed by the Gujarat Co-operative Societies Act which was subsequently enacted. We have already adverted to the general provisions thereof but it may be relevant to notice here that under Section 6, no society other than a federal society, could be registered unless it consisted of at least 10 persons belonging to different families and who resided in the area of operation of the society and no society with unlimited liability could be registered unless all persons forming the society, resided in the same town or village or in the group of villages. Section 24 of the Act put restrictions in respect of membership. Section 30 restricted the right of transfer and Section 31 the right of inheritance. Thus, running right through the relevant enactments, is the concept of restricted membership in a co-operative society. The concept of open membership referred to in Section 24 of the Act has therefore to be understood in this background, especially when we bear in mind that it only placed an embargo on refusal of admission to membership to any person duly qualified therefor under the provisions of the Act, the Rules and the bye-laws of the society.

10. It could be seen from the leaflet which is a part of Annexure P-1 containing the bye-laws of the Society filed with the rejoinder, that suggestions were made regarding the formation of co-operative housing societies. The appellant is a housing society. It was stated that the essential feature of every housing society was at least that its houses formed one settlement in one compact area and the regulation of the settlement rested in the hands of the managing committee of the society. The problem involved in devising of model bye-laws which had to combine rather opposite requirements is also seen explained. In the suggestions for the promotion of a housing society the first essential is said to be that there should be a bond of common habits and common usage among the members which should strengthen their neighbourly feelings, their loyal adherence to the will of the society expressed by the committee's orders and their unselfish and harmonious working together. In India, this bond was most frequently found in a community or caste or groups like cultivators of a village. It is seen that the appellant Society, more or less, adopted the model bye-laws prepared in that behalf and by bye-law 7, the housing society confined its membership to those of the Parsi community.

11. The cooperative movement, by its very nature, is a form of voluntary association where individuals unite for mutual benefit in the production and distribution of wealth upon principles of equity, reason and common good. No doubt, when it gets registered under the Cooperative Societies Act, it is governed by the provisions of the Cooperative Societies Act and the Rules framed thereunder. In *Damyanti Naranga v. Union of India & Others* (AIR 1971 SC 966), this Court, discussing the scope of the right to form an association guaranteed by Article 19(1)(c) of the Constitution of India, stated that the right to form an association necessarily implies that the persons forming the association have also the right to continue to be associated with only those whom they voluntarily admit in the association. Any law, by which members are introduced in the voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. Based on this decision, it is contended on behalf of the Society that its members have the right to be associated only with those whom they consider eligible to be admitted and the right to deny admission to those with whom they do not want to associate, cannot be

interfered with by the Registrar by imposing on them a member who according to them was not eligible to be admitted. The argument on this basis is sought to be met on behalf of the respondents by reference to another decision of this Court in *Daman Singh and others, etc. v. State of Punjab and others, etc.* (AIR 1985 SC 973). Therein, their Lordships, after referring to *Damyanti (supra)*, held that that decision had no application to the situation before them. The position was explained in the following words:-

"That case has no application whatever to the situation before us. It was a case where an unregistered society was by statute converted into a registered society which bore no resemblance whatever to the original society. New members could be admitted in large numbers so as to reduce the original members to an insignificant minority. The composition of the society itself was transformed by the Act and the voluntary nature of the association of the members who formed the original society was totally destroyed. The Act was, therefore, struck down by the Court as contravening the fundamental right guaranteed by Art. 19(1)(f). In the cases before us we are concerned with co-operative societies which from the inception are governed by statute. They are created by statute, they are controlled by statute and so, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association."

It is emphasized that the principle recognized in the *Damyanti's* case (*supra*) was not applicable to a co-operative society since it is a creature of a statute, the Cooperative Societies Act and that the rights of its members could be abridged by a provision in the Act. Regarding the rights of an individual member, their Lordships have stated:

"Once a person becomes a member of a cooperative society, he loses his individuality qua the Society and he has no independent rights except those given to him by the statute and the bye-laws."

12. '*Daman Singh's* case (*supra*), in our view, is not an answer to the claim of the Society that it had the right to decide with whom it wants to associate or to deny membership to a person who was not qualified to be one in terms of the bye-laws of the Society. The effect of the observations in *Daman Singh's* case (*supra*), is only that cooperative societies, from their very inception are governed by the statute, the Cooperative Societies Act, that they are created by statute, they are controlled by the statute and so, there can be no objection to statutory interference with their composition or functioning and no merit in a challenge to statutory interference based on contravention of the individual right of freedom of association. As we understand the statement of the law by this Court in *Daman Singh's* case, it only means that the action of the Society in refusing membership to a person has to be tested in the anvil of the provisions of the Act, the Rules and its bye-laws. Be it noted that the bye-laws had already been approved on the basis that it is consistent with the Act and the Rules. Even then, it may be possible in a given case to point out that a particular bye-law was against the terms of the Act or the Rules. *Daman Singh* does not indicate that the Act, the Rules and the bye-laws for that matter, have to be given the go-by, merely because the particular bye-law or action of the Society may not accord with our concept of fairness or propriety in terms of the rights

available to an ordinary citizen. Therefore, in the light of the observations in Daman Singh, what one has to search for, is a provision in the Act or the Rules which prevails over bye-law No.7 of the Society, confining membership in it, to only a person who is a Parsi. Section 24 of the Act, no doubt, speaks of open membership, but Section 24(1) makes it clear that, that open membership is the membership of a person duly qualified therefor under the provisions of the Act, the Rules and the bye-laws of the Society. In other words, Section 24(1) does not contemplate an open membership dehors the bye-laws of the Society. Nor do we find anything in the Act which precludes a society from prescribing a qualification for membership based on a belief, a persuasion or a religion for that matter. Section 30(2) of the Act even places restrictions on the right of a member to transfer his right. In fact, the individual right of the member, respondent No.2, has got submerged in the collective right of the Society. In *State of U.P. and another v. C.O.D. Chheoki Employees' Cooperative Society Ltd. and others*, (1997) 3 SCC 681, this Court after referring to Daman Singh's case (supra) held in paragraph 16 that :

"Thus, it is settled law that no citizen has a fundamental right under Article 19(1)(c) to become a member of a Cooperative Society. His right is governed by the provisions of the statute. So, the right to become or to continue being a member of the society is a statutory right. On fulfillment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable from time to time. A member of the society has no independent right qua the society and it is the society that is entitled to represent as the corporate aggregate. No individual member is entitled to assail the constitutionality of the provisions of the Act, rules and the bye-laws as he has his right under the Act, rules and the bye-laws and is subject to its operation. The stream cannot rise higher than the source."

13. Section 4, on which reliance is placed, with particular reference to its proviso, only speaks of denial of registration if, in the opinion of the Registrar, the Society to be formed was economically unsound, or its registration may have an adverse effect upon any other Society, or it is opposed to, or its working is likely to be in contravention of public policy. Prima facie, it may have to be said that public policy, in the context of Section 4 of the Act, is the policy that is adopted by the concerned Act and the Rules framed thereunder. The concept of public policy in the context of the Cooperative Societies Act has to be looked for under the four corners of that Act and in the absence of any prohibition contained therein against the forming of a society for persons of Parsi origin, it could not be held that the confining of membership as was done by bye-law No.7, was opposed to public policy. When a statute is enacted, creating entities introduced thereunder on fulfillment of the conditions laid down therein, the public policy in relation to that statute has to be searched for within the four corners of that statute and when so searched for, one does not find anything in the Act which prevents the Society from refusing membership to a person who does not qualify in terms of bye-law No.7 of the Society.

14. Reliance was placed on Rule 12 of the Gujarat Cooperative Societies Rules, 1965. Rule 12 deals with open membership and provides in Rule 12(2) as follows:

"12. Open membership.-(1) ..

(2) No co-operative housing society shall without sufficient cause, refuse admission to its membership to any person, duly qualified therefor, under the provisions of the Act, and its bye-laws to whom an existing member of such society wants to sell or transfer his plot of land or house and no such society shall without sufficient cause, refuse to give permission to any existing member thereof to sell or transfer his plot of land or house to another person who is duly qualified as aforesaid to become its member."

Rule 12(2), as can be seen, provides only that, no person shall be refused admission provided he is duly qualified under the Act and the bye-laws of the society to be a member or permission for transfer refused, if the proposed transferee is qualified to be a member. Here again, the primacy given to the bye-laws of the society is in no manner sought to be whittled down by reference to any public policy going by the larger concept of that term and outside the Act. The decisions of the Bombay High Court, the Gujarat High Court and the Madhya Pradesh High Court relied on by learned counsel proceeded on the basis that if any provision is made against the constitutional scheme of things like confining membership in a Society to a caste, religion or creed, the same would be opposed to public policy and hence unenforceable. The question is whether such an approach is warranted when a statute enacted in that behalf outlines the contours of the policy sought to be enforced by the creation of bodies thereunder, being essentially associations which are voluntary in nature.

15. Membership in a co-operative society only brings about a contractual relationship among the members forming it subject of course to the Act and the Rules. One becomes a member in a co-operative society either at the time of its formation or acquires membership in it on possessing the requisite qualification under the bye-laws of the society and on being accepted as a member. It is not as if one has a fundamental right to become a member of a co-operative society. But certainly, if the application of one for membership, who is otherwise qualified to be a member under the Act, Rules and the bye-laws of the society, is rejected unreasonably or for frivolous reasons, the person may be entitled to enforce his claim to become a member in an appropriate forum or court of law. This is the effect of the decision in *Jain Merchants Co-operative Housing Society vs. HUF of Manubhai* (1995 (1) Gujarat Law Reporter 19) relied on by the High Court. The said decision does not lay down a proposition, nor can it lay down a proposition, that even a person who does not qualify to be a member in terms of the bye-laws of a society can enforce a right to become a member of that society. It is one thing to say that it is not desirable to restrict membership in a society based solely on religion or sex but it is quite different thing to say that any such voluntary approved bye-law containing such a restriction could be ignored or declared unconstitutional by an authority or a tribunal created under the Act itself. Normally, the bye-laws of a society do not have the status of a statute and as held by this Court in *Co-operative Central Credit Bank Ltd. vs. Industrial Tribunal, Hyderabad* (AIR 1970 SC 245) bye-laws are only the rules which governs the internal management or administration of a society and they are of the nature of articles of association of a company incorporated under the Companies Act. They may be binding between the persons affected by them but they do not have the force of a statute.

16. The validity of a bye-law, that too an approved bye-law, has to be tested in the light of the provisions of the Act and the rules governing co-operative societies. In so testing, the search should be to see whether a particular bye-law violates the mandate of any of the provisions of the Act or runs counter to any of its provisions or to any of the rules. Section 24(1) of the Act only provides for open membership subject to a person, aspiring to be a member, possessing the qualification prescribed by the bye-laws. It is not an open membership de hors the qualification prescribed by the bye-laws. When in *Daman Singh* this Court held that when a co-operative society is governed by the appropriate legislation it will be subject to the intervention made by the concerned legislation, it only meant that a legislative provision in the Act can be introduced for the purpose of eliminating a qualification for membership based on sex, religion or a persuasion or mode of life. But so long as there is no legislative intervention of that nature, it is not open to the court to coin a theory that a particular bye-law is not desirable and would be opposed to public policy as indicated by the Constitution. The Constitution no doubt provides that in any State action there shall be no discrimination based either on religion or on sex. But Part III of the Constitution has not interfered with the right of a citizen to enter into a contract for his own benefit and at the same time incurring a certain liability arising out of the contract. As observed by the High Court of Bombay in *Karvanagar Sahakari Griha Rachana Sanstha Maryadit and others vs. State* (AIR 1989 Bombay 392) the members have joined the society in accordance with the bye-laws and the members join a housing society by ascertaining what would be the environment in which they will reside. It is not permissible for the State Government to compel the society to amend its bye-laws as it would defeat the object of formation of the society. In that case, the society was constituted with the object of providing peaceful accommodation to its members. Though there may be circumstances justifying the State taking steps to meet shortage of accommodation, it was not open to the State Government to issue a direction to the Registrar of Co-operative Societies to direct a co-operative society to make requisite amendments to their bye-laws and grant permission to its members to raise multistoried constructions. In appeal from that decision reported as *State of Maharashtra and others vs. Karvanagar Sahakari Griha Rachana Sanstha Maryadit and others* (2000 (9) SCC 295) this Court while dismissing the appeal stated that it was clear that though a power was conferred on the Registrar to direct amendment of the bye-laws of a society, yet the paramount consideration is the interest of the society. So also, the power of the State Government to issue directions in public interest, could not be exercised so as to be prejudicial to the interest of the society. In the view of this Court, what was in the interest of the society was primarily for the society alone to decide and it was not for an outside agency to say. Where, however, the government or the Registrar exercised statutory powers to issue directions to amend the bye-laws, such directions should satisfy the requirement of the interest of the society. This makes it clear that the interest of the society is paramount and that interest would prevail so long as there is nothing in the Act or the Rules prohibiting the promotion of such interest. Going by *Chheoki Employees' Cooperative Society Ltd.*, 's case, neither the member, respondent No.2, nor the aspirant to membership, respondent No.3 had the competence to challenge the validity of the bye-laws of the Society or to claim a right to membership in the Society.

17. It appears to us that unless appropriate amendments are brought to the various Cooperative Societies Acts incorporating a policy that no society shall be formed or if formed, membership in no society shall be confined to persons of a particular persuasion, religion, belief or region, it could not

be said that a society would be disentitled to refuse membership to a person who is not duly qualified to be one in terms of its bye-laws.

18. It can be seen from the bye-laws of the present Society that the Society, more or less, adopted the model bye-laws made applicable to the Bombay Presidency. The object of the Society as set out in bye-law No.2 reads:

"2. The objects of the Society shall be to carry on the trade of building, and of buying, selling, hiring, letting and developing land in accordance with Co-operative principles and to establish and carry on social, re-creative and educational work in connection with its tenets and the Society was to have full power to do all things it deems necessary or expedient for the accomplishment of all objects specified in its bye- laws, including the power to purchase, hold, sell, exchange, mortgage, rent, lease, sub-lease, surrender, accept surrenders of and deal with lands of any tenure and to sell by installments and subject to any terms or conditions and to make and guarantee advances to Members for building or purchasing property and to erect, pull down, repair, alter or otherwise deal with any building thereon."

Under bye-law No.7, it was provided that members shall be elected by the Committee provided that all members shall belong to the Parsi community and on the conditions referred to in bye-law No.7. Provision has been made providing for the contingency arising out of the death of a member. Under bye-law No.21, it is provided that any share held by a member could be sold in terms of the other relevant bye-laws only with previous sanction of the Committee. The Committee is given full discretion in granting or withholding such sanction. Of course, in terms of the Act and the Rules, the refusal may be appealable before the Authority under the Act and the Society may not be in a position to argue that its decision is final. But that does not mean that the Authority under the Act is competent to ignore the bye-law relating to qualification to membership and direct the Society by exercising appellate or other power, to admit a person to membership who is not qualified to be a member, on the basis of its notion of public policy or fairness in dealing. These approved bye-laws, clearly, confer power on the Committee to reject the application for membership of a person who is not qualified in terms of the bye-law concerned and this cannot be interfered with on the basis of anything contained in the Act or the Rules. We are, therefore, satisfied that by introducing a theory of what the court considers to be public policy, a society registered under the Cooperative Societies Act, cannot be directed to admit a member who is not qualified to be a member in terms of its duly registered bye-laws.

19. It is true that it is very tempting to accept an argument that Articles 14 and 15 read in the light of the preamble to the Constitution of India reflect the thinking of our Constitution makers and prevents any discrimination based on religion or origin in the matter of equal treatment or employment and to apply the same even in respect of a co- operative society. But, while being thus tempted, the Court must also consider what lies behind the formation of co-operative societies and what their character is and how they are to be run as envisaged by the various Cooperative Societies Acts prevalent in the various States of this Country. Running through the Cooperative Societies Act, is the theory of area of operation. That means that membership could be denied to a citizen of this

Country who is located outside the area of operation of a society. Does he not have a fundamental right to settle down in any part of the country or carry on a trade or business in any part of the country? Does not that right carry with it, the right to apply for membership in any cooperative society irrespective of the fact that he is a person hailing from an area outside the area of operation of the society? In the name of enforcing public policy, can a Registrar permit such a member to be enrolled? Will it not then go against the very concept of limiting the areas of operation of cooperative societies? It is, in this context that we are inclined to the view that public policy in terms of a particular entity must be as reflected by the statute that creates the entity or governs it and on the Rules for the creation of such an entity. Tested from that angle, so long as there is no amendment brought to the Cooperative Societies Acts in the various States, it would not be permissible to direct the societies to go against their bye-laws restricting membership based on its own criteria.

20. What is relied on to invoke the plea that the restriction of membership is opposed to public policy is the proviso to Section 4 of the Act. We have already quoted Section 4. For convenience, we extract the proviso once again:-

"Provided that it shall not be registered if, in the opinion of the Registrar, it is economically unsound, or its registration may have an adverse effect upon any other society, or it is opposed to, or its working is likely to be in contravention of public policy."

What is the public policy contemplated by the proviso, when the formation and running of an association like a cooperative society is governed by a law enacted for that purpose, the Cooperative Societies Act, which recognizes the sanctity of the rights of the citizens coming together, to impose restrictions on their own rights by making appropriate provisions in the bye-laws of the society? Normally, that policy has to be searched for within the confines of that statute. What one has to bear in mind is that the statute reflects the policy of the Legislature in respect of the subject matter dealt with thereunder. When the Gujarat Cooperative Societies Act, 1961 was enacted, it could not be taken that the Legislature was unaware of the fundamental rights of citizens enshrined in Articles 19(1)(d) and (g) of the Constitution of India. But the Legislation, in aid of the cooperative movement and in the context of the rights available to citizens under Article 19(1)(c) of the Constitution of India, imposes only certain restrictions as reflected by the Act, the Rules and the Bye-laws of the particular society. The Acts specifically gave sanctity to the bye-laws of a Society duly approved by the authorities under the Act. The expression 'public policy' in the context of Section 4 of the Act can be understood only as being opposed to the policy reflected by the Cooperative Societies Act. As indicated in *Renusagar Power Co. Ltd. vs. General Electric Co.*, 1994 Supp. (1) SCC 644, the public policy underlying a statute has to be considered in the context of the provisions of that statute. Therein, in the context of the Foreign Exchange Regulation Act, 1973, it was held that any violation of the provisions of that Act enacted in national economic interest would be contrary to public policy and that would be the sense in which it should be understood when used in Section 7(1)(b)(ii) of that Act.

21. Under the Indian Contract Act, a person sui juris has the freedom to enter into a contract. The bye-laws of a cooperative society setting out the terms of membership to it, is a contract entered into by a person when he seeks to become a member of that society. Even the formation of the society is based on a contract. This freedom to contract available to a citizen cannot be curtailed or curbed relying on the fundamental rights enshrined in Part III of the Constitution of India against State action. A right to enforce a fundamental right against State action, cannot be extended to challenge a right to enter into a contract giving up an absolute right in oneself in the interests of an association to be formed or in the interests of the members in general of that association. This is also in lieu of advantages derived by that person by accepting a membership in the Society. The restriction imposed, is generally for retaining the identity of the society and to carry forward the object for which the society was originally formed. It is, therefore, a fallacy to consider, in the context of cooperative societies, that the surrendering of an absolute right by a citizen who becomes a member of that society, could be challenged by the said member by taking up the position that the restriction he had placed on himself by entering into the compact, is in violation of his fundamental right of freedom of movement, trade or right to settle in any part of the country. He exercises his right of association when he becomes a member of a society by entering into a contract with others regulating his conduct vis-à-vis the society, the members constituting it, and submerging his rights in the common right to be enjoyed by all and he is really exercising his right of association guaranteed by Article 19(1)(c) of the Constitution of India in that process. His rights merge in the rights of the society and are controlled by the Act and the bye-laws of the society.

22. Entering into an association with others for forming a co-operative society and subscribing to its bye-laws are matters of contract voluntarily undertaken by a citizen. While considering an argument that a provision in the bye-laws thus subscribed to by a member is opposed to public policy, the court cannot forget another important public policy as stated by Jessel, M.R. in *Printing and Numerical Registering Company v.s Sampson* (1874-75 (Vol. 19) L.R. Equity Cases 462):

"it must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime, or a contract to give a reward to another to commit a crime, is necessarily void. The decisions have gone further, and contracts to commit an immoral offence, or to give money or reward to another to commit an immoral offence, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further."

23. In the context of the freedom of contract available to a person and in the context of the right to form an association guaranteed by Article 19(1)(c) of the Constitution of India, and the law

governing such an association, courts have to be cautious in trying to ride the unruly horse of public policy in acceding to a challenge to a qualification for membership in the bye-laws, not taboo under the Act and the Rules themselves.

24. It also appears to us, that a person after becoming a member of a Cooperative Society cannot seek to get out of the obligation undertaken by him while becoming a member of such a Society by resort to the principle of public policy based on constitutional protections given to an individual as against State action. As noticed in *Rodriguez vs. Speyer Bros.* (1919) A.C. 59 and *Fender vs. Mildmay* (1938) A.C. 1, the considerations of public policy are disabling and not enabling. Observed Lord Sumner in *Rodriguez* (Supra)":

"Considerations of public policy are applied to private contracts or dispositions in order to disable, not to enable. I never heard of a legal disability from which a party or a transaction could be relieved because it would be good policy to do so."

By invoking considerations of public policy, there appears to be no justification in relieving a member of a Cooperative Society of the obligations undertaken by him while joining it. The argument, therefore, that Respondent No.2, herein, a member, should be relieved of the obligation undertaken by him while joining the Society or becoming its member or while seeking permission to put up a multi-storeyed construction, should be relieved of the restriction, he has agreed to, on the ground that the same might affect his fundamental rights guaranteed by Article 19(1)(d) or (g) of the Constitution of India or that it offends Article 300A of the Constitution.

25. Dealing with the validity of a restriction which prohibits assignments of contractual rights which have the effect of bringing the assignee into direct contractual relations with the other party to the contract, the House of Lords held in *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposal Ltd.* and others, [1993] 3 All E.R. 417, that the prohibition on the assignment including that of accrued rights of action was not void as being contrary to public policy; since, a party to a building contract could have a genuine commercial interest in seeking to ensure that he was in contractual relations only with a person whom he had selected as the other party to the contract and there was no public need for the law to support a market in choses in action. The principle in our view supports the position that a contractual restriction on whom to admit as a member or with whom to associate, cannot be said to be opposed to public policy.

26. It is true that in secular India it may be somewhat retrograde to conceive of co-operative societies confined to group of members or followers of a particular religion, a particular mode of life, a particular persuasion. But that is different from saying that you cannot have a co-operative society confined to persons of a particular persuasion, belief, trade, way of life or a religion. A co-operative society is not a state unless the tests indicated in *Ajay Hasia* are satisfied. There is no case here that the appellant society satisfies the tests laid down by *Ajay Hasia* so as to be considered to be a state within the meaning of Article 12 of the Constitution. The fundamental rights in Part III of the Constitution are normally enforced against State action or action by other authorities who may come within the purview of Article 12 of the Constitution. It is not possible to argue that a person has a fundamental right to become a member of a voluntary association or of a co-operative society

governed by its own bye-laws. So long as this position holds, we are of the view that it is not possible, especially for a Registrar who is an authority under The Co-operative societies Act, to direct a co-operative society to admit as a member, a person who does not qualify to be a member as per the bye-laws registered under the Act. Nor can a Registrar direct in terms of Section 14 of the Act to amend the bye-laws since it could not be said that such an amendment, as directed in this case is necessary or desirable in the interests of the appellant society. What is relevant under Section 14 of the Act is the interests of the society and the necessity in the context of that interest. It is not the interest of an individual member or an aspirant to a membership.

27. It is true that in the activities of a society, as envisaged by the bye-laws, the society may acquire rights or incur obligations which may be enforced. But the incurring of such an obligation or the acquiring of such a right, cannot stand in the way of the right to form an association guaranteed by Article 19(1)(c) of the Constitution available to the members of the society who formed themselves into the appellant Society. The position under The Bombay Co-operative Societies Act under which the Society was originally formed was also no different as can be seen from the relevant provisions of the Act. It, therefore, appears to us to be not open to the Registrar or any other authority under The Co-operative Societies Act to direct the Society to go against its own bye-laws and to admit a person to membership as has been sought to be done in this case.

28. The argument that public policy is as reflected by the constitutional guarantees, which govern rights and obligations has to be approached with caution. It will be easy for State Legislatures to provide in their respective Co-operative Societies Acts that no society could be formed or registered under the Act as confined to a group, a sex, a religion or members of a particular persuasion or way of life. But that is different from saying that in the name of open membership, subject to its bye-laws contemplated by the relevant provisions of the Act, a direction could be issued to ignore the bye-laws and to admit a person who is not qualified to become a member. Moreover, what is public policy in the context of a co-operative society got registered by certain persons coming together and laying down a qualification for membership in that society, is a question that has to be considered essentially in the context of the availability of such a right in India to form such associations and the absence of a prohibition in that behalf contained in the Co-operative Societies Act and the Rules. In fact, the Act and the Rules contemplate classification of a society and even there, no prohibition has been indicated in respect of the confining of the membership to a class of people. The decisions of the Bombay High Court relied on by counsel for the respondent, in our view, have proceeded on the basis of the concept of open membership without giving adequate importance to the provision in the very section that the open membership is subject to bye-laws of the society or the qualification prescribed for membership in the society. In that context, it is not possible to import one's inherent abhorrence to religious groups or other groups coming together to form, what learned counsel for the respondent called "ghettos". That is certainly an important aspect but that is an aspect that has to be tackled by the legislature and not by the authorities under the Act directing the co-operative society to go against its own bye-laws or by the courts upholding such orders of the authorities, based on presumed public policy when the Act itself does not warrant it or sanction it.

29. Section 23 of the Contract Act provides that where consideration and object are not lawful the contract would be void. But for Section 23 to apply it must be forbidden by law or it must of such a

nature that it would defeat the provision of any law or it is fraudulent or it involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy. If we proceed on the basic premise that public policy in relation to a co-operative society is to be looked for within the four corners of the Act, the very enactment under which the very society is formed, a bye-law that does not militate against any of the provisions of the Act cannot be held to be opposed to public policy unless it is immoral or offends public order. It cannot be said that a person bargaining for membership in a Society or for coming together with those of his ilk to form a society with the objects as set out in the bye-laws subscribed to by him, can be considered to be doing anything immoral or against public order. An aspirant to membership in a co-operative society, is at arms length with the other members of the society with whom he enters into the compact or in which he joins, having expressed his willingness to subscribe to the aims and objects of that society. In the context of Section 23 of the Contract Act, something more than possible or plausible argument based on the constitutional scheme is necessary to nullify an agreement voluntarily entered into by a person. We have already quoted the relevant observations of Lord Sumner in *Rodriguez vs. Speyer Bros.* (1919) A.C. 59). Here, respondent No.2 became a member of the Society of his own volition acquiring the rights and incurring the obligations imposed by the approved bye-laws of the Society. It is not open to respondent No.2 to approach the authorities for relieving him of his obligations attaching to the acquisition of membership in the Society. It is also not open to the authorities under the Act to relieve him of his obligations in the guise of entering a finding that discrimination on the basis of the religion or sex is taboo under the Constitution in the context of Part III thereof. As has been held by this Court, he is precluded from challenging the validity of the bye-laws relating to membership.

30. The above conclusion would lead us to the question whether there is anything in The Gujarat Co-operative Societies Act and the Gujarat Co-operative Societies Rules restricting the rights of the citizens to form a voluntary association and get it registered under The Co-operative Societies Act confining its membership to a particular set of people recognized by their profession, their sex, their work or the position they hold or with reference to their beliefs, either religious or otherwise. It is not contended that there is any provision in the Gujarat Co-operative Societies Act prohibiting the registration of such a co-operative society. We have already referred to the history of the legislation and the concept of confinement of membership based on residence, belief or community. The concept of open membership, as envisaged by Section 24 of the Act is not absolute on the very wording of that Section. The availability of membership is subject to the qualification prescribed under the provisions of the Act, the Rules and the bye-laws of such society. In other words, if the relevant bye-law of a society places any restriction on a person getting admitted to a co-operative society, that bye-law would be operative against him and no person, or aspiring member, can be heard to say that he will not be bound by that law which prescribes a qualification for his membership.

31. In our view, the High Court made a wrong approach to the question of whether a bye-law like bye-law No.7 could be ignored by a member and whether the Authorities under the Act and the court could ignore the same on the basis that it is opposed to public policy being against the constitutional scheme of equality or non-discrimination relating to employment, vocation and such. So long as the approved bye-law stands and the Act does not provide for invalidity of such a bye-law

or for interdicting the formation of co-operative societies confined to persons of a particular vocation, a particular community, a particular persuasion or a particular sex, it could not be held that the formation of such a society under the Act would be opposed to public policy and consequently liable to be declared void or the society directed to amend its basic bye-law relating to qualification for membership.

32. It is true that our Constitution has set goals for ourselves and one such goal is the doing away with discrimination based on religion or sex. But that goal has to be achieved by legislative intervention and not by the court coining a theory that whatever is not consistent with the scheme or a provision of the Constitution, be it under Part III or Part IV thereof, could be declared to be opposed to public policy by the court. Normally, as stated by this Court in *Gheru Lal Parakh vs. Mahadeodas Maiya and others* (1959 Suppl. (2) SCR 406, the doctrine of public policy is governed by precedents, its principles have been crystalised under the different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although, theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of stability of society.

33. The appellant Society was formed with the object of providing housing to the members of the Parsi community, a community admittedly a minority which apparently did not claim that status when the Constituent Assembly was debating the Constitution. But even then, it is open to that community to try to preserve its culture and way of life and in that process, to work for the advancement of members of that community by enabling them to acquire membership in a society and allotment of lands or buildings in one's capacity as a member of that society, to preserve its object of advancement of the community. It is also open to the members of that community, who came together to form the co-operative society, to prescribe that members of that community for whose benefit the society was formed, alone could aspire to be members of that society. There is nothing in the Bombay Act or the Gujarat Act which precludes the formation of such a society. In fact, the history of legislation referred to earlier, would indicate that such coming together of groups was recognized by the Acts enacted in that behalf concerning the co-operative movement. Even today, we have Women's co-operative societies, we have co-operative societies of handicapped persons, we have co-operative societies of labourers and agricultural workers. We have co-operative societies of religious groups who believe in vegetarianism and abhor non-vegetarian food. It will be impermissible, so long as the law stands as it is, to thrust upon the society of those believing in say, vegetarianism, persons who are regular consumers of non-vegetarian food. May be, in view of the developments that have taken place in our society and in the context of the constitutional scheme, it is time to legislate or bring about changes in Co-operative Societies Acts regarding the formation of societies based on such a thinking or concept. But that cannot make the formation of a society like the appellant Society or the qualification fixed for membership therein, opposed to public policy or enable the authorities under the Act to intervene and dictate to the society to change its fundamental character.

34. Another ground relied on by the Authorities under the Act and the High Court to direct the acceptance of respondent No.3 as a member in the Society is that the bye-law confining membership

to a person belonging to the Parsi community and the insistence on respondent No.2 selling the building or the flats therein only to members of the Parsi community who alone are qualified to be members of the Society, would amount to an absolute restraint on alienation within the meaning of Section 10 of Transfer of Property Act. Section 10 of the Transfer of Property Act cannot have any application to transfer of membership. Transfer of membership is regulated by the bye-laws. The bye-laws in that regard are not in challenge and cannot effectively be challenged in view of what we have held above. Section 30 of the Act itself places restriction in that regard. There is no plea of invalidity attached to that provision. Hence, the restriction in that regard cannot be invalidated or ignored by reference to Section 10 of the Transfer of Property Act.

35. Section 10 of the Transfer of Property Act relieves a transferee of immoveable property from an absolute restraint placed on his right to deal with the property in his capacity as an owner thereof. As per Section 10, a condition restraining alienation would be void. The Section applies to a case where property is transferred subject to a condition or limitation absolutely restraining the transferee from parting with his interest in the property. For making such a condition invalid, the restraint must be an absolute restraint. It must be a restraint imposed while the property is being transferred to the transferee. Here, respondent No.2 became a member of the Society on the death of his father. He subscribed to the bye-laws. He accepted Section 30 of the Act and the other restrictions placed on a member. Respondent No.2 was qualified to be a member in terms of the bye-laws. His father was also a member of the Society. The allotment of the property was made to appellant in his capacity as a member. There was really no transfer of property to respondent No.2. He inherited it with the limitations thereon placed by Section 31 of the Act and the bye-laws. His right to become a member depended on his possessing the qualification to become one as per the bye-laws of the Society. He possessed that qualification. The bye-laws provide that he should have the prior consent of the Society for transferring the property or his membership to a person qualified to be a member of the Society. These are restrictions in the interests of the Society and its members and consistent with the object with which the Society was formed. He cannot question that restriction. It is also not possible to say that such a restriction amounts to an absolute restraint on alienation within the meaning of Section 10 of the Transfer of Property Act.

36. The restriction, if any, is a self-imposed restriction. It is a restriction in a compact to which the father of respondent No.2 was a party and to which respondent No.2 voluntarily became a party. It is difficult to postulate that such a qualified freedom to transfer a property accepted by a person voluntarily, would attract Section 10 of the Act. Moreover, it is not as if it is an absolute restraint on alienation. Respondent No.2 has the right to transfer the property to a person who is qualified to be a member of the Society as per its bye-laws. At best, it is a partial restraint on alienation. Such partial restraints are valid if imposed in a family settlement, partition or compromise of disputed claims. This is clear from the decision of the Privy Council in *Mohammad Raza v. Mt. Abbas Bandi Bibi*, ALR 59 I.A. 236 and also from the decision of the Supreme Court in *Gummanna Shetty and others v. Nagaveniamma*, AIR 1967 SC 1595. So, when a person accepts membership in a cooperative society by submitting himself to its bye-laws and secures an allotment of a plot of land or a building in terms of the bye-laws and places on himself a qualified restriction in his right to transfer the property by stipulating that the same would be transferred back to the society or with the prior consent of the society to a person qualified to be a member of the society, it cannot be held

to be an absolute restraint on alienation offending Section 10 of the Transfer of Property Act. He has placed that restriction on himself in the interests of the collective body, the society. He has voluntarily submerged his rights in that of the society.

37. The fact that the rights of a member or an allottee over a building or plot is attachable and saleable in enforcement of a decree or an obligation against him cannot make a provision like the one found in the bye-laws, an absolute restraint on alienation to attract Section 10 of the Transfer of Property Act. Of course, it is property in the hands of the member on the strength of the allotment. It may also be attachable and saleable in spite of the volition of the allottee. But that does not enable the Court to hold that the condition that an allotment to the member is subject to his possessing the qualification to be a member of the cooperative society or that a voluntary transfer by him could be made only to the society itself or to another person qualified to be a member of the society and with the consent of the society could straight away be declared to be an absolute restraint on alienation and consequently an interference with his right to property protected by Article 300A of the Constitution of India. We are, therefore, satisfied that the finding that the restriction placed on rights of a member of the Society to deal with the property allotted to him must be deemed to be invalid as an absolute restraint on alienation is erroneous. The said finding is reversed.

38. In view of what we have stated above, we allow this appeal, set aside the judgments of the High Court and the orders of the Authorities under the Act and uphold the right of the Society to insist that the property has to be dealt by respondent No.2 only in terms of the bye-laws of the Society and assigned either wholly or in parts only to persons qualified to be members of the Society in terms of its bye-laws. The direction given by the authority to the appellant to admit respondent No.3 as a member is set aside. Respondent No.3 is restrained from entering the property or putting up any construction therein on the basis of any transfer by respondent No.2 in disregard of the bye-laws of the Society and without the prior consent of the Society.

39. The Writ Petition filed by the appellant in the High Court is allowed in the above manner. The appellant will be entitled to its costs here and in the court below.