

Madhavnagar Cooperative Housing ... vs Joint Registrar And Member, Board Of ... on 30 August, 2019

Equivalent citations: AIRONLINE 2019 GUJ 394

Author: J.B. Pardiwala

Bench: J.B.Pardiwala

C/SCA/4585/2016

CAVJUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 4585 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

MADHAVNAGAR COOPERATIVE HOUSING SOCIETY LIMITED & another
Versus
JOINT REGISTRAR AND MEMBER, BOARD OF NOMINEES, SURAT & others

Appearance:

MR BS PATEL with MR CHIRAG B PATEL for the Petitioners
MR RONAKRAVAL, AGP for the Respondent No. 1
MR DHAVAL G NANAVATI for the Respondent No. 3
MR MANOJ T DANAK for the Respondent No. 2

CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date: 30/08/2019

CAV JUDGMENT

1. By this writ-application under Article 226 of the Constitution of India, the writ-applicants have prayed for the following reliefs :

C/SCA/4585/2016

CAVJUDGMENT

"(A) be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction quashing and setting aside the order dated 17.3.2016 passed by respondent no.1 at Annexure-A to the petition and also ordered the application at Exh.5 in Lavad Case No.104 of 2015 at Annexure-P to the petition be allowed;

(AA) Your Lordship will be pleased to issue a writ of mandamus or any other appropriate order or direction quashing and setting aside the Development Plan dated 01/06/2016 and the BU Permission dated 06/06/2016 at Annexure-Y to the petition issued by the respondent no.3.

(B) Pending admission and final disposal of this petition, Your Lordships will be pleased to restrain respondent no.2 for utilizing the plot/bungalow no.40 of petitioner no.1 society or part thereof for any other purpose than residential purpose;

(BB) Your Lordships will be pleased to restrain the respondent no.2 from utilizing the premises on Plot No.40 or any part thereof for any other purpose than the residential purpose.

(C) Be pleased to award the cost of this petition;

(D) Such other and further relief that is just, fit and expedient in the facts and circumstances of the case may be granted."

C/SCA/4585/2016 CAVJUDGMENT

2. The facts giving rise to this writ-application may be summarised as under :

3. The writ-applicant no.1 is a society registered under the provisions of the Gujarat Cooperative Societies Act, 1961. The writ-applicant no.2 is the Chairman of the Society. One Niranjanaben Manubhai Patel was the member of the Society. She was the owner of the Bungalow No.40 in the Society. Niranjanaben decided to sell her Bungalow No.40 to the respondent no.2 herein, namely, Shri Pankaj A.Karnavat.

4. In such circumstances, Niranjnanaben preferred an application dated 24th February 2010 addressed to the Chairman of the Society, seeking permission to sell the Bungalow No.40 to the respondent no.2.

5. The respondent no.2 also preferred an application dated 24th February 2010 addressed to the Chairman of the Society, seeking permission to purchase the Bungalow No.40 in the Society from Niranjnanaben Manubhai Patel.

6. The Society, vide letter dated 13th March 2010, granted permission to the respondent no.2 to purchase the Bungalow No.40 in the Society by admitting him as a nominal member.

7. On 20th June 2010, a meeting of the committee members of the Society was convened to discuss few issues relating to the administration of the Society and for the purpose of passing appropriate resolutions in that regard. One of the items in the agenda in the meeting of the Society was with respect to C/SCA/4585/2016 CAVJUDGMENT Niranjnanaben Manubhai Patel resigning as a member of the Society and the sale of her Bungalow No.40 in favour of the respondent no.2.

8. In the said meeting, a resolution was passed permitting Niranjnanaben Manubhai Patel to resign as a member of the Society on account of her financial difficulties. At the same time, the committee members also passed a resolution admitting the respondent no.2 as a member of the Society by accepting the share transfer fees and also with a distinct understanding that the respondent no.2 would abide by the bye-laws of the Society.

9. The respondent no.2 executed an undertaking in writing on oath on a stamp paper duly notarized by the notary public stating as follows :

"I, Pankaj Ajitraj Karnavat, aged: 35, religion: Hindu, Occupation - Chartered Accountant, residing at: 1004, Padmakruti Apartment, City Light, Surat, C/o, Bungalow No.40, Mahadevnagar Co.Op. Housing Society, Ltd., Surat, on this 20th day of June, 2010, Gujarati Samvat : 2066, Sunday, do hereby, enter into an agreement with Mahadev Nagar Co.Op. Housing Society, Majura Darwaja, Surat - 395002 and admit that :-

(1) I shall act harmoniously with all the members and neighbours of the society and live peacefully.

(2) I shall live and behave in such a manner which may not cause any kind of noise.

C/SCA/4585/2016

CAVJUDGMENT

(3) The bye-laws of the society and subsequent revisions

came in force pursuant to the Resolution passed in the General Meeting are accepted to me. I have read all those rules and I hereby assure to obey the same accordingly. I have also put my signatures on the various circulars. I am also aware with the previous circulars and rules which are accepted to me. Signature.

(4) The bye-laws have been interpreted vide the circulars dated 20/7/1963, 16/5/1964, 3/10/1979, 05/1/1981 etc. and all those diktats are accepted to me.

(5) This society is a kind of "Tenant Ownership" and the land of all its plots is owned by the society. Therefore, the ownership of the property on the land and the construction can be transferred after the written approval of the society and if the society has no objection to include the new member. I have been given understanding that the land is not transferred in favour of anybody at any time, which is accepted to me. I am not supposed to initiate any process of transfer in favour of anybody without the prior permission and approval of the society, and If I will initiate such process, the same will stand cancelled.

(6) I am aware with the bye-laws and the customs of the society in respect of construction. The rules thereof are accepted to me, which say that, the construction towards the main road has to be kept unaltered and the remaining marginal space has to be kept free. The rule that, minimum three feet space has to be kept free from the three side C/SCA/4585/2016 CAVJUDGMENT neighbouring boundary, is accepted to me. The rule that, not more than two storeyed construction has to be made from the ground floor, is accepted to me.

(7) The addition, alterations in construction have to be produced in the city municipal corporation after prior approval of the society. In this regard, I accept the supremacy of the rules of the society.

(8) The tenants shall not be allowed without the permission of the society. It is also necessary to define as to who can be the tenant and the tenant shall be the licensee as the member of the society. In this manner, only those shall be allowed as the tenants who assure to accept and follow the rules of the society after executing a separate agreement in this regard. The tenant shall also be civilized, peace-loving and vegetarian and defined by the society as suitable. I agree to accept all these rules and they are binding upon me.

(9) It is against the rules of the society to construct one's house either with multi-storey or in flat system and I agree to this rule.

(10) Only one person is considered to be the member in the record of the society and the property is also considered to be registered in the name of one person only. This rule has also been brought to my notice. I know the fact that the person other than the said one has no rights and status of a member and I agree to it.

C/SCA/4585/2016 CAVJUDGMENT (11) The house in the society shall be utilized for the residential purpose only, i.e. the society is for residential housing only. Except for the residential purpose, the residential space with the membership of the society shall not be used for the work and machinery creating noise pollution. I undertake in written that I or my heirs will not use the same in this manner. However, if it is used in the above said manner, the society has the authority to stop it immediately.

(12) The above rules and their explanations and descriptions have been agreed to and accepted by me voluntarily after due consideration and they are acceptable to and binding upon me and my heirs. Signature : My heirs or any other person shall not raise any dispute to gain any rights against these rules. And I specifically admit that if such dispute is raised, it will not be accepted.

(13) My membership is liable to be canceled if any of the above rules and regulations of the society mentioned in the agreement is violated by me or my heirs. No dispute shall be raised in this regard.

(14) The above agreement has been executed by me with my full consciousness and willingness after reading it with due consideration. It will be agreed to and binding upon me and my heirs."

10. The respondent no.2 decided to demolish the Bungalow No.40, which he purchased from the erstwhile owner C/SCA/4585/2016 CAVJUDGMENT Niranjnanaben Manubhai Patel. The respondent no.2 represented before the Society that he wanted to construct a residential low- rise bungalow. In that regard, he prayed for appropriate No Objection Certificate from the Society. The request made by the respondent no.2 in his letter dated 7th September 2013 addressed to the Chairman of the Society (Annexure-G to this petition) is in the following words :

"We request you to kindly provide us the No Objection Certificate (NOC) on behalf of the society for the proposed residential low rise bungalow at new plot no.40 located in your society, since we have to submit it for plan pass of the same with the respective authority.

Hope you will provide us the NOC at the earliest."

11. The Society, in good faith and believing that the respondent no.2 proposed to demolish the old Bungalow No.40 and construct a low-rise bungalow, granted the No Objection Certificate. However, after demolishing the bungalow, the respondent no.2 started putting up a huge structure meant for commercial use. The respondent no.2 is a practicing Chartered Accountant and he decided to put up construction in the form of his office.

12. The Society seriously objected to his plans and asked the respondent no.2 to stop the construction. However, the respondent no.2 did not pay heed to the say of the committee members of the Society and proceeded with the construction highhandedly.

C/SCA/4585/2016 CAVJUDGMENT

13. The Society has placed on record the photo of the construction which has been put up by the respondent no.2 in a residential society. The same is attached herein below :

14. Ultimately, the dispute reached before the Joint Registrar and Member, Board of Nominees, Surat. The Society was constrained to institute Lavad Case No.104 of 2005 against the respondent no.2. The Society also preferred an application Exh.5 in the above referred Lavad Case, seeking injunction restraining the respondent no.2 from proceeding with the construction contrary to the bye-laws of the Society.

15. The Joint Registrar, vide order dated 17th March 2016, rejected the application Exh.5 and declined to grant injunction restraining the respondent no.2 from putting up the construction.

16. It appears that the Society immediately thereafter approached the respondent no.3 - Surat Municipal Corporation.

C/SCA/4585/2016 CAVJUDGMENT The Society brought to the notice of the Surat Municipal Corporation that it could not have sanctioned the plans as put up by the respondent no.2 without the No Objection Certificate issued by the Society.

17. On the other hand, the respondent no.2 went on assuring the Joint Registrar that he was putting up the construction only for the residential purpose and in accordance with the bye-laws of the Society.

18. It appears that on 16th June 2016, the Surat Municipal Corporation issued a Building Use Certificate in favour of the respondent no.2, which reads as follows :

"Central Zone Surat Municipal Corporation Building Use Certificate Central Zone/A./No.02 Dated 06.06.16 Construction Permission Applied on 07/10/2013 Construction Permission Granted on 10/02/2014 Construction Completed on 20/03/2016 Reference: (1) Order dated 17/03/2016 of the Joint Registrar and Member, Board of Nominees, Surat, in Lavad Case No.104/2015;

(2) Application dated 22/03/2016 of Mr.Pankajbhai A. Karnavat for permission to use including modified plan;

(3) Permission dated 01/06/2016 of the City Engineer and Zonal Chief, Central Zone.

C/SCA/4585/2016 CAVJUDGMENT It is to inform to Mr.Pankajbhai A. Karnavat C/o. Architect Mr.Murtuza M.Basrai, 4/2523, 302, Al-Burhaani, Begumpura, Aamkhaas, Surat, that considering the application Sr.no.2 referred to above submitted by you along with the building completion certificate dated 20/03/2016 of Architect Mr.Murtuza M.Basrai, Structural Stability Certificate dated 11/01/2016 of

Structural Engineer Mr.Jalil A. Shaikh and order at Sr.no.1 referred to above, pursuant to the permission Sr.no.3 referred to above, permission is granted to use the ground floor (Personal C.A. / Advocate Office) + First Floor (Residence) + Second Floor (Residence) of the property bearing Ward No.2, Entry No.1930/A/1/A/1/40 as per application Sr. No.2 referred to above submitted along with the modified plan seeking use of the building. Any other use than the permission granted for without obtaining the revised permission shall attract legal action.

Description of the Property for Usage:-

For the use of the Ground Floor (Personal C.A./Advocate Office) + First Floor (Residence) + Second Floor (Residence) of the property bearing Ward no.2, Entry No.1930/ A/1/A/1/40 as per application Sr. No.2 referred to above submitted along with the modified plan seeking use of the building.

Sd/-

Executive Engineer Central Zone Surat Municipal Corporation"

C/SCA/4585/2016 CAVJUDGMENT

19. In this writ-application, not only the order passed by the Joint Registrar, Cooperative Societies, rejecting the application Exh.5 preferred in the Lavad Case is a subject matter of challenge, but later by amending the petition, it is also prayed to declare that the Municipal Corporation could not have sanctioned the development plan and also could not have granted the Building Use Permission in the absence of a valid No Objection Certificate and an appropriate resolution passed in that regard by the Society.

20. In such circumstances referred to above, the Society is here before this Court with the present writ-application.

SUBMISSIONS ON BEHALF OF THE WRIT-APPLICANTS :

21. Mr.B.S.Patel, the learned counsel appearing for the writ-

applicants, vehemently submitted that the construction put up by the respondent no.2 in a residential society is absolutely illegal and unauthorized. Mr.Patel invited the attention of this Court to the photograph of the building at Annexure-Z1 and submitted that a bare look at the entire building constructed on Bungalow No.40 of the Society cannot be termed as a low-rise residential bungalow meant for residential purpose. Mr.Patel submitted that even if one or two rooms are being used for the purpose of residence, the same by itself will not cure the illegality. Mr.Patel submitted that a member of the society cannot put up any construction de hors the bye-laws of the society. He pointed out that the bye-laws of the Society do not permit any member to put up construction of

commercial nature like office, etc. C/SCA/4585/2016 CAVJUDGMENT

22. Mr.Patel submitted that the Surat Municipal Corporation committed a serious illegality in sanctioning the plans put up by the respondent no.2 without insisting for the No Objection Certificate duly issued by the Society. According to Mr.Patel, if the revised plan which was put up before the Corporation for sanction was not accompanied by a valid No Objection Certificate issued by the Society, the Corporation would have no jurisdiction to look into such plans and sanction the same.

23. Mr.Patel submitted that once it comes to the notice of the officials of the Corporation that the plans have been submitted without any No Objection Certificate from the Society, then it is the duty of the Corporation to inform the Society about such plans being put forward by one of its members and an opportunity of hearing should be given to the Society if the Society has any objection with regard to the nature of the construction proposed to be put up by its member.

24. Mr.Patel submitted that the position of law has been made abundantly clear by the Supreme Court in the case of Zoroastrian Cooperative Housing Society Limited v. District Registrar, Cooperative Societies (Urban), reported in AIR 2005 SC 2306. The dictum laid therein is that the members of the society are duty-bound to abide and act as per the bye-laws of the society and the members have no right or they cannot be permitted to put up any construction which is de hors the bye- laws of the society. The bye-laws framed by the society are binding to all its members.

25. Mr.Patel submitted that the respondent no.2, while purchasing the Bungalow No.40 in the Society from its erstwhile C/SCA/4585/2016 CAVJUDGMENT owner Niranjnanaben Manubhai Patel, had agreed in writing and that too on oath to abide by the bye-laws and the rules & regulations of the Society.

26. In such circumstances referred to above, Mr.Patel prays that as the construction could be termed as absolutely illegal or unauthorized, the same needs to be demolished.

SUBMISSIONS ON BEHALF OF THE RESPONDENT NO.2:

27. Mr.Manoj T.Danak, the learned counsel appearing for the respondent no.2, vehemently submitted that none of the submissions canvassed on behalf of the writ-applicants referred to above merits any consideration. Mr.Danak laid much emphasis on the fact that the plans were put forward before the Surat Municipal Corporation and those were sanctioned by the competent authority in accordance with law and even the Building Use Permission ultimately came to be granted by the Surat Municipal Corporation. In such circumstances, according to Mr.Danak, the building constructed by the respondent no.2 cannot be termed as illegal or unauthorized.

28. Mr.Danak submitted that in the building constructed by the respondent no.2, there is facility even to reside over there. Once the building is used for both purposes, i.e. residential as well as commercial, i.e. for the purpose of office, then it cannot be said that the construction is de hors the bye-laws of the Society.

29. Mr.Danak submitted that a Chartered Accountant can run his office in his residential premises and if he does so, then he C/SCA/4585/2016 CAVJUDGMENT cannot even be taxed accordingly on the assumption that the premises is being used for commercial purpose.

30. In such circumstances referred to above, Mr.Danak prays that there being no merit in this writ-application, the same deserves to be rejected.

31. Mr.Danak, in support of his submissions, has placed reliance on the following decisions :

In N.E.Merchant v. State, AIR 1968 Bombay 283, it has been held that :

"...A profession or occupation is carried on for the purpose of earning a livelihood and a profit motive does not underline such carrying of profession or occupation."

In L.M.Chitala v. Commissioner of Labour, AIR 1964 Madras 131, it has been held that :

"...Profession as distinguished with 'commercial' means a person who enters into a profession. It involves certain amount of skill as against commercial activity where it is more of a matter of things or business activity. In profession, it is purely use of skill activity. Therefore, two are distinct concepts in commercial activity - one works for gain or profit and as against this, in profession, one works for his livelihood."

C/SCA/4585/2016 CAVJUDGMENT In V.Sasidharan v. Peter and Karunakar, AIR 1984 SC 1700, the Supreme Court held as under :

"...It does not require any strong argument to justify the conclusion that the office of a lawyer or a firm of lawyers is not a 'shop' within the meaning of Section 2(15). Whatever may be the popular conception or misconception regarding the role of today's lawyers and the alleged narrowing of the gap between a profession on one hand and a trade or business on the other, it is trite that, traditionally, lawyers do not carry on a trade or business nor do they render services to 'customers'. The context as well as the phraseology of the definition in Section 2(15) is in-apposite in the case of a lawyer's office or the office of a firm of lawyers."

In Harendra H.Mehta & Ors. v. Mukesh H.Mehta & Ors., (1999)5 SCC 108, it was noted as follows :

"1. Of, engaged in, or concerned with, commerce.

2. Having profit as a primary aim rather than artistic etc. value; philistine."

In R.M.Investment and Trading Co. (P) Ltd. (1994)4 SCC 541, the terms of the agreement required the petitioner to play an active role in promoting the sale and to provide 'commercial and managerial assistance and information' which may be helpful in the respondents sales efforts. It was held that the relationship between the appellant and the respondents was of a commercial nature.

The Court said that the word 'commercial' under Section 2 of the Foreign Awards Act should be liberally construed.

C/SCA/4585/2016 CAVJUDGMENT In Dr.Devendra M.Surti v. The State of Gujarat, AIR 1969 SC 63, it was held that a doctor's establishment is not covered by the expression 'commercial establishment'.

In New Delhi Municipal Council v. Sohan Lal Sachdev, (2000)2 SCC 494, the following observations were made :

"The two terms 'domestic' and 'commercial' are not defined in the Act or the Rules. Therefore, the expressions are to be given the common parlance meaning and must be understood in their natural, ordinary and popular sense. In interpreting the phrases the context in which they are used is also to be kept in mind."

32. Mr.Danak, the learned counsel appearing for the respondent no.2, also relied upon following other decisions :

(1) Chairman, Madhya Pradesh Electricity Board and others v.

Shiv Narayan and another, (2006)1 GLH 562;

(2) V.Sasidharan v. Peter and Karunakar, AIR 1984 SC 1700;

(3) Phillipos & Company and others v. The State, 1989 ILR Kar 3135;

(4) Dr.Kavita Pravin Tilwani v. The State of Maharashtra and others [Writ Petition (Criminal) No.3989 of 2013, decided on 10th July 2014 by the Bombay High Court] C/SCA/4585/2016 CAVJUDGMENT SUBMISSIONS ON BEHALF OF THE SURAT MUNICIPAL CORPORATION :

33. Mr.Dhaval G.Nanavati, the learned counsel appearing for the Surat Municipal Corporation, supported Mr.B.S.Patel, the learned counsel appearing for the writ-applicants. Mr.Nanavati very fairly conceded to the position of law that the Corporation should have insisted for a valid No Objection Certificate duly issued by the Society before approving or sanctioning the revised plans. Mr.Nanavati fairly submitted that in the absence of such valid No Objection Certificate duly issued by the Society, the Corporation could not have sanctioned the plans. He submitted that in fact the respondent no.2 mislead the Corporation for the purpose of getting the revised plans sanctioned.

34. In such circumstances referred to above, according to Mr.Nanavati the construction put up by the respondent no.2 on the strength of an illegal order passed by the Corporation sanctioning the plans deserves to be demolished.

SUBMISSIONS ON BEHALF OF THE STATE :

35. Mr. Ronak Raval, the learned AGP appearing for the State, has also supported the writ-applicants. He adopted all the submissions canvassed by Mr. Patel on behalf of the writ-applicants. According to him also, the construction could be termed as absolutely illegal and unauthorized.

ANALYSIS :

36. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following C/SCA/4585/2016 CAVJUDGMENT questions fall for the consideration of this Court :

- (1) Whether a member of a cooperative housing society is entitled in law to put up construction de hors the bye-laws of the society ?
- (2) Whether a member of a cooperative housing society is entitled to put up construction on the plot other than a residential house or bungalow ?
- (3) Whether a member of a cooperative housing society can put up construction of commercial nature and use the same for the purpose of office, etc. ?
- (4) Whether the respondent Corporation could have sanctioned the plans/revised plans in favour of the respondent no.2 contrary to the bye-laws of the society and that too without any notice or giving any opportunity of hearing to the society ?

The following facts are not in dispute :

- (1) The writ-applicant no.1 is a Cooperative Housing Society limited registered and established in the year 1949.
- (2) The bye-laws framed by the Society had been registered and approved by the District Registrar, Cooperative Societies, Surat, at the time of the then State of Bombay.
- (3) The land came to be purchased by the Society. The lay out plan of 66 units along with the common plot had been C/SCA/4585/2016 CAVJUDGMENT approved and 66 members constructed their own residential bungalow on it.
- (4) The bye-laws of the Society make it abundantly clear that there cannot be any commercial activity in the Society. To put it in other words, no member can put up construction of commercial nature and use the same for commercial purpose.
- (5) The respondent no.2, for the purpose of purchasing the Bungalow No.40 in the Society, had sought permission from the Society and the permission was granted by the Society by passing appropriate resolution, on the condition that the respondent

no.2 shall abide by the bye-laws of the Society and shall not act in any manner detrimental to the interest of the Society.

(6) The construction, which has been put up by the respondent no.2, by any stretch of imagination, cannot be termed as a low-rise residential bungalow. It is nothing but a commercial house and the same is being used as an office.

37. The issues raised in this writ-application and falling for my consideration are no longer res integra. This Court, in *Ambica Nagar Co-Op. Housing Society Ltd. v. State of Gujarat and others*, reported in 2013(5) GLR 3740, had the occasion to consider two questions, namely (i) Whether in the co-operative housing society, a member can use the land for commercial purpose and can the authority grant permission for the same where in the entire society all the members are using the houses C/SCA/4585/2016 CAVJUDGMENT for their residence only, and (ii) Whether in the co-operative housing society where there are specific bye-laws to use the house allotted to member for residence, can the same be used for commercial purpose and can the entire land be converted into clinic and thereafter for any other commercial activities. A learned Single Judge of this Court, after an exhaustive consideration of the provisions of the Gujarat Cooperative Societies Act, 1961, Gujarat Town Planning and Urban Development Act, 1976, and the Bombay Provincial Municipal Corporation Act, 1949, answered both the questions referred to above in the negative. The learned Single Judge also took into consideration various decisions of the Supreme Court, this High Court and also the other High Courts. I may quote the relevant observations thus :

"11.1 The first and foremost decision which has bearing on the subject petitions is reported in AIR 2005 SC 2306, *Zoroastrian Cooperative Housing Society Ltd vs. District Registrar, Cooperative Societies [Urban] and others*, where the Apex Court had considered earlier decisions on the law governing Sections 4, 13, 24, 30 and the relevant Rules of Gujarat Cooperative Societies Act, 1961. Various contentions raised by the learned counsel for the parties on the touch-stone of Articles 14, 15 and 19 of the Constitution of India were considered along with the restrictions imposed under the bye-laws for conferring membership to members of one community whether would be contrary to public policy, and freedom of an individual to enter into a contract in accordance with law, the Apex Court noticed and held that the bye-law is a contract and the freedom of contract cannot be curtailed and, by relying upon C/SCA/4585/2016 CAVJUDGMENT the fundamental rights, the bye-law restricting membership to the members of one community cannot be said to be illegal or contrary to public policy or violative of Article 14, 15 or 19 of the Constitution of India. The Apex Court further held that the bye-law prohibiting transfer of property by a member to non-member is not violative of Section 10 of the Transfer of Property Act and such bye-law even does not offend Article 300A of the Constitution of India. In the above decision, the Apex Court considered its earlier decisions in the cases of *Daman Singh vs. State of Punjab*, AIR 1985 SC 973; *Damyanti Naranga vs. Union of India*, AIR 1971 SC 966; *State of Maharashtra vs. Karvanagar Sahakari Griya Rachana Sansthan Maryadit*, (2000) 9 SCC 295 and other decisions, details of which will be mentioned in this judgment later on.

11.2 In the case of Amreli District Cooperative Sale & Purchase Union Ltd and others vs. State of Gujarat, [1984] 25 (2) GLR 1244, a Division Bench of this Court interpreted Section 4 of the Gujarat Cooperative Societies Act, 1961 holding that Section 24 of the said Act as ultra vires Article 19(1)(c) of the Constitution of India. Paragraphs 54 and 55 of the aforesaid judgment read as under:

"54. We must state at the outset that we have not been able to appreciate the necessity of new provision contained in Section 22(2) of deemed membership of a class of societies as may be notified by the State Government in the Official Gazette when the amended provision contained in Section 24 almost seeks to C/SCA/4585/2016 CAVJUDGMENT serve the same purpose. Apart from this initial inability of ours, we have not been able to persuade ourselves that this amended provision contained in Section 22(2) can be justified either on the ground of public interest much less on the ground of public order or morality, even if we agree with the learned Advocate General that this restriction should be tested on its reasonableness in public interest. The rights of the members in any voluntary association, incorporated or otherwise, inter alia, in respect of as to with whom they should associate is an essential content of the fundamental right to association under Article 19(1)(c). Any provision restricting such right must be justified on the twin ground, as stated above, as permitted under Article 19(4) of the Constitution, namely the restriction is reasonable and necessary on the grounds of sovereignty of the country or public order or morality. In our opinion, there is not a whisper in the reply affidavit to justify this restriction except that persons qualified to be members should not be denied the right of becoming members of co-operative society. There is in fact no right, statutory or otherwise, for any person within the area of operation of a co-operative society to become a member. He has only a right to be considered for being a member, and it is for that society which has to determine as to whether a particular person seeking membership should or should not be admitted to the society. As a matter of fact the underlined portion of the paragraph which we have quoted from paragraph 7 of the reply C/SCA/4585/2016 CAVJUDGMENT affidavit negatives the necessity of their insertion. We are in complete agreement when it is stated in the reply affidavit that the open membership does not mean that anybody can demand as of right, admission to any co-operative society. It only means that the society must keep its doors open for all such persons who are prepared to subscribe to their objectives. It is not the case of the Government, and it could not have been, that the petitioner-societies, or for that matter the co-operative societies in the State, have closed their doors for eligible persons on the ground of community, religion, caste, creed, language, trade etc. They could not have provided in the bye-laws for the close shop since otherwise they would not have qualified themselves to be registered under the Act.

The statement made on behalf of the State Government in the reply affidavit that any society aggrieved by the deemed membership of any person under Section 22(2) has been given a right to move the Registrar by an application seeking declaration that

such person shall be ceased to be a member with effect from such date as may be specified by the Registrar, if in the opinion of the society such person is not qualified for being a member or should not be continued as a member can hardly justify such a provision. We think that this is merely an apology for justification of such a restrictive provision. No material has been placed on the record by the State Government from the record of the office of the Registrar, or the District Registrar, as the case may be, C/SCA/4585/2016 CAVJUDGMENT that a widespread malpractice had crept into the working of the societies in the State as a result of which they had become close shop for all intents and purposes and, therefore, such a provision was necessary even on the ground of public interest assuming that this impugned provision under Section 22(2) violates Article 19(1)(g) and not merely Article 19(1)(c). We must, therefore, hold that the impugned provision contained in Section 22(2) is violative of Article 19(1)(c) of the Constitution and, therefore, must be quashed and set aside.

55. As regards Sub-section (1) of Section 24, we are of the opinion that it also suffers from the same vice of it being violative of Article 19 (1) (c). The marginal note of Section 24 indicates that it provides for open membership which only postulates that the society has to keep its doors open for all those persons who are prepared to subscribe to their objectives and there should be no restrictive clause refusing membership on the ground of caste, creed or religion etc. Admittedly, it can never mean that any person can demand as of right admission to any cooperative society. This position is accepted by the State Government in the reply affidavit as stated above. Whether a person should be admitted even though he may be qualified to the membership of a society is a matter within the internal management of that society. It is for the members of the society to decide whether or not a person seeking admission should be enrolled C/SCA/4585/2016 CAVJUDGMENT as a member. Section 24(1) in our opinion is either redundant or violative of Article 19(1)(c). If as to with whom one should associate is inherent content of the right to associate under Article 19(1)(c) any provision, as in the nature of Section 24 (1), investing the right of admission in any person duly qualified under the Act, the rules and the bye-laws of the society, unless there is sufficient cause for refusing the membership, is clearly violative of Article 19(1)(c) since the condition that admission can be refused only on the ground of the cause which must be objectively sufficient cannot be said to be a restriction necessary on the ground of public order or morality even if it is reasonable. In any case, an aggrieved person has always a right to move the Courts by seeking appropriate remedies by regular civil action in civil Court or before Registrar by invoking his special jurisdiction where the membership is refused on flimsy and trivial grounds. Sub-section (2) also, in our opinion, providing for the deemed membership to such person who is not communicated the decision of the society to which he is seeking the membership within a period of three months, is equally offensive of Article 19(1)(c) of the Constitution for the self-same reasons. The consequential provisions of appeal and limitation thereof in Sub-

sections (3), (4), (5) and (6) would also fail since the main provisions have been held to be suffering from the infirmity as stated above. Sub-section (7) also becomes redundant in the view of the matter which we have taken on the impugned provision in Sub-section C/SCA/4585/2016 CAVJUDGMENT (2) of Section 22. We are, therefore, of the opinion that the provisions contained in Sections 22 (2) and 24(1) & (2) are bad in law and void inasmuch as they are violative of Article 19(1)(c) of the Constitution."

11.3 In AIR 1974 SC 2177, K.Ramdas Shenoy vs. The Chief Officers, Town Municipal Council, Udipi and others, sanction to construct cinema building in contravention of Town Planning Scheme by the Municipality by passing a resolution came to be quashed and set aside.

11.4 In AIR 1996 SC 2938, Dadar Avanti Co-op Housing Society Ltd., Bombay vs. Municipal Corpn. Of Greater Bombay and others, while considering Sections 52, 46 and Section 159 of the Maharashtra Regional and Town Planning Act, the Apex Court upheld that change of user cannot be permitted on the ground that change of user could have been granted when original plan of the building was sanctioned.

11.5 In AIR 1990 SC 1563, Sanwarmal Kejriwal vs. Vishwa Co-op Housing Society Ltd, the Apex Court considered Sections 15A, 28, 5(4-A), 5(11)(bb) of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 and found that a licensee occupying a flat in tenant co- partnership society since 1957 is a deemed tenant under Section 15A read with other Sections and can be evicted under the Rent Act and the Society cannot proceed to evict him under Section 91(1) of the Maharashtra Co-operative Societies Act. In the above decision, the Apex Court had an C/SCA/4585/2016 CAVJUDGMENT occasion to consider its earlier decision in the case of Ramesh Himmatlal Shah vs. Harsukh Jadhavji Joshi, (1975) 2 SCC 105, where the Apex Court had an occasion to consider the provisions of the Act, Rules, Regulations and bye-law and it was held that a member-allottee has a right to transfer his interest in the flat to a third party, and, therefore, the right to induct a third party on leave and licence basis.

11.6 In AIR 1962 Bombay 154, in Dr. Manohar Ramchandra Sarfare vs. The Konkan Co-op Housing Society Ltd and others, the Full Bench of the Bombay High Court considered jurisdiction of the Registrar of cooperative societies under Section 54 of the Act to decide the dispute between a cooperative society and member of such society to whom a tenement has been allotted by the society in accordance with the rules, by-laws and regulations of the society and the Rent Courts referred to in Section 28 of the Rent Act will have jurisdiction to decide a similar issue between the two members of the society if the relationship between them is that of landlord and tenant.

11.7 In AIR 1985 SC 973, in Daman Singh vs. State of Punjab and others, the Constitution Bench of the Apex Court decided the validity of Sections 1, 13(8) and 30 of the Punjab Co-operative Societies Act which was challenged on the ground that protection accorded by Article 31-A(1)[c] of the Constitution of India to 'Corporation' and 'Companies' was not available to Co-operative Societies and it was held that the said protection was available to cooperative C/SCA/4585/2016 CAVJUDGMENT societies. The Apex Court further held that Section 13(8)(9) and (10) of the Act was not violative of principles of natural justice on the ground that it did not make express

provisions for issuance of notice to members of the cooperative society and further held that 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.

11.8 The above decision is considered by the Apex Court subsequently in the case of Zoroastrian Cooperative Housing Society Ltd [supra].

11.9 In (2000) 9 SCC 295, State of Maharashtra vs. Karvanagar Sahakari Griha Rachana Sanstha Maryadit and others, the Apex Court upheld the decision of a Division Bench of the Bombay High Court in a case of exercise of power by the State Government under Section 79A of Maharashtra Co-operative Societies Act, 1960 to issue directions in public interest and further to direct amendment of the bye-law under Section 14 about amending the bye-laws to enable the plot-holders to construct multi-storyed building with more than one tenement on their plots and to form a society of such building-owners, was held contrary to interest of the Society.

11.10 In AIR 1963 SC 1320, Deccan Merchants Cooperative Bank Ltd vs. M/s.Dalichand Jugram Jain and others, it is about a dispute between a society and a C/SCA/4585/2016 CAVJUDGMENT member or a person claiming through a member and scope of such dispute touching business of society to be decided under Section 91(1) of the Maharashtra Co-operative Societies Act, which is akin to Section 96 of the Gujarat Co-operative Societies Act, 1961.

11.11 In Oral Judgment dated 29.6.2006/1.7.2006 [Sangna Co-op Housing Society Ltd vs. Jyotiben Jogibhai Patel and others - Special Civil Application No. 4278 of 1997], after considering Section 24 of the Gujarat Co-operative Societies Act, Rule 12(2) of the Rules made thereunder and the decisions in the cases of Amreli District Cooperative Sale & Purchase union Ltd [supra], Zoroastrian Cooperative Housing Society Ltd [supra] and Jain Merchant Co-op Housing Society Ltd vs. HUF of Manubhai, 1995 (1) GLR, 19, and power under Section 24, Rule 12(2), Section 82(1) and Section 160(1) of the Gujarat Co-operative Societies Act, the learned Single Judge of this Court [Coram:

Akil Kureshi, J.] held that unless it is found that the intending member is not qualified to become a member of the society and no such restrictive clause is found in the bye-law of the society, it would not be open for the society to turn down the request of a person to become a member of the society by transferring the property held by a member. The Court further upheld the powers of the District Registrar to give direction under sub-section (1) of Section 82 of the Act.

11.12 In the case of New India Cooperative Housing Society Limited vs. Municipal Corporation of Greater C/SCA/4585/2016 CAVJUDGMENT Mumbai and another, (2008) 9 SCC 694, when the lease of land by Cooperative Housing Society for effecting structural changes in the approved plan of the building on the land, NOC of the lessor-Society, as stipulated in the lease deed, was held to be necessary precondition, without which, the Municipal Corporation cannot sanction for the modified plan.

11.13 In the case of V. Narasimham vs. Greater Hyderabad Municipal Corporation, Writ Petition No.13127 of 2770, by judgment and order dated 25 th June 2007, a Division Bench of the Andhra Pradesh High Court refused to interfere with the action of the respondent-

authority of demolishing unauthorized construction of the petitioner who had constructed fourth floor in breach and violation of building bye-laws when initially he was permitted to construct a parking area with three floors only as per the sanctioned plan.

11.14 In AIR 1970 SC 245, Cooperative Central Bank Ltd vs. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad, considering the provisions of the Andhra Pradesh Co-operative Societies Act in the context of the factual aspects when conditions of service came to be altered and a dispute was raised, the Apex Court, considering the provisions of Section 61 of the Andhra Pradesh Co-operative Societies Act and Section 15 of the Industrial Disputes Act, 1947, noticed that the bye-laws of the cooperative society framed in pursuance of the provisions of the Act cannot be held to have force of law.

C/SCA/4585/2016

CAVJUDGMENT

11.15 In AIR 1984 SC 192, Babaji Kondaji Garad vs.

Nasik Merchants Co.Op. Bank Ltd, considering the scope of Maharashtra Co-operative Societies Act Rules and the bye-law framed thereunder, the Apex Court held that the bye-laws are neither statutory in character nor they have statutory flavour so as to be raised to the status of law.

11.16 In (2007) 6 SCC 448, Greater Kailash Part II Welfare Association vs. DLF Universal Ltd, the Apex Court, in the matter of conversion of single-screen cinema hall into mini cinema hall-cum-commercial complex granted by all the Authorities after following the due procedure and considering the implications for traffic flow and other hardships to the nearby residents, refused to interfere with such sanction/permission granted by the Authorities.

11.17 In 2008 AIR SCW 6459, N.D.M.C. & Ors vs. M/s. Tanvi Trading and Credit Pvt. Ltd and others, the Apex Court held that the guidelines regarding multi-storied buildings in Delhi issued by the Ministry of Urban Development have statutory force and building plan in relation to plot L.B.Z. cannot be sanctioned by the Municipal Council in disregard to the guidelines.

11.18 The decision of the learned Single Judge of this Court in 2004 (2) GLR 1055, Satyanarayan B. Sharma vs. A.L. Dineu, is based on a phenomena "due to the globalization and fast development and growth of trade and commerce and expansion of city life, it is difficult to draw a line C/SCA/4585/2016 CAVJUDGMENT between the residential and non-residential premises in the town, cities and metropolitan areas where the space is the biggest problem" and no provision of the Act, Rules or bye- laws was noticed or discussed and the case was decided on the facts as they were.

Another decision of the learned Single Judge of this Court dated 13.12.2004 in Special Civil Application No. 15555 of 2004 is about upholding the sanction granted by the society for commercial activity since the area was declared to be a commercial zone. Again, provisions of the Act, Rules and Regulations were not considered. Both the above decisions were rendered prior to Zoroastrian [supra].

11.19 Yet one more decision of the learned Single Judge of this Court dated 18.8.1998 in Special Civil Application No. 5057 of 1998 is about interpreting Sections 48(4), 65A and 67 of the Bombay Land Revenue Code and the provisions of Gujarat Town Planning and Development Act, including Sections 3, 6, 22 and 117 of the above Act and the Court held that when the permission is granted under the Town Planning Act by the Competent Authority by necessary implication the Legislature excluded requirement of prior permission under Section 65 or 65A of the Bombay Land Revenue Code.

11.20 In the case of Mulshanker Kunverji Gor and others vs. Juvansinhji Shivubha Jadeja, XX(1) GLR 878, the Full Bench of this Court while considering the provisions of Section 42 of the Gujarat Cooperative Societies Act, 1961 and Section 17 of the Indian Registration Act, examined C/SCA/4585/2016 CAVJUDGMENT corporate structure of the society as defined under Section 37 of the Act and noticed that there are two types of co-operative housing societies. One type is called 'tenant co-partnership society'. Another is called 'tenant ownership society'. A 'tenant co-partnership society' is a society where the land is owned by the society and upon which houses are constructed by the society for the benefit of its members. In such a society, it is the society in which the land and the building in the eye of law vest. Therefore, when a member of such a cooperative housing society transfers his shares to another with approval of the society, he not only transfers shares but also as a necessary incident thereof, transfers his interest in the immovable property which has been allotted to him and the argument raised by the learned counsel for the petitioners that with the transfers of 'shares in such society' what are transferred are merely the shares in the society and not the right to occupy the house which necessarily flows from the allotment of the houses by the society to its members was not upheld. In case of a 'tenant co-partnership society', the 'shares in a society' which a member holds appeared to the Full Bench to be inseverable from his interest in the immovable property which has been allotted to him for his occupation and enjoyment. Looking at it from another angle, the Full Bench found that since the immovable property - the land and the house - vest in the society, no title is transferred to the purchasers with the transfer of shares. Title continues to remain with the society. Right to occupy and enjoy is transferred by transfer of his shares by one C/SCA/4585/2016 CAVJUDGMENT member to another. However, this would not embrace within its sweep any personal interest, independent of the society, which a member may have in the immovable property which he occupies. In case of 'a tenant ownership society', the land belongs to the society and the super-structure thereupon is constructed, not by the society out of its funds, but, by the member out of his personal funds. In such a case, when by an instrument a member transfers his 'shares in the society' to another person, he not only transfers his shares but also his right to occupy and enjoy the land belongs to the society and the super-structure which he has constructed out of his personal funds and which belongs to him personally. The transfer of such a super-structure cannot be effected except under a registered conveyance because clause (a) of Section 42 does not exempt from

compulsory registration the transfer of a member's personal immovable property - not belonging to the society - to another. It is, therefore, clear that in case of 'a tenant co-partnership society', the transfer of shares necessarily carries with it the transfer of a member's interest in the immovable property allotted to him and that such a transfer can be brought about without a registered instrument because clause (a) of Section 42 carves out an exception to the rule enunciated in sub-sec.(1) of sec.17 of the Registration Act, 1908. In case of 'a tenant ownership society', shares carrying with it, as necessary incident, the member's interest in the land which belongs to the society otherwise can be transferred without a registered instrument but the superstructure cannot be transferred except under a registered instrument contemplated in sub-

C/SCA/4585/2016 CAVJUDGMENT sec (1) of sec.17 of the Registration Act, 1908 read with sec.54 of the Transfer of Property Act.

11.21 The decision in State of Bihar vs. Upendra Narayan Singh, JT 2009 SC (4) 577, is with regard to guarantee of equality before law as envisaged under Article 14 of the Constitution of India that it is a positive concept which cannot be enforced in a negative manner and if any illegality or irregularity has been committed in favour of any individual or group of individuals, or a wrong order has been passed by a judicial forum, others cannot invoke jurisdiction of higher or superior court in repeating or multiplying the same irregularity or illegality for passing the wrong order.

11.22 In the case of Renals v. Cowlishaw, reported I 9 Ch.D125, about interpretation of 'restrictive covenant' and the conditions laid therein, speaking through Hall, Vice Chancellor, the Chancery Division, observed as under:

"The law as to the burden and the persons entitled to the benefit of covenants in conveyances in fee, was certainly not in a satisfactory state; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs, and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity,, having notice thereof. Who, then (other than the original covenantee), is entitled to the C/SCA/4585/2016 CAVJUDGMENT benefit of the covenant? From the cases of Mann vs. Stephens, Western v. Macdermott, and Coles v. Sims, it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the Court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such contract need not be express, but may be

collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he C/SCA/4585/2016 CAVJUDGMENT is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.

The Plaintiffs, in this case, in their statement of claim, rest their case upon their being 'assigns' of the Mill Hill estate, and they say that as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me C/SCA/4585/2016 CAVJUDGMENT that the three cases to which I have referred show that this is not the law of this Court; and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not shewing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the Plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice Bramwell, in *Master v. Hansard*, said: "I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained." In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to Bainbrigge that there were such restrictive covenants in conveyances already executed, and expressly or otherwise that Bainbrigge was to have the benefit of them, he and the Plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to Bainbrigge no reference to the existence of such covenants by recital of the conveyances

containing them or otherwise, the Plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed with costs."

C/SCA/4585/2016 CAVJUDGMENT 11.23 The above decision is affirmed by the House of Lords in the case of George John Spicer and George Martin, 14 Appellate Cases 12, again considered by the Court of Appeal in Rogers v. Hosegood, (1900) 2 Ch.388, in Spicer v. Martin.

11.24 Decision reported in 107 Company Cases 502 in the case of Core Health is relied on in support of the submission that as far as possible, to avoid apparent conflict, the Court would take recourse to harmonious construction of two statutes.

11.25 Decisions in (1998) 8 SCC p.1, Whirlpool Corporation vs. Registrar of Trade Marks and (2007) 10 SCC 88, M.P. State Agro Industries Development Corporation vs. Jahan Khan, are relied on in support of the submission that, even if an alternative remedy is available, writ petition can be entertained in exercise of powers under Article 226 of the Constitution of India.

11.26 In Amreli Dist. Co.op. Sale & Purchase Union v. State, XXV(2) GLR 1244, a Division Bench of this Court held Section 24 of the Gujarat Cooperative Societies Act as ultra vires and in Jain Merchant Cooperative Housing Society vs. HUF of Manubhai, 1995 (1) GLR 19, interpreted Rule 12(2) of the Gujarat Cooperative Societies Rules, 1965, as intra-vires.

12 It is also to be noted that all these petitions are basically under Articles 226 and 227 of the Constitution of India and, keeping in mind the law laid down by the Apex Court in the case of Umaji Keshav vs. Radhikabai, reported in AIR 1986 SC 1272, the pleadings in the context of the subject matter, prayer and arguments canvassed by the learned counsels for the parties respectively taken together, the contention of the learned counsels for one of the parties that the petitions be treated under Article 227 of the Constitution of India and, therefore, this Court has limited scope to interfere with the orders of the Gujarat State Cooperative Tribunal/Authorities, is hereby rejected. In Umaji Keshav (supra), the Apex Court observed as under:

"In our opinion, where the facts justify a party in filing an application either under Article 226 or 227 of the Constitution, and the party chooses to file his application under both these articles, in fairness and justice to such party and in order not to deprive him of the valuable right of appeal the court ought to treat the application as being made under Article 226, and if in deciding the matter, in the final order the court gives ancillary directions which may pertain to Article 227, this ought not to be held to deprive a party of the right of appeal under clause 15 of the Letters Patent where the substantial part of the order sought to be appealed against is under Article 226."

That all the writ petitions are treated to have been filed under Articles 226 and 227 of the Constitution of India.

13 The following three decisions reflect on distinct nature, character and true purport of the Cooperative Societies Act, as under:

C/SCA/4585/2016 CAVJUDGMENT 13.1 The Gujarat Cooperative Societies Act, 1961, is a complete Code falling in Entry 32 of List II of Schedule VII of the Constitution of India, as held in AIR 1973 Guj.159 [Chhotlal Vannavan Kakkad vs. The State of Gujarat and others].

13.2 The Division Bench of the Bombay High Court in the case of Karvanagar Sahakari Griha Achana Sanstha Maryadit and Others, confirmed by the Supreme Court in (2000) 9 SCC 295, in paragraph 6, summarized the principles of cooperative movement, as under:

"The basic principles of co-operation is that the members join as human persons and not as capitalist. Co-operation is form of Organization wherein persons associated together as 'human beings' on the basis of equality for the promotion of the economic interest of themselves. Co-operation is method of doing business with an ethical base. 'Each for all, and all for each' is the motto of co-operation movement not only develops the latent business capacity of its members; it produces leaders; it encourages the growth of social virtues, honesty and loyalty becomes imperative, the prospect of a better life obtainable by concerted effort is opened up: the individual realizes that there is a something more to be sought than mere material gain for himself. Co-operation being a business-cum-moral movement, the success of the enterprise depends upon the reality with which each one of the members works for the achievement of the object of the organization."

C/SCA/4585/2016

CAVJUDGMENT

13.3 Basically, three principles are incorporated in the law

so far as the Cooperative Societies Act is concerned, namely, [i] membership of a co-operative society should be voluntary and, ordinarily, it should be available to a member without any social, political, racial or religious discrimination and all members should voluntarily accept responsibilities of membership; [ii] cooperative societies are democratic organization and administration including internal business of the society is to be governed as per the terms of the provisions of the Act, Rules and bye-laws; [iii] the members should provide and participate and function in the interest and benefit of the societies by surrendering their individual interest and work to promote development of the business of the cooperative. Section 4 of the Act, 1961 refers to co- operative principles vis-a-vis object and promotion of general welfare of members of the Society or public as fundamental requirement at the time

of registration 13.4 As observed by a Division Bench of the Madhya Pradesh High Court in Kamta Prasad vs. Registrar, Cooperative Societies, AIR 1967 MP 11, the co-operation movement is both a theory of life and a system of business. It is a form of voluntary association where individual unite for mutual aid in the production and distribution of wealth upon principles of equity, reason and common good.

C/SCA/4585/2016

CAVJUDGMENT

14 Legality and validity of the Gujarat Cooperative

Societies Act and the basic principles of cooperation which are incorporated in Cooperative Societies Act are also reflected from the following decisions.

14.1 From the conspectus of law laid down by the Apex Court, the Division Bench of our High Court and the High Court of Judicature of Bombay, High Court of Madhya Pradesh, what emerges is the distinct statutory character of the Cooperative Societies Act, Rules and the Regulations framed thereunder.

14.2 What is elaborately stated by the Division Bench of the Bombay High Court in the case of Karvanagar Sahakari Griha Achana Sanstha Maryadit {supra} and confirmed by the Apex Court is about the basic principles and motto of the cooperative movement and organization, namely, Society and the members of such Society have distinct right accrued, acquired and crystallized in their favour by virtue of the provisions of the Act, Rules, Regulations and bye-laws framed thereunder. In the above case, even the directions issued by the Competent Authority under section 79A of the Maharashtra Cooperative Societies Act, 1960 in the public interest to amend the bye-law framed by the Society so as to enable the plot-holders to construct a multi-storied building on the plots held by them were held contrary to the interest of the Society. Thus, the supremacy of bye-laws over other provisions of the Act was recognized.

14.3 In the case of Daman Singh (supra), the Constitution Bench of the Apex Court however held that a member of C/SCA/4585/2016 CAVJUDGMENT the Cooperative Society loses his individuality qua the Society and he has no independent right except those given to him by the Statute and the bye-laws. Thus, rights conferred upon a member of the Cooperative Society by the Statute and the bye-laws are given priority over other rights. Therefore, the right conferred upon a member under an approved bye-law has a distinct character.

14.4 In the case of Amreli District Cooperative Sale & Purchase Union Limited (supra), in paragraphs 54 and 55 of the judgment, Section 24 of the Gujarat Cooperative Societies Act of 1961 was held to be ultra-vires Article 19(1) [c] of the Constitution of India, though another Division Bench of our High Court considered the above decision in the case of Jain Merchant Co-operative Housing Society Limited (supra) and held that, though the provisions of Rule 12(2) are pari-materia with Section 24 which was held to be ultra-vires by a Division Bench in the case of Amreli District Cooperative Sale & Purchase Union Limited (supra), Rule 12(2) of the Rules was not ultra-vires. The

contention of the learned counsel for the petitioners that, in case of Zoroastrian Co-operative Housing Society (supra), the Apex Court had no occasion to deal with the law laid down in the case of Amreli District Cooperative Sale & Purchase Union Limited (supra) holding Section 24 of the Act as ultra-vires while laying down a ratio in case of Zoroastrian Co-operative Housing Society (supra) that the Act did not confer any exclusive right upon a member of a Housing Society, does not persuade this Court to accept such contention, in as much as, in case of Zoroastrian Co-operative C/SCA/4585/2016 CAVJUDGMENT Housing Society (supra) the Apex Court did consider the case of Jain Merchant Co-operative Housing Society Limited (supra) upholding vires of Rule 12 of the Rules framed under the Act of 1961 and the said decision of a Division Bench of this Court had considered the decision of Amreli District Cooperative Sale & Purchase Union Limited (supra) and, therefore also, it cannot be said that the Apex Court had not noticed the decision in the case of Amreli District Cooperative Sale & Purchase Union Limited (supra) holding Section 24 of the Act ultra vires. Even otherwise, on a conjoint reading of the reasoning contained in paragraphs 54 and 55 of a Division Bench of this Court in the case of Amreli District Cooperative Sale & Purchase Union Limited (supra), it is clear that there is no divergent view nor any conflict of law in the case of Amreli District Cooperative Sale & Purchase Union Limited (supra) and in Zoroastrian Co-operative Housing Society (supra). Besides, in Zoroastrian Co-operative Housing Society (supra), the Apex Court, in no uncertain terms, held that the bye-law is a contract and freedom of contract cannot be curtailed by placing reliance on the fundamental right and, in the context of Articles 14, 15 and 19 of the Constitution of India, restriction of membership to the members of a particular community was held to be legal and in accordance with the provisions of the Cooperative Societies Act and, once again, the supremacy of bye-law over any other Rules and Regulations including such restriction was not held to be violative of Section C/SCA/4585/2016 CAVJUDGMENT 10 of the Transfer of Property Act and Article 300A of the Constitution of India. Therefore, the law declared in the above decisions is directly applicable to the facts and circumstances of these cases, as regards the right upon a member of a Cooperative Housing Society as conferred under the Statue, Rule, Regulations and bye-laws making it clear that a member loses his individual identity to the Cooperative Society.

14.5 As regards the decision in the case of Babaji Kondaji Garad (supra) and the proposition of law laid down therein that the bye-laws are neither statutory in character nor they have statutory flavour raising such bye-laws on par with or confer the status of law, this Court is in agreement with the above proposition, but with a rider as to what is held in the case of Daman Singh (supra) and in the case of Zoroastrian Co-operative Housing Society (supra).

14.6 Other decisions in the cases of Greater Kailash Part 'II' Welfare Association (supra) and NDMC (supra) have no bearing on the facts of the present case and the issue on hand and the law laid down by the Apex Court in both the above cases had genesis with special rules and regulations framed by the Urban Development Authority and the regulations framed by the Municipal Corporation of Delhi.

14.7 In the decision in the case of Satyanarayan B. Sharma (supra), the learned Single Judge of this Court had no occasion to consider the statutory scheme of the Act of 1961 or of the Act of 1976 and, therefore, only because of globalization, fast development, growth of trade and commerce and expansion of city life, right C/SCA/4585/2016 CAVJUDGMENT conferred upon a member of the

Cooperative Society under the Act, Rules, Regulations and bye-laws does not get extinguished and cannot be taken away without authority of law. So is the case with another decision in Special Civil Application No. 1555 of 2004 and even the decision in Special Civil Application No. 5047 of 1998 was also in the context of interpretation of Sections 48(4), 65A, and 67 of the Bombay Land Revenue Code and various provisions of the Town Planning Act and it was not decided in the context of the Act, 1961. The decision of the learned Single Judge of this Court in Satyanarayan B. Sharma (2004(2) GLR 1055, [supra] and another decision dated 13.12.2004 of the learned Single Judge of this Court in Special Civil Application No.15555 of 2004 and Special Civil Application No.5047 of 1998 were rendered prior to the judgment of the Apex Court in Zoroastrian (supra) and are impliedly overruled by Zoroastrian.

14.8 The law laid down by the Full Bench of our High Court in the case of Mulshanker Kunverji Gor (supra) still remains in operation with equal force in light of the decisions of the Apex Court in Daman Singh and Zoroastrian Co-operative Housing Society (supra) and even in a case of 'tenant co-partnership society' and 'tenant ownership society', the land remains under the ownership of the Society since the immovable property, namely, the land vests in the Society and no title is transferred to the purchaser on transfer of shares. That, distinct character of bye-law providing restricted use of such plot for housing/residence cannot be changed for other than housing and residential use.

C/SCA/4585/2016

CAVJUDGMENT

14.9 The decisions with the authorities of Chancery

Division, Court of Appeal and House of Lords [supra] on the interpretation of 'restrictive covenant' would have reflection of law laid down by the Apex Court in Daman Singh (supra) and Zoroastrian Co-operative Housing Society (supra) that the bye-laws has supremacy as above and contents and restriction of bye-law is binding to all subsequent successors.

14.10 In view of what is discussed and held hereinabove, it is clear that, since the law laid down by the Apex Court in Damansingh and Zoroastrian interpreting the statutory provisions with regard to right of a member of a Cooperative Society accruing to him under the Act, Rules, Regulations and bye-laws, is clearly applicable in the facts of all these cases and, in absence of any conflict between two Acts, there is no need for any harmonious construction, as canvassed by the counsel on the basis of the decision in the case of Core Health (supra).

14.11 The decision in the case of Zoroastrian Co-operative Housing Society (supra) was referred by the learned Single Judge of this Court in the case of Sangna Cooperative Housing Society Limited (supra) in the context of the stand of the petitioner-Society in the said case that no person had an unfettered and unlimited right to become a member thereof, when an application by purchaser of the house belonging to a member of a Cooperative Society to become a member of the said Cooperative Society came to be rejected. The learned Single Judge, while considering the judgment in the case of Zoroastrian Co-operative Housing Society (supra) C/SCA/4585/2016

CAVJUDGMENT found that the concept of open membership took a bit of beating in the above case. In paragraph 18, with regard to the contention that the respondent No.2 in the said case was making commercial use of the property in question, where the petitioner-Cooperative Society was a Housing Cooperative Society and its bye-laws prohibited any use other than purely residential use, the learned Single Judge noticed that the building regulations and zoning tables are prepared by the Authorities under the Town Planning Act and the Rules and Regulations for entirely different purpose and just because large number of commercial activities, such as shops, hotels, restaurants, etc. are permitted in the residential zones under different building bye-laws, it cannot be argued that such uses are residential uses and the said contention was not accepted[emphasis supplied]. This Court is in complete agreement with the above reasoning and is an apt answer to the contention raised about permission granted for construction by the authority on the basis of zoning regulation under GDCR and/or user certificate under the BPMC Act.

15 Chapter XV of the Bombay Provincial Municipal Corporations Act, 1949, pertaining to 'building regulations', more particularly Sections 253 to 263A pertaining to notices to be given to Commissioner of intention to erect building and/or to make additions, etc. to building; plans to be submitted for such construction; powers of the Commissioner to grant of approval to such plan and supervise construction of buildings and other works; and, finally, to grant permission to occupy or use the premises by C/SCA/4585/2016 CAVJUDGMENT issuing 'completion certificate', nowhere provides that the provisions under the said Act have any overriding effect to other laws and, if the issue is examined in the context of Chapter XV of the said Act, it does not take away the right conferred upon a Member of the Cooperative Housing Society under the Gujarat Cooperative Societies Act, Rules, Regulations and bye- laws.

16. Therefore, on perusal of what is discussed and held hereinabove, it is clear that none of the provisions of the Gujarat Town Planning and Urban Development Act, 1976, especially in view of deletion of sub-section (1) of Section 117 of the Act and the GDCR being enabling provisions in the context of Act of 1976 or the provisions of the BPMC Act, 1949, has over-riding effect over the provisions of the Gujarat Cooperative Societies Act, 1961 and the Rules and Regulations made thereunder and no member of the Cooperative Housing Society or even the Society can be deprived of the right accrued, acquired and crystallized in their favour under the Gujarat Cooperative Societies Act, 1961, Rules, Regulations, and bye-laws on the ground that permission to construct/develop/use the land/plot allotted to a member of the Cooperative Housing Society is granted by the Authority under the Town Planning Act, Rules, Regulations framed therein or under the BPMC Act.

17 In view of the law as discussed hereinabove on the basis of various decisions of the Apex Court and the High C/SCA/4585/2016 CAVJUDGMENT Courts, more particularly in the cases of Daman Singh, Karvanagar, Zoroastrian Co.Op Housing Society, Sangna Co.Op Housing Society Ltd and Mulshanker Kunverji Gor (supra), interpretation of 'restricted covenant', and cooperative principles incorporated in Sections 4, 29, 30, 37 and other provisions of the Act, 1961, the answer to the question, in general, as raised, is that a Member of the Cooperative Housing Society, who is allotted land/plot by the Cooperative Housing Society governed by and under the provisions of the Gujarat Cooperative Societies Act, 1961, is not entitled to use/develop/transfer/alienate such land/plot for

the purpose other than so specified in the bye-laws and/or contrary to the Rules and the co-operative principles enshrined in the Act, 1961 and to raise construction of commercial in nature or purpose on the ground that such permission for use/development/erection/construction, etc. is granted by the Competent Authority exercising powers under the Gujarat Town Planning and Urban Development Act, 1976, Rules including the GDCR or under the provisions of the BPMC Act, 1949. Such usage/development/erection/construction on the land/plot by a member or any other person on his behalf and/or a person acquiring any interest, share, etc. in such land/plot contrary to the provisions of the Act, 1961, rules and/or bye-laws of the society is illegal and such permission is inconsequential. That a person, a member and/or the Society so aggrieved is entitled to take action in accordance with law including invoking of provisions of the Act, 1961."

C/SCA/4585/2016 CAVJUDGMENT

38. This Court, in the case of Sarjan Co-Operative Housing Society Ltd. v. Surat Municipal Corporation and others, reported in 2012(1) GLR 267, had the occasion to consider the very same issues. M.R.Shah, J. (as His Lordship then was), after detailed consideration of various provisions of the Act, 1961, and other provisions of the Gujarat Town Planning and Urban Development Act, etc., held as under :

"7.03. As stated above, under the rules and regulations of the petitioner-society for raising the construction, which the respondent Nos.2 and 3 agreed to abide by at the time of enrolling them as members, the construction upto ground plus 2 floors and upto 35 feet only is permissible. Even as per the conditions imposed by the Society while passing resolution dated 18/07/2003 enrolling respondent Nos.2 and 3 as members of the society and approving the sale in favour of respondent Nos.2 and 3, as per condition No.7, before any construction and/or renovation, member is required to get approval of the society and/or get the plan sanctioned by the society and respondent Nos.2 and 3 also agreed to abide by the same. Despite the above specific terms and conditions and aforesaid rules and regulations for raising construction in the Society, respondent Nos.2 and 3 submitted revised plan before respondent No.1- Corporation without prior sanction/approval of the petitioner-society and raised construction contrary to the rules and regulations of the society and terms and conditions of the resolution, by which, sale in favour of respondent Nos.2 and 3 was approved and terms and conditions of the resolution, by which, respondent Nos.2 and 3 were enrolled as members of the petitioner-society.

C/SCA/4585/2016 CAVJUDGMENT 7.04. It is the case on behalf of the petitioner-society that respondent Nos.2 and 3 are bound by the rules, regulations and bye- laws of the petitioner-society. It is the case of the petitioner-society that without prior sanction/ approval of the plans/ revised plans by the society, respondent Nos.2 and 3 could not have submitted plans before the respondent No.1- Corporation and respondent No.1-Corporation could not have sanctioned such revised plans, which were submitted without prior approval/sanction of the petitioner- society.

7.05. On the other hand, it is the case on behalf of the respondent Nos.2 and 3 that under GDCR and rules and regulations of the Surat Municipal Corporation, construction of Ground plus 3 floors and beyond 35 feet is permissible and, therefore, despite the rules, regulations and bye laws of the petitioner-society, respondent Nos.2 and 3 can put up the construction of ground plus 3 floors and beyond 35 feet and for that prior approval/sanction of the petitioner-society is not required.

7.06. So far as respondent No.1-Corporation is concerned, it is the case on behalf of the Corporation that there is no provision under the GDCR by which member is required to obtain prior approval/sanction of the society and, therefore, Corporation can sanction the plans/revised plans, even in absence of any prior approval/sanction of the society, in which the plot is situated. It is the case of the respondent-Corporation that though in the year 1998 the Director of C/SCA/4585/2016 CAVJUDGMENT Planning, State of Gujarat, issued circular that in the area within the limits of Surat Municipal Corporation, if any plot holder/occupier of the Cooperative Housing Society submits application for permission to put up the construction, approval of the society is required and the plans should be countersigned by the responsible officer of the Society and in case, development permission has been granted without prior permission of the society and the society objects to the same, such permission should be cancelled. The Corporation is not bound by the same as there is no provision under the GDCR to obtain such a permission.

7.07. Looking to the above, this Court is required to consider the following questions :-

I. Whether a member of the society can be permitted to put up the construction dehors the bye-laws of the society for raising construction ?

II. Whether respondent-Corporation and/or appropriate authority can sanction the plans/revised plans in favour of the member of the society, which is contrary to the bye-laws for raising construction in the society and that too without giving any opportunity to the society in which, he/she is the member?

7.08. In the case of Zoroastrian Co-operative Housing Society Ltd. and another (supra), the Hon'ble Supreme Court has categorically observed and held that when a person accepts membership in Cooperative Society by submitting himself to its bye-laws and secures an allotment C/SCA/4585/2016 CAVJUDGMENT 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 Sec.10 of the Transfer of Property Act. It is further observed by the Hon'ble Supreme Court that he has placed that restriction on himself in the

interest of the collective body, the society and he has voluntarily submerged his rights in that of the society. In the case before the Hon'ble Supreme Court there was restriction on the transfer of plot/membership to class of certain persons and member wanted to transfer a plot to a person, who was not qualified as per the bye-laws of the society. The Hon'ble Supreme Court has observed as stated hereinabove and has stated that original member/allottee is bound by the terms and conditions and bye laws of the society.

7.09. Identical question came to be considered by the Hon'ble Supreme Court in the case of New India Cooperative Housing Society Limited (supra) wherein, submissions identical to the submission made on behalf of the respondent Nos.2 and 3 herein, were made, and it was sought to be contended that all the statutory provisions of the BPMC Act have been complied with like alteration in the approved plans, NOC of the Society was not required and the Hon'ble Supreme Court negated the same and the Hon'ble Supreme Court observed and held that Corporation cannot sanction the modified plan unless fresh NOC has been obtained by the lessee/member from the society.

C/SCA/4585/2016 CAVJUDGMENT 7.10. As stated hereinabove, while purchasing the plot/ bungalow and seeking permission to sell the bungalow/plot in their favour, they agreed to abide by terms and conditions and rules and regulations of the society and Kabulatnama to that effect was also executed by the respondent Nos.2 and 3 and on that, the petitioner-society approved the sale in favour of respondent Nos.2 and 3 and enrolled respondent Nos.2 and 3 as members of the society, more particularly on the terms and conditions mentioned in aforesaid Resolution. Therefore, respondent Nos.2 and 3 are bound to abide by the same and thereafter it is not open for them to turn around and say that before submitting the revised plans/before putting up any construction/ renovation, they are not required to obtain any prior permission/approval from the society and they can put up the construction contrary to the rules, regulations and bye laws of the society. As stated above, under the rules and regulations of the Society, only construction of Ground plus 2 floors is permissible and upto 35 feet only and therefore, it is not open for the respondent Nos.2 and 3 to put up the construction beyond Ground plus 2 floors and beyond 35 feet and that too, without prior sanction / approval of the society. As observed by the Hon'ble Supreme Court in the case of Zoroastrian Co-operative Housing Society Ltd.

and another (supra), membership in the Cooperative Housing Society brings about contractual relationship amongst the members. Therefore, respondent Nos.2 and 3 became the members of the petitioner-society and they are bound by the relevant rules and regulations and bye-laws of C/SCA/4585/2016 CAVJUDGMENT the petitioner-society. As observed by Hon'ble Supreme Court in the case of Daman Singh and others V/s. State of Punjab and others reported in AIR 1985 SC 973, when a person becomes a member of a Co-Operative 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. Under the circumstances, it is not open for respondent Nos.2 and 3 to contend that before raising

construction/renovation work and before submitting revised plans, prior approval / sanction of the petitioner- society is not required and they can put up the construction de-hors the rules and regulations and/or bye-laws of the petitioner-society. On the ground of estoppel also, respondent Nos.2 and 3 are bound to abide by rules and regulations of the society and conditions imposed by the society while enrolling respondent Nos.2 and 3 as members of the petitioner-society. If respondent Nos.2 and 3 would not have agreed to abide by rules and regulations of the society, in that case, the petitioner society might not have approved the sale in favour of respondent Nos.2 and 3 and would not have enrolled respondent Nos.2 and 3 as members of the Society.

8. Now so far as contention on behalf of respondent Nos.2 and 3 that as per GDCR construction above 35 feet is permissible and, therefore, they can put up the construction on the plot in question above 35 feet de hors the bye-laws of the Society is concerned, the same cannot be accepted. Respondent Nos.2 and 3 being members of the Society are bound to obey and act as per the bye-laws of the Society.

C/SCA/4585/2016 CAVJUDGMENT Otherwise contrary would be against the purpose and object of the Co-Operative Society. As stated hereinabove and as observed by Hon'ble Supreme Court in the case of Daman Singh and other (Supra), a member of the Society is bound to act and obey the bye-laws of the Society. Therefore, merely because GDCR might be permitting construction above 35 feet, a member cannot put up the construction de hors the bye-laws of the Society.

9. Now so far as contention of Mr.Dhaval Nanavati, learned advocate appearing on behalf of respondent- Corporation that in view of subsequent GDCR, the Corporation is not bound to follow the Circular issued by Director of Planning (Annexure "A"- Page No.17) is concerned, the aforesaid also cannot be accepted. The subsequent GDCR has nothing to do with circular dated 03/01/1998. There is no another Circular issued. The Director of Planning being Higher Authority, all other authorities are bound to obey the circular dated 03/01/1998. Nothing is on record that subsequently any other Circular is issued and earlier Circular dated 03/01/1998 has been modified. Circular issued by the Director of Planning dated 03/01/998 under which it is provided that for any construction in the plot of Co-Operative Societies, prior approval of the Society is required and plans for construction are required to be countersigned by the concerned Officer bearers of the Society and which further provides that if any plan is sanctioned and any development permission is granted without prior approval of the Society and the Society objects to the same, in that case, C/SCA/4585/2016 CAVJUDGMENT the proceedings can be initiated to cancel such permission. Under the circumstances, the Corporation is bound to follow the Circular issued by the Director of Planning dated 03/01/1998, which is at Annexure "A" to the petition.

So far as reliance placed upon the decision of the Division Bench of this Court in Letters Patent Appeal No.344 of 2009 and others is concerned, it is to be noted that the said decision is on the peculiar facts and circumstances of the case and Division Bench has also clarified the same in paragraph Nos.16 and 17 and Division Bench has also clarified that they have not expressed any final view on the question of interpretation of Regulation No.12.4.1. It is also required to be noted at this stage that there is no explanation whatsoever by the Surat Municipal Corporation why the plans came to be sanctioned during the pendency of the Suit and during the intervening period, when

there was non-extension of stay/status quo. As stated hereinabove, there was already an order of status quo by learned Board of Nominees, which through oversight was not extended for sometime and taking advantage of the same, Surat Municipal Corporation sanctioned the plans. When the Suit is pending and earlier status quo was granted, which was not extended for some period, the Corporation being an independent authority ought to have waited and ought not to have sanctioned the plans in haste and taking advantage of non-extension of the order of status quo for sometime.

10. Considering the aforesaid facts and circumstances of the case, it is held that sanction of the plans in favour of C/SCA/4585/2016 CAVJUDGMENT respondent Nos.2 and 3 for the purpose of putting up the construction on the land in question without prior approval of the petitioner-society and sanctioning of the plans, which are not counter signed by the office bearers of the petitioner

- society and/or without prior approval of the petitioner- society is absolutely illegal, which deserves to be quashed and set aside. It is held that before submitting the plans by the member of the Society with the Corporation/ appropriate authority, such a member has to obtain prior approval of the Society to which he is the member so as to clarify that proposed construction is in conformity with the Bye-laws of the Society or not and such plans to be countersigned by the office bearers of the Society so that the Society can certify as to Whether the proposed construction is in confirmation with the rules, regulation and bye-laws of the Society or not. If it is found that the Society is not deliberately sanctioning the plans with malafide intention, in that case, it will be open for the member to challenge the said decision before appropriate authority under the Gujarat Co-Operative Societies Act.

11. In view of the above and for the reasons stated hereinabove, the petition succeeds and action of the respondent-Corporation in approving the plans submitted by respondent Nos.2 and 3 and sanctioning the plans submitted by respondent Nos.2 and 3, which is at Annexure "P" to the petition is hereby quashed and set aside. It will be open for the respondent Nos.2 and 3 to submit the plans afresh and/or revised plans after getting approval from the petitioner-society and submit the plans after getting it C/SCA/4585/2016 CAVJUDGMENT countersigned by the office bearers of the petitioner-society and thereafter to submit the same before appropriate authority/Corporation, which may be considered in accordance with law and GDCR as well as bye-laws of the petitioner-society. Rule is made absolute to the aforesaid extent. No costs."

39. The aforesaid decision of the learned Single Judge in Sarjan Cooperative Housing Society (supra) was carried in appeal by the Surat Municipal Corporation by filing the Letters Patent Appeal No.232 of 2012. The appeal came to be dismissed vide order dated 13th August 2014.

40. The facts of this case are extremely gross. The action on the part of the respondent no.2 could be termed as highhanded and arbitrary. He has no regards for the rule of law. Although he gave an undertaking on oath to the Society that he would abide by the rules & regulations and the bye-laws of the Society, yet with impunity, he defied the same. If the Society would have known that the intention of the respondent no.2 was otherwise, they would not have, in the first instance, enrolled him as a member of the Society. Once the respondent no.2 came to be inducted as a member of the Society, he was obliged to comply with the bye-laws of the Society. He knew it that the Society was

only meant for residence. All other structures in the Society are residential houses. It is too feeble an argument to be canvassed that in the huge building constructed by the respondent no.2 he has made provisions within to reside and that would be sufficient to bring the construction within the ambit of a residential house or a bungalow. In fact, this argument sounds quite absurd. The submissions canvassed on behalf of the C/SCA/4585/2016 CAVJUDGMENT respondent no.2 as regards the property tax to be paid are also quite absurd. We are not concerned, in the present case, with the issue, whether a professional Chartered Accountant is liable to pay property tax accordingly if he is using his residential house as an office. The case on hand is not one in which a residential bungalow is constructed and some part of the bungalow is used for the purpose of office. The photograph of the building speaks for itself. By any stretch of imagination it cannot be said to be a low-rise residential bungalow.

41. The Cooperative movement is both a theory of life and a system of business. It is a form of voluntary association where individuals unite for mutual aid in the production and distribution of wealth upon the principles of equity, reason and common good. It stands for distributive justice and asserts the principle of equality and equity ensuring to all those engaged in the production of wealth a share proportionately commensurate with the degree of their contribution. It provides as a substitute for material assets, honesty and a sense of moral obligation and keeps in view the moral rather than the material sanction. The movement is thus a great Cooperative movement. Such being the nature of the Cooperative movement, there is no place in any Cooperative Society for any member who is not honest, but rather, a trickster.

42. The basic principles of cooperation are that the members join as human beings and not as capitalists. The Cooperative Society is a form of organization wherein persons associate together as human beings on the basis of equality for promotion of economic interest of its members. This movement is a method of doing the business or other activities with ethical base. "Each C/SCA/4585/2016 CAVJUDGMENT for all and all for each" is the motto of the cooperation movement. This movement not only develops latent business capacities of its members but produces leaders; encourages economic and social virtues, honesty and loyalty, becomes imperative, prospects of better life, obtainable by concerted effort is opened up; the individual realises that there is something more to be sought than mere material gains for himself. So in fact, it being a business cum moral movement, and the success of the Cooperative Society depends upon the reality with which one of the members work for the achievement of its objects and purpose. The Committee on Cooperation in India emphasized the moral aspect of cooperation, to quote the words.

"The theory of co-operation is very briefly that an isolated and powerless individual can , by association, with others and by moral development support, obtain in his own degree the material advantages available to wealthy or powerful persons and thereby develop himself to the fullest extent of his natural abilities. By the Union of forces, material advancement is secured and by united action self reliance is fostered and it from the inter-action of these influences that it is hoped to attain the effective realisation of the higher and more prosperous standard of life which has been characterised as better business, better arming and better living; we have found that there is a tendency not only among the outside public but also among supporters of

the movement to be little its moral aspect and to regard this as superfluous idealism. Cooperation in actual practice must often fall short of the standard aimed at and details inconsistent with co- operative ideals have often to be C/SCA/4585/2016 CAVJUDGMENT accepted in the hope that they may lead to better things. We wish clearly to express that it is the true co-operation alone, that is, to a co-operation which recognises the moral aspect of the question that Government must look for the amelioration of the masses and not to a pseudo co-operative edifice, however imposing, which is built in ignorance of co- operative principles. The movement is essentially a moral one and it is individualistic rather than socialistic. It provides as a substitute for material assets honesty and a sense of moral obligation and keeps in view the moral rather than the material sanction. Pages 5 and 6 of Theory and Practice of Co-operation in India and Abroad by Kulkarni, Volume 1. Co-operation is a mode of doing business, is at present applied as the solution of many economic problems. Co-operation is harnessed to almost all forms of economic activity. Though co-operation was introduced in this country as a remedy for rural indebtedness, it has been applied successfully in a wide range of activities such as production, distribution, banking, supply, marketing, housing and insurance. (see Theory and Practice of Co-operation in India and Abroad by Kulkarni - Volume 1, Page 2.)

43. Though cooperation was introduced in this country as a remedy for rural indebtedness, it has been able to successfully widen range of activities such as production, distribution, banking, civil supplies, marketing, housing and insurance. This movement had got momentum and in the fields aforesaid, it is no doubt working throughout the nation. The aim, object and purpose of this Cooperative movement now to certain extent turns out as if it is to provide platform to the ambitious persons C/SCA/4585/2016 CAVJUDGMENT to have their political gains or some other gains. (see Uttar Bhartiya Nagar Cooperative Housing Society Limited vs. State of Gujarat, 2000 CTJ 699).

44. I may remind the applicant of the observations made by the Supreme Court in the case of Daman Singh v. State of Punjab, reported in AIR 1985 SC 973. The observations are as under:

"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. He must act and speak through the society or rather, the society alone can act and speak for him qua rights or duties of the society as a body."

45. The decision of the Supreme Court in the case of Daman Singh (supra) has been quoted with approval in the case of State of U.P. and another etc., v. C.O.D. Chheoki Employees' Co- op. Society Ltd. and others etc., reported in AIR 1997 SC 1413. I may quote the relevant observations thus:

"15A. Thus, it is settled law that no citizen has an fundamental right under Article 19(1)(c) to become a member of a Co-operative 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, C/SCA/4585/2016 CAVJUDGMENT 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 bye- laws and is subject to its operation. The stream cannot rise higher than the source."

46. A Division Bench of the Bombay High Court in the case of Karvenagar Sahakari Griha Rachana Sanstha Maryadit, Pune and another v. State of Maharashtra and others, reported in AIR 1989 BOMBAY 392 has made the following observations:

"A co-operative society is a voluntary association of persons; it is an economic institution informed by social purpose and not motivated by entrepreneurial profits; it is a democratic organisation owned and controlled by those utilising its services. A combination all these features mark out co-operatives as distinct organisations different from other types in the private or public sector. What objectives and scope of co-operative legislation should be, have been succinctly described by Mr.Watkin in his preface to International Handbook of Co-operative Legislation:

"True co-operation draws its inspiration from realms where the State's writ does not run. Co-operative movements are not created by legislation.

Nevertheless, without an appropriate

C/SCA/4585/2016

CAVJUDGMENT

framework a co-operative movement in the form of a

growing economic organism is not possible or even conceivable. The right of individuals to associate in co- operative societies and the right of the societies to unite in federations must be recognised..... The legal harness must allow for the free play of fundamental co-operative principles and the normal development of cooperative organisations according to the needs of their members and their own laws of growth."

It would be interesting to make reference to the speech of Sir Denzil Ibbeston introducing Co-operative Credit Societies Bill, 1904, which sets out broad principles and precautions in respect

of legislation regarding co- operative societies:

"The people must in the main be left to work out their own salvation on their own lines, the function of Government being confined to hearty sympathy, assistance and advice."

The legislation of co-operative which was enacted by introduction of Co-operative Credit Societies Bill, 1904, prescribes the basic rule that the bye-laws of a co- operative expresses its real intention of the participating members, and should be framed within the parameter of the Act and the Rules. The co-operative laws do not attempt a legal definition characteristic of co-

operatives are incorporated in the law. The Commission
on Co-operative Principles appointed by the

C/SCA/4585/2016

CAVJUDGMENT

International Co-operative Alliance and which was presided over by the renowned Indian Co-operator, late Prof. D.G.Karve, has re-enunciated these principles as follows:

"(i) Membership of a co-operative society should be voluntary and available without artificial restriction or any social, political, racial or religious discrimination, to all person who can make use of its services and are willing to accept the responsibilities of membership;

(ii) Co-operative societies are democratic organisations, their affairs should be administered by persons elected or appointed in the manner agreed by the members;

(iii) the members should provide for development of the business of the co-operative, provide for common services, and distribute amongst the members the profits made."

My final conclusions are as follows :

(1) A member of a Cooperative Housing Society has no legal right or any other right of any nature to use the land for commercial purpose. If it is a Cooperative Housing Society, then there cannot be any construction of commercial nature other than a residential house.

(2) A member of a Cooperative Housing Society is obliged in law to strictly abide by the bye-laws and other rules & regulations of the Society.

C/SCA/4585/2016 CAVJUDGMENT (3) No Municipal Corporation or a Municipality shall assume the power or jurisdiction or authority to sanction the plans without a valid No Objection Certificate issued by the Society. In the absence of a valid No Objection Certificate duly issued by the Society, the Corporation or the Nagarpalika, as the case may be, will have no authority to even accept the plans and look into the same.

(4) Before sanctioning the plans, even if there is any No Objection Certificate duly issued by the Society, the competent authority of the Corporation or the Nagarpalika, as the case may be, is duty-bound to give a notice to the Society so that if the Society has anything further to say in the matter, they can put forward their case or objection.

(5) The plans sanctioned by the Corporation including the Building Use Permission could be termed as absolutely illegal as the same are contrary to the bye-laws of the Society.

(6) As the bye-laws of the Society, in the case on hand, provide that the members have to use the plot allotted to them only for residential purpose, there is no question of putting up any construction of commercial nature, i.e. other than the residential house.

(7) None of the provisions of the Gujarat Town Planning and Urban Development Act, 1976, especially in view of the deletion of sub-section (1) of Section 117 of the Act and the GDCR being the enabling provision in the context of the Act of 1976 or the provisions of the BPMC Act, 1949, has C/SCA/4585/2016 CAVJUDGMENT any overriding effect over the provisions of the Gujarat Cooperative Societies Act, 1961, and the rules & regulations made thereunder and the Society cannot be deprived of the right accrued, acquired and crystalized in their favour under the Gujarat Cooperative Societies Act, 1961, rules & regulations and bye-laws, on the ground that the permission to construct/develop/use the land/plot allotted to a member of the Cooperative Housing Society is granted by the authority under the Town Planning and Urban Development Act, rules & regulations framed therein or under the BPMC Act. To put it in other words, in a Cooperative Housing Society, a member cannot use the land for commercial purpose, namely the purpose other than the residence, as per the bye-laws, rules and provisions of the Act, 1961, irrespective of the permission granted by any authority either under the Town Planning and Urban Development Act, GDCR or under the BPMC Act or likewise.

(8) When there are specific bye-laws in the Cooperative Housing Society for use of the house allotted to a member for residence, the land cannot be permitted to be

converted into commercial use or any other purpose.

47. As the order passed by the Surat Municipal Corporation sanctioning the plans contrary to the bye-laws of the Society and the grant of the Building Use Permission is per se illegal, the impugned order passed by the Joint District Registrar below application Exh.5 in the Lavad Case No.104 of 2015 could also be said to be erroneous in law. However, I am not going much into the Lavad Case instituted by the Society as I am of the view C/SCA/4585/2016 CAVJUDGMENT that the construction could be declared as absolutely unauthorized or illegal for the reasons recorded in this judgment.

48. In the result, this writ-application succeeds and is hereby allowed. The Development Plan dated 1st June 2016 and the Building Use Permission dated 6th June 2016 (Annexure-Y to this petition) are hereby quashed and set-aside.

49. As the construction has been completed and the property is being used de hors or contrary to the bye-laws of the Society, the writ-applicant is directed to pull down the entire construction at his own cost within a period of four weeks from today. If the writ-applicant fails to demolish the construction as directed by this Court on his own, then the Surat Municipal Corporation shall pull down the entire structure and the cost that may be incurred in demolishing the illegal construction shall be recovered from the writ-applicant.

50. If a member of a Cooperative Housing Society is of the view that the bye-laws or the rules & regulations framed by the society are in any manner violative of any of the provisions of the Constitution of India or are infringing his or her fundamental rights or any other legal rights, then he or she can challenge it before the appropriate forum in accordance with law, but cannot on his own defy such bye-laws or the rules & regulations and act contrary to the same.

51. It is made clear that the officer or the officers concerned of the Corporation or any Municipality sanctions the plans or grants Building Use Permission without any valid No Objection C/SCA/4585/2016 CAVJUDGMENT Certificate from the Society, then he or she shall be held personally liable for dereliction of duty and shall also be held guilty of contempt. In future if it is found or noted by this Court that plans have been sanctioned or Building Use Permission has been granted without hearing the Society and without there being a valid No Objection Certificate on record issued by the Society, then appropriate steps shall be taken against such officers. I am saying so, because such officers would be equally liable for the illegal construction which the member puts up contrary to the bye-laws of the Society.

52. The registry shall forward one copy of this Judgment to the Principal Secretary, Urban Development and Urban Housing Department, State of Gujarat, Gandhinagar. The department, in turn, shall forward one copy each of the Judgment to all the Municipal Corporations and Municipalities including the Urban Development Authorities across the State with appropriate instructions.

(J.B. PARDIWALA, J.) /MOINUDDIN