

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 11343 of 2006****With****SPECIAL CIVIL APPLICATION No. 3854 of 2008****With****SPECIAL CIVIL APPLICATION No. 6108 of 2008****With****SPECIAL CIVIL APPLICATION No. 7750 of 2008****With****SPECIAL CIVIL APPLICATION No. 8193 of 2008****With****SPECIAL CIVIL APPLICATION No. 576 of 2009****With****SPECIAL CIVIL APPLICATION No. 8474 of 2009****With****CIVIL APPLICATION No. 13060 of 2010****In SPECIAL CIVIL APPLICATION No. 6108 of 2008****For Approval and Signature:****HONOURABLE MR.JUSTICE ANANT S. DAVE**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of
the judgment ?

4 Whether this case involves a substantial question of
law as to the interpretation of the constitution of
India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AMBICA NAGAR CO-OP HOUSING SOCIETY LTD**Versus****STATE OF GUJARAT & others**

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Appearance :Special Civil Application No.11343 of 2006

MR PRAKASH K JANI for Petitioner

GOVERNMENT PLEADER for Respondent Nos. 1 and 2

MR MEHUL SHARAD SHAH for Respondent Nos. 3 and 4

RULE SERVED for Respondent No.5

MR BS PATEL for Respondent No.6

Special Civil Application No.3854 of 2008

Mr. Prakash Jani for the petitioner

Mr. G.H. Bhatt for respondent No.1

Mr. C.G. Sharma for respondent No.2

Mr. A.J. Patel for the respondent No.3

Special Civil Application No.6108 of 2008

Mr. Shirish Joshi with Mr. Satyen N. Thakkar for the petitioner

Mr. S.I. Nanavati, Senior Advocate with Mr. Ravindra Shah for respondent No.1

Respondent No.2 is served.

Special Civil Application No.7750 of 2008

Mr. Prakash Jani for the petitioner

Mr. H.S. Munshaw for respondent Nos. 1 and 2

Mr. Ritesh Soni for respondent No.3

Mr. Aspi Kapadia for the respondent No.4

Special Civil Application No.8193 of 2008 and Special Civil Application No.576 of 2009

Mr. Mihir Joshi, Senior Advocate with Mr. Uday Vyas for the petitioners

Government Pleader for respondent No.1

Respondent No.2 served

Mr. N.D. Nanavaty, Senior Advocate with Mr. Anshin H. Desai for the respondent Nos. 3 and 4

Special Civil Application No.8474 of 2009

Mr. B.S. Patel for Mr. Umang Oza for the petitioners

Mr. Ravindra Shah for respondents

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CORAM : HONOURABLE MR.JUSTICE ANANT S. DAVE

Date : 19/04/2012

CAV JUDGMENT

1 All these seven petitions are filed under Articles 226 and 227 of the Constitution of India against the judgments/orders passed by the Gujarat State Cooperative Tribunal and the Authorities under the State of Gujarat. Since common question of law is involved in this group of petitions, at the request of the learned counsels appearing for the parties, they are taken up for final hearing together.

2 A common question raised in these seven petitions is whether a Member of the Cooperative Housing Society, who is allotted land/plot by Cooperative Housing Society governed by and under the provisions of the Gujarat Cooperative Societies Act, 1961, [for short, 'the Act of 1961'] is entitled to use/develop and/or transfer/alienate, in any manner, the said land/plot and raise construction thereon of commercial in nature or purpose contrary to the provisions contained in the Act of 1961, Rules, Regulation and bye-laws of the Society made thereunder on the ground of permission so granted by the appropriate authority under the Gujarat Town Planning & Urban Development Act, 1976, [for short, 'the Act of 1976'], Rules and Regulations framed thereunder, viz. General Development Control Regulation, and under the Bombay Provincial Municipal Corporations Act, 1949, [for short, 'the Act of 1976'], which should be tested on the touch-stone of the law laid down by the Apex Court, this Court and other High Courts in plethora of judgments cited by the learned counsels appearing for the parties and the provisions of the Acts as above.

Special Civil Application No. 11343 of 2006

3 The petitioner is a Cooperative Housing Society Limited registered on 26th March 1968 under the provisions of the Act of 1961. The certificate of incorporation was issued by the District Registrar, Cooperative Societies, Mehsana, on 26th March 1968. Initially, the petitioner-society had approached one Shri Daoodkha Aliyarakha, owner of the land bearing Survey No.1995/ 33 and an application was submitted to the District Collector, Mehsana, for the purpose of the permitting the subject land which was purchased by the petitioner-society to be converted as non-agricultural land to be used for residential purpose and, in exercise of powers conferred upon the District Collector under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, permission came to be granted on 18th July 1968 subject to the condition that the land should be utilized for the purpose of Cooperative Housing Society only. Accordingly, the petitioner-society constructed about 30 units for residential purpose and the members were granted allotment by draw of lot and no member of the society had built-up any unit on his own. The petitioner-society had obtained loan for construction of dwelling units from the financial institutions and the members have been paying installments accordingly for the loan taken by the society. Thus, the members of the society have only right to use the super-structure and the land is owned by the society. The residential units allotted to the members are being utilized by the members in accordance with the bye-laws of the society and no member has right to use the land or super-structure for any purpose other than the purpose of residence. Initially, plot No.30 was in the name of Shri Indravadan Ambalal Raval who made a request to transfer his membership in the name of Shri Mukeshkumar Ishwarlal Patel, respondent No.5 herein, who also submitted an application for acquiring the membership and

agreed and undertaken to abide by the bye-laws of the society that he needed the house for the purpose of residence and, therefore, by passing a resolution, respondent No. 5 was admitted as a member of the society.

3.1 However, a dispute had arisen only when respondent No.5, without seeking NOC or any permission from the petitioner, submitted an application to the Urban Development Authority, Mehsana, on 4th November 2003 to grant permission for usage of plot No.30 for commercial purpose by demolishing the existing residential unit. The society filed an objection before the Chief Officer, Mehsana Nagarpalika. The above application was submitted before the Town Planning Committee, Mehsana, who considered all the details and, by resolution dated 20th November 2003, opined that the application was liable to be rejected. In the general meeting dated 30th November 2003 of the society, resolution No.5 came to be passed, by which, it was resolved not to grant any NOC to any member for the purpose of carrying out any commercial activity in the society. The above resolution was communicated to all the members of the society on 15th November 2003.

3.2 On 14th July 2004, the petitioner-society submitted an application to the District Collector, Mehsana, about creation of third party rights by respondent No.5 who had demolished a structure standing on plot No.30. Later on, without seeking any permission from the petitioner-society, respondent No.5 sold open parcel of plot No.30 of the petitioner-society to Smt. Dharmisthaben J. Patel respondent No.6 herein, by registered sale deed on 27th December 2004. Respondent No.6 submitted an application to the Urban Development Authority, Mehsana, on 8th June 2005 for carrying out construction of commercial nature to establish a clinic though she was not admitted as a member by the society. However, on 12th August 2005, a resolution was passed by the

Town Planning Committee to grant permission and an order was passed on 26th August 2005. The society once again approached the Chief Officer, Mehsana, and also the District Collector, Mehsana, by preferring an application under Section 6B(2) of the Act, 1976, and, accordingly, initially, an ad-interim order was granted by the District Collector, Mehsana, on 7th March 2006 directing respondent Nos. 5 and 6 not to put up construction on the subject land. Thereafter, on 31st March 2006, the above interim order was confirmed, against which, respondent No.6 preferred an appeal on 10th April 2006 before the Officer on Special Duty and Secretary, Urban Development and Urban Housing Department, Government of Gujarat, under Section 6B(4) of the Town Planning Act. The appellate authority stayed the order of the Collector and directed all the parties to maintain status-quo. On 25th May 2006, the appellate authority allowed the appeal by setting aside the order of the Collector.

3.3 Mr. Prakash Jani, learned Senior Counsel for the petitioner-society, who also appears in SCA Nos. 3854 of 2008 and 7750/08, raised the following main grounds:

[i] Whether in the cooperative 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 for their residence only ?

[ii] Whether in the cooperative 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 ?

[iii] In the instant case the Urban Development Authority had refused the permission for the commercial purpose on 20.11.2003. Thereafter another application was given for establishing clinic without there being any change in the factual position. Whether the Urban Development

Authority can grant the permission once refused in absence of any change of details and facts, particularly when the land is granted to the Cooperative Society by the State Government subject to restriction of section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948.

3.4 Inter-alia, the learned counsel for the petitioner would submit that, analogous to the above main grounds, further question arises as to whether respondent No.5, a member of the society, could have sold, transferred and alienated plot No.30 belonging to the society without prior permission and contrary to the provisions of the Act, Rules and the bye-laws in favour of respondent No.6 when none of the members was owner of the plot of the society and the entire land belongs to the society where the members had right to use super-structure and the land appurtenant to the structure. The learned counsel for the petitioner has relied upon the bye-laws Nos. 2 and 3 about the objects of Cooperative Housing Society and further bye-laws Nos. 6(2), 23, 28 and 29.

3.5 Per contra, the learned counsel for the respondents, mainly, the Municipality, respondent No.5 and respondent No.6, have opposed the above submissions and relied upon the provisions of the Town Planning Act and the Rules and submitted that, under the development plan, construction is permissible for a dispensary in the context of 'Land User Zone' and, after considering inconvenience to the members, nuisance due to vehicular traffic and the regulations for development, the orders passed by the authorities do not require any interference by this Court in exercise of powers under Articles 226 and 227 of the Constitution of India.

3.6 On behalf of respondent No.6, it is submitted that the land in question was purchased by a registered sale deed and even, as per the

development regulation, such construction for clinic along with residence is permitted and, since the nephew of respondent No. 6 who was about to complete the MBBS required a small clinic to begin with for medical profession, a construction was put up. It is further submitted that plot Nos. 24, 27 and 28 of the society are also used for commercial purpose but respondent No. 6 is being discriminated for oblique motive. Considering the above, it is submitted that the petition be dismissed.

3.7 Mr. Bharat Patel, learned counsel for respondent No.5 has submitted that both the Acts - the Gujarat Cooperative Societies Act and the Town Planning Act - operate in a different area, but once the permission is granted for development under the development regulation of the Town Planning Act, operation of the provisions under the Gujarat Cooperative Societies Act, Rules and Regulations will have to give a go-bye. In addition to the above, it is submitted that, by a registered sale deed, the land was transferred and, therefore, a prayer can be made to quash and set aside such sale deed before the appropriate Civil Court in case if such sale is illegal, but the construction cannot be ordered to be demolished when the permission to construct such unit is granted by the competent authority. Even if any grievance arises, the society has to approach the Board of Nominees, namely, competent court under the Gujarat Cooperative Societies Act or Civil Court depending upon the nature of dispute, but the society has no right to object before the Authorities namely competent as well as designated under the Town Planning Act.

3.8 It is to be noted at the outset that, while issuing Rule in this petition, on 29th August 2006, the learned Single Judge [Coram: Jayant Patel, J.] passed the following order:

1. Upon hearing Mr. Jani, for the petitioner, Ms. Patel, learned AGP for respondent Nos. 1 & 2, Mr. Shah for respondent Nos. 3 & 4 and Mr. Patel for respondent No.6, it prima facie appears that in view of the decision of this Court (Coram: Akil Kureshi, J.) dated 29.06.2006 & 01.07.2006 in Special Civil Application No. 4278 of 1997 and the another decision of the another Bench of this Court (Coram:K.A. Puj, J.) reported at 2004(2) GLR 1055, matter deserves consideration on the aspects as to whether the use of the property/tenement allotted by the Society to the member, which is originally for residential purpose, can be permitted for other than residential purpose, rather semi-commercial activities like schools, colleges, shops, banks, hospitals, nursing homes, religious places etc. when such area is permitted to be used for such purpose under the Town Planning Scheme or the regulations framed by the local authority.
2. It may be recorded that even if such use for other than residential purpose in view of globalisation or fast development or growth of trade and commerce for extension of city life is to be permitted, question will still remains to be considered as to whether such use would be permitted, de hors the bylaws of the society or when such use is objected by all the members of the society or should it be permitted when not causing nuisance to the other adjacent member of the Society or who are to be affected thereby? In my view, such questions can be decided finally at the time of final hearing of the matter.
3. However, prima facie it appears that until the bylaws are so amended or until the society does not grant consent, the property has to be used for residential purpose only, even if the construction permitted is for the use other than residential. Mr. Patel, learned counsel appearing for respondent No. 6 has declared before the Court that the respondent No. 6 shall not use the property or shall not permit the use of the property for the purpose other than residential and shall be used only for residential purpose without prejudice to the rights and contentions of this petition.
4. So far as the contention raised by Mr. Jani for non-admission to respondent No. 6 as the member of the society is concerned, as such, such was not an issue before the Authority under the Gujarat Town Planning and Urban Development Act. Neither respondent No.6 has made application for being admitted as member, nor the respondent has rendered decision on the said aspects and therefore, as such, the said aspect is outside the scope of the petition, but suffice it to say that in the event such an application is made, the respondent shall consider in accordance with law.
5. In view of the above, **Rule.** Ms. Patel, learned AGP waives notice of Rule for respondent No.1 & 2, Mr. Shah for respondent Nos. 3 & 4 and Mr.B.S.Patel for respondent No. 6.
6. Ad interim relief granted earlier shall stand modified to the effect that if the respondent No. 6 files an undertaking within a period of two weeks from today before this Court to permit construction at her own risk and consequences with the further declaration of not to claim any equity due to the construction already made and with the express stipulation that the construction if made, shall only be used for residential purpose and not for any other purpose whatsoever, the respondent No. 6 shall be at the liberty to make construction at her own risk and consequences with the express stipulation that no equity shall stand created on

account of the construction already made or may be made. It is further directed that if the construction is made as indicated earlier by respondent No. 6, then respondent No. 6 shall strictly abide by the declaration made before this Court and shall not use the constructed premises in any manner, whatsoever, for the purpose other than residential purpose.

7. *In the event, as per the petitioner, the use of the property pending the petition is made by the respondent No. 6 for other than residential purpose, then it would be open to the petitioner to move the District Collector by filing complaint and in the event such complaint is made and it is found that the use of the property is other than residential purpose, the District Collector shall be at the liberty to apply seal over the property and upon failure to do so, the petitioner may move this Court.*
8. *The matter is fixed for final hearing on 22nd November, 2006.”*

Special Civil Application No. 3854 of 2008

4 The petitioners are the members of the Hindu Colony Cooperative Housing Society Limited, Navrangpura, Ahmedabad, and they are allotted sub-plot No.40. Respondent Nos. 2 and 3 are also the members of the society and have been allotted sub-plot Nos. 42B and 43.

4.1 It is not in dispute that respondent No. 1 is a Cooperative Housing Society registered as such in the year 1942 for the purpose of providing residence to all members. Internal management of the society is governed by the bye-laws annexed at Annexure “B” to the petition. The bye-laws provide that the members have to use the plots allotted to them only for residential purpose. On 2nd September 2001, in a Special General Meeting of respondent No.1-Society, by a majority decision, it was resolved that no commercial activity should be permitted in the society. On 30th May 2004, the Managing Committee of respondent No.1-Society considered the application of respondent No. 3 and the Committee was of the opinion that granting permission for commercial activity would amount to an amendment in the bye-laws and, therefore, it was decided that the issue be considered in a general meeting. In the general meeting held on 18th June 2006, it was resolved that a proposal

is to be prepared considering the interest of the members and it may be decided whether permission for commercial activity be granted to respondent No.4 or not. 39 members of respondent No.1-Society objected to the proposed decision of 19th July 2006 stating that the society is incorporated for providing residential premises to its members and about permitting construction of commercial nature. Therefore, respondent No.4, a private limited company incorporated for the purpose of setting up MRI Center, who had agreed to purchase land from respondent No. 2 and 3, decided to go ahead with the construction.

4.2 On 2nd August 2006, the petitioners instituted Lavad Case No.773 of 2006 before the Registrar, Nominees Court, Ahmedabad, with a prayer to restrain the society and respondent Nos. 2 and 3 from transferring their plots to respondent No.4 for establishing MRI Center, since it would cause serious prejudice to the peaceful living of the petitioners having adjacent plots. On the same day, initially, ex-parte ad-interim relief was granted in favour of the petitioners and against the respondents and, thereafter, on 28th September 2006, the Registrar, Nominees Court, allowed the application Exh.6 by restraining defendant Nos. 2 and 3 from transferring, selling and/or alienating the property in favour of respondent No.4 for putting up commercial or flat type construction.

4.3 Being aggrieved, on 18th October 2006 respondent No. 2, 3 and 4 filed Revision Application No.309 of 2006 before the Gujarat State Cooperative Tribunal. On 31st January 2008, the above revision application was finally heard and partly allowed by quashing and setting aside the order dated 28th September 2006 passed by the Registrar, Nominees Court. Hence, against the order dated 31st January 2008 passed by the Gujarat State Cooperative Tribunal in Revision Application No.309 of 2006, the present petition is filed raising similar contentions

as raised in the cognate petition.

4.4 It is to be noted that, in additional affidavit dated 25th March 2008 filed by the Honorary Secretary of respondent No.1-Society, it is reiterated that majority of 51 members have in writing submitted that no plot should be permitted or allowed to be used for the purpose other than residence exclusively. Further affidavit was filed on 5th August 2009 denying the fact that, at any point of time, any final permission was granted by the society to any of the members to carry out any commercial activity on the plot allotted to them contrary to the bye-laws of the society which do not permit any members to use the plot for the purpose other than residential purpose.

4.5 However, learned counsel appearing for respondent No.3 has submitted that commercial activity has been permitted in the society and even hospitals and schools are found functioning in the plots belonging to the society along with other shops.

4.6 The bye-laws of the society and the preamble reveal that the society is established to carry on business of construction of houses for residential purpose and analogous activities for the benefits and welfare of the members of the society.

4.7 Mr. A.J. Patel, learned counsel appearing for the respondents, has relied upon the provisions of the Town Planning Act, Rules and Regulations along with Development Regulations particularly Section 12(2)(m) about the contents of the draft plan, Section 13(2)(l) about publication of the draft development plan, Section 22 which is about declaration of urban development area and consideration of Urban Development Authority and Sections 23 and 117 about permission to be

granted by the Authority for development and submitted that the General Development Control Regulation [for short 'GDCR'] permits commercial use of the premises and, if the permission is granted under Section 29 of the Town Planning Act, Rules and Regulations, even though a restriction is contained in the bye-laws under the Gujarat Cooperative Societies Act which has no statutory force, this Court would not like to interfere with the order passed by the Tribunal in exercise of powers conferred under Articles 226 and 227 of the Constitution of India. It is, further, submitted that zone tables regulating the type and nature of construction provide a road abutting 18 meters width, and construction is permitted and for seven such plots permission was granted. The learned counsel further pressed into service the provisions of Regulation 12.1 of GDCR read with Section 117 of the Town Planning Act and submitted that once GDCR approves or the town planning approves, permission can be accorded for transfer/construction for commercial or semi-commercial purpose. Rule 6 of the bye-law of the Society does not place absolute restriction while transferring, constructing and developing a housing unit for commercial or semi-commercial purpose.

4.8 In rejoinder, Mr. Prakash Jani, learned counsel for the petitioners has submitted that the Tribunal has erred in exercising revisional jurisdiction by applying the wrong principles and erroneous application of the provisions of law in holding that the provisions of the Town Planning Act would over-ride the provisions of the Act of 1961, Rules and bye-laws.

Special Civil Application No. 7750 of 2008

5. The petitioner, tenant-ownership society was registered on 10th June 1971 with the objects to purchase land and divide the same into sub-plots for being allotted to its members for residential purpose as per the bye-laws at Annexure "C". In December 2005, the original allottee

Madhuben Rasiklal Shah made an application for transfer of her plot to respondent No.1 who undertook the same to use for residential purpose and to abide by the byelaws of the society. The permission was granted accordingly. Thereafter, on an application being made, the society granted permission for renovation to respondent No.1. However, respondent No.1 was constructing a nursing home and, therefore, requested the Ahmedabad Municipal Corporation to stop the construction activity. Thereafter, respondent No.2 wanted to purchase the plot No.8 from respondent No.1 and necessary correspondence took place between the parties. Without taking permission from the society, respondent No.1 executed sale deed dated 3rd April 2007 in favour of respondent No.2. Respondent No.2 had never applied for membership of the society and he is not a member of the society.

5.1 Since the construction was carried out contrary to the bye-laws of the society, the Society filed Lavad Suit No.983 of 2007 against respondent Nos. 1 and 2 before the Board of Nominees, Ahmedabad, wherein initially an order of status-quo was granted on 21.9.2007 and, thereafter, confirmed by order dated 8th February 2008. Being aggrieved, respondent Nos. 1 and 2 filed Revision Application No. 4 of 2008 before the Gujarat Cooperative Tribunal which was allowed by order dated 19th April 2008. Hence the Society filed the present petition.

5.2 Mr. Aspi Kapadia, learned counsel for respondent No.4 would submit that there is no prohibition under the Act, Rules or bye-laws and such bye-law has no statutory force. It is further submitted that the Apex Court had not taken into consideration implication of Section 11 of the Transfer of Property Act while deciding the case of Zoroastrian Co-operative Housing Society.

Special Civil Application No. 6108 of 2008

6 On 2nd July 2007, the petitioner-society filed Lavad Suit No.295 of 2007 before the Board of Nominees, Surat, inter-alia, contending that [i] respondent No. 1 has, without getting approval of the society on the plan submitted to respondent No.2- Surat Municipal Corporation, made construction on his plot No.3, [ii] the nature of construction is of basement plus ground floor plus four storeys and, therefore, it is a high-rise building; [iii] by making construction on plot No.3, respondent No. 1 would create nuisance, annoyance and disturbance to the society and [iv] it is a society meant only for bungalows for residential purpose, and prayed for appropriate reliefs.

6.1 Initially, the Board of Nominees, Surat, granted ex-parte ad-interim injunction and, after hearing the parties, vacated the same by order dated 26th July 2007. The petitioner-society preferred Revision Application No.206 of 2007 before the Gujarat State Cooperative Tribunal which was rejected by order dated 13th January 2008. Hence, the present petition.

6.2 Mr. Shirish Joshi, learned Senior Counsel with Mr. Satyen N. Thakkar, learned counsel for the petitioner, has highlighted the principles governing movement of cooperation, objects of the Cooperative Society and referred to Section 2(13), Section 12 about classification of Society by the Registrar, Section 13 amendment to bye-law, Sections 22, 24, and 30 restriction on transfer, Section 36 expulsion of member, Section 37 corporate nature of cooperative society along with Rule 12 for open membership, Rule 18 procedure for transfer of share along with Chapter VII namely Sections 73, 74 and 81 of the Act. He has supported the submissions of Mr. Prakash Jani, learned counsel appearing for the

petitioners in other petitions, by further emphasizing that [i] any profiteering by converting or changing use of residential in nature into commercial cannot be permitted; [ii] tendency of profiteering or to derive advantages by converting change of user of residence into commercial is strictly prohibited; and [iii] Town Planning Act or Development Regulations have no over-riding effect over the Gujarat Cooperative Societies Act.

6.3 Mr. S.I. Nanavati, learned Senior Counsel, with Mr. Ravindra Shah, learned counsel appearing for respondent No.1 would submit that, in the facts and circumstances of the case, the bye-laws do not provide any restriction and the construction of a structure carried out by the petitioner is a low-rise as defined under Regulation 2(j) of GDCR framed under clause (m) of sub-section (2) of Section 12 and clause [c] of sub-section (2) of S.13 of the Act, 1976, which permits construction of such nature on a road with width of 16.50 meters and having ground floor plus four floors. It is submitted that, in fact, the society had given permission to respondent No.1 to make construction on his plot in accordance with the building bye-laws of the Surat Municipal Corporation which is clear from the NOC dated 19.3.2006. It is further submitted that under the statute the permission of the society is not contemplated but the plans are to be approved by the Surat Municipal Corporation. That there is a bar of estoppel against the society itself in as much as the society itself constructed a commercial complex and the society has not prevented other members from undertaking commercial activities. Hence, the petitioner-society is not entitled to equitable and discretionary relief on account of its conduct itself coupled with the fact that the society approached the Board of Nominees Court after a long span of period during which the construction activity on the plot of respondent No.1 was in full swing. It is further submitted that the bye-

laws of the society nowhere provides restriction upon respondent No.1 to make construction which he is intending to put up in accordance with the building bye-laws of Surat Municipal Corporation. According to the learned counsel for respondent No.1, the present petition deserves attention of this Court on the limited aspect about whether the society is right in contending that the construction sought to be put up by respondent No.1 can be termed as a high-rise building or low-rise building and whether the bye-laws of the society which are contractual in nature put an embargo on making construction of bungalow of ground floor and one floor thereupon only and whether the permission of the society is necessary for the plan to be submitted to and sanctioned by the Surat Municipal Corporation even if they are in accordance with the GDCR.

Special Civil Application No.8474 of 2009

7 The petitioners, members of respondent-society, being aggrieved by the order dated 30.7.2009 passed by the Gujarat State Cooperative Tribunal in Revision Application No.58 of 2009, allowing the said application and, quashing and setting aside the order dated 12th February 2009 passed by the Board of Nominees in Lavad Suit No.1922 of 2088, have preferred the present petition raising similar contention. In this petition, by order dated 25.8.2009, this Court granted status-quo qua the property.

7.1 Mr. B.S. Patel, learned counsel appearing for the petitioners herein, has adopted and reiterated his submission on law made in SCA No.11343 of 2006 while appearing for respondents therein.

Special Civil Application No.8193 of 2008

8 The petitioner-society filed Lavad Suit No.1081 of 2007 praying for a declaration that respondent No.3 has no right to raise construction for commercial purpose. Initially, an order of status-quo was granted by the Board of Nominees, which was challenged by respondent No.3 by way of preferring Revision Application No.15 of 2008 before the Gujarat State Cooperative Tribunal. The Tribunal granted the revision application and quashed and set aside the order of the Board of Nominees. Hence, this petition raising similar contentions. In this petition, by order dated 17.6.2008, this Court granted ad-interim relief in terms of paragraph No.3.12[c] [amended].

Special Civil Application No.576 of 2009

9 The petitioner-society filed Lavad Suit No.300 of 2008 praying for a declaration that respondent No.2 has no right to raise construction for commercial purpose. Initially, an order of status-quo was granted by the Board of Nominees, which was challenged by respondent No.3 by way of preferring Revision Application No.163 of 2008 before the Gujarat State Cooperative Tribunal. The Tribunal granted the revision application and quashed and set aside the order of the Board of Nominees. Hence, this petition raising similar contentions. In this petition, by order dated 25.2.2009, this Court granted status-quo qua the property.

9.1 Special Civil Application No.8193 of 2008 and Special Civil Application No.576 of 2009 both have common facts.

9.2 Mr. Mihir Joshi, learned Senior Counsel appearing with Mr. Uday Vyas, learned counsel for the petitioners, would submit that GDCR is an enabling provision and it is for controlling and regulating development and Section 117 confers right to development in accordance with the provisions of GDCR and operate in a different arena. It is further submitted that right to develop is truncated and a fetter is imposed by the bye-laws and even the right of an individual, as conferred under the

Act 1961, Rules and Regulations, is, in no manner, affected by operation of provisions of the Town Planning Act, Rules and Regulations made thereunder.

9.3 Mr. N.D. Nanavaty, learned Senior Counsel appearing with Mr. Anshin H. Desai, learned counsel for respondents, would submit that the facts are different and, when the sale deed is executed in favour of respondent No.2 for valid consideration, no objection is given by the petitioner-society for sanction of plan and shares are transferred in the name of respondent No.2 which are signed by the President and the Secretary of the Society and even commencement letter, namely, raja-chitti is granted by the Ahmedabad Municipal Corporation and when the construction is on the verge of completion, Lavad Suit is filed by the Society, therefore, the order passed therein by the Tribunal does not require any interference in exercise of power under Articles 226 and 227 of the Constitution of India.

10 In order to appreciate the rival contentions raised by the learned counsels appearing for parties, it would be appropriate to reproduce relevant provisions of the Gujarat Cooperative Societies Act, as under:

10.1 Sections, 4, 12, 13, 22(1)(2), 24, 26, 29, 30, 37 of the Act read as under:

“4. **Societies which may be registered** :- A society, which has as its object the promotion of the economic interests or general welfare of its members or of the public, *in accordance with co-operative principles*, or as society established with the object of facilitating the operations of any such society, may be registered under this Act: Provided that it shall not be registered if, in the opinion of the Registrar, it is economically unsound, or its registration may have an adverse effect upon any other society, or it is opposed to, or its working is likely to be in contravention of public policy

12. Classification of societies.:- The Registrar may classify all societies in such manner, and into such classes, as he thinks fit; and the classification

of a society under any head of classification by the Registrar shall be final.

13. Amendments of bye-laws of societies. :- (1) No amendment of the bye-laws of a society shall be valid until registered under this Act. For the purpose of registration of an amendment of the bye-laws, a copy of the amendment passed, in the manner prescribed, at a general meeting of the society, shall be forwarded to the Registrar. (2) If the Registrar is satisfied that the amendment so forwarded is not contrary to this Act or the rules, he may register the amendment: Provided that no order refusing to register the amendment shall be passed except after giving the society an opportunity of being heard. '[Provided further that the application for registration of amend- nment of bye-laws of a society shall be disposed of within sixty days from the date of its receipt.] (3) When the Registrar registers an amendment of the bye-laws of a society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence of its registration. (4) Where the Registrar refuses to register an amendment of the bye- laws of a society, he shall communicate the order of refusal, together with his reasons therefor, to the society.

22(1) ,(1) Subject to the provisions of Section 25, no person shall be admitted as a member of a society except the following, that is to say- (a) an individual, who is competent to contract under the Indian Contract Act, 1872 (IX of 1872); (b) a firm, company, '[or any other body corporate constituted under any law for the time being the force] or a society registered under the Societies Registration Act, 1860 (XXI of 1860); (c) a society registered, or deemed to be registered, under this Act; (d) the State Government; [(e) a local authority; (f) a public trust registered or deemed to have been registered under Bombay Public Trusts Act, 1850; (Bom. XXIX of 1950)]: [(g) a group of the individuals eligible under clause (a), whether incorporated or not and whether established or not by or under any law :] Provided that, the provisions of clause (a) shall not apply to an individual seeking admission to a society exclusively formed for the benefit of students of a school or college; Provided further that subject to such terms and conditions as may be laid down by general or special order [a firm or a company or other body corporate constituted under any law for the time being in force] may be admitted as a member only of such society as may be prescribed.

22(2) [(2) [held ultra-vires in Amreli Dist. Co.Op. Bank Limited (infra)] Every person seeking admission as a member of a society, if duly qualified for membership of such society under the provisions of this Act, the rules and the bye-laws of the society, may make an application to the society for membership. The society shall take decision on the application and shall communicate the decision within a period of three months from the date of the receipt of the application.]

24. Open membership.- [struck down by Amreli Dist. Co.Op. Bank Limited (infra)]

(1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act, the rules and bye-laws of such society. (2) Where the society

does not communicate any decision to a person within a period of three months from, the date of receipt by the society of his application for admission, such person shall be deemed to have become the member of such society on the expiry of the aforesaid period of three months. (3) Where a person is refused admission as a member of a society, the decision together with the reasons therefor shall be communicated in writing to such person by the society within three months from the date of receipt by the society of the application for admission made by such person. (4) Any society aggrieved by the admission of a member under sub-section (2) or any person aggrieved by the decision of the society refusing him its membership under subsection (3) may appeal to the Registrar. (5) An appeal under sub-section (4) shall be made within a period of two months from the date of communication to him of the decision of the society or, as the case may be, from the date of the expiry of the period of three months specified in sub-section (2). (6) The decision of the Registrar in appeal shall be final and shall not be called in question in any Court. (7) Nothing in this section shall apply to a society belonging to a class notified under sub-section (2) of Section 22.

26. Cessation of membership.:- A person shall cease to be a member of a society on his resignation from, the membership thereof being tendered in writing to the society and accepted by the society or on the transfer of the whole of his share or interest in the society to another member, or on his death, or removal or expulsion from the society: Provided that, the resignation of a person from the membership of a society, if such member is not in debt to the society or is not a surety for an unpaid debt due to the society, shall unless it is accepted earlier be deemed to have been accepted on the expiry of one month from the date of tendering his resignation in writing to the society.

29. Restrictions of holding on shares :- In any society, no member other than the State Government or a society, shall hold more than such portion not exceeding one fifth of the total share capital of the society as may be prescribed: Provided that the State Government may, by notification in the Official Gazette, specify in respect of any class of societies a higher maximum than one-fifth of the share capital.

30. Restrictions on transfer of share or interest :- (1) Subject to the provisions of Section 29 and sub-section (2) a transfer of, or charge on, the share or interest of a member in the capital of a society **shall be subject to such conditions as may be prescribed.** (2) A member shall not transfer any share held by him, or his interest in the capital or property of any society, or any part thereof, unless,- (a) he has held such share or interest for not less than one year; (b) the transfer or charge is made to the society, or to a member of the society, or to a person whose application for membership has been accepted by the society; and (c) **the committee has approved such transfer.**

[emphasis supplied]

37. Societies to be bodies corporate.:- A society on its registration shall be a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to acquire, hold and dispose of property, to enter into contracts, to institute and

defend suits and other legal proceeding, and to do all such things as are necessary for the purpose for which it is constituted.

Rule 12(2) of the Gujarat Cooperative Societies Rules reads as under:

“12(2). No co-operative housing society shall without sufficient cause, refuse admission to its membership to any person duly qualified therefor under the provisions of the Act. And its bye-laws to whom an existing member of such society wants to sell or transfer his plot of land or house and no such society shall without sufficient cause, refuse to give permission to any existing member thereof to sell or transfer his plot of land or house to another person who is duly qualified as aforesaid to become its member.”

Chapter IX of the Act is pertaining to procedure for deciding disputes, which includes Section 96 about nature of dispute touching the constitution, agreement or business of the society; Section 98 about settlement of dispute; and Section 99 prescribing procedure for settlement of dispute and power of Registrar, his nominee or Board of Nominees. Sections 108 to 115 of the Act provide for appointment of liquidator and dissolution of Cooperative Societies. So, overall scheme of the Cooperative Societies Act confers distinct statutory character of the cooperative societies as a 'corporate body' like a company registered under the Companies Act and, thus, the statutory scheme of the Cooperative Societies Act, 1961.

10.2 If a bird's eye view to TP Act, 1976 is taken, Chapter-II contains about development area and constitution of area development authorities. Section 3 is for the purpose of acquiring planned development of areas within the State, declared, by notification, any area in the State to be a development area and under Section 5 area development authority can be constituted after the declaration of the development area under Section 3. Under Section 6 powers have been conferred to designate a legal authority as area development authority and section 7 prescribes powers and functions of area development

authority. After the constitution of an area development authority for any development area under Section 5, the area development authority is authorized to declare such area as a development area and prepare and submit to the State Government a draft development plan and such draft development plan is open for public inspection as provided under Section 10 of the Act. Section 11 is about manner of preparation of draft development plan and section 12 prescribes functions of draft development plan and section 13 provides method and manner and particulars to be published along with draft development plan and suggestions or objections to draft development plan to be considered under section 14 and section 15 is about modifications made after publication of draft development plan. Thus, after submissions of draft development plan to the State Government for sanction as required under Section 16, the State Government may exercise powers conferred under section 17 by according sanction to such draft development plan and variation, if any, in the final development plan can be undertaken as prescribed under section 19 of the Act. Section 20 is about acquisition of land. Chapter-III provides for declaration of urban development areas and constitution of urban development authorities. Chapter-IV is for control of development and use of land included in development plans and section 26 imposes restrictions on development after publication of draft development plan under section 13 and without obtaining permission in writing of the appropriate authority and without obtaining certificate from the appropriate authority no person is entitled to carry on any development in any building or any land within limits of the area of development as such published. Section 27 permits a person to prefer an application of permission for development and an appropriate authority after after making inquiry as it thinks fit, subject to the provisions of the Act, may pass order in writing of granting the permission with or without condition or pass any specific order or may

refuse to grant the permission as provided under section 29 of the Act. So far as other sections under Chapter-IV are concerned, we are not concerned with them, at this stage. Chapter-V is pertaining to town planning scheme and Section 40 empowers the appropriate authority to make one or more town planning schemes for development area or any part thereof and while doing so regard being had to the proposal in the final development plan if any and the above factor is to be taken into consideration. The town planning scheme is to be prepared in respect of any land which is in the course of development and the land which is likely to be used for residential or commercial or industrial or for building purpose or of any land upon which construction is already made. Section 41 prescribes power of appropriate authority to resolve on declaration of intention to make scheme and Section 42 is about making and publication of draft schemes and section 43 is about power of State to require appropriate authority to make scheme. Section 44 contains draft schemes. Section 45 is about reconstitution of plots, which took place as provided under Section 45 and as per Rules prescribed under Rules of 1979. Section 48 is about power of State Government to sanction draft scheme and thereafter land vest in appropriate authority under Section 48A and town planning authority is appointed as per section 50 and after preparing contents of preliminary and final schemes, as provided under Section 52, decisions of town planning officers are final as under section 53 of the Act and as per Section 65, scheme becomes part of the Act.

10.3 Section 65 of the Act is about power of Government to sanction or refuse to sanction the scheme and effect of sanction and sub-section (3) of the above Section clearly provides that on and after the date fixed in such notification, the preliminary scheme or the final scheme, as the case may be, shall have effect as if it were enacted in this Act. Thus, such

scheme becomes the part of the Act. Section 70, Section 70-A and Section 71 are about power conferred upon the Authority to vary scheme on ground of error, irregularity or infirmity for public purpose or by another scheme. Chapter VI is about finance containing Sections 77 to 98 and Chapter VII is about levy, assessment and recovery of development charges and provisions of appeal and revision are provided in Section 103. Chapter VII contains miscellaneous provisions and, to our concern, Section 117 refers to effect of other laws. Initially, the above Section 117 read as under:

“Section 117.Effect of other laws

Notwithstanding anything contained in any other law for the time being in force-

(a) when permission for development in respect of any land has been obtained under this Act, such development shall not be deemed to be unlawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under such other law for such development has not been obtained;

(deleted by Clause (a) of Gujarat Act 2/99)

(b) When permission for such development has not been obtained under this Act, such development shall not be deemed to be lawfully undertaken or carried out by reason only of the fact that permission, approval or sanction required under such other law for such development has been obtained.”

The above Section is reproduced, since the arguments are advanced by the learned counsel for the petitioners in support of over-riding effect of the Act and the above Section has bearing on the subject, but, at the same time, clause (a) was deleted by the Gujarat Act 2 of 1999 and, therefore, only clause (b) remains in force. **Therefore, it is to be noted that clause (a) of Section 117, which earlier provided over-riding effect, is no more in the Statute.**

10.4 General Development Control Regulations [GDCR] are framed in furtherance of clause (m) of sub-section (2) of Section 12 and clause [c] of sub-section (2) of Section 13 of the Gujarat Town Planning & Urban

Development Act, 1976, as an enabling provision to control and regulate development. That, again, procedure prescribed for securing development is subject to Sections 26, 27, 28, 34 and 49 of the Act, 1976 and type of development in each land use zone is to be regulated as per zone table and type of zone and type of development have nothing to do with rights conferred under the Gujarat Cooperative Societies Act and such enabling provisions of GDCR have, therefore, no overriding effect on other laws.

10.5 Thus, Act of 1976 if perused in juxtaposition, both Acts operate in different areas. Town Planning Act, 1976 is for regulation and planned development. The Gujarat Cooperative Societies Act, 1961, Rules, Regulations and bye-laws are based on cooperative principles enumerated in the subsequent paragraphs.

10.6 The Bombay Provincial Municipal Corporations Act, 1949 [for short, 'the Act of 1949'] is enacted to provide for the establishment of municipal corporations in the City of Ahmedabad and certain other cities with a view to ensure a better municipal government of the said cities. Chapter XV of the Act of 1949 pertains to 'building regulations', more particularly Sections 253 to 263A pertain 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 issuing 'completion certificate'.

11. Now, it is necessary to consider the relevant decisions of the Apex Court, this Court and other High Courts relied on by the learned counsels appearing for the parties on the issue:

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 byelaws 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 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 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 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, 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.

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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 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 (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 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 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 Statue 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 byelaws to enable the plot-holders to construct multi-storied 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 AIR 1963 SC 1320, **Deccan Merchants Cooperative Bank Ltd vs. M/s.Dalichand Jugram Jain** and others, is about dispute between a society and a 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 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 25th 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 byelaws 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.

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 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 byelaws 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 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 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 copartnership 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-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. Cowlshaw**, 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 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 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 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."

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:

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 Vanravan 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."

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 byelaws; [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.

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 byelaw 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.**

[emphasis supplied]

14.3 In the case of **Daman Singh** (supra), the Constitution Bench of the Apex Court however held that **a member of 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.

[emphasis supplied]

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 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 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 byelaws 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 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.**

[emphasis supplied]

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.

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) 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

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 BMC 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 BMC Act.

17 In view of the law as discussed hereinabove on the basis of various decisions of the Apex Court and the High 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.

Special Civil Application Nos. 11343 of 2006

18 So far as the specific contention of Mr. P.K. Jani raised in Special Civil Application Nos. 11343 of 2006 is concerned, the land was granted in exercise of power under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 to the Society; the order dated 18.7.1968 of the District Collector, Mehsana, and N.A. permission granted under Sections 65 and 65A granted under the Bombay Land Revenue Code, 1879, on 5.12.1968, reveals conditional grant in favour of the Cooperative Housing Society only for the purpose of residential houses; the plot was allotted to a member subject to provisions of the Act, Rules and Regulations including restrictions of bye-laws 6(2), 23, 28 and 29

and permission sought for was refused by the Society for commercial purpose, therefore, the permission granted by the Authority under the Gujarat Town Planning and Urban Development Act, 1976, Rules and Regulations framed thereunder will have no effect or consequence, whatsoever, and the plot/house constructed by the society for a member for residence has to be used as per the provisions of the bye-laws for residence only and such plot or construction thereon cannot be converted for any other use including any commercial activity. Therefore, in Special Civil Application No.11343 of 2006, though the Appellate Authority in exercise of power under Section 6B(4) of the Town Planning Act has quashed and set aside the order dated 31.3.2006 of the District Collector, Mehsana, by which the right conferred upon a Member of the Cooperative Housing Society in the context of resolutions passed opposing construction of commercial in nature contrary to law is adjudicated and, to that extent, the order impugned dated 25.5.2006 is bad and illegal in the eye of law and deserves to be quashed and set aside and it is hereby set aside. It will be open for the petitioner to enforce the undertaking dated 12.9.2006 filed by the respondents at the time when the interim order was passed by this Court, since the transfer of plot by respondent No.5, who had agreed to abide by the bye-laws of the society, to respondent No.6 is contrary to the provisions of the Act, Rules, Regulations and bye-laws, and so declared and held in paragraphs 14 to 17 of this judgment. Rule is made absolute with no order as to costs.

Special Civil Application No.3854 of 2008

19 The Society is a registered Cooperative Housing Society and internal management of the Society is governed by the bye-laws as per Annexure "B" to the said petition and the said bye-law clearly provides that the members have to use the plots allotted to them only for

residential purpose and considering the decision of the Society in the Special General Meeting dated 2.9.2011 that no member is permitted to undertake any commercial activity and so reiterated in the affidavit filed by the Secretary of the Society before this Court, the decision of respondent No.2 and 3 to sell the land/plot of the society to respondent No.4, a private limited company, for setting up a MRI Center, is illegal and the decision of the Gujarat State Cooperative Tribunal in allowing revision application by quashing and setting aside the order dated 28.9.2006 passed by the Registrar of Board of Nominees Court, relying upon the provisions of the Gujarat Town Planning and Urban Development Act, 1976, Rules and Regulations framed thereunder, and the permission granted thereunder, is illegal. Hence, the order dated 31.1.2008 passed by the Gujarat State Cooperative Tribunal in Revision Application No.309 of 2006 is quashed and set aside and the matter is remanded to the Gujarat State Cooperative Tribunal with a direction to consider the revision application afresh in light of the law laid down by this Court in paragraphs 14 to 17 of this judgment. Rule is made absolute with no order as to costs.

Special Civil Application No.7750 of 2008

20 So is the case with Special Civil Application No.7750 of 2008 where sale deed dated 3.4.2007 was executed by respondent No.1 in favour of respondent No.2, which had never applied for membership of the society and, admittedly, respondent No.2 is not a member of the society, irrespective of the permission granted by the Ahmedabad Municipal Corporation, the construction for nursing home in the residential cooperative housing society contrary to the provisions of bye-law, rules and Act of 1961 is illegal.

20.1 Contention of learned counsel for the petitioner that the Apex

Court had not taken into consideration implication of Section 11 of the Transfer of Property Act while deciding the case of **Zoroastrian** Co-operative Housing Society (supra), is misconceived, in as much as, the Apex Court, in no uncertain terms, considered the provisions of Section 10 of the Transfer of Property Act and held that right conferred to a member of Cooperative Society under the bye-law will not be contrary to Section 10 of the said Act and, if the above aspect is seen with same analogy, it will mutatis mutandis apply to Section 11 of the Transfer of Property Act. Such right is subject to the law laid down by the Apex Court as above and Sections 29 and 30 of the Act 1961.

20.2 In this petition also, the decision of the Gujarat State Cooperative Tribunal dated 8.2.2008 confirming the status-quo order dated 21.9.2007 passed by the learned Board of Nominees Court, Ahmedabad, on the basis of the provisions of the Gujarat Town Planning and Urban Development Act, 1976, Rules and Regulations framed thereunder, and some observations of this Court in the writ petition, is illegal. Since the order impugned is of interim in nature, the matter is remanded to the Gujarat State Cooperative Tribunal. The order dated 8.2.2008 passed by the Gujarat State Cooperative Tribunal is quashed and set aside. The Gujarat State Cooperative Tribunal is directed to consider the revision application afresh in light of the law laid down by this Court in paragraphs 14 to 17 of this judgment. Rule is made absolute with no order as to costs.

21 Therefore, with regard to three questions raised by Mr. P.K. Jani, learned counsel for the petitioner-Society in all the above three petitions, in consonance with what is discussed and held in paragraphs 14 to 17 of this judgment, it is answered as under:

[i] In a cooperative housing society, a member cannot use land for

commercial purpose, namely, the purpose other than residence as per bye-laws, rules and provisions of the Act of 1961 irrespective of permission granted by any authority either under the Town Planning Act, GDCR or under the BPMC Act or like-wise.

[ii] When there are specific bye-laws in cooperative housing society for use of house allotted to a member for residence, land cannot be permitted to be converted into commercial use or purpose including for the purpose of establishing medical clinic, nursing home, etc.

[iii] The land was granted to cooperative housing society by the State Government in the facts of Special Civil Application No.11343 of 2006 subject to restrictions in Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948 and also under Sections 65 and 65A of the Bombay Land Revenue Code, 1879 and without removing such restrictions and permission so granted by the Competent Authority under the Bombay Tenancy and Agricultural Lands Act, 1948, and the Bombay Land Revenue Code, 1879, permission for use of commercial purpose of such land granted by the Authority under the Town Planning Act is inconsequential, when the development and use of the land allotted by the Cooperative Housing Society to the member was contrary to bye-law, rules and the provisions of the Act, 1961.

Special Civil Application No.6108 of 2008

22 In view of what is discussed and held in paragraphs 14 to 17 of this judgment, the basic contentions of the learned counsel for the petitioner based on distinct character of the Act 1961 and cooperative principles contained therein and rights conferred upon a member as well as the society accruing out of bye-law, rules and provisions of the Act 1961 are accepted and the order impugned passed by the Tribunal based on the permission granted under the provisions of the Town Planning Act

and the GDCR is illegal and deserves to be quashed and set aside.

22.1 However, as regards the submissions of learned counsel for respondent No.1 based on revised development plan and the GDCR Regulations framed under Section 17(1)[c] of the Act of 1976, regulations 2(j) and (k) define 'low-rise building' and 'high-rise building', deserve to be considered and are reproduced hereinbelow:

“(j) ‘Low rise building’ shall mean a building having height up to 16.50 mts. And having ground floor plus four floors. However, hollow plinth up to 2.8 mts and parapet on terrace up to 1.5. mts shall not be counted.

(k) ‘High rise building shall mean building other than mentioned in 2.9(j) ‘Low Rise Building’ proved the maximum permissible height shall not exceed 40 mts.”

Thus, when clear definition is given in the above Regulations, the Authorities below including the Cooperative Tribunal are duty bound to examine and address on the above factual aspect as to whether the construction is a 'low rise' or 'high rise' and, if so, such construction is to be used for commercial or residential purpose, having not considered this aspect from the above point of the view, viz. whether bye-laws of the society are in conflict with the above regulations and, admittedly, the Tribunal had not examined and considered the above aspect at any stage, the matter is to be remanded to the Tribunal by quashing and setting aside the impugned order so that a decision can be rendered on merit by applying the law laid down by this Court in paragraphs 14 to 17 of this judgment as well as factual aspects about usage of land/plot by respondent No.1 for residential and/or commercial purpose and whether such usage/development is in consonance with the bye-laws of the Society vis-a-vis regulations 2(j) and (k) defining 'low-rise building' and 'high-rise building'. This petition stands allowed accordingly. Rule is made absolute.

Special Civil Application No.8193 of 2008 and Special Civil Application

No. 576 of 2009

23 This Court is in agreement with the submissions made by Mr. Mihir Joshi, learned Senior Counsel for the petitioner-society, in as much as, GDCR are framed under the provisions of the Gujarat Town Planning and Urban Development Act, 1976, and under Section 17(1)[c], it is an enabling provision and it is for controlling and regulating development in accordance with what is contained in Section 117 of the Gujarat Town Planning and Urban Development Act, 1976, which confers right to development in accordance with the provisions of the Act and the GDCR and such right to develop is subject to the provisions of the Gujarat Cooperative Societies Act, 1961, rules, regulations and the bye-laws made thereunder and, thus, when an individual/member is conferred a distinct right under the bye-law to protect his distinct identity as a Member of the Cooperative Housing Society, such right cannot be taken away under the guise of permission either to develop the plot granted by the Competent Authority under the Gujarat Town Planning and Urban Development Act, 1976, Rules and Regulations made thereunder, or raise a construction under the Bombay Provincial Municipalities Act, by the Ahmedabad Municipal Corporation.

23.1 Even otherwise, the fact remains that Shantiniketan Cooperative Housing Society is a Registered Cooperative Housing Society and bye-law No.2 clearly provides that the objects of the Society shall be to carry on the trade of building, and buying, selling, hiring, letting and developing land in accordance with **Co-operative principles** and to establish and carry on social, recreative and educational work in connection with its tenants and the society shall have full power to do all things it deems necessary or expedient for the accomplishment of all objects specified in its bye-laws. Therefore, on the basis of issuance of share certificate or 'no objection certificate', though it is disputed by the

Society by filing affidavit that the Chairman had no such authority, the construction carried out for commercial activity even to run any nursing home or clinic will be contrary to the ethos of cooperative principles. As discussed earlier, any such construction, though, might have been permitted by the Authority under the BPMC Act, 1949 or even in consonance with the GDCR, such construction of commercial in nature is contrary to the principles of cooperation movement as embodied in the provisions of the Act of 1961, Rules and Regulations, as reproduced in the foregoing paragraphs. Further, transfer of shares of a member of Cooperative Housing Society in favour of a third person or issuing share certificate accordingly by itself will not create any right in favour of such person for usage of plot or premises for the purpose other than specified in the bye-laws [as held by the Full Bench of this Court in **Mulshanker Kunverji Gor** (supra)] since the land in any case remained with the Society only and the right of a member as an individual gets extinguished and merged with that of the Society except what is given in the bye-laws [as held by the Apex Court in **Daman Singh** (supra)]. The decision, therefore, impugned in Special Civil Application No.8193 of 2008 and Special Civil Application No. 576 of 2009, by applying the provisions of the Gujarat Town Planning and Urban Development Act, 1976, and reversing the order of status-quo granted by the Board of Nominees Court, is illegal and is hereby quashed and set aside. The matter is remanded to the Gujarat State Cooperative Tribunal. The Gujarat State Cooperative Tribunal is directed to consider the revision application afresh in light of the law laid down by this Court in paragraphs 14 to 17 of this judgment. Rule is made absolute with no order as to costs.

Special Civil Application No.8474 of 2009

24 The arguments canvassed by Mr. B.S. Patel, learned counsel for the petitioners are similar to those submissions he made while opposing Special Civil Application No.11343 of 200.

24.1 Special Civil Application No.8474 of 2009 is a case where petitioner No.1 a member of the respondent-Cooperative Housing Society, but, admittedly, petitioner No.1 entered into an agreement to sale with petitioner Nos. 2 and 3 and also issued a power of attorney in their favour. That, the permissions granted by the Competent Authority under the provisions of the Gujarat Town Planning and Urban Development Act, 1976, and the GDCR framed therein and even by the Baroda Municipal Corporation under the provisions of the Bombay Provincial Municipal Corporations Act, **are considered by the Tribunal in the context of bye-law No.11(B), approved and sanctioned by the District Registrar, Cooperative Societies, which clearly restricted and prohibited the member to use the residential house for any other purpose other than residential.** Further, the Tribunal, while considering the provisions of the Gujarat Town Planning and Urban Development Act, 1976, and the permission granted by the Baroda Municipal Corporation under the provisions of the Bombay Provincial Municipal Corporations Act, also noticed the decision of the Full Bench in the case of **Mulshanker Kunverji Gor** and others vs. **Juvansinhji Shivubha Jadeja**, XX(1) GLR 878 [supra], and the decision of the Apex Court in the case of **Zoroastrian** Co-operative Housing Society (supra), and held that the bye-law confers a distinct and special right in favour of a member of the Cooperative Housing Society and, thus, the order impugned dated 30.7.2009 passed by the Gujarat State Cooperative Tribunal is in consonance with the law laid down by this Court in paragraphs 14 to 17 of this judgment and does not require any interference by this Court. Rule is discharged with no order as to costs.

The interim relief stands vacated.

25 Consequently, there shall be no order on Civil Application No.13060 of 2010 and it stands disposed of.

(ANANT S. DAVE, J.)

26 After pronouncement of the judgment, learned counsels appearing for parties aggrieved request that this judgment may be stayed for a period of **six weeks** to enable them to approach the higher forum. The request is accepted. Order accordingly.

[swamy]

(ANANT S. DAVE, J.)

