

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26.07.2012

Date of Decision: 05.12.2012

+ W.P. (C) 3868/2012

DELHI DAYALBAGH COOP. HOUSE BUILDING SOCIETY LTD.

... ..Petitioner

Through : Mr. K.K. Sharma, Sr. Adv. with
Mr. Rajiv Bakshi, Mr. Bhanita Patowary,
Mr. Rajesh Kr. Gupta and
Ms. Sumati Sharma, Advocates.

Mr. Sanjay Jain, Sr. Adv. (Amicus Curiae)
with Ms. Ruchi Jain, Advocate.

versus

THE REGISTRAR COOPERATIVE SOCIETIES & ORS.

... .. Respondents

Through : Ms. Purnima Maheshwari,
Advocate for R – 1 / RCS.
Mr. Anil Amrit, Advocate for R–5 to R–11.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

SANJAY KISHAN KAUL, J.

1. The petitioner is a house building society and was registered with the Registrar, Co-operative Societies, Delhi (hereinafter referred to as, 'the RCS') / respondent No. 1 herein, under the provisions of the Bombay Co-operative Societies Act, 1925 (hereinafter referred

to as, ‘the BCS Act of 1925’) as extended to Delhi. On enactment of the Delhi Co-operative Societies Act, 1972 (hereinafter referred to as, ‘the DCS Act of 1972’), the provisions of the DCS Act of 1972 and the Rules framed thereunder came to govern the field. This Act was also repealed by The Delhi Co-operative Societies Act, 2003 (hereinafter referred to as, ‘the said Act’) as amended by The Delhi Co-operative Societies (Amendment) Act, 2006 (hereinafter referred to as, ‘the Amending Act of 2006’), which now governs the field along with The Delhi Co-operative Societies Rules, 2007 (hereinafter referred to as, ‘the said Rules’) framed thereunder.

2. The Bye-Laws of the petitioner society state the objects of the society with the main object being to acquire land either through outright purchase or on lease for construction of houses for giving to its members either on rent or on hire purchase system or by outright sale. The ‘*Objects*’ as contained in Chapter II are reproduced hereunder:

“II. OBJECTS

3. Its objects shall be :-
 - (i) to acquire either through outright purchase or on lease, land for :-
 - (a) the construction of houses for giving to members, either on rent or on hire purchase system or by outright sale;
 - (b) allotment to its members, on such terms and conditions as may be fixed by the society in accordance with these bye-laws, for the construction of houses by the members for their own use;
 - (ii) to arrange to supply, either on commission or otherwise, building material to its members for the

construction of house by them (members) for their own use on the land allotted to them (members) by the society;

- (iii) to advance loans to its members for building houses for residential purposes;
- (iv) to do all such things as are incidental or conducive to the attainment of any or all of the above objects.”

2.1. Chapter III of the Bye-Laws deals with ‘*Membership*’. Bye-Law 5(i) deals with eligibility of member. The relevant Bye-Laws are as under:

“III. MEMBERSHIP

5.(i) Any person shall be eligible to be a member of the society provided :-

- (a) he is a follower of Radha Soami faith and a member of Radha Soami Satsang affiliated to Radha Soami Sabha, Dayalbagh, Agra;

... ..

- (iv) When a person’s application has been accepted by the Committee and he has paid his admission fee and first instalment of his shares, he shall be deemed to have acquired all the rights and incurred all the obligations and liabilities of a member of the society as laid down in the Co-operative Societies Act, the Rules made thereunder and these bye-laws.”

2.2. Bye-Laws 8 and 9 provide when a person ceases to be a member and the relevant portion thereof is reproduced hereunder:

“8. A person ceased to be a member :-

- (i) on death; or

... ..

- (viii) on ceasing to be member of the Radhasoami Satsang affiliated to the Radhasoami Satsang Sabha, Dayalbagh, Agra.

9. (1) A member or the nominee or successor of an ex-member may transfer his shares to another member or applicant qualified under bye-law 5 and approved by the Committee or to a share transfer fund created by the society out of its profits and shall then be paid the value of his shares, less any sum due from him to the society. No transfer of share or interest shall, however, be made unless a member has held such shares for not less than one year.

... ..”

- 2.3. Chapter V deals with ‘*Shares*’ and the relevant Bye-Law, i.e., Bye-Law 16 reads as under:

“16. Every member may nominate a person or persons to whom on death his shares shall be transferred but no member may nominate more than one person, unless he holds more than one share and in any case unless the amount to be paid to such nominees, whether by way of whole shares or by fixed proportion of the amount available for transfer, as the case may be, is duly specified when the nominee is appointed, and he shall attest the nomination by putting his signature or thumb impression in the register of members. If not admitted to membership, the nominee or nominees shall be paid the value of the shares or interest subject to the provisions of bye-law 9. If any deduction has to be made from the shares of the deceased, and there is more than one nominee, the amount to be deducted shall be set off against the amount due to each nominee in proportion to his interest.”

- 2.4. Bye-Law 21, contained in Chapter VII dealing with ‘*General Meetings*’, provides for the duties and powers of the General Meeting, which *inter alia* entail to amend the bye-laws, subject to the sanction of the RCS as per sub-clause (9) thereof.
- 2.5. Chapter XIV is under the heading of ‘*Loans*’, which has Bye-Laws 40 to 51, deals with as to who is eligible to get a loan, in what manner, creation of mortgage, obtaining security, payment

of interest, etc. This is upto Bye-Law 49. The last three Bye-Laws of this Chapter read as under:

“50. Society shall not allot or transfer by sale or otherwise any property including plots and houses to any person except to its own members. No member shall be allotted by sale or otherwise more than one plot by the society.

50A. In case any member does not want to construct a house over the plot the same will be returned to the Society.

51. No member shall be permitted to transfer, sell or mortgage his house to any person other than the members of the society or the society itself.”

(emphasis supplied)

3. The society in view of the aforesaid was, thus, desirous of obtaining land for construction of dwelling units to be constructed for its members. However, it did not go into the market to purchase land, but surprisingly sought the assistance of the State Government, as would be apparent from the facts being set out hereinafter.
4. In order to appreciate how this land was made available by the State Government, it is necessary to refer to the provisions of The Land Acquisition Act, 1894 (hereinafter referred to as, ‘the LA Act’).
- 4.1. Part VII of the LA Act is under the heading ‘*Acquisition of Land for Companies*’. It begins with Section 38 and runs upto Section 44B. Section 38 was, however, repealed by Act 68 of 1984 w.e.f 24.09.1984. Since the issue of acquisition of land, in the present case, is pertaining to the year 1955, we have taken into account

even this provision. This Section 38 permitted a company to be authorized to enter and survey.

- 4.2. Section 38A stipulates that an industrial concern would be deemed to be a company for certain purposes and the pre-qualifying requirement is that it should ordinarily be employing not less than one hundred workmen owned by an individual or by an association of individuals and not being a company, desiring to acquire land for the erection of dwelling-houses for workmen employed by the concern or for the provision of amenities directly connected therewith.
- 4.3. In terms of Section 39, the provisions of Sections 6 to 16 and Sections 18 to 37 shall not be put in force in order to acquire land for any company under this Part unless with the previous consent of the appropriate Government and also unless the company shall have executed the agreement hereinafter mentioned. This is in the context of the fact that Section 4 of the said Act providing for publication of preliminary notification provides that where it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, the notification would be published in the Official Gazette. Similar is a phraseology used in Section 6.
- 4.4. In terms of Section 40, consent is not to be given unless the appropriate Government is satisfied either on the report of the Collector under Section 5A or by enquiry held as provided that the purpose of acquisition is to obtain land for erection of dwelling houses for workmen employed by the company or that such acquisition is needed for construction of some building or work

for the company and that work is likely to prove useful to the public.

4.5. Section 41 provides for an agreement with the appropriate Government post satisfaction of the appropriate Government providing for the details of the transaction and it is required to be published in the Official Gazette under Section 42 thereof.

4.6. Section 44A puts a restriction on transfer of land or any part thereof by the company by sale, mortgage, gift, lease or otherwise except with the previous sanction of the appropriate Government. Section 44B puts a limitation that notwithstanding anything contained in the Act, no land will be acquired under this Part except for the purpose mentioned in clause (a) of sub-section (1) of Section 40 for a private company which is not a Government company. The explanation appended thereto makes it clear that the expressions '*Private company*' and '*Government company*' shall have the meanings respectively assigned to them in the Companies Act, 1956 (hereinafter referred to as, 'the Companies Act'). The provisions contained in Sections 44A and 44B are, however, inserted by the Land Acquisition (Amendment) Act of 1962 and would, thus, not affect the transaction in question.

4.7. The expression '*company*', in turn, has been defined in Section 3(e) of the LA Act and includes a '*co-operative society*'. The definition reads as under:

“3. **Definitions.**— In this Act, unless there is something repugnant in the subject or context, —

... ..

(e) the expression "*company*" means —

- (i) a company as defined in Section 3 of the Companies Act, 1956 (1 of 1956), other than a Government company referred to in clause (cc);
- (ii) a society registered under the Societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a State, other than a society referred to in clause (cc);
- (iii) a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State, other than a co-operative society referred to in clause (cc);”

In the aforesaid context, clause (cc) referred to aforesaid defines the expression ‘*corporation owned or controlled by the State*’ and qua a co-operative society provides that the said co-operative society should be one in which not less than fifty one per cent of the paid-up share capital is held by the Central Government or by any State Government or Governments or partly by the Central Government and partly by the State Government(s).

5. It appears that it is under the aforesaid provisions that at the request of the petitioner, the State Government purportedly carried out an exercise under Part VII of the LA Act. The petitioner society made an application to the Government of Delhi to acquire land for purposes of the society under the provisions of the LA Act located in certain khasra nos. and measuring 137 bighas and 11 biswas situated at Village Chirag Delhi. The State Government, thus, proceeded under Part VII of the LA Act and is stated to have held an enquiry to satisfy itself that the land was needed for construction of housing for members of the society and other buildings for all facilities and amenities necessary for life in a colony, which work is ‘*likely to prove useful to the public*’. Since under Section 41 of the said Act, the society is required to

enter into an agreement with the Chief Commissioner, such an Agreement was executed on 12.04.1955 and was published vide a notification dated 13.05.1955 recording so. The terms and conditions of this Agreement *inter alia* stipulated payments by land owners whereupon the Chief Commissioner would convey and grant to the society the land. The land was to be used only for the purpose it was acquired, the condition applicable on the society, its successors and assignees.

6. In case of failure of the society to carry out any terms of the Agreement, the society was to relinquish and restore the land in favour of the Chief Commissioner and the land was, thus, liable to be resumed.
7. The petitioner claims that in pursuance to this Agreement, the land was acquired on 26.02.1957 and possession was handed over to the society on 11.06.1957. The society claims to have fulfilled its obligations and allotted plots within the stipulated time-limit of 15 years. The plots were given to its members on which building plans were sanctioned by Delhi Development Authority (for short, 'DDA') and the transfer documents in favour of the members were executed. Peculiarly, to support the claim in the present petition, which will be discussed later, the petitioner society sought to take up a stand that the allotment of land to the petitioner society was conditional and that the document in favour of its members was captioned as Sale Deed under duress by DDA. This aspect has been raised for the first time. The Sale Deed referred to the notifications dated 17.03.1955 and 13.06.1956 of the Chief Commissioner and the Awards made in pursuance thereof acquiring the land for the colony of the society known as Soami

Nagar Colony, the society being owner of the plot and the member having paid all dues to the society and the members having agreed to abide by the rules and Bye-Laws of the society in force, the purchaser member to construct a house within two years after execution of the Sale Deed. The Sale Deed transfers and conveys to the member, his/her heirs and assignees all rights of plots to hold the same forever. Clauses 2 and 3 of the Sale Deed read as under:

“2. The purchaser member will continue to be the member of the vendor society. If the purchasing member proposes to sell or transfer his house or plot, he/she undertakes to sell or transfer it to or through the society. If the society does not purchase the house within six months at the prevailing market price, the member will be at liberty to dispose it off as he/she likes.

3. The successor will have also to be a member of the Vendor Society. If he/she does not become a member of the society, he/she shall sell the house or plot to or through the society at the prevailing market price. If the society does not purchase the house within six months, the successor will be at liberty to own it as any other member or dispose it off as he/she likes.”

(emphasis supplied)

The aforesaid two clauses are stated to be in compliance with Bye-Law 51, noticed hereinabove, which provides that no member shall be permitted to transfer, sell or mortgage his house to any person other than the members of the society or the society itself. The aforesaid clause 2 of the Sale Deed is stated to confer a first right of purchase on the society at market price, failing which, the member may dispose of the property as he likes. Clause 3 provides that the successor will also be a member of the society and in case he/she fails to become a member, he/she shall sell the

house/plot to or through the society at prevailing market price. However, if the society does not purchase the house within six months, the successor will be at liberty to own it as any other member or dispose of as he or she likes.

8. Now coming to the particular facts of the membership in question. One Mr. K.L. Manocha was allotted plot No. B-68, Soami Nagar and a Sale Deed was executed in his favour on 30.12.1968 in the same terms. The petitioner society claims that it noticed that the original single-storey house built by the member was demolished and a multi-storey structure was being raised, but, on enquiry, it was told that new construction was being carried out by Mr. K.L. Manocha for his own needs and requirements. As to when this fact was noticed has not been mentioned in the petition. The petitioner, however, claims to have come across the advertisement in a magazine titled 'Real Property Times' in June, 2005 for sale of a basement, four bedroom apartments on each of the upper four floors of the new building constructed on the plot, which advertisement was repeated in August, 2005 by one Mr. Sanjeev Channa, the alleged builder and respondent No. 3 herein. It is at that time that on 18.06.2005, the society claims to have published a notice in 'The Hindu' notifying the public in general that residential plots in Soami Nagar cannot be sold/transferred to persons, who are not members or who are not eligible to become members of the society in violation of the Society's Bye-Laws and the terms and conditions of the original Sale Deed and anyone doing so to the contrary would do so at his own risk and costs. In this context, reference was also made to the judgment of the Supreme Court in Zoroastrian Cooperative Housing Society Ltd.

and Anr. v. District Registrar, Cooperative Societies (Urban) and Ors., (2005) 5 SCC 632. The society also sent a letter dated 30.10.2005 to Mr. K.L. Manocha notifying him about the legal position with respect to sale/transfer of properties in the petitioner society as also under the Agreement and Bye-Laws. This was followed by another letter dated 02.12.2005. Since no reply was received, the petitioner filed a claim petition under Section 70 of the said Act against respondents No. 2 to 4 herein for declaring the sale/transfer of the property on the plot in question by respondent No. 2 through respondents No. 3 and 4 to any non-member and without permission, as illegal and void being in violation of the Agreement, Bye-Laws and the terms of the Sale Deed and the same be cancelled and reverted back to the society. The Award was passed in favour of the petitioner and against respondent No. 2 on 01.12.2006 holding that sale/transfer was violative of clauses 2 and 3 of the Sale Deed and Bye-Law 51 and directing respondent No. 2 to hand over the property within two months to the petitioner society. No Award was passed against respondents No. 3 and 4 being non-members of the society. In pursuance to this Award, an execution petition was filed on 24.01.2007 and warrants of attachment/possession were issued on 01.11.2007. The property is stated to have been attached on 28.11.2007. It is at this stage that respondents No. 5 to 11, stated to be third-parties and claiming to be new purchasers and occupants, filed five separate appeals against the Award before the Delhi Co-operative Tribunal (hereinafter referred to as, 'the Tribunal'). On the interim prayer, stay was granted on 10.12.2007 in favour of these respondents. The petitioner society also filed an Appeal No.

66/2008 in April, 2008 challenging the Award with regard to deletion of names of respondents No. 3 and 4 with a prayer for reinstatement. The five appeals filed by respondents No. 5 to 11 as also the appeal filed by the petitioner society were heard by the Tribunal and disposed of by a common impugned order dated 06.01.2012. The appeal of the petitioner society was allowed, but the Award passed by the Arbitrator dated 01.12.2006 was set aside.

9. In the appeal, the facts pertaining to the origination of rights of respondents No. 5 to 11 were discussed. The plot in question was treated as a freehold property by the concerned parties. Mr. K.L. Manocha transferred the property in favour of Mr. Sanjeev Channa vide a Sale Deed registered on 09.09.2004. Mr. Channa then entered into a Collaboration Agreement with M/s. Jagdambe Builders Pvt. Ltd. through Mr. Suresh Kochhar, Partner of M/s. Kochhar Builders, who is respondent No. 4 herein. Sanction of the plans was obtained from the competent authority and M/s. Jagdambe Builders Pvt. Ltd. is stated to have constructed the building on the entire plot as per the plans sanctioned. It is thereafter that different portions of the constructed property have been sold to respondents No. 5 to 11 herein. The parties are seven, though appeals filed are 5 as there is common holding qua two portions. These parties are also assessed to property tax in respect of their respective portions. The Award obtained was ex-parte against Mr. K.L. Manocha, Mr. Suresh Kochhar and Mr. Sanjeev Channa and there was no prayer challenging or for setting aside the Sale Deed(s) executed by respondents No. 2 and 3 nor was there a prayer for cancellation of the registered Sale Deed(s).

Respondents No. 5 to 11, thus, pleaded that the rights in pursuance to the registered Sale Deed(s) could not be affected, especially between members and non-members, by proceedings under Section 70 of the said Act and the remedy, if any, was by a civil suit. Another fact pointed out was that the society had earlier filed a civil suit in respect of another property, but could not succeed as the plots allotted to the society were held to be freehold and, thus, transferable and alienable and these facts have been concealed by the petitioner society. The claim petition, after it was referred to arbitration, was amended and the scope is alleged to have been totally changed, which had resulted in an ex-parte Award. Respondents No. 5 to 11 claim to be *bona fide* purchasers for value and in occupation of various portions of the property constructed on the plot in question. Another plea is based on some of the Bye-Laws having become inconsistent with the provisions of the said Act and the said Rules. The property in question being freehold, there could be no restriction on the transfer and, thus, the judgment in Zoroastrian Cooperative Housing Society Ltd. and Anr.'s case (supra) was claimed to be not applicable. Reliance has been placed on an order dated 09.09.1983 of Shri N.C. Kochhar, Additional District Judge (as he then was) as well as a letter dated 15.03.1989 issued by the Secretary of the petitioner society. The order dated 09.09.1983 recorded that the land in dispute was a freehold one and there was no legal bar to the same being sold and consequently the certificate dated 15.03.1989 was issued also saying that the land was acquired through Delhi Administration on an absolute freehold basis.

10. A reference in the appeal has also been made to an Order of the Division Bench of this Court in FAO No. 168/1996 recording that the member had absolute rights over the plot No. B-19 in question therein, which under a Will devolved on the third-party and it was held that the society ceases to have any title on the plot once the Sale Deed was executed. A distinction was made between ownership of the plot and membership of the society. The appeal also referred to the law relating to co-operative societies having undergone a sea-change, especially in view of the enactment of the said Act and there could not be any clog on the title. Not only that even power of attorney transactions could result in right to get the property converted from leasehold under the amended Section 91 of the said Act. The Tribunal's attention was also drawn to Section 94 of the said Act where the Legislature in its wisdom has directed that societies like the petitioner society should be wound up after they had carried out the task. Section 91 and 94 of the said Act read as under:

“91. A member of a housing society who has sold his plot or flat on the power of attorney or agreement for sale or by sale deed, shall cease to be a member of that society from the date of the sale of plot or flat:

PROVIDED that the purchaser having registered power of attorney or registered agreement for sale or registered sale deed, as the case may be, in respect of such plot of flat, may apply for membership by paying transfer free of five hundred rupees and share money and admission fee as per the provisions of the bye-laws of the society and the committee shall grant membership to the applicant within thirty days after the submission of his application. In case of refusal by the committee, the applicant may appeal to the Registrar within thirty days and the decision of the Registrar shall be final:

PROVIDED FURTHER that no purchaser shall be entitled for more than one membership in a housing society.”

“94. House building co-operative societies which have achieved their objectives

In case of a house building co-operative society where all plots have been allotted to its members and basic civil services have been transferred to the local civic body, the Registrar shall, after giving sixty days’ notice to the committee, initiate winding up proceedings and such co-operative house building society shall be wound up:

PROVIDED that in the case of a co-operative house building society where land has been allotted on perpetual lease, before passing winding up orders the prior consent of the lessor shall be obtained:

PROVIDED FURTHER that where a house building co-operative society has been provided land to run a club, school, community centre, dispensary or community facility, etc. by the lessor, the above provision shall not apply to such a co-operative house building society, if the general body decides to run these activities for the benefits of the members and the residents.”

(emphasis supplied)

11. The stand of the petitioner society before the Tribunal was that these respondents, who had purchased various portions of the built up area, had failed to comply with the mandate of Section 79, which puts a restriction on the transfer of shares or interest of a member except the transfer to his heir or a nominee, unless previous permission of the society obtained by the transferor and the transferee applies and acquires membership of the society. There is alleged to be, thus, consequent breach of Rule 29 of the said Rules, which provides the procedure for transfer of shares.

The important aspect emphasized is the plea based on the land being a freehold. The failure to obtain prior permission and handing over occupation to third-parties being in breach of Section 79 of the said Act, it was pleaded that there was a disqualification incurred under Section 25 of the said Act for such persons to become members now.

12. The impugned order, on noticing the relevant pleas, has examined the decision of this Court in W.P. (C) No. 2136/2008 decided on 12.05.2010 relating to plot No. B-48. The original member, who was allotted the plot, passed away without any successor being nominated. The son entered into a Collaboration Agreement and when this fact came to notice of the society, a claim petition was filed with the RCS under Section 70 of the said Act. The society claimed that in other similar case also, a petition was filed under Section 70 of the said Act and in that case, the Award was made in favour of the society on 17.10.2005, but was upset by the Tribunal, which held in favour of the member. The order of the Tribunal was challenged by the petitioner society in W.P. (C) No. 6409/2008. However, qua subject matter of W.P. (C) No. 2136/2008, the claim petition was dismissed by the RCS and the appeal filed before the Tribunal also met the same fate. W.P. (C) No. 6409/2008 was decided on 28.10.2009 where the plea of the society that the plot could not be sold to anyone except the society or through the society was noticed and the Division Bench held that the validity of the documents, especially keeping in mind the third-party rights created, could only be challenged in the civil court having jurisdiction and not under the provisions of the said Act. In W.P. (C) No. 2136/2008, the endeavour of the society to

distinguish the judgment in W.P. (C) No. 6409/2008 proved futile. An SLP (C) No. 9015/2010 had been filed against the order in W.P. (C) No. 6409/2008 in which notice had been issued, but there was no stay of operation of the order impugned therein. After noticing the provisions of Section 91 of the said Act, W.P. (C) No. 2136/2008 was also dismissed. We may add that against the decision in W.P. (C) No. 2136/2008 also, SLP (C) No. 26905/2010 has been filed in which notice has been issued and interim order restraining creation of third-party interest has been passed on 11.07.2012.

13. The findings in the impugned order qua different matters are as under:
 - (1) Respondents No. 5 to 11 are *bona fide* purchasers for consideration and the society has to correct their records accordingly.
 - (2) The judgment in Zoroastrian Cooperative Housing Society Ltd. and Anr.'s case (supra) would not apply.
 - (3) The property in question is a freehold property.
 - (4) The Sale Deed(s) executed in favour of the purchasers could not be cancelled.
 - (5) Section 91 of the said Act, in fact, provides for regularization of transactions without prior permission.
 - (6) The Sale Deed(s) in favour of third-parties could not have been set aside in the arbitration proceedings.
 - (7) The basic objective of formation of the society itself has been achieved and Section 94, in fact, envisaged winding up of such society.

14. In view of the important rights of the members involved, the validity of the Bye-Laws, the judgment in Zoroastrian Cooperative Housing Society Ltd. and Anr.'s case (supra) and the said Act having come into force in Delhi, we considered it appropriate to appoint Amicus Curiae to assist this Court. We, thus, called upon Mr. Sanjay Jain, Senior Advocate to act as Amicus Curiae. We now proceed to deal with the case made out before us as also the legal principles and judgments referred to by learned counsel for the parties as well as the learned Amicus Curiae.

• **PETITIONER'S CASE:**

15. The case of the petitioner is largely predicated on its Bye-Laws more specifically Bye-Laws 5(i) and 51. In this context, we may note that Bye-Law 5(i)(g) dealing with eligibility for a person to become a member puts a restriction that a person should not be directly or indirectly dealing with purchase or sale of house either himself or through any of his dependents, while Bye-Law 51 restricts the transfer to any person other than the members of the society or the society itself. These Bye-Laws, it was submitted, have to be read in the context of the nature of the grant qua the land, which was acquired for the benefit of the petitioner society by the State Government and had restrictive clauses. It requires the society to hold the land forever. The restrictive covenants were included in the so-called Sale Deed executed by the petitioner society in favour of the members qua the plots in question and the land was liable to revert to the Chief Commissioner in case of breach by the society. Not only that, the Bye-Laws provided a scheme for the plot to be held only within

the members of the society, who were part of the Radha Soami sect.

- 15.1. The petitioner also pleaded that when the DCS Act of 1972 came into force, there was a saving clause being Section 79 qua what had transpired under the BCS Act of 1925. A similar provision was contained in Section 141 of the said Act when DCS Act of 1972 was repealed. Since the Bye-Laws were registered under BCS Act of 1925, they were stated to be preserved. Mr. K.L. Manocha is stated to have transferred the property without following the norms prescribed under Rule 34 of the DCS Rules, 1973 and the plot was purchased without the successor becoming a member of the society. The subsequent sale of five dwelling units is also without complying with the provisions of the said Act more specifically Section 79 thereof.
- 15.2. Learned counsel for the petitioner society conceded that under Section 91 of the said Act, transfer of property even through power of attorney sale was permitted, but that cannot be in breach of the Bye-Laws. The applicability of Section 94 is stated to be extraneous to the matter in issue apart from the fact that the RCS had passed an order dated 05.12.2011 rejecting such a request. We may, however, note that the same is now the subject matter of adjudication / challenge before this Court.
- 15.3. Learned counsel referred to the following judgments.
- 15.4. In State of Maharashtra and Ors. V. Karvanagar Sahakari Griha Rachana Sanstha Maryadit and Ors., (2000) 9 SCC 295, the power of the RCS to issue directions to amend Bye-Laws of the society under the Maharashtra Co-operative Societies Act, 1960 was

examined on a plea of the housing society that it seeks to completely destroy the basis of such societies. The directions were issued in respect of the tenement-ownership type of societies to amend their Bye-Laws so as to enable plot-holders to construct multi-storey buildings with more than one residential tenement on their plots and to form a society of the owners of the flats on multi-storey buildings who shall be members of the housing society and be represented by its representative in the housing society. Under the Bye-Laws, an allottee was permitted to construct a house of one tenement for his own use, but could not transfer or let out the flat without the permission of the society and there was specific prohibition to make use of the plot for any commercial purpose. The Supreme Court observed that the paramount consideration is the interest of the society and the powers could not be utilized to prejudice the interest of the society, as the directions should satisfy the requirement of interest of the society.

- 15.5. The judgment in Zoroastrian Cooperative Housing Society Ltd. and Anr.'s case (supra) is, in fact, the bedrock of the case of the petitioner society and it is claimed that the facts are apposite and identical. The attention of this Court was invited to the observations in this judgment to the effect that the right of a person to be member of a society is subject to operation of the Act, Rules and Bye-Laws applicable from time to time and, thus, a member of the society has no independent right qua the society. It may be noticed that simultaneously it was observed that if any provision is made against the constitutional scheme of things like confining membership of a society in caste, religion or creed, the

same would be opposed to public policy and hence unenforceable. A reference was made to the concept of ‘*open membership*’ and it has been observed that where a co-operative society is governed by the appropriate legislation, it will be subject to the intervention made by the concerned legislation. Thus, the legislative provision in the Act can be introduced for the purpose of elimination of a qualification for membership based on sex, religion, persuasion or a mode of life. But so long as there is no legislative intervention of that nature, it is not open to the Court to coin a theory that a particular bye-law is not desirable and would be opposed to public policy, as indicated in the Constitution of India (hereinafter referred to as, ‘the Constitution’). It was also observed that unless appropriate amendments are brought to the various Co-operative Societies Acts, incorporating a policy of this nature, no direction ought to be issued by the Court.

- **CASE OF RESPONDENTS NO. 5 to 11:**

16. Learned counsel for respondents No. 5 to 11 sought to distinguish the judgment in Zoroastrian Cooperative Housing Society Ltd. and Anr.’s case (supra) by pointing out that it pertained to the Gujarat Co-operative Societies Act, 1961, while we are concerned with the provisions of the said Act in the present case. It was submitted that even if the society was registered under the BMC Act of 1925, once the said Act is enacted, the provisions of the Bye-Laws cannot be in conflict with the provisions of the said Act. The saving clause cannot imply that what is inconsistent would also continue to exist. Special privileges were also claimed by reason

of the society there being in relation to the Parsi community, which was a minority community.

- 16.1. Learned counsel emphasized that under the said Act, a separate Chapter IX was incorporated making '*Special Provisions for Co-operative Housing Society*' and it is those provisions from Sections 73 to 94, which would govern the petitioner society. In that context, learned counsel specifically invited the attention of this Court to Section 76(4) of the said Act, which makes the right, title and interest in a plot of land or in dwelling unit in a building of the co-operative housing society including the undivided interest in common areas to be heritable and transferable immovable property within the meaning of any law for the time being in force. The provisions of Section 79(a), which requires prior previous permission of co-operative housing society to be obtained by the transferor, have to be read with Section 80, which stipulates that no co-operative housing society shall ordinarily refuse to grant its members permission for transfer of his occupancy rights unless the transferee is otherwise not qualified to be a member.
- 16.2. It was next pointed out that Section 137 of the said Act empowers the Government to make rules and the said Rules were accordingly enacted. Such rules *inter alia* can be enacted in respect of the aspects listed under sub-section (2) thereof. Clause (zzb) of sub-section (2) of Section 137 of the said Act enlists the manner of regularization of membership of persons, who have acquired property in a co-operative housing society as power of attorney holder or purchaser of property through agreement for sale and purchase subject to right of lessor and procedure for

enforcement of time-limit for conversion of property to freehold. This has to be read with Rule 104 of the said Rules, which makes special provision for regularization of occupancy rights of persons, who have acquired such rights through instrument of registered power of attorney or registered agreement for sale or registered sale deed. Sub-rule (1) of this Rule stipulates that where the draw of lots has been conducted by DDA, the purchaser may apply for membership along with the documents as mentioned in Rule 92 thereof. Sub-rule (2) of Rule 104 stipulates that provisions of Section 79(a) shall not be attracted to transactions mentioned in Section 91 prior to the date of commencement of the Amending Act of 2006, which came into force on 13.01.2007. The transaction, in the present case, having occurred prior to this date, i.e., in June, 2005, it was pleaded that the restriction on transfer of share or interest of the member as envisaged under clause (a) of Section 79 would, thus, not be applicable.

- 16.3. It was emphasized that the Award was an ex-parte Award and the Arbitrator had no jurisdiction to cancel the Sale Deed(s). It was also emphasized that the provisions of Section 94 of the said Act read with Rule 107 of the said Rules clearly provide for winding up of a house building society, which has achieved its objections. Rule 107 reads as under:

“107. Winding up of house building co-operative societies which have achieved their objectives

- (1) Every co-operative house building society at the commencement of these rules, within three hundred sixty-five days, shall furnish details pertaining to status of handing over of civic services to the local body besides the

common community facilities developed by the co-operative house building society with the approval of the lessor.

(2) In case a co-operative house building society has handed over civic services to the local body and have developed certain assets for social, cultural, educational, commercial activities, etc. with the approval of the lessor and such a co-operative house building society intends to run and manage such services or facilities for the benefit of residents of the area, it may approach the lessor after getting the proposal approved from the general body for transfer of the land to a new co-operative body either on freehold or on leasehold basis as per policy of the lessor within two years of the commencement of these rules.

(3) On receipt of the approval of the lessor to the proposal of a co-operative house building society under sub-rule (2) above, and after resuming un-allotted plots of land therein by the lessor, the Registrar shall initiate start proceedings for winding up of such a co-operative house building society.

(4) In case a co-operative house building society has land on freehold basis, the general body within three hundred sixty-five days of the commencement of these rules shall pass a resolution to request the Registrar to initiate winding up proceedings. The common assets used for social, cultural, educational, commercial activities, a proposal for transfer to a new co-operative society may also be submitted to the Registrar. While submitting the proposal, it shall be ensured that such a registration of a co-operative society does not infringe any other law applicable to such activities.”

It is pleaded that all the tests, as envisaged under sub-rule (2) of Rule 107 of the said Rules, have been satisfied and the society ought to have moved for its winding up, but has continued to perpetuate its existence only with the objective of playing an illegal role of interfering with transfer of properties, which are

held freely and absolutely. If at all, the role of the society can only be for running common facilities like a club, school, community centre, dispensary or community facility and that too has to be for the area in question.

16.3. Learned counsel also referred to the Division Bench judgment of this Court in W.P. (C) No. 4982/2008 titled 'CSIR Employees Co-operative House Building Society Ltd. v. Registrar Co-operative Societies' decided on 01.09.2008. The Bye-Laws of the society sought to restrict membership to only CSIR employees / ex-employees and, thus, it was pleaded that the society was not in a position to grant membership to those who do not fulfill the above criterion. The Division Bench was of the view that Section 91 of the said Act gave a wider scope for eligibility of membership of a housing society to cases of even registered power of attorney or agreement for sale or registered sale deed. Thus, the concept of '*sale*' was expanded. With the object of ensuring that the rights of persons, who are living in housing societies, are equally available to its occupants irrespective of the fact that they are original members or power of attorney holders. The people, who have purchased the flats in these societies, have invested their life saving and they should not be deprived of the privilege, which are available to members. Since Section 11 provides that the Bye-Laws of a society have to be consistent with the provision of the Act and the Rules made thereunder and, therefore, the Bye-Laws wherever they are inconsistent must be amended to bring them in consonance with the said Act and the said Rules.

16.4. The last aspect emphasized is that the aspect of application for membership, as being raised by the petitioner society, is only a

bogie as respondent No. 7 had applied, yet was refused membership.

- **AMICUS CURIAE'S ASSISTANCE:**

17. Learned Amicus Curiae emphasized certain aspects to be kept in mind while adjudicating the dispute, which are enumerated below:

- *Freedom to form association and freedom to attain its objectives are two different things and restrictions on alienation based on religious or sectarian beliefs have no nexus with the objective of either the co-operative movement in general or the society in question in particular.*

18. Reference, to establish the aforesaid proposition, was made to the judgment of Mahinder Narain, J. (as he then was) while penning down his opinion in Navjivan Co-operative House Building Society Ltd. v. Delhi Co-operative Tribunal and Ors., ILR 1987 Delhi 323. The relevant observations are contained in paras 16 and 17, which are reproduced hereunder:

“(16) As this case relates to the rights of members vis-a-vis Cooperative Society, it is necessary to keep the principles which have given birth to Cooperative Societies in one's mind. In a book titled "Indian Cooperative Laws vis-a-vis - Cooperative Principles" written by Shri P. E. Wearaman, the then Regional Director for South East Asia, International Cooperative Alliance, cooperative principles have been dealt with. The author of the Book says this about "Cooperative Societies" at page 2. A cooperative society is thus an association of persons or of societies, which has as its object the economic and social betterment of its members, through the satisfaction of their common economic needs by means of a common undertaking based upon mutual aid and profit-elimination, and which

conforms to the Cooperative Principles. It is stated that there are six Principles of Cooperation. The first four set out the working methods of the cooperatives and the other two states what is essential for the continued progress of the movement. All the six principles are equally important. "They form a system and are inseparable. They support and reinforce one another. They can and should be observed in their entirety by all cooperatives if they claim to belong to the Cooperative Movement" (ICA Principles Commission). The six principles are stated as follows :-

- (1) Voluntary and open membership.
- (2) Democratic control.
- (3) Limited interest on capital.
- (4) Equitable division of surplus.
- (5) Cooperative Education.

among Cooperation

(17) The principle that the membership shall be voluntary in the Cooperative Society means that :-

- (1) a person who joins a cooperative society of his own free will, and.
- (2) the society which admits a person into its membership should likewise do so voluntarily.

The principle open membership is that :-

- (1) there shall be no artificial restriction on the admission of members;
- (2) there shall be no social, political, racial or religious discrimination against persons who wish to join, and
- (3) membership shall be available to all persons who need and can make use of the society's services and are willing to accept the responsibilities of member ship."

(emphasis supplied)

19. The aforesaid Co-operative Principles have now been formally incorporated in the said Act in the First Schedule to the said Act. Section 2(g) of the said Act defines '*Co-operative Principles*' to

mean the co-operative principles specified in the Schedule to this Act, which reads as under:

“THE FIRST SCHEDULE
[Refer Section 2(g)]
CO-OPERATIVE PRINCIPLES

1. Voluntary and Open Membership

Co-operatives are voluntary organizations, open to all persons capable of using their services and willing to accept the responsibilities of membership, without discrimination on basis of gender, social inequality, racial, political ideologies or religious consideration.

2. Democratic Member Control

Co-operatives are democratic organizations controlled by their members, who actively participate in setting their policies and decision-making. Elected representatives of these co-operatives are responsible and accountable to their members.

3. Member's Economic Participation

Members contribute equitably and control the capital of their co-operative democratically. At least a part of the surplus arising out of the economic results would be the common property of the co-operatives. The remaining surplus could be utilized benefiting the members in proportion to their share in the co-operative.

4. Autonomy and Independence

Co-operatives are autonomous, self-help organizations controlled by their members. If co-operatives enter into agreement with other organizations including Government or raise capital from external sources, they do so on terms that ensure their democratic control by members and maintenance of co-operative autonomy.

5. Education, Training and Information

Co-operatives provide education and training to their members, elected representatives and employees so that they can contribute effectively to the development of their co-operatives. They also make general public, particularly

young people and leaders aware of the nature and benefits of co-operation.

6. Co-operation among co-operatives

Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through available local, regional, national and international structures.

7. Concern for community

While focusing on the needs of their members, co-operatives work for the sustainable development of communities through policies accepted by their members.”

Thus, these Co-operative Principles are required to be followed and all Bye-Laws of any society must be in consonance with the same.

20. Learned Amicus Curiae referred to the objectives for which the petitioner society was formed, which have been reproduced hereinabove. A reading of the objectives makes it clear that they are to enable and empower its members to be able to acquire dwelling units and the objects do not include in their ambit to compel its members to ensure that their successors-in-interest including legal heirs should continue to meet the eligibility criterion that was set out at the threshold stage. Since the primary object of formation of the petitioner society was of house building, the character of the society cannot be construed as religious and must be confined to house building activity. Its objectives would essentially be non-religious ceding their way to primacy of house building. If house building activity is undertaken by the religious group, the activity itself being secular in nature, the dominant purpose of the co-operative movement is house building.

- *Right to form co-operative society is a Fundamental Right under Article 19(1)(c) of the Constitution and, thus, privileges and rights must satisfy that touchstone.*

21. Article 19(1)(c) and Article 19(4) of the Constitution read as under:

“Article 19. Protection of certain rights regarding freedom of speech, etc:

(1) All citizens shall have the right –

... ..

(c) to form associations or unions;

... ..

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.”

It was pleaded that the right to form associations and unions does not include within its ambit a right construed as a Fundamental Right to form associations or unions for achieving a particular object or running a particular institution, the same being a concomitant of a Fundamental Right, but not the Fundamental Right itself. All rights to form associations and unions are subject to reasonable restrictions under Article 19(4) and, thus, the petitioner society cannot claim that it must be able to achieve the purpose for which it had come into existence due to which any interference against objectives of such achievement by a law, which is otherwise a valid law, becomes unconstitutional.

22. Learned Amicus Curiae relied upon the following judgments.
23. In Dharam Dutt and Ors. v. Union of India and Ors., AIR 2004 SC 1295, the Supreme Court in turn relied upon the observations made in Smt. Maneka Gandhi v. Union of India and Anr., (1978) 2 SCR 621, which laid down that a test, which must be applied, is whether the right claimed by the petitioner is an integral part of the named Fundamental Right or partakes some basic nature or character as the named Fundamental Right so that the exercise of such a right is in reality and substance nothing but an instance of the exercise of the named Fundamental Right. The Court further negated the argument that freedom to form unions carried with it the concomitant right that such unions should be able to fulfill the object for which they were formed by relying on All India Bank Employees' Association v. National Industrial Tribunal, (1961) IILLJ 385 SC = AIR 1962 SC 171. The true import of the right to form associations was discussed in para 19, which reads as under:

“19. The resulting position may be illustrated thus : If an association were formed for the purpose of carrying on business, the right to form it would be guaranteed by sub-clause (c) of clause (1) of Article 19 subject to any law restricting that right conforming to clause (4) of Article 19. As regards its business activities, however, and the achievement of the objects for which it was brought into existence, its rights would be those guaranteed by sub-clause (g) of clause (1) of Article 19 subject to any relevant law on the manner conforming to clause (6) of Art. 19; while the property which the association acquires or possesses would be protected by sub-clause (f) of clause (1) of Article 19 subject to legislation within the limits laid down by clause (5) of Article 19.”

24. Learned Amicus Curiae emphasized that the essential activity for which the society was formed is the housing activity, which

objective cannot be construed as a mirror image of the objective of its original members as a matter of religion or lifestyle beliefs, which, in turn, are governed by Articles 25 and 26 of the Constitution. Thus, those rights cannot be super-imposed on co-operative objectives of group housing society.

○ *The need to amend co-operative law for housing activity.*

25. The BCS Act of 1925 was made applicable to Delhi which, in turn, was repealed by the DCS Act of 1972 and ultimately the said Act in 2003 with subsequent amendments of 2006. Learned Amicus Curiae has referred to the legislative debates advocating the intention in bringing out the said Act. These include the enabling provision for power of attorney holders to become members; recognition of the fact that some time a number of members move out of the society of their own free will; irregularities in management of societies; integration of weaker sections and the development process; need to put end to defunct societies; the societies charging huge amount towards maintenance charges despite reduced scope of their functioning in view of the duties performed by local bodies qua amenities, etc. The intention of the Legislature, thus, was to make holdings in co-operative societies freehold without any onerous conditions on its transfer.

26. The Amending Act of 2006 in its Statements of Objects and Reasons specifically emphasized that the objective and role of co-operatives had undergone a sea-change during the last decade, especially in view of economic liberalization and superfast growth in various fields. Section 11 was inserted providing for bye-laws

of co-operative societies subject to provisions of the Act and the Rules made thereunder. Chapter IX provides for ‘*Special Provisions for Co-operative Housing Societies*’ from Section 73 to Section 94. Section 94, which is stated to be a sun-set clause, was enacted thereby providing for winding up of co-operative societies, which have attained their objectives. There was no parallel section in the earlier Acts. The judgment in Zoroastrian Cooperative Housing Society Ltd. and Anr.’s case (supra), based on old Acts, therefore, did not discuss or deliberate on the situation when a co-operative society may be put to an end. In fact, the said judgment itself envisaged a situation where the Legislature may intervene as it happened in the present case. Another important aspect pointed out is that there is no burden on the housing co-operative society to undertake maintenance activities as a co-operative housing maintenance society may be formed as defined under Section 74(e)(iii), which reads as under:

“74. Definitions.

... ..

(e) “co-operative housing society” means a co-operative society –

... ..

(iii) “co-operative housing maintenance society” means a co-operative society formed by the owners of dwelling units in a building for the purpose of maintenance of the building and provisions of common amenities, services, etc.;

... ..”

27. The Zoroastrian Cooperative Housing Society Ltd. and Anr.’s case (supra), thus, emphasized the need to make the Act

contemporaneous with existing circumstances. It is in view thereof it was observed in para 33 as under:

“33. ... We have co-operative societies of religious groups who believe in vegetarianism and abhor non-vegetarian food. It will be impermissible, so long as the law stands as it is, to thrust upon the society of those believing in say, vegetarianism, persons who are regular consumers of non-vegetarian food. Maybe, in view of the developments that have taken place in our society and in the context of the constitutional scheme, it is time to legislate or bring about changes in Co-operative Societies Acts regarding the formation of societies based on such a thinking or concept. But that cannot make the formation of a society like the appellant Society or the qualification fixed for membership therein, opposed to public policy or enable the authorities under the Act to intervene and dictate to the society to change its fundamental character.”

The petitioner society is not being required to change its fundamental character. There is, however, a misconception about the fundamental character, which is actually a housing activity. The Zoroastrian Cooperative Housing Society Ltd. and Anr.’s case (supra) dealt with a society formed by persons of Parsi community, admittedly a minority, which apparently did not claim the status of minority when the Constituent Assembly was debating the Constitution – the fact noticed by the Supreme Court in the said case. We are, in the present case, not concerned with such a minority community or even a religious community. It is only a sect of the mainstream Hindu religion. The legislative intervention with which the goal had to be achieved, as observed by the Supreme Court in Zoroastrian Cooperative Housing Society Ltd. and Anr.’s case (supra) has, in fact, happened when the said Act has been enacted in 2003 and amended in 2006.

- *Land being a natural resource of limited nature, it is unreasonable to put restrictions on its transfer, which may operate till foreseeable future.*
28. Learned Amicus Curiae emphasized that right of housing is recognized as a Fundamental right under Article 21 of the Constitution. In this behalf, learned Amicus Curiae drew strength from the observations in Shantistar Builders v. Narayan Khimalal Totame & Ors., AIR 1990 SC 630.
 29. Learned Amicus Curiae also referred to the deliberations in Taorima Theosophical Community Inc. v. Silver, (1983) 140 Cal. App. 3d 964, 974 = 190 Cal. Rptr. 38 (1983) where Courts of Appeal of California have deliberated on aspects of land being scarce and its transfer ought not to be restricted by unreasonable restraints. The society in question restricted the membership to persons aged 50 and older who had been members of the Theosophical Society in America for 3 years. Such persons as per statistics numbered only about 6000 in the United States and the Court, therefore, held that if the number of persons to whom the property may be transferred is so small that sales are unlikely to take place, restraint is unreasonable. These observations are pleaded to be germane on two counts:
 - (i) Deciding the yardstick on which reasonableness of restraints should be tested; and
 - (ii) Availability of ownership of a piece of land should not be limited to a small group of persons.
 30. In the aforesaid context, learned Amicus Curiae referred to the judgment of the Supreme Court in A.S. Narayana Deekshitulu v.

State of Andhra Pradesh and Ors., AIR 1996 SC 1765 where it was observed in paras 91 and 92 as under:

“91. The Court, therefore, while interpreting Articles 25 and 26 strikes a careful balance between the freedom of the individual or the group in regard to religion, matters of religion, religious belief, faith or worship, religious practice or custom which are essential and integral part and those which are not essential and integral and the need for the State to regulate or control in the interest of the community.

92. There is a difference between secularism and secularization. Secularization essentially is a process of decline in religious activity, belief, ways of thinking and in restructuring the institution. Though secularism is a political ideology and strictly may not accept any religion as the basis of State action or as the criteria of dealing with citizens, the Constitution of India seeks to synthesize religion, religious practice or matters of religion and secularism. In secularizing the matters of religion, which are not essentially and integrally parts of religion, secularism, therefore, consciously denounces all forms of super-naturalism or superstitious beliefs or actions and acts which are not essentially or integrally matters of religion or religious belief or faith or religious practices. In other words, non-religious or anti-religious practices are anti-thesis to secularism, which seeks to contribute in some degree to the process of secularization of the matters of religion or religious practices. For instance, untouchability was believed to be the part of Hindu religious belief. But human rights denounce it and Article 17 of the Constitution of India abolished it and its practice in any form is a constitutional crime punishable under Civil Rights Protection Act. Article 15(2) and other allied provisions achieve the purpose of Article 17.”

31. Learned Amicus Curiae also referred to the judgment of a learned Single Judge of the High Court of Bombay (Dr. D.Y. Chandrachud, J.) in St. Anthony's Co-operative Society Ltd.,

Mumbai v. Secretary (Co-operation and Textile Department), Mumbai and Ors., 2001 (1) Bom CR 730. In the said case, the co-operative society registered under the Maharashtra Co-operative Societies Act, 1960 sought to exclude persons other than Roman Catholics from its membership. The society assailed the decision of the State Government and the appellate authority in coming to a conclusion that the bye-laws would violate the basic precept of open membership accepted by the Act. It was observed that Section 23 of that Act embodied one of the basic principles underlying the co-operative movement, which was the principle of open membership. A reference has been made to the Commission on Co-operative Principles presided over by Prof. D.G. Karve appointed by International Co-operative Alliance. The Commission enunciated the basic principles of co-operative society as under:

“(i) Membership of a Co-operative Society should be voluntary and available without artificial restriction or any social, political, racial or religious discrimination, to all persons who can make use of its services and are willing to accept the responsibilities of membership.

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

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

32. The formation and conduct of business by a co-operative society was observed to be within the legal framework provided by the Maharashtra Co-operative Societies Act, 1960 and, thus, was subject to statutory regulation and *de hors* the statute, a right,

which would be at variance with the provisions of that Act, could not be asserted, as emphasized by the Supreme Court in Daman Singh v. State of Punjab, AIR 1985 SC 973. It was concluded that the restriction on bye-laws of the co-operative societies imposing condition of qualification restricting membership to a particular religious group would violate the principle of open membership. The co-operative housing societies provide an essential amenity to citizens, namely, amenity of housing, which itself is recognized as a Fundamental Right under Article 21 of the Constitution. In case of co-operative housing society, it is an incident of membership the right to own property or the right to at least enjoy and occupy the property. Thus, restricting the access to a co-operative housing society through members of a particular religious group was held to necessarily impose restrictions on full enjoyment of the property.

33. Learned Amicus Curiae also emphasized that the Constitution (Ninety Seventh) Amendment Act, 2011 (hereinafter referred to as, ‘the 97th Amendment Act’) amended Article 19(1)(c) in Part III of the Constitution by inserting after the words ‘*or unions*’, the words ‘*or co-operative societies*’ emphasizing the constitutional mandate qua the co-operative societies.

- **CONCLUSION:**

34. We had the benefit of elaborate submissions, the large amount of material placed before us and the able assistance of learned Amicus Curiae to formulate our opinion and what we perceive to be a very crucial aspect having far wider ramifications than just the *lis* before us. We have to, thus, not only rule on certain given

facts of the present case, but also on certain principles, which would apply where a group housing society seeks to place restrictive covenant qua the ownership and enjoyment of flats or plots by the legal heirs and successors-in-interest of the members. The members may have originally satisfied the test for membership as envisaged by the society, i.e., a certain group of people by reason of a sect or a social belief, but with passage of time, the ownership devolves on their legal heirs or is transferred further to third-parties. We are, thus, putting forth our conclusion under different heads.

○ *The nature of title of the members of the petitioner society.*

35. We have dealt with at great length qua the factual matrix of how the land was acquired by the Delhi Government for the benefit of the petitioner society. In fact, the acquisition is under Part VII of the LA Act, which provides the limited scope of acquisition of land for companies and that too for erection of dwelling units for workmen. However, the expanded definition of ‘*company*’ under Section 2(e) of the LA Act includes ‘*co-operative society*’. The purpose of acquisition, however, was for dwelling units for its members and not for any workmen. This is, however, history.
36. The petitioner society claims title arising out of the Articles of Agreement dated 12.04.1955 as published in the Gazette vide Notification dated 13.05.1955 and the subsequent acquisition, making of the Award and the placing of land at the disposal of the petitioner society.
37. The covenants of the Agreement itself show that they are not restrictive in nature, as was sought to be made out by learned

counsel for the petitioner society. This is so as the restriction burdened as per the Agreement only required that the land should be utilized for purposes for which it was acquired within 15 years and the society and its successors and assignees should use the land for purposes set out therein and for no other purpose. The purpose has been set out as construction of houses. It is nobody's case that something else, other than houses / flats, has been constructed. There has been no failure of the society or its members to carry out the terms of that Agreement, which would have required surrender of land by the society. In fact, there is no surrender of land by the society, but the rights being claimed by the society are quite different from what was set out qua the terms and conditions *inter se* the State and the society. The title in the land is '*freehold*'.

38. The plea sought to be raised on behalf of the petitioner society that the Sale Deed executed as far back as on 30.12.1968 was under duress by DDA is only stated to be rejected. No such plea was raised at an earlier stage. It is surprising that the society can go to any length to somehow deprive the citizens of this country, who are not members of a sect of religious beliefs of Hindu, of enjoyment and ownership of plots and flats acquired for valuable consideration through registered documents. Both the Agreement and the Sale Deed leave no manner of doubt that the interest is absolute and it is not a lease or a restrictive covenant, which operates. No doubt, the Sale Deed contains certain restrictive covenants as a right of first purchase and the successor to become a member of the society, but then it is a cache-22 situation – where the society is not admitting such members who do not follow their

sect, as is apparent from the rejection of the request of membership of respondent No. 7. Once an absolute right is transferred, clause 2 of the Sale Deed would be a clog on the title. The society cannot bind down the seller for six months as per that clause whereafter only the seller / owner would be at liberty to sell and dispose of the property. The market situations can change and the property would not get a proper value. Such a condition would be unconscionable and would be in violation of Section 10 of the Transfer of Property Act, 1882 (hereinafter referred to as, 'the TP Act') being a condition restraining alienation. In our view, it would also, in a sense, be violative of Section 73 of the Indian Contract Act, 1872 (hereinafter referred to as, 'the Contract Act'), as the object is to discriminate between the citizens of India qua the entitlement to own any property in the land of the petitioner's society with the unlawful object of restricting it to only a religious sect, which is not permissible. This would, in fact, be contrary to the constitutional scheme itself.

39. We have no hesitation to hold that the title in the property given to the members was '*freehold*' with the absolute right of alienation, subject to the provisions of the said Act and the said Rules, which is the governing law at present.

○ *The Co-operative Principles, statutory force under the said Act and the said Rules and the effect of Zoroastrian Cooperative Housing Society Ltd. and Anr.'s case (supra).*

40. The Co-operative Principles were set out by Mahinder Narain, J. in Navjivan Co-operative House Building Society Ltd.'s case (supra) as far back as in the year 1987. The six Principles include

‘Voluntary and Open Membership’. Thus, there can be no artificial restriction on admission of member and there would be no social, political, rational or religious discrimination against persons, who wish to join. This aspect has again been emphasized by Dr. D.Y. Chandrachud, J. in St. Anthony’s Co-operative Society Ltd., Mumbai’s case (supra). The Co-operative Principles have not just remained under the status of principles, but have acquired a statutory force under the said Act. The said Act of 2003 was enacted to bring into force a modern Co-operative Societies Act. This was further amended by the Amending Act of 2006 w.e.f. 13.01.2007. The Co-operative Principles have been defined under Section 2(g) of the said Act as those specified in the First Schedule to the said Act. The very first Principle in the First Schedule is *‘Voluntary and Open Membership’*. Thus, such voluntary and open membership has acquired a statutory character and it is not open for the petitioner society to claim that it is entitled to certain rights in the teeth of these Principles.

41. A Schedule in an Act of Parliament is a mere question of drafting and it is the legislative intent that is material. An explanation to the Schedule amounts to an explanation in the Act itself and, thus, the Schedule has such force as the Act (See Aphali Pharmaceuticals Ltd. v. State of Maharashtra, (1989) 4 SCC 378). It is in this context, in Halsbury’s Laws of England, Third Edn., Vol. 36, para 551, it was stated as under:

“To simplify the presentation of statutes, it is the practice for their subject-matter to be divided, where appropriate, between sections and Schedules, the former setting out matters of principle, and introducing the latter, and the latter containing all matters of detail. This is purely a matter of arrangement, and a Schedule is as much

a part of the statute, and as much an enactment, as is the section by which it is introduced.”

(emphasis supplied)

Thus, the Schedule may be used in construing provisions in the body of the Act. It is as much an act of legislature as the Act itself and it must be read together with the Act for all purposes of construction. Expressions in the Schedule cannot control or prevail against the express enactment and only in case of any inconsistency between the Schedule and the enactment, the enactment is to prevail and if any part of the Schedule cannot be made to correspond, it must yield to the Act.

42. The judgment in Zoroastrian Cooperative Housing Society Ltd. and Anr.’s case (supra) has to be understood in that context. There are two crucial issues why the said judgment cannot *ipso facto* apply to the present case. The first is that the observations in that judgment have to be understood in the context of the society of Parsi community. The Parsi community is undisputedly a shrinking minority community, but which voluntarily excluded itself from the benefit of the minority community as set out in the judgment. The second and the more important aspect is that in the said judgment itself, the Supreme Court noticed that there was nothing under the Act in question which precluded the formation of such society and in view of the developments that have taken place in society and in the context of the constitutional scheme, it may be time to legislate and bring changes in the Co-operative Societies Act regarding the formation of societies based on such thinking and belief, but the same has not occurred. This is not so, in the present case, where the said Act and the said Rules have

been enacted bringing into force and giving a statutory flavour to all these aspects.

43. We are, thus, of the view that it is the provisions of the said Act and the said Rules embodying the Co-operative Principles, which would be applicable.
44. Once we come to the aforesaid conclusion, the petitioner being the co-operative housing society, it is Chapter IX, which would come into play as that Chapter has been made creating '*Special Provisions for Co-operative Housing Societies*'. Section 76 forming a part of the said Chapter refers to the rights and privileges of the members on allotment of plot or dwelling units in a co-operative housing society. Sub-section (4) of Section 76 of the said Act reads as under:

“76. Rights and privileges of members on allotment of plot or dwelling unit in a co-operative housing society.

... ..

(4) The right, title and interest in a plot of land or dwelling unit in a building of the co-operative housing society (including the undivided interest in common areas and facilities) shall constitute a heritable and transferable immovable property within the meaning of any law for the time being in force:

PROVIDED that notwithstanding anything contained in any other law for the time being in force, such land or building shall not be partitioned for any purpose whatsoever.”

(emphasis supplied)

The right, title and interest in the plot of land, thus, has been made heritable and transferable. This itself, thus, leaves very little doubt

over the entitlement of the member to deal with the property in question.

45. Section 79 of the said Act puts restriction on transfer of shares or interest of a member and as per clause (a) thereof, the previous permission had to be obtained by the transferor. However, similarly, as per Section 80 of the said Act, ordinarily, such transfer is not to be refused. On the contrary, when one of the respondents, i.e., respondent No. 7 applied, such permission was refused. In this context, if Rule 104(2) of the said Rules is perused, the provisions of clause (a) of Section 79 are not to be attracted to transactions mentioned in Section 91 prior to the date of commencement of the Amending Act of 2006 for which the effective date is 13.01.2007. As noticed aforesaid, Section 91 refers to the power of attorney transactions and agreement for sale and, thus, the occasion to obtain prior permission would not arise in such power of attorney transactions, though such power of attorney transactions are recognized, if the transaction itself is prior to 13.01.2007.
46. Section 92 stipulates how the execution of the housing project would take over, while Section 93 refers to management of co-operative housing complex by co-operative societies. In the present case, there is no such complex as plots have been allotted and civil services are with the municipal authorities. Section 94, which is applicable to a house building co-operative society, where all plots have been allotted to its members and basic services have been transferred to local civil body (as in the present case). However, this is subject to two provisos and as per the second proviso if the society is carrying on activities of running a

club, school, community centre, dispensary or community facilities, then the provision will not apply. Whether the petitioner society, in the present case, in view of the second proviso is entitled to any protection or not, we are not examining as this issue is pending in a separate writ petition. Suffice to say that under Rule 107 of the said Rules, if a society has developed certain assets for social, cultural, educational, commercial activities and seeks to run and manage such services for the benefit of the residents of the area, it may approach the lessor after getting the proposal approved from the General Body for transfer of the land to new co-operative body for the said activity.

47. The aforesaid provisions under Chapter IX would, thus, apply to a co-operative housing society.

○ *The effect of registration of the petitioner society under the BCS Act of 1925 and inconsistency between the Bye-Laws and the said Act and the said Rules.*

48. The petitioner has sought to make out a case that in view of the society being registered under the BCS Act of 1925 and there being a saving clause in the succeeding DCS Act of 1972 and the said Act, the Bye-Laws will not be effected, which will be governed by the earlier Act. In our view, this is a complete misconception. A bare reading of Section 141 of the said Act would show and for that matter, even the earlier saving clause under the DCS Act of 1972 that what is sought to be protected is acts done under the BMC Act of 1925. This does not imply that if there is something under the Bye-Laws inconsistent with the provisions of the said Act as operates now, there has to be

perpetuation of those aspects. The said Act coming into force as also the Bye-Laws under the said Act, the same is a law of the land at present. Thus, if some membership has been given even on the basis of a religious sect and that has been the basis for formulation of the petitioner society, it is not that all those acts done, which will be valid, will be wiped out. This cannot, however, imply that there is continuity of acts, which at present cannot withstand the scrutiny of law on the test of there being contrary to the said Act. It is not as if the Bye-Laws are restrictively invalidated, but once the Act comes into force, certainly directions can be issued by the Registrar to bring the Bye-Laws in conformity with the present legal position.

49. We may also observe that Section 131 of the said Act provides for saving of existing co-operative societies and reads as under:

“131. Saving of existing co-operative societies.

(1) Every existing co-operative society which had been registered under the Co-operative Credit Societies Act, 1904 or under the Co-operative Societies Act, 1912, or under the Bombay Co-operative Societies Act, 1925, as was in force in Delhi, or the Delhi Co-operative Societies Act, 1972 shall be deemed to be registered under the corresponding provisions of this Act and rules framed thereunder and bye-laws thereof shall, so far as the same are not inconsistent with the express provisions of this Act, continue in force until altered or rescinded.

... ..”

(emphasis supplied)

50. The aforesaid provision, thus, itself stipulates that the existing co-operative society will be deemed to be registered under the said Act as also its Bye-Laws ‘*so far as the same are not inconsistent with the express provisions of this Act*’. Thus, it does not lie in the

mouth of the petitioner to contend that even inconsistent Bye-Laws qua the said Act would prevail.

51. It is, thus, the bounden duty of respondent No. 1 / RCS to scrutinize the Bye-Laws of the petitioner society and to the extent they are inconsistent with the said Act and the said Rules, direct amendment thereof. Such power is conferred on the RCS under Section 12(6) of the said Act. Needless to say, the RCS must ensure it performs the statutory task in this behalf.
52. In any case, even if this task has not been performed as yet, no provisions in the Bye-Laws inconsistent with the provisions of the said Act and the said Rules can have force.

○ *The nature of housing activity per se.*

53. The right to have housing has been recognized as part of Article 21 of the Constitution as already observed aforesaid. The citizens, thus, have a right to housing and they have a right to reside in any part of the country. The association formed in the form of the co-operative society was only with the objective of providing housing to its members. This is set out in the objects of the Bye-Laws of the society itself. Once that task was performed, really the objects have worked themselves out. The various members become absolute owners of their properties in question with the right to transfer them. The primary object for formulation of the society was, thus, house building, which is not a religious activity.
54. The right to form association(s) under Article 19(1)(c) of the Constitution is also subject to all reasonable restrictions under Article 19(4) of the Constitution. This has to be further

understood in the context of the 97th Amendment Act, which included formation of the co-operative society under that head. It is in that context, it has been rightly argued that a right to form association(s) does not include within its ambit the right construed as a Fundamental Right to form association(s) for achieving the particular object or running a particular institution as a concomitant of the Fundamental Right. The observations referred to aforesaid in Smt. Maneka Gandhi's case (supra) and relied upon in Dharam Dutt and Ors.'s case (supra) are, thus, apposite. That is the reason that in All India Bank Employees' Association's case (supra), the observations were made that as regards business activities of the association, the achievement for which it was brought into existence, its rights would be those guaranteed under Article 19(1)(g) of the Constitution, while the property which the association acquires or possesses would be protected under Article 19(1)(f) of the Constitution, though the right to form association(s) is protected under Article 19(1)(c) of the Constitution.

○ *The effect of land being a natural resource.*

55. Learned Amicus Curiae has rightly emphasized that in view of right of housing being recognized as a Fundamental Right under Article 21 of the Constitution and the land being a natural resource of limited nature, any restriction on transfer of the nature as one in the present case would not pass the constitutional test. The judgment of the California's Courts of Appeal in Taorima Theosophical Community Inc.'s case (supra) rightly points out that if the availability of ownership of a piece of land would be limited to a small group of persons, it is an unreasonable restraint.

56. In another judgment of the US Supreme Court in Shelley v. Kraemer, 334 U.S. 1 (1948), an African-American couple had bought a property, which was subject to a restrictive covenant under which the seller had undertaken to sell only to whites. Owners of restricted property in the same neighbourhood sued to prevent the couple from taking possession of the property. Relying on the Fourteenth Amendment, the discriminatory covenant was held not enforceable by courts.
57. In the facts of the present case, there would be a limited number of persons, who would be members of the religious sect in question. If the right to transfer is restricted to only such persons or people with such belief, it would, thus, be unreasonable restraint. The seller would never be able to get an appropriate price when the zone of the purchaser is so restricted. It is of no use for the society to state that it is willing to give market price, but then the market price itself is dependent on as to whom the property can be sold. Not only that, it is not the business of the petitioner society to indulge in sale and re-sale of property, but the objective was to develop the land and transfer rights in the plot. The society, in fact, wants to become a property broker and earn profit from the land, which is not permissible.
58. In the end, we must observe that our country has the benefit of diversity in cultures, religious and social beliefs. It is always said that there is unity in this diversity. However, recently pernicious tendencies have raised their heads raising disputes based on caste, creed, religion, etc. This has resulted at times in tenets of particular religion, caste, sect, affecting intermingling with different sections of the society, which is required for an overall

growth of the country. If this kind of reservation for particular sects in matters of residence is permitted, we will be left with cities divided into areas depending on the religion, caste and cultural belief(s) – a wholly undesirable situation.

59. A member may originally be a believer in the Radha Soami Sect, it is not necessary his children may be so. Is their right of inheritance to be denied on account of their belief or non-belief! The answer of the petitioner would be in the affirmative, but this would amount to depriving inheritance to heirs according to statutory and traditional laws of succession as applicable. If this cannot be done, then similarly, the right of the original member or the successor-in-interest, including an heir, cannot be curtailed by restricting the right of transfer. We have already noticed that if the petitioner society seeks to act as a property broker, i.e., to arrange to whom the property is sold or purchase the property itself and indulge in property business, then such activities would be contrary to what activities the petitioner society can pursue under its Bye-Laws, apart from being violative of permissible activities under the said Act and the said Rules framed thereunder. On the one hand, the society seeks to place reliance on the provisions of Bye-Law 5(i)(g) to contend that member should not be a property dealer (the object being to have it for his own residence); while, on the other hand, it seeks to play role of a property dealer itself and that too a property dealer, who wants to get back property and re-sell it as per its own wish.
60. We, thus, conclude by holding that the impugned order and its conclusion does not suffer from any infirmity in setting aside the Arbitrator's Award and the proceedings in execution and the Bye-

Laws of the society inconsistent with the provisions of the said Act will not hold good and the RCS would take necessary action in this behalf within a period of one month from today to issue necessary directions and respondents No. 5 to 11 may apply for membership, which application would be considered in terms of the aforesaid parameters.

61. The writ petition is accordingly dismissed with costs of Rs.20,000/- in favour of respondents No. 5 to 11.

SANJAY KISHAN KAUL, J.

December 05, 2012
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VIPIN SANGHI, J.