

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3540 OF 2018

1. Navi Mumbai Co-operative Housing Federation limited, through its authorised representative Mr.K.S.S. Narayanan, registered under Maharashtra Co-operative Societies Act, 1960 having its office at 303, Big Splash, Plot Nos.78,79, Sector 17, Vashi, Navi Mumbai 400703.
2. Manmandir Co-operative Housing Society Ltd, a Housing Society registered under the Maharashtra Co-op. Societies Ltd, having its registered address at Manmandir Co-op Housing Society Ltd, Plot No.3, Sector No.19,. Nerul, Navi Mumbai 400706.
- 3 Surya Co-op. Housing Society, Plot 7 C/D, .. Petitioners
Sector, Vashi, Navi Mumbai 400703.

Versus

1. City and Industrial Development Corporation of Maharashtra Ltd, a Government Company incorporated under the Companies Act, 1956 having its registered office at Nirmal, 2nd Floor, Nariman Point, Mumbai 400021.
2. The Estate Officer, CIDCO, CBD Belapur, Navi Mumbai 400614.
3. The State of Maharashtra, through its Urban Development Dept, Mantralaya, .. Respondents
Mumbai 400032.

...

Ms. Gayatri Singh, Senior Advocate with Mr.Shreeprasad Parab for the petitioners.

Mr.G.S. Hegde, Sr. Advocate with Mr.B.B. Sharma for CIDCO.

Ms. Savita A. Parbhune, AGP for the State.

CORAM : BHARATI DANGRE &

MANJUSHA DESHPANDE, JJ

RESERVED ON: 15th JULY, 2026.

PRONOUNCED ON : 29th SEPTEMBER, 2026

JUDGMENT :- (Per Bharati Dangre, J)

1. Navi Mumbai Co-operative Housing Federation Limited, a Federation of Co-operative Housing Societies, Navi Mumbai with several members, being a legally constituted advisory body for the Co-operative Housing Societies of Navi Mumbai along with Manmandir Co-operative Housing Society and Surya Co-operative Housing Society, the two members of the Federation have approached this Court, praying for issuance of writ of mandamus, restraining the City and Industrial Development Corporation of Maharashtra Ltd, (CIDCO) from demanding transfer charges in respect of the members of the petitioner no.1 Federation along with those who are members of petitioner nos.2 and 3, who are listed at Exhibit A and B, where the allotment letter/agreement to lease and the lease deed pre-date the amendment to the New Bombay Disposal of Lands Regulations, 1975. (hereinafter referred to as ‘the Regulations’)

A declaration is also sought to the effect that the Explanation (iii) to Regulation 3(vii) of the New Bombay Disposal of Lands Regulation, 1975 inserted vide notification

dated 8/2/1990, be restricted to the exclusion of the Co-operative Housing Societies formed and registered prior to its introduction by way of amendment and therefore, not applicable to the members of such societies.

For all practical purposes, the demand letter dated 26/10/2016 for payment of transfer charges amounting to Rs.24,58,100/- issued by the respondent no.2 to the petitioner no.1 and similar demand letters issued to other similarly placed societies of petitioner no.1 Federation are sought to be quashed and set aside.

2. Rule. Rule is made returnable forthwith. Heard by consent of the parties. We have heard learned Senior Advocate Ms. Gayatri Singh for the petitioners and Mr. G.S. Hegde, Senior Advocate for CIDCO and Ms. Savita A. Parbhune, AGP for the State.

Ms. Singh by inviting our attention to the pleadings in the petition, would submit that distinct agreements to lease were executed with the various housing co-operative societies who were allotted plots and the specimen of the agreements are annexed along with the petition. It is her specific contention that neither the allotment letter nor the agreement to lease or lease deed between the petitioner's society and the CIDCO contained any restrictive conditions with regard to seeking prior permission from respondent no.1 for transfer of respective flat/share of an individual members of the Society or with regard to the payment of transfer charges for transfer of shares of

individual members and as a result they were free to transfer their flats/shares without seeking any permission and without having to pay any transfer charges.

However, it is submitted that vide notification issued by the State of Maharashtra on 8/2/1990, when the New Bombay Disposal of Lands Regulation 1975 came to be amended by inserting the explanation (iii) to Regulation no.3(vii), which contemplated that 'Transfer of Demised Land' shall include the transfer of share(s) by shareholders or members of the Society, the amount was claimed from the members of the Housing Society.

3. Petitioner no.2 Manmandir Co-operative Housing Society was issued an allotment letter on 3/2/1987 pursuant to which an agreement to lease was executed on 13/8/1987. As far as petitioner no.3 Surya Co-operative Housing Society, it was issued an allotment letter on 6/1/1980 to which an agreement to lease was executed on 4/5/1983.

4. As far as petitioner no.2 Society is concerned, it is pointed out that the lease executed prior to 8/2/1990, did not include any restrictive conditions and covenant with regard to the transfer of shares by the individual members. However, by letter dated 26/10/2016, the respondent no.2 Estate Officer made reference to the transfer charges against 27 transfer and called upon the petitioner no.2 Manmandir Co-operative Housing Society to make arrangement for payment of the same.

Similarly, as far as petitioner no.3 is concerned, the Lease Deed was executed, prior to 1/2/1990 with no restrictive clause being enforced to the aforesaid effect, it is alleged that CIDCO has been making demands for payment of transfer charges from the members/intending members of the Societies and this has constrained the petitioners to approach this Court.

5. The petition is accompanied with the noting preceding the amendment being introduced in clause (vii) of Regulation 3 of the New Bombay Disposal of Land Regulations, 1975. It is urged by learned senior counsel Ms. Singh that in absence of the aforesaid condition of transfer charges being levied upon the members before the flat could be transferred, an attempt to give retrospective effect to the amendment, is illegal *per se*, as any liability cannot be fastened upon the members of the petitioner Societies which was not part of their Deed of Lease or even the allotment letter.

Ms. Singh is very specific in her submission that she is conscious of the position that after the amendment was effected, this stipulation would apply, but according to her, prospectively and all those Lease Deeds which are executed after the said date, would be bound by the said clause.

6. It is submitted by Ms. Singh, that there was no restriction upon the transfer of the flat by an individual member and even the Model Bye-Laws of 2000, which contemplated that before transfer of shares by individual members, approval of the Authority should be taken, came into force only in 2000 and

this was replicated in the Bye-laws of 2014. According to her, there are three types of Standard Transfer Charges that a new comer has to pay to the Society, which form part of the Bye-laws even prior to 2000, and this included the entrance fee, as well as the payment of transfer fee to Society mentioned in Bye-law 38(vii) and payment of premium to be paid to a new member of Society which rate was fixed by the Government as per Bye-law 38(ix) and this rate was fixed from time to time by the State Government. According to her, this premium is not to be confused with the premium to be paid by Lessee (Society) to the Lessor (CIDCO), which is a one time payment. In addition to the premium, according to Ms. Singh, the Society is required to pay yearly rent in accordance with the Lease agreement, and as per the contract that is entered which, of course is not a part of the Bye-laws. She would submit that by Amendment dated 01.02.1990, CIDCO introduced payment of transfer charges by individual members for the first time which subsequently was introduced in the model Bye laws after 2000 as can be seen from Annexure 1 and 2. These transfer charges are different from the transfer charges that a new member has to pay the Society, these transfer charges being fixed by CIDCO and this is evident from the notice issued by CIDCO for the first time dated 26/10/2016 which is annexed at Exhibit 'O'. The notice though issued in the year 2016 covers the period even prior to 01/02/1990 in regards to individual transfers but according to her, details have been produced nor served on Petitioner

Societies regarding the transfer charges payable and the period from which they became payable. No notices similar to that issued to Petitioner No.2 have been issued to other Petitioner Societies is the contention. She submit that CIDCO was clearly aware that no transfer charges could be levied prior to 01.02.1990 and here no such notices were issued.

She would submit that if the demand and claim of CIDCO is accepted, then the individual members would be liable to pay transfer charges even for the date prior to 1/2/1990 and this would detrimentally affect their interest.

7. Contesting the submissions advanced by the learned senior counsel, Mr. Hegde, representing CIDCO would place reliance upon the affidavit in reply filed on behalf of CIDCO for opposing the admission.

He would submit that CIDCO is a Government Company incorporated under the Companies Act and the Government of Maharashtra with an intent to decongest the area of Greater Mumbai and to upgrade its civic amenities, decided to create a new town across Thane Creek and in exercise of powers under sub-section (1) of Section 113 of the MRTP Act, has notified the area for the New Town - Navi Mumbai. Further, in exercise of powers under sub-section 3A of Section 113 of the MRTP Act, CIDCO was appointed as the "New Town Development Authority" for Navi Mumbai and since then, it is functioning as statutory agent of the State Government for the development of Navi Mumbai. He would submit that in furtherance, the

Government has acquired all privately held lands within the notified area and vested it along with the government lands to CIDCO and authorised it to grant lands on lease for a defined term in accordance with its Land Disposal Regulations in force from time to time.

It is thus submitted by Mr. Hegde that the Authority is the statutory agent of the State Government and has framed Land Disposal Regulations with previous approval of the State Government styled as “New Bombay Disposal of Land Regulations, 1975” and which was substituted by the Navi Mumbai Disposal of Lands (Amendment) Regulations 2008 which is currently in force. The Regulations, according to Mr. Hegde, specify the process and the terms and conditions for grant of lease of plots and apartments in Navi Mumbai and all lands by CIDCO are disposed off in accordance with the same.

The reply affidavit is accompanied with an agreement to lease dated 13/8/1987 executed between CIDCO and petitioner no.2, and according to Mr.Hegde, clause 7A expressly provide that lease of the land is subject to the provisions of Section 118 of the MRTP Act, 1966 and the rules and regulations made thereunder, including the Regulations, 1975 and the said clause 7A read thus :-

“It is hereby agreed and declared by and between the parties hereto that the Corporation has agreed to lease the said land to the Licensee and the Licensee has agreed to have such lease upon the terms and conditions contained herein and subject to Section 118 and other applicable provisions of the Maharashtra Regional and Town Planning Act, 1966 (Maharashtra Act XXXVII of 1966) and rules and regulations

made thereunder including the New Bombay Disposal of Lands Regulations 1975 for the time being in force.”

It is the contention of Mr.Hegde that from 8/2/1990, where the new amended Regulations came into force, by which an explanation was inserted to clarify as to what was meant by “Transfer of the Demised Land”, it only offered a clarification regards to the transfer of the land, and according to him, there is no contradiction between the provisions contained in the Lease Deed/Agreement and the amended rules. It is his specific contention that the sale/transfer of flat/apartment in a co-operative society by a member is also covered by the said explanation, and therefore, any transfer of such flat would require approval of CIDCO. According to him, some of the members of petitioner no.1 have paid the transfer charges at the time of transfer and these charges are required to be paid in the event when there is a “transfer of flat” and not at the time of incorporation of the Society or when the land was leased/allotted and CIDCO is entitled to recover the transfer charges as per the prevailing rates which are revised every year.

8. In absence of any specific instances, as regards the petitioner nos.2 and 3 Society being cited, it is the contention of Mr.Hegde that a lock stock barrel principle cannot be applied to each and every member, and in fact, when an application was preferred by petitioner no.2 Society for execution of lease deed, it was noticed that there was a change in the members of the Society as per the records of CIDCO, inasmuch as 27 original

members of the Society had sold/transferred their respective flats/apartments and membership in the Society to new members without obtaining its prior approval and the moment the transfer is effected, the payment of transfer charges became payable.

Accordingly, by letter dated 26/10/2016, CIDCO called upon the petitioner no.2 Manmandir Co-operative Housing Society to deposit the transfer charges.

A serious objection is also raised to the maintainability of the petition through the petitioner no.1 a Federation and according to Mr. Hegde, such a representative petition without providing details filed by the Federation of the Society is not at all maintainable and therefore, he would request for dismissal of the said Writ Petition.

9. We have perused the pleadings in the Petitions. Before we appreciate the rival contentions and the reply affidavit, we must refer to the statutory framework involved.

In the wake of the Government of Maharashtra designating a site for a new town of New Bombay and appointing City and Industrial Development Corporation of Maharashtra (CIDCO) to be the New Town Development Authority, CIDCO, in exercise of powers conferred by sub-clause (a) of Section 159 of the MRTP Act, 1966, with the previous approval of the State Government published the Regulations titled as “New Bombay Disposal of Lands Regulation, 1975” which were published in the Maharashtra Government Gazette

IV-C on 26/7/1979. The Regulations applied to all lands of the Corporation and it came into force from the date of its publication in the Maharashtra Government Gazette.

Chapter III of the said Regulations set out the conditions of lease as the Corporation was empowered to dispose of plots of land on lease by incorporating conditions specified in the Regulation and this in particular, included the following :-

- (i) Term of lease;
- (ii) Payment of rents, taxes and other charges
- (iii) Payment of land revenue
- (iv) Recovery of premium or rent as land revenue
- (v) User of plot etc.

The two most important stipulations therein read thus :-

(vi) To build according to the building regulations or municipal regulations or development control rules enforced from time to time -- the lessee shall not at any time during the lease, erect any building, erection or structure on any portion of the demised land, except in accordance with the building, regulations or development control rules framed by the corporation from time to time, or the municipal regulations or any other regulations in force from time to time.

(vii) Restrictions against assignment - the lessee shall not sell, assign mortgage, underlet, or otherwise transfer wholly or partly the demised land, or his interest therein, or part wholly or partly, with the possession of the demised land or permit any person to use wholly or partly, the demised land, (hereinafter referred to as "transfer of the demised land"), PROVIDED THAT nothing contained herein shall apply if the lessee shall perform to the satisfaction of the Corporation the following conditions:-

(A) Before transferring the demised land, the lessee shall pay to the corporation one half of the difference between the declared premium and the premium paid by the lessee to the Corporation, for obtaining the lease of the demised land, subject to a minimum of Rs.1000/-.

(B) In the instrument by which the lessee shall transfer the demised land, the lessee shall impose upon the person to whom the demised land is so transferred to perform and observe to the corporation all the conditions and covenants of the lease granted to him, the Lessee."

10. The Regulations also provided for mode of disposal of land which was set out by way of public auction or tender, or by considering individual applications as the Corporation may determine.

It also set out the premium agreed to be paid by the intending lessee upon acceptance of the proposal by the Corporation.

The Regulations also contain specific provisions for grant of land for religious/educational/charitable and public purposes.

11. It is these regulations which came to be amended by inserting an explanation and we have before us the agenda note circulated before the Board of Directors of CIDCO with regards to the subject of amendment to clause (vii) of Regulation no.3 of the Regulations, 1975.

The agenda note which was forwarded recorded thus :-

“3 The power and authority of the corporation is, by virtue of sub-section(1) of section 118 of the said act, qualified by the limitation of such disposal to leases only. The lease of land or immovable property is defined by section 105 of the Transfer of property Act, 1882 as “a transfer of right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised or any other thing of value, to be rendered periodically or on specific occasions to the transferor by the transferee who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium and the money or other thing to be so rendered is called the rent. It is posited by section 10 of the Transfer of Property Act,1882 that where the land or property is transferred subject to a condition or limitation absolutely restraining the transferee from parting with or disposing of his interest in the land or property, the condition or limitation is void except in case of a lease where the condition is for the benefit of the Lessor.

4. It is in pursuance to this provision of law that the Lessor and for that matter, the corporation restricts the Lessee to transfer his leasehold interest in the land. This restriction is warranted for the benefit of the corporation where the land is leased not at its market price or premium but at a concessional rate of premium to subserve the wider interests of the society in the context of the planned development of New Bombay and the accelerated decongestion of Greater Bombay. Besides, in the inflationary economy in the country, the land values tend to rise at an extraordinary rate and such an unearned increment of value accruing to the Lessee of the corporation deserves to be mapped up by the corporation to be ploughed back in the development of New Bombay for the benefit of the community and for public purpose. This restriction has its parallel in the state govt and other authorities engaged in housing or urbanising activity.”

12. In the backdrop of the fact that the Corporation was desirous of launching its scheme of leasing land to co-operative housing societies for the purpose of affording accommodation on reasonable terms to the lower income and middle income groups or classes of the community, at a premium to be calculated at the rate of percentage of its reserve price, far less than the market price and it intended to break even the cost of its acquisition together with the cost of its urbanisation in the departmental parlance as the city development cost.

In the wake of the fact that the scheme intended to offer affordable residential accommodation, it was thought imperative for the Corporation to ensure that such a salutary object is not thwarted by unscrupulous persons or by devious methods. Therefore, it was deemed essential to ensure that the land is used by persons for whose benefit it was intended to be leased by the Corporation. However, since the Corporation had the privity of contract only with the Co-operative Housing

Societies and not with the individual members, it devised a safeguard to restrict not only the Society but also each of its constituents from parting with the benefit of the land intended for them, by applying the safeguard or device through the Society, who is in contract with the Corporation.

It is in this aforesaid contingency, the agenda stipulated thus :-

“7. The task of prohibiting a member of a co-operative housing society from transferring his share in the society and incidentally his right to occupy the tenement allotted to him by the society is formidable for the corporation for reason that such a member has no privity of contract with corporation and is not amenable to its code of conduct. The corporation is constrained to forge an extra contractual devise against him. It is only through the medium of society that corporation is entitled to regulate or restrict his freedom to transfer his share.”

To this end, it is proposed to amend clause (vii) to add explanation (iii) so as to provide as to what would constitute “transfer of the demised land” by providing where the land with or without a building erected thereon or to be erected thereon is leased to or demised unto or agreed to be leased or demised upto a company or a co-operative housing society for the purpose of providing accommodation to its shareholders or members, it shall include the transfer of a share or shares by its shareholder or member or any agreement or act or omission whatsoever of such shareholder or member which has the effect of transferring or enabling the enjoyment of such land or building or a part thereof. In the case of such transfer, the lessee being a company or as the case may be a society shall pay one

half of the difference the declared premium and the premium paid by the lessee as is allocable to the land or building or part thereof so transferred or agreed to be transferred by a shareholder or member.

13. It was also realised that the aforesaid amendment itself would not achieve the desired object but it would be necessary to include this explanation into every Agreement of lease and the Deed of lease to be made and executed between the Corporation and Lessee Society to impose contemplated obligation on the Society. Therefore, it was also directed that the Society shall amend the Bye-laws if already existing, or it shall make Bye-laws providing necessary stipulations to the following effect :-

“No member shall transfer his share in the society or part with the possession of the tenement to be allotted to him by the society or permit any person to use or occupy such tenement except securing in writing the permission from the City and Industrial Development Corporation of Maharashtra Limited and except upon the payment of additional premium at the rate determined by the said condition or covenant.”

14. This agenda received approval through a resolution passed by the Board of Directors and as a consequence thereof, a notification was published by CIDCO, thereby inserting the Explanation (iii) after Explanation (ii) to clause (vii) of Regulation 3 of Regulations of 1975 and the notification published read thus:-

“Whereas ,in exercise of the powers conferred by sub-clause (a) of clause (1) of section 159 of the Maharashtra Regional and Town Planning Act ,1966 (Mah XXXVII of 1966), the city and industrial development corporation of Maharashtra Ltd, hereinafter referred to as “the corporation” being the New Town Development Authority for the new town of New Bombay Disposal of

Land regulations, 1975, hereinafter referred to as “the said regulations”

And whereas it is considered expedient to insert the explanation (iii) after explanation (ii) to clause (vii) of regulation 3 of the said regulations, that is to say:-

“Explanation (iii) ‘transfer of the demised land’ shall where the land with or without a building erected thereon or to be erected thereon is leased to or demised unto or agreed to be leased or demised unto a company registered under the companies act, 1956 (I to 1956) or a co-operative housing society registered under the maharashtra co-operative societies Act, 1960 (Mah.act. no.XXIV of 1961) or any law for the time being in force for the registration of a corporate body for the purpose of providing accommodation to its shareholders or members, include the transfer of a share or shares by its shareholder or member or any agreement or act or omission whatsoever of such shareholder or member which has the effect of transferring or enabling the enjoyment of such land or building or a part thereof. In the case of such transfer, the lessee being a Company or as the case may be a Society shall pay one-half of the difference of the declared premium and the premium paid by the lessee as is allocable to the land or building or part thereof so transferred or agreed to be transferred by a shareholder or member and such allocation shall be with reference to the proportion which the floor space index (as defined in the General Development Control Regulations constituting the development plan for New Bombay for the time being in force)” of the land or building permitted by the corporation shall bear to such Floor space Index of the land or building or part thereof so transferred or agreed to be transferred.

And whereas, the government of Maharashtra has in exercise of its powers under sub-clause (a) of clause (1) of section 159 of the said act, read with section 21 of the Bombay General Clauses Act, 1903, granted approval to the foregoing amendment to the said Regulations.

Now, therefore, it is hereby notified for the information of public that the said regulations shall stand accordingly amended from the date of the publication of the notification in the Maharashtra Government Gazette.”

15. The aforesaid event was followed by a Government Order issued by the Urban Development Department with regard to the subject of “Allotment of land/plots to the Co-operative Housing Societies in New Bombay by CIDCO Revised policy in respect of”.

The said order in its preface set out that the Government had laid down the policy guidelines under its letter dated

28/7/1989 and since the CIDCO is making allotment of plots/lands to the Co-operative Societies, according to these policy guidelines and condition of lease prescribed under the New Bombay Disposal of Lands Regulations, 1975, as amended from time to time, and since it was noted that there is a wide difference between the market rate and concessional rate of the lands resulting into certain malpractices, abuses and therefore, a request made by the Managing Director of CIDCO was considered by the State Government to prevent such malpractices. Vide Government Order dated 17/6/1993, Managing Director of CIDCO was directed to stop giving plots/lands on concessional rate to co-operative housing societies, till preventive measures are formulated and revised policy is decided upon by the Government.

Thereafter, CIDCO was requested to stipulate appropriate conditions and submit a proposal to the Government for deciding revised policy and Government received representation from various co-operative societies to vacate the stay granted, and in exercise of the power conferred by Section 154 of the MRTP Act, the Government vacated the stay and directed CIDCO to consider the revised policy guidelines for inclusion in the lease agreement by CIDCO while making allotment of plots to the Co-operative Housing Societies.

This included various stipulations regarding lease premium charged to the co-operative housing societies and certain restraints being imposed upon the Co-operative Housing

Society to whom the plot/land is allotted by CIDCO and including the following stipulations :-

- i) Society shall utilise lands only for the purpose of constructing of residential tenements for its approved members and the lands or any part thereof shall not be utilised by the Society or by any of its members directly or indirectly for any commercial business, professional purpose;
- ii) The land or any part thereof shall not be sold, mortgaged, leased, transferred or in any other way alienated without the written previous permission of CIDCO;
- iii) Society shall not permit any of its members. to lease or sub-let or give on Leave and Licence basis, or to transfer the house/flat held by him or her without the prior written permission of the CIDCO.
- iv) Society shall not enroll any new member or substitute any member without prior written permission of the CIDCO. The transfer/handing over of the flat in the Cooperative Housing Society by the member under the instrument of Power of Attorney, without prior written permission of CIDCO will be treated as a breach of condition and the person in occupation as a Power of Attorney being an illegal occupant will be liable to be evicted.
- v) The house/flat should be occupied personally by the members as as soon they are ready for occupation and if any member does not occupy the house/flat the same shall be placed at the disposal of the CIDCO who shall arrange to pay the rent to the said member as may be determined by the CIDCO.

16. The Regulations of 1975 once again underwent Amendment by the Amendment Regulations 2008, which were made applicable to all lands and apartments of the Corporation in Navi Mumbai and the Regulations provided for conditions for disposal of plots including the conditions of lease, as stipulated in Chapter IV which included several stipulations including the restrictions against assignment of leasehold rights, restricting the lessee from selling, assigning, under-letting, or otherwise transferring the demised land or his interest therein, wholly or partly.

It is worth to note that the said regulation define the term 'Lease, Lessor and Lessee' in clause 2(ix) to convey that it shall have the same meaning assigned under Section 105 of the Transfer of Property Act.

Worth it to note that the conditions of Lease stipulated contemplated a lease to the Society and not to an individual and what is relevant to note is the clause pertaining to grant of Lease, which clearly provided that the allottee shall join in forming and registering a Company or a housing society under the provisions of the Companies Act, 1956 or a housing society under the provisions of the Maharashtra Co-operative Societies Act, 1960 or an Apartment Owner's Association under the Maharashtra Apartment Ownership Act, 1970.

Sub-clause (ii) of clause 15 of the Amended Regulation now made it imperative for the Company or the Society to include the following stipulations in the Articles of Association and Memorandum of Association in case of Company and the following stipulations in Bye-laws of the Society :-

"Every shareholder/member shall be bound by the Navi Mumbai Disposal of Lands (Amendment) Regulations, 2008 as amended from time to time during the subsistence of the Agreement for Sale made between the said Corporation & shareholder/member and also during the subsistence of the Lease Deed made between the said Corporation and the Company or Society or Apartment Owner's Association."

"No shareholder/member shall transfer his/her shares in the Company/Society or otherwise create third party interest in respect of the apartment allotted to him/her, nor the Company/Society shall give the permission to its shareholder/member for such transfer, without the prior written permission of the Corporation.

The Company/Society shall not delete or otherwise amend these Articles/By-laws.

It is only upon full payment of their respective dues to the Corporation by the allottees and on compliance by them, of all terms and conditions of Agreement for Sale executed with the Corporation, it was under an obligation to grant lease to the Company of the Society, as the case may be, and to accept the lease of the condominium for period of 60 years to be computed from the date of execution of first Agreement for Sale in respect of apartment within such condominium.

This Regulation also imposed a restriction against transfer and included the restriction imposed on the Apartment owner to the following effect :-

16. Restrictions against transfer.-(i) Except if specifically provided in a particular scheme, before the Agreement for Sale the Allottee shall not transfer the rights, benefits & interest he derives in the apartment allotted to him. Provided that in a deserving case, if the Allottee fulfills satisfactorily the terms and conditions of allotment of apartment, the Managing Director may allow such transfer only to person who fulfill the same eligibility criteria on payment of Transfer Charges as may be fixed from time to time and on execution of such documents as may be determined thereto, provided further that the person to whom such transfer is proposed is eligible to contract under the Indian Contract Act, 1872.

(ii) After the Agreement for Sale/grant of lease, the Apartment Owner shall not sell, assign, mortgage, underlet, sublease or otherwise transfer wholly or partly the apartment sold to him or his interest therein or in the Agreement for Sale or shall not part with the possession of such apartment nor shall permit any person to use wholly or partly such apartment without the prior written permission of the Managing Director, which permission shall, on request of the Apartment Owner may be granted on execution of such documents and on payment of Transfer Charges at the rate as may be determined from time to time:

Provided that in the instrument by which the apartment is proposed to be transferred, the Apartment Owner shall impose upon the Transferee full obligation to perform and observe to the Corporation the conditions and covenants of the Lease granted to the Company or to the Society, as the case may be.

Explanation:- Nothing contained herein shall apply to mortgage the apartment or any part thereof, to the Central Government, State Government, Nationalised Bank, the Life Insurance Corporation of India, the Maharashtra State Finance Corporation, an employer of the Apartment Owner or to any other financial institution as may be approved by the Corporation from time to time, provided that until the execution of Agreement for Sale, such mortgage shall only for obtaining the loan for paying the sale price of the apartment to the Corporation.

(iii) Transfer of apartment to the legal heirs:- (a) In case of demise of the Apartment Owner before the formation and registration of a Company or Society or an Association of the Apartment Owners within a condominium, the apartment shall be transferred to the legal heirs of demised Apartment Owner, as may be declared by a Court of law by the Succession Certificate or by Heirship Certificate or in case of a Will made by the demised Apartment Owner, by a probate.

(b) In cases, except those referred at (a) above, the respective Company or a Society or an Apartment Owner's Association, as the case may be, shall transfer the shares and the apartment of the demised Apartment Owner, to his/her legal heir in accordance with the provision in the Articles of Association and Memorandum of Association and Bye-laws, as the case maybe, and inform to the Corporation the decision so taken, with the details of legal heir in whose name transfer is effectuated, for enabling the Corporation to take a note thereof in its record to administer the apartment.

17. It is in the aforesaid statutory regime we must examine the claim of the petitioners.

At the outset, we must record that the petitioner no.1 is a Federation of Co-operative Housing Society and as paragraph no.1 of the petition has indicated that it has 2528 co-operative housing societies as its members.

We have before us petitioner nos.2 and 3 which are two Co-operative Housing Societies, which are the members of petitioner no.1 Federation.

While seeking the relief in the petition, it is prayed that the respondent no.1 shall not demand transfer charges in respect of Co-operative Housing Societies, in particular, petitioner nos.2 and 3 where the allotment letter, agreement to lease and lease deed executed is prior to 8/2/1990 when the amended provision in the Regulation of 1975 came into force.

A declaratory relief is also sought to the effect that the explanation (iii) is added to Regulation 3 (vii) shall be declared to have a prospective effect to the exclusion of the co-operative societies where the lease deed is executed prior to 8/2/1990.

18. We find that there are no details of the Societies enlisted at Exhibit-A, except their names. We find the list of 9 Societies where it is alleged that the Lease Deed has been entered prior to 8/2/1990 along with four other Societies which are enlisted at Exhibit-B. It is not in dispute that the amendment by way of clarification was introduced in the Regulation, may be with avowed purpose and the explanation (iii), in relation to the restrictions against assignment which prevented the Lessee to sale, assign, mortgage underlet or otherwise transfer the demised land or its interest therein or part wholly or partly or permit any person to use wholly or partly the demised land unless the following two conditions are complied with :-

(a) Before transferring the demised land, the lessee shall pay to the corporation one half of the difference between the declared premium and the premium paid by the lessee to the corporation, for obtaining the lease of the demised land, subject to a minimum of Rs.1,000/-.

(b) In the instrument by which the lessee shall transfer the demised land the lessee shall impose upon the person to whom the demised land is so transferred to perform and observe to the corporation all the conditions and covenants of the lease granted to him, the Lessee.

19. By virtue of the amendment, an explanation is added defining the term 'transfer of the demised land' and it is clarified that if with or without the building standing thereon, is leased to or demised upon a Company or a Co-operative housing society for the purpose of providing accommodation to its shareholders or members, then the said term shall include even a transfer of share or shares by its shareholders. It is further clarified that in case of such transfer, the Lessee, being the company or as the case may be, the Society, shall pay one half of the difference of the declared premium and the premium paid by the lessee as if is allocable to the land or building or part thereof so transferred or agreed to be transferred by its shareholder or a member and such allocation shall be with reference to the proportion which the FSI of the land or building permitted by the Corporation shall bear to such FSI of the land or building or part thereof so transferred or agreed to be transferred.

20. By virtue of the said amendment, when the restriction is imposed on the Lessee and there is a prohibition against assignment, unless and until the Lessee had paid to the Corporation the difference between the declared premium and the premium paid by the lessee to the Corporation when the lease deed was executed. The clarification offered by the explanation is that transfer of the demised land shall include the transfer of a share by its shareholder and it will apply to an act or omission which has the effect of transferring or enabling the enjoyment of such land or building or part thereof.

21. The arguments canvassed before us on behalf of the petitioners is, that this condition being imposed by the amendment though in form of an explanation, which offered a clarification cannot have a retrospective effect and in fact, the Lease deed which is executed between CIDCO and petitioner no.2 and 3 which forms part of the petition do not include any such restriction.

We have perused the Lease deed executed on 4/5/1983 between CIDCO and Surya Co-operative Housing Society, referred to as the 'Lessee', where it is recorded as below :

“The Lessor agreed to grant to the Lessee upon the performance and observance by the Lessee of the obligations and conditions contained in the said agreement, a lease of the piece of the land and premises (hereinafter described and WHEREAS the Lessee requested the Lessor to grant a lease before completion of construction of building/buildings in relaxation of condition no.7 of the Agreement to lease executed and whereas the lessor granted necessary permission as a special case”

The covenants of the said lease deed contain various clauses distinctly set out as below :-

To pay rent
To pay rates and taxes,
Not to excavate,
Not to erect beyond the building line
Not to build, except with the permission of the lessor.
Alterations.
To enter and inspect.
Nuisance.
User.

22. There is also another important clause captioned as ‘Not to assign’ and it has subjected to the following conditions :-

“Not to sell, assign, mortgage, underlet or otherwise transfer wholly or partly the demised premises or his/theirs/its interest therein or part wholly or partly with the possession of the demised premises or permit any person to use wholly or partly the demised premises PROVIDED thing contained herein shall apply if the lessee shall perform to the satisfaction of the Lessor the following conditions :-

(i) Before transferring the demised premises, the Lessee shall pay to the Lessor one half of the difference between the declared premium (i.e. premium calculated at such rate or rates as may be determined by the Lessor, for obtaining the lease of the demised land subject to a minimum of Rs.1,000/-.)

(ii) In the instrument by which the Lessee shall transfer the demised premises the Lessee shall impose upon the person to whom the demised premises are so transferred to perform and observe to the Lessor all the conditions and covenants of the lease granted to him including this covenant.”

23. Admittedly, in the said Lease deed, where there is a restriction on assignment, which is only imposed upon the Lessor and it do not stipulate this condition being imposed upon the member or a shareholder of the Lessor. The

explanation of the term “Transfer of the demised land” is introduced by way of an amendment and it clarify that it shall also include the transfer of share or shares by its shareholder or a member and any agreement or act of omission whatsoever of such shareholder, which has the effect of transferring or enabling the enjoyment of such demised premises or a part thereof.

It is worth to note that till explanation was introduced, what was only contemplated was the permission by the Lessor and it is only by way of amending the regulations in 2008 the restrictions against transfer was imposed, by prescribing that the Managing Director would allow such transfer, to fulfil the eligibility criteria on payment of transfer charges and sub-clause (2) of Clause 16 extended it to the Apartment owner who was required to seek written permission of the Managing Director, if he intended to sell, assign, mortgage, sub-lease or otherwise transfer the Apartment sold to him or his interest therein and such permission may be granted on payment of transfer charges, as may be determined from time to time.

This being specifically included as a part of the Regulations by the Amendment Regulations of 2008, the intention of CIDCO is evidently clear and in order to give effect to the explanation, it amended the Regulation to extend the same to flat owner. In the lease deed executed with the Society i.e. petitioner no.2, the restriction on assignment, clearly contemplated that before transferring the demised premises,

which only extended to plot of a land, the lessee was under an obligation to pay to the lessor one half of the difference between the declared premium and the premium paid by the lessee to the lessor for securing the lease, so that by selling the property, the lessee do not enrich itself and if at all, it must share the benefit with CIDCO.

24. We also noted that the Government vide its order dated 3/3/1994 exercised its power under section 154 of the MRTP Act, 1966 and directed CIDCO to consider the revised policy guidelines for inclusion in the lease agreement by CIDCO, several stipulations including that Society shall not permit any of its members to lease or sub-let or give on leave and licence basis or to transfer the house/flat held by them or her without prior written permission of CIDCO. The Society was also not to enroll any new member or substitute any member without prior written permission of CIDCO and if any member indulges into the same, it would be treated as breach of condition and a person would be liable to be evicted.

25. A conjoint reading of the amendments in the Regulation of 1975 and the order issued by the State Government is clearly reflective of the fact that the flat owners/the members of individual society/shareholder was not cast with any obligation to pay the amount upon the transfer of his unit, but the obligation was only upon the Society as per the terms and conditions of the lease and the 1975 Regulation. The transfer charges to be recovered from each shareholder/member was

not the requirement or part of the lease condition when the lease was granted in favour of the Society, but after the amendment of the Regulation with effect from 1990 as well as the further amendment of the Regulation in the year 2008, it became necessary for the Society to have this clause incorporated in the lease agreement itself, so that every member/shareholder of the Society is aware of its obligations and even on transfer of an individual flat in the Society, he shall be liable to make payment of transfer charges.

26. When we have perused the impugned order issued by CIDCO in regards to Manmandir Co-operative Housing Society on 26/10/2016, we find that there is a reference to the transfers which took place without CIDCO's permission and the transfers in the said Society were subjected to levy of transfer charges in favour of CIDCO. The letter being addressed to the Secretary of the Society, we find the Society objecting to this aspect, since this was not a condition stipulated in the lease deed. The Society has responded, and according to us, rightly, by submitting that when the lease deed was executed, on 13/8/1987, it did not contain any clause/condition for payment of transfer charges for the transfer of right/title and interest in the property and this clause was subsequently introduced by CIDCO in 1990-91. The Lease deed/agreement was never amended and as long as the lease subsisted i.e. for a period of 60 years i.e. from the date of its execution, the lease rent was remitted by the Society and therefore, the demand for payment

of transfer charges in the wake of the transfers of the individual flats in the Society is said to be unwarranted.

27. We find substance in the submission of Ms. Gayatri Singh that howsoever laudable the purport of CIDCO may be, it cannot unilaterally modify the conditions in the Lease deed, nor shall it apply the provision introduced for charging transfer fee to its shareholder or member who transfer his share/shares or does any act which has the effect of transferring his interest in the land or building or part thereof, which was the stipulation when the lease deed was executed.

It is well settled principle of interpretation that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule being a current law should govern the current activities and the Law passed today cannot apply to the events of the past.

28. In **Commissioner of Income Tax-I, New Delhi Vs. Vatika Township P. Ltd.**,¹ the Apex Court has elaborated the principles against retrospectivity by describing it as the principle of fairness and it is so set out in the following words :-

“28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have

1 2015 1 SCC page 1

been retrospectively upset. This principle of law is known as *lex prospicit non respicit* : law looks forward not backward. As was observed in *Phillips v. Eyre* [(1870) LR 6 QB 1] , a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of “fairness”, which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.* [(1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and *this legal position was conceded by the counsel for the parties.*”

29. The very said decision has also laid down the principle in construing an amendment which is introduced and whether it can be treated as clarificatory or declaratory in nature and the Hon’ble Apex Court has reproduced the exposition of law on this subject as explained by Justice G.P. Singh (in principles of statutory interpretation, 13th Edition) in the following words:-

“32. Declaratory statutes : The presumption against retrospective operation is not applicable to declaratory statutes. As stated in *Craies* [W.F. Craies, *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971)] and approved by the Supreme Court [Ed. : The reference is to *Central Bank of India v. Workmen*, AIR 1960 SC 12, para 29] :‘For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word “declared” as well as the

word “enacted”.’ But the use of the words ‘it is declared’ is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is ‘to explain’ an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language ‘shall be deemed always to have meant’ is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law.”

30. The principle of law which could be discerned from the above passage is to the effect that if the statute is curative or merely declaratory of the previous law, then retrospective operation is generally intended and the clarificatory amendment will have retrospective effect, but in absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. Therefore, if an amending clause do not seek to explain any pre-existing legislation which post some ambiguity or defect, and it do not attempt to explain the meaning of that provision, but expand its scope to bring within the main provision, certain other objects or things, which would have an adverse impact on their rights or entitlement, in that

case, definitely, it cannot be given a retrospective effect.

31. The aforesaid principle against retrospectivity apply with full force to a delegated legislation, which ordinarily will have a prospective effect as a right or liability which was created for the first time, cannot be given a retrospective effect.

In **Federation of Indian Mineral Industries Vs. Union of India**,² the Apex Court held thus :-

“26. The power to give retrospective effect to subordinate legislation whether in the form of rules or regulations or notifications has been the subject-matter of discussion in several decisions rendered by this Court and it is not necessary to deal with all of them—indeed it may not even be possible to do so. It would suffice if the principles laid down by some of these decisions cited before us and relevant to our discussion are culled out. These are obviously relatable to the present set of cases and are not intended to lay down the law for all cases of retrospective operation of statutes or subordinate legislation. The relevant principles are:

(i) The Central Government or the State Government (or any other authority) cannot make a subordinate legislation having retrospective effect unless the parent statute, expressly or by necessary implication, authorises it to do so. [Hukam Chand v. Union of India [Hukam Chand v. Union of India, (1972) 2 SCC 601] and Mahabir Vegetable Oils (P) Ltd. v. State of Haryana [Mahabir Vegetable Oils (P) Ltd. v. State of Haryana, (2006) 3 SCC 620]].

(ii) Delegated legislation is ordinarily prospective in nature and a right or a liability created for the first time cannot be given retrospective effect. (Panchi Devi v. State of Rajasthan [Panchi Devi v. State of Rajasthan, (2009) 2 SCC 589 : (2009) 1 SCC (L&S) 408])

(iii) As regards a subordinate legislation concerning a fiscal statute, it would not be proper to hold that in the absence of an express provision a delegated authority can impose a tax or a fee. There is no scope or any room for intendment in respect of a compulsory exaction from a citizen.

It is equally well settled that when an issue arises before the Court whether a statute is prospective or retrospective, the

² (2017) 16 SCC 1860

Court shall proceed to deal with the issue by keeping in mind the presumption of prospectivity articulated in legal maxim *nova constitutio futuris formam imponere debet non praeteritis* i.e. “a new law ought to regulate what is to follow, not the past”. The presumption of prospectivity operates unless shown to the contrary by express provision in the statute or is otherwise discernible by necessary implication.”

In words of Lord Blanesburg, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment’

32. Any statute or a provision in a statute which takes away or impairs vested right or creates a new obligation or impose a new duty, or attaches a new disability in respect of the transactions done in the past, must be presumed to be intended not to have a retrospective effect.

As observed in principles of statutory interpretation by Justice G.P. Singh, as a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a subordinate rule to the effect that a statute or section in it, is not to be construed as to have larger retrospective operation than its language renders necessary.”

33. If a statute or provision is intended to operate ante-date then, by an express provision, it can be so done and the presumption against retrospectivity can be rebutted by

necessary implication in case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole, otherwise, every statute or a provision in a statute shall be presumed to have a prospective operation.

When it comes to the statute prescribing compliance or formalities for effecting transfers, such a provision cannot be given a retrospective effect so as to bring within its sweep transfers made prior to their enforcement. A validity of existing contract is not affected by a posterior act making contracts of that nature void, as when a contract which was entered between the parties, the parties take their positions considering the prevailing scenario that would affect their right or liability and imposing an additional liability and denuding one of the party of the benefit which was otherwise available to it at the time when contract was entered into, by reading an amended provision into it, would be highly unfair.

34. In **Ajay Gupta and ors Vs. State of Maharashtra**,³ a decision involving The New Bombay Disposal of Lands Regulations, 1975, with reference to the disposal of Land (Amendment) Regulations 2008 in regards to its applicability to the grant of lease by CIDCO, the Division Bench of this Court in the backdrop of the fact that the allotment under the agreement of lease was to Air India as far back in 1992 for the construction of staff quarters, recorded that the allotment was not in pursuance of a scheme that was contemplated by the

³ 2012 SCC Online Bom 1026

Regulations of 2008, noted that the allotment was evidently not governed by the Regulations of 2008. As a matter of fact, the record indicated that the process had begun much prior to the publication of the amending Regulations of 2008 and even the earlier Regulations of 1999 contemplate a scheme under which allotments would be made. In this peculiar background, the Division Bench observed thus :-

“19 In the circumstances, we are of the view that the action of CIDCO in insisting upon the observance of a fifteen years' residential requirement (in the State) as a condition of eligibility for the employees of Air India was contrary to law and would have to be set aside. Independently we are of the view that having regard to the background of the case and the nature and purpose of the allotment, it would be necessary to record the undertaking which has been tendered on behalf of the Petitioners to the effect that no employee to whom an allotment is made owns more than one residential unit in Navi Mumbai, either in his or her name, or as the case may be, in the name of the spouse, or family consisting of dependent children. We accept the undertaking. We direct that in consequence CIDCO shall examine the proposals for eligibility in terms of the earlier orders of the Division Bench dated 30 June, 2010 and 9 February, 2011 and in terms of the aforesaid directions. This process shall be completed by CIDCO within a period of one month of the date on which an authenticated copy of this order is made available.”

As a result, the petition was made absolute.

35. We have also taken note of one decision delivered by this Court at Nagpur in case of **Jaikumari Amarbahadursingh & Ors Vs. State of Maharashtra**,⁴ wherein the question which fell for consideration was whether the lands which were allotted pursuant to a lease deed and when the lease condition provide for right to transfer or alienate and inheritance, and which postulated that on expiry of the lease period, the Authority will

4 2008 SCC Online Bom 951

renew the lease for further period on the same terms and conditions, but on expiry of the lease period, the Competent Authority failed to execute the requisite renewal and insisted that the petitioner should accept new conditions to be incorporated, which were prejudicial to the rights and interest of the petitioners.

It was urged that the insistence by the Authority to impose any new conditions such as putting restriction on the right to alienate the land only after taking approval of the competent authority and upon payment of unearned income, is ex-facie illegal, impermissible and *ultra vires*, whereas in law, the Authority was obliged to renew the lease on the same terms and conditions which were to be found in the former lease.

The Government placed reliance upon the resolutions issued by it from time to time and justified the insertion of new condition required to the grantee/lessee to take prior permission of the Revenue Authority before effecting transfer of the land in question at the time of renewal of lease which has already expired or likely to expire in near future. It justified imposition of condition to claim/levy unearned charges so as to legitimize and regularise the transfer of the land to the grantee/lessee.

The power of the State was justified with reference to the provisions of the Government Grants Act, 1895. It was therefore, urged that agreement was created only as a licence which was revocable at the Will of the granter and the

Government defended its action of revoking a contract as necessitated in larger public interest.

In the wake of the contesting arguments being advanced with reference to the provisions of the MLR Code, the Division Bench observed thus :-

“45. Taking over all view of the matter, we have no difficulty in accepting the claim of the petitioners that provisions enacted by the State Legislature as of now would not authorise the State Government to insert new conditions or modify any condition during the subsistence of lease period or for that matter at the time of renewal of the lease. The renewal of the lease necessarily should be on same terms and conditions as in the earlier lease except the change or revision in respect of Annual lease rent.

48. Much emphasis is placed on the observations of the Apex Court in Mangalmurti's case (supra) which has noted that the Court cannot ignore the position that when the plots were let out to the respective lessees, the lessees have paid premium. The fact remains that the earlier lease period either had expired or was likely to expire and new lease is to be entered. Significantly, the Apex Court had noted that it would be unrealistic not to take into account increase in the market value of the property. Indeed, the Apex Court added word of caution that importance of that fact should not be exaggerated and that should not be a decisive factor itself.

.....

49. To sum up, we hold that the principle stated in Mangalmurti's case (supra) that it is not open to the State Government to add new condition during the subsistence of the lease or at the time of renewal of the lease unless the conditions of the tenure so provide is binding. However, if the conditions of the grant or lease imposes such restriction, condition or limitation, obviously, that would be protected by section 3 of the Government Grants Act, 1895. In cases where such condition has been imposed, obviously, those cases will not be covered by the definition of “occupants Class-I” so as to enjoy permanent and transferable right in the land.”

36. In light of the aforesaid position emerging in law and it being applied to the facts before us, we must express that the Explanation (iii) which is added by the Amendment to the Regulations of 1975, on it being published in the Government

notification, though is projected before us as offering clarification to the main provision, in our view, cannot be construed to be explanatory or clarificatory, but not only in our view, but also in the opinion of CIDCO as well as State Government, it was a substantive provision, where fastening the liability of the members of the Cooperative Housing Society and its shareholder, who intended to transfer the share/shares or or indulge in any act which has the effect of transferring or enabling the enjoyment of such land or building or part thereof.

The amended provision specifies that in case of such a transfer, the lessee being a Company or the Society shall pay one half of the difference of the declared premium, and the premium paid by the lessee, as is allocable to the land or building or part thereof, so transferred or agreed to be transferred by a shareholder or a member, shall be with reference to the proportion which the Floor Space Index of the land or building permitted by the corporation shall bear to such of the part thereof so transferred or agreed to be transferred. It is only from 1/2/1990, the said provision is given effect to, and the occupant of a flat public/unit in the Cooperative Housing Society, who would transfer his share(s) or a member who agreed to transfer his unit so as to permit the transferee to enjoy it.

This, however, became applicable from 1/2/1990 and it is important to note that this explanation being added, amounting to a substantive provision, since it was noted that the lease

which is granted was subjected to the stipulations set out in the lease deed/agreement, and the Corporation intended to restrict the lessee to transfer his leasehold interest in the land. It was proposed that the restriction is warranted for the benefit of Corporation, when the land is leased not at its market price or premium, but at a concessional rate of premium to subserve the wider interest of the society in the context of the planned development. Since the Corporation was desirous to launch its scheme for leasing lands to Cooperative Housing Society, on reasonable terms to the lower income and middle income of the classes of the community, at a premium to be calculated at the rate of percentage of its reserve price, which was far less than market price, and it is in such contingency it was contemplated that if the lessee earns profit by transferring the land or the interest therein, in that contingency, the Corporation must safeguard its interest not only qua the Society but each of its constituents from parting with the benefit of the land intended for them. Realizing that there was no privity of contract between an individual flat holder and the Corporation, the CIDCO was quite conscious that the safeguard or device will have to be applied through the Society, as the contract is between the Society and the Corporation. It is in this background the amendment was introduced, but it was also proposed that while the Regulation is amended, it would be necessary to have the provision incorporated into every agreement of lease and the deed of lease to be made and

executed between the Corporation and the lessee Society, so as to impose upon the Society the contemplated obligation. The agenda note of CIDCO, which was placed before the Board of Directors for the purpose of bringing an amendment, clearly stipulated that the Society shall provide in its bye-laws that no member shall transfer his share in the Society or part with the possession of the tenement allotted to him by the Society or permit any person to use or occupy such tenement, except the permission in writing sought from CIDCO, and except upon payment of additional premium at the rate determined by the said condition over the covenant.

Accordingly, it was expected that the Society shall amend its bye-laws so that each member of the Society is aware of such a stipulation that it will be liable for payment of transfer fees, whenever he transfers his Apartment in any way, and in any manner.

37. A reading of the Amendment Regulations 2008, would make it clear that it, for the first time, introduced a provision incorporating conditions relating to disposal of Apartments, and specific clause 15 and 16 therein included grant of lease and restrictions against transfer, and this included the condition of permission to be sought by the Apartment owner from the Managing Director of CIDCO, and on payment of transfer charges at the rate, as may be determined from time to time.

In the wake of the aforesaid development, it can be discerned that in absence of a specific condition being included

in the Lease deeds subject to which the land was allotted to the Cooperative Housing Society, and when there was no specific provision for charging transfer fee to the members or transferring of shares in the Society without permission of CIDCO, or on receipt of premium decided by CIDCO, the imposition of the said condition as a condition of transfer of the Apartment/shares cannot be justified, as it would be amounting to giving effect to the substantive provision retrospectively.

However, we must make it clear that we are not extending the benefit to the members of the petitioner no.1 Federation, as the petition though projected to be filed in representative capacity, has failed to furnish any information about the Cooperative Housing Societies, and as to whose members have suffered such an inconvenience, in the wake of giving effect to the condition of payment of transfer fees to the Apartment holders, in the wake of the amendment to the New Bombay disposal of Lands Regulation, 1975.

It is the contention of the petitioner that the federation has 2528 cooperative housing society as its members, but we are not at all inclined to grant a blanket declaration in this regard, as we have not seen the covenants in the lease deed executed between those cooperative societies and CIDCO.

Presently, we have before us the lease deeds in respect of petitioner nos.2 and 3 and therefore we restrict the relief only qua the members of petitioner nos.2 and 3 as the Lease deeds/the lease agreement executed between the said

petitioner Society and CIDCO definitely do not permit inclusion of a condition which was not part of the lease, but in any case, as subsequent to the amendment to the Regulation of 1975 and in specific, the amendment effected in the year 2008, it is imperative for the Society to indicate such a covenant in the byelaws, which definitely will bind the members who would be liable to contribute their share upon they effecting the transfer of their unit/flat/share/shares.

We are even not extending the reliefs to those Societies which are mentioned in Exhibit A and B, and the declaration given by us that the respondent no.1 CIDCO, shall not demand transfer charges in respect of the housing societies, where the lease deed is executed prior to 08/02/1990, that is the date on which the New Bombay Disposal of Land Regulation 1975 in its amended form came into existence. Though we are not called upon to strike down the said provision, but we only issue a declaration that, looking to the facts placed before us in respect of petitioner no.2 and 3 Society, it shall have no applicability in respect of transfer of share/s or units effected in the Manmandir Cooperative Housing Society and Surya Co-operative Housing Society, and the explanation (iii) to Regulation 3 (vii) of the New Bombay Disposal of Land Regulation 1975, inserted by the notification dated 08/02/1990 shall not apply to such transfers.

38. As a result, the impugned demand letter dated 26/10/2016 addressed to petitioner no.2 Society, and such

demand being raised against members of petitioner no.3 are quashed and set aside. We make it clear that this relief shall only restrict to the demand notice for payment of charges demanded from petitioner nos.2 and 3 Society, as the agreement to lease and lease deed predate the amendment to the amendment to the regulations of 1975, which came into effect from 08/02/1990.

The petition is made absolute in the aforesaid terms.

(MANJUSHA DESHPANDE, J)

(BHARATI DANGRE, J.)