

O.A.No.139 of 2013**R. MAHADEVAN, J.**

Aggrieved by the appointment of the 4th respondent as the chief executive of the 3rd respondent society, the applicant has approached this court under section 9 of the Arbitration and Conciliation Act, 1996.

2. The case of the applicant is as follows:

The applicant is a member of the 3rd respondent society which is registered under the Multi-state Co-operative societies Act and comprises of the members, who are current and past employees of Railways of various states in India with a huge cash flow. Alleging that the appointment of the 4th respondent who was employed as a Reservation Booking Clerk with just a qualification of PUC till 28.03.2011 as illegal and malafide on the following grounds the application has been filed.

a. That the 4th respondent is age barred,

b. That the 4th respondent does not possess the required educational and other qualifications to manage the society,

c. That the selection by the board is without application of mind and at the instance and recommendation of one Mr.Kannaiah

d. That the 4th respondent has already mis-managed the funds to the tune of several crores

e. That the appointment is contrary to the procedure contemplated under the bye-laws of the society as no application was invited by giving application in local news papers and by inviting candidates from employment exchange.

3. On the above grounds, an injunction has been sought invoking section 9 of the Arbitration Act,1996 to restrain the 4th respondent from functioning as the chief executive of the 3rd respondent society.

4. Refuting the allegations, the 1st , 3rd and 4th respondents have filed their counter. The applicant has filed his reply to the counter and the 3rd and 4th respondents have filed their common rejoinder to the reply.

5. The learned counsel for the applicant relying upon the pleadings and the documents filed by him contended that the appointment of the 4th respondent is not in interest of the society but under the

compulsion of one R.Kannaiah, the chairman of the 3rd respondent society. The counsel also contended that the age of the 4th respondent at the time of appointment was 52 contrary to the prescribed age of 35. The counsel also assailed the qualification of the 4th respondent contending that he is not a graduate as contemplated under the proceedings of the Government of India dated 16.08.2011. The counsel also contended as per section 84 of the multistate co-operative societies Act, any dispute touching with the constitution, management or business of the society is arbitrable. The counsel contending that the 4th respondent is mishandling and mismanaging the funds of the society and pointed out to several instances. The counsel also relied upon the judgment of a Division Bench of this Court reported in CDJ 2014 MHC 2047 in support of his contention that the post must have been filled up by inviting applications from prospective and qualified candidates among general public and employees of the railways by advertising in news papers. Replying to the defence of the respondents that the appointment is in accordance with the regulations of the bye-laws, the learned counsel relied upon the judgment of the Apex Court in 2015 (1) SCC 192 and contended that the bye-law contrary to constitutional mandates cannot be relied upon as they are void ab initio. The counsel referring to the service regulations amended upto 03.11.97, contended that the appointment is illegal and that there was no such amendment in 2004 as contended by the respondents. The counsel also contended that the present appointment is tainted with irregularities at the instance of one

N.Kannaiah, the chairman of the 3rd respondent society. It is at his behest, the board has appointed the 4th respondent as the Chief Executive. The counsel further contended that contrary to the regulations, members are being inducted to facilitate the continuous success of the said Kannaiah. The 4th respondent who was employed in a clerical cadre is now the chief executive of the society. His salary has been increased to manifolds. The counsel also refuting the contention of the 3rd and 4th respondents that the 4th respondent was absorbed into the society as Chief Executive, contended that the 4th respondent was appointed as the Chief Executive on the very next day of his resignation from Railways and that the earlier deputation as Chief Executive is itself invalid. The counsel also pointed out that since the 1st respondent has failed to appoint an arbitrator, he has filed an application under section 11 of the Arbitration Act in O.P No 164/2013 and the same is pending. In the interest of the members of the society and to prevent the closure of the society itself, the counsel insisted that injunction as sought may be granted.

6. Per contra,

the Learned standing counsel for the 1st respondent relying upon section 49 of the Multistate co-operative societies Act, contended that the appointment is well within the powers of the board and there is no irregularity in the appointment. The counsel further contended that the 3rd

respondent society is a voluntary and autonomous organisation controlled by its members and if there is any irregularity or mismanagement, the issue can be raised before the general body and hence sought the dismissal of the application.

7. The learned

Senior counsel appearing for the 3rd and 4th respondents scrupulously contended that the applicant has no locus to file the instant application and that the dispute raised would not fall within the ambit of section 84. The appointment of the 4th respondent cannot be testified in arbitration proceedings. The learned Senior Counsel also contended that the appointment was made by the board in exercise of its powers under section 49 of the MSCS Act and is in consonance with the regulations of bye-laws which were approved in the annual general body meeting. Further, the learned Senior Counsel contended that the contention of the applicant that the bye-laws are invalid would not hold water as long as the bye-laws are in force and when the majority of the members decide to have the regulations in a particular way, it cannot be challenged by a single member. The Learned Senior Counsel also raised a plea that the injunction sought for in any case is beyond the scope of Section 9 of the Arbitration Act as any relief under section 9 can only be an interim measure, pending arbitration proceedings. The Learned Senior counsel also contended that the applicant has not been vigilant in initiating the arbitration proceedings. Even the notice seeking appointment was not sent as per the provisions of the Act.

Refuting the allegations of mismanagement, the Learned Senior Counsel has contended that the income of the society has increased and the NPA has also reduced. The Learned Senior counsel also placed reliance upon the judgments reported in *Ashok Kumar and another vs. SBI Officers Association (Delhi Circle) The General Secretary and another (CDJ 2013 DHC 328)*, *Dr. A.C. Muthiah vs. The Board of Control for Cricket in India rep. by its Secretary (CDJ 2009 MHC 2533)*, *Deccan Merchants Cooperative Bank Limited vs. Daliehand Jugraj Jain and others (CDJ 1968 SC 265)* and *Firm Ashok Traders and Another vs. Gurumukh Das Saluja and others (CDJ 2004 SC 249)* in support of his above contentions.

8. Heard all the counsels and the perused the records.

9. Relying upon the qualifications prescribed in 3(1) (a) of the service regulations effective from 03.11.1997, the learned counsel for applicant has contended that the 4th respondent does not possess a post-graduate degree and he is also above 35 years. The counsel also placed reliance upon the guidelines issued by the Central government on 16.08.2011 and the RBI on 28.02.2014 regarding appointment to the post of Chief Executive. The counsel also contended that it is also mandatory that he must have an experience of 5 to 10 years in the administration of a co-operative bank or institution and the 4th respondent does not possess the

same. The counsel also claimed that preference can also be given only to MBA decree holder or chartered accountant with experience. Therefore, in the interest of the society, the board ought to have invited applications from public by effecting advertisements in the news papers. In support of his contention, the counsel for the applicant has relied upon the judgment in ***The Commissioner, Department of Employment & Training, Chennai and others vs. K.P.Jaganathan (CDJ 2014 MHC 2047)***, wherein the Division Bench of this Court has held as follows:-

9. In the decision reported in (2011) 3 SCC 436 [State of Orissa v. Mamata Mohanty], the same issue came up for consideration and in Paragraphs 35 and 36, it was held thus:-

“35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution. (Vide Delhi Development Horticulture Employees’ Union v. Delhi Admn., (AIR 1992 SC 789), State of Haryana v. Piara Singh AIR 1992 SC 2130), Excise Supdt. v. K.B.N. Visweshwara Rao ((1996) 6 SCC 216), Arun Tewari v. Zila Mansavi Shikshak Sangh (AIR 1996 SC 331), Binod Kumar Gupta v. Ram Ashray Mahoto (AIR 2005 SC 2103), National Fertilizers Ltd. v. Somvir Singh (AIR 2006 SC 2319), Telecom District Manager v. Keshab Deb ((2008) 8 SCC 402), State of Bihar v. Upendra Narayan Singh ((2009) 5 SCC 65) and State of M.P. v. Mohd. Abraham ((2009) 15 SCC 214)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without

inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

10. This Court, in the decision reported in (2012) 3 MLJ 669 [P.M.Malathi v. State of Tamil Nadu] held that any Rule of the State Government restricting the right of consideration of the eligible candidates for public appointment is unconstitutional as it is violative of Articles 14 and 16 of the Constitution of India.

11. The learned single Judge has followed the above said decisions and held that selecting persons in public employment, on the basis of the list of candidates sponsored by the Employment Exchange alone, is in violation of Articles 14 and 16 of the Constitution of India, as it denies opportunity to all the eligible persons to participate in selection in public employment.

14. It is also relevant, at this juncture, to note that the Three Judge Bench of the Hon'ble Supreme Court, in the decision reported in 2014 (2) SCALE 262 [Renu and others v. District & Sessions Judge, Tis Hazari and another] reiterated the above said proposition of law and gave a direction to all the High Courts to comply with the purport of Articles 14 and 16 of the Constitution of India while filling up of any vacant post either in the High Court or in the Subordinate Courts throughout the India. In the said decision, the Hon'ble Supreme Court held that "post shall be filled up by issuing the advertisement in atleast two newspapers and one of which must be in vernacular language having wide circulation in the respective State, apart from calling for a list from the local employment exchange and any vacancy filled up without advertising as prescribed, shall be void ab-initio and would remain unenforceable and inexecutable except the appointment on compassionate grounds, as per the Rules applicable".

15. Therefore, no error could be found from the order of the learned single Judge. The learned single Judge was also right in giving further direction to communicate the copy of the order to the Chief Secretary to the Government of Tamil Nadu for strict compliance to see that all public posts in future are filled up, as per the law declared by the Hon'ble Supreme Court.

10. Per contra, it was contended by the Learned Senior counsel for the 3rd and 4th respondents that as per service regulation III (3) (2), the qualification, age limit and experience is not applicable when the service of the candidate is borrowed from Railways on deputation/by appointment. The said service regulations were approved in the general body meeting and hence cannot be questioned by a member. The counsel also placed reliance upon the judgment of this Court reported in CDJ 2009 MHC 2533, cited supra, to contend that the member of a society has no locus to question the decision taken in the General Body meetings.

"32. Mr. P. S. Raman, the learned Additional Advocate General (AAG) contended that even a member of a Society could not have questioned the decision of the general body of a society. Having agreed to work under the bye-laws of a society, a member cannot have an higher right. In essence a stream cannot rise above than the source. For this proposition, he relied upon the decision of the Supreme Court in Zoroastrian Cooperative Housing Society Ltd. and another v. District Registrar, Cooperative Societies (Urban) and others reported in

(2005) 5 SCC 632. Paragraphs 17, 25 and 35 of the said judgment reads as follows:

"17. ... In *State of U.P. v. C.O.D. Chheoki Employees# Coop. Society Ltd.* this Court after referring to *Daman Singh* case held in para 16 that: (SCC p.691)

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

25. It is true that it is very tempting to accept an argument that Articles 14 and 15 read in the light of the preamble to the Constitution reflect the thinking of our Constitution-makers and prevent any discrimination based on religion or origin in the matter of equal treatment or employment and to apply the same even in respect of a cooperative society. But, while being thus tempted, the court must also consider what lies behind the formation of cooperative societies and what their character is and how they are to be run as envisaged by the various Cooperative Societies Acts prevalent in the various States of this country. Running through the Cooperative Societies Act, is the theory of area of operation. That means that membership could be denied to a citizen of this country who is located outside the area of operation of a society. Does he not have a fundamental right to settle down in any part of the

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

35. Section 23 of the Contract Act provides that where consideration and object are not lawful the contract would be void. But for Section 23 to apply it must be forbidden by law or it must be of such a nature that it would defeat the provision of any law or it is fraudulent or it involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy. If we proceed on the basic premise that public policy in relation to a cooperative society is to be looked for within the four corners of the Act, the very enactment under which the very society is formed, a bye-law that does not militate against any of the provisions of the Act cannot be held to be opposed to public policy unless it is immoral or offends public order. It cannot be said that a person bargaining for membership in a society or for coming together with those of his ilk to form a society with the objects as set out in the bye-laws subscribed to by him, can be considered to be doing anything immoral or against public order. An aspirant to membership in a cooperative society, is at arm's length with the other members of the society with whom he enters into a compact or in which he joins, having expressed his willingness to subscribe to the aims and objects of that society...."

(Emphasis added)

33. He further relied upon a decision of this Court for the very same proposition, i.e. that the power of the court to have judicial review over the decisions of a society is very limited. He referred to the decision of this Court vide its judgment in *Chennai Kancheepuram Tiruvelore District Film Distributors Association, rep by its Secretary and another Vs. Chinthamani S. Murugesan and others* reported in 2001 (3) CTC 349. He placed emphasis on the following passages found in paragraphs 5 and 6 of the judgment, which reads as follows:

"5. The Executive Committee of a voluntary association cannot be put on par with a Court or a Tribunal when dealing with the disciplinary matters concerning the membership of the Body. They have a very wide latitude in deciding as to when disciplinary action is warranted, and the extent to which the powers vested in them under the Rules or byelaws should be exercised while penalizing the members for the misconduct which the appropriate Body within the association empowered to decide that question, considers him to be guilty. The procedure to be followed by such an association also cannot be that which is normally expected to be followed in a Court, or a Tribunal. Every letter written by the Executive Committee of an association to its member calling for an explanation is not to be judged under a lens to find out the possible defects therein for the purpose of holding that the action that followed was not in consonance with the principles of natural justice. Even principles of natural justice are not required to be applied with the same degree of rigour as they would be in the case of adjudication before a Court or a Tribunal.

6. What is required of such bodies is that they act fairly in a broad way without having to imitate the Courts and Tribunals, with regard to the rigour and the formality of the procedures. Such bodies are of course expected to act in accordance with their own Rules, and stay within the limits imposed by those Rules. If the Body vested with the power under the Rules, exercise that power within the ambit of the Rule, after having

afforded an opportunity to the member concern to have his say in the matter, the decision rendered by such Committee cannot be regarded as illegal, or violative of natural justice, or as arbitrary. The Courts will not sit in appeal over the decisions of such Committees, subject to such decision being broadly in consonance with the general standard of fairness." (Emphasis added)

39. This Court in its decision in *S. Krishnaswamy and others vs. South India Film Chamber of Commerce and others* reported in AIR 1969 MADRAS 42 dealt with the scope of the power vested on a civil Court for the grant of injunction under Order 39 Rule 1 and had set out parameters. It also analysed as to what constitutes a *prima facie* case and as to when a balance of convenience can set to arise. Useful reference may be made to paragraphs 13 and 14 of the said judgment:-

"13. The principles which govern the grant or refusal of an interim injunction in aid of the plaintiff's rights are well settled and they depend upon a variety of circumstances. In the nature of things, it is impossible to lay down, any set, rigid or general rule on the subject by which the discretion of the court ought in all cases be regulated. As the plaintiff, by the interim injunction undoubtedly seeks to interfere with the rights of the opponent before the plaintiff's right is finally established, the injunction is not granted as a matter of course and it is necessary for the plaintiff to make out a strong *prima facie* case in support of the right that he asserts. It is true that at the interlocutory stage, the court should not embark upon a detailed investigation on the relative merits of the contentions of the parties and it is enough if the plaintiff raises questions of a substantial character calling for decisions after an examination of the facts and the law arising in the case. The Court can consider the nature and the merits of the rival contentions at the interlocutory stage only as bearing upon the limited question as to whether or not the plaintiff has made out a strong *prima facie* case. The Court should avoid expressing any opinion on the

merits which would partake the character of a decision of the main issues in the case. The plaintiff should next make out the Court's interference if necessary to protect him from an injury or mischief imminent and it is at the same time irreparable. He should make out that the injury is so serious, irreparable and imminent that an immediate order of Court is necessary even before his rights are established at the trial. Inseparably connected with this, is the burden, which lies upon the plaintiff to make out, that the comparative mischief or inconvenience which would ensue from withholding the injunction would be far greater from what would ensue from the injunction being granted. Lastly, which again is a very important consideration, is that in considering whether an interim injunction should be granted the court must have due regard to the conduct and dealings of the parties, before the application is made to the Court, by the plaintiff to preserve and protect his rights, since the jurisdiction to interfere being purely equitable, is governed by the equitable principles (Vide 21, Halsbury's Laws of England, paragraphs 766 and 767).

14. On the question of the balance of convenience and the threatened mischief or injury irreparable or otherwise, regard must be had to the nature of the suit and the particular right asserted like suits against Government, Public Corporations, Municipal Corporation, Statutory bodies, Social clubs and its members, Societies registered under the Societies Registration Act and its members distinguished from litigation between private individuals. In the case of clubs and Societies registered under the Societies Registration Act, the general principles governing the right of suit of an individual share holder or a member of the Company would apply and ordinarily the Court will not interfere with the internal management of the Society at the instance of one or some only of the members of the Society subject to well recognised exceptions (1) where the impugned act is ultra vires of the Society, (2) the act complained of constitutes fraud or (3) whether the impugned action is illegal. The Rules are made by the Society itself for the convenience of its members for regulating their own conduct as members and for regulating the affairs of the Society as an entity. A breach of any Rule made by the Society would not give rise to a cause of action for any member to rush to

Court, it must be a case of manifest illegality or where the act of omission or commission is something which goes to the root of the matter. All the members would be bound by the decision taken by the general body though there may be some violation of some Rules provided it is something which could well be condoned and ignored by the general body (Vide Shridhar Misra v. Jaihandra, AIR 1959 All 598; Satyavart Sidhantalankar v. Arya Samaj, Bombay, AIR 1946 Bom 516 and Nagappa v. Madras Race Club, ILR (1949) Mad 808 at pp. 821 to 823 = (AIR 1951 Mad 831 (2) at pp. 835-836).

40. In the very same decision, this Court also held that such decisions of a society taken by its majority cannot be thwarted at the instance of one individual. Useful reference may be made to para 22 of the judgment, which reads as follows:-

"22. The next aspect that has to be considered is the question of balance of convenience and the irreparable mischief or damage which the plaintiff would sustain in case the interim injunction is refused. As prefaced in my preliminary observations, this involves two aspects, (a) whether the mischief or injury is irreparable and so serious and (b) whether the plaintiff's complaint of the threatened injury is real or merely illusory and imaginary. In the first place, it has to be borne in mind that it is established law that at the instance of one member Courts are highly reluctant to interfere; at any rate, would not lightly interfere with the functioning of a corporate body or a Society. It is not a dispute between two private individuals. ..."

(Emphasis added)

41. As to when an injunction can be granted under Order 39 Rule 1 C.P.C. has been propounded by the Supreme Court in several decisions. One such case of the Supreme Court is in Dalpat Kumar and another Vs. Prahlad Singh and others reported in (1992) 1 SCC 719. It is necessary to quote the following passage found in paragraphs 4 and 5 of the said judgment, which reads as

follows:

"4. Order 39 Rule 1(c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing ... or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the court thinks fit until the disposal of the suit or until further orders. Pursuant to the recommendation of the Law Commission clause) was brought on statute by Section 86(i)(b) of the Amending Act 104 of 1976 with effect from February 1, 1977. Earlier thereto there was no express power except the inherent power under Section 151 CPC to grant ad interim injunction against dispossession. Rule 1 primarily concerned with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or to refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting ad interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. It is settled law that the grant of injunction is a discretionary relief. The exercise thereof is subject to the court satisfying that (1) there is a serious disputed question to be tried in the suit and that an act, on the facts before the court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs

adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of the granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

(Emphasis added)

42. In the light of the above factual matrix and the legal precedents set out above, the plaintiff has not made out any prima facie case. The balance of convenience is not for grant of any interim order. The very locus standi of the plaintiff in maintaining the suits

themselves are doubtful. In the light of the same, all the applications will stand dismissed with costs of Rs.25,000/- (Twenty five thousand only). The cost shall be paid to the Tamil Nadu State Legal Aid Services Authority, Chennai-600 104 within four weeks."

11. In reply, the counsel for the applicant has relied upon the judgment reported in 2015 (1) SCC 192 to contend that the bye-laws cannot be contrary to the constitutional mandates.

"44. As is evincible, the respondent no.5- Association has been registered under the Trade Unions Act having registration No.1871. Its aims and objects are as follows: a) To organize and unite the Motion Picture Costume Artist's Make-Up Artist's and Hair Dressers and their Assistants with a view to protect their interests. b) To secure to the members fair conditions of life and services and to protect them from unfair labour 33 practice in the Trade, keeping the relations with other Trade Unions in the Film Industry. c) To try to standardize minimum wages and contractual remuneration, as devised from time to time. d) To try by all legal means to redress their grievances. e) To endeavour to regulate the relations of the members among themselves as and for their employers, and to secure them fair conditions of life service and career. f) To endeavour to secure compensation for members in case of accidents under the Workmen's Compensation Act. g) To provide the members against unemployment, sickness, infantry, old age if funds permit. h) To provide legal assistants to members in respect of matters arising out of or incidental to their employment if in the opinion of the Executive Committee it is found necessary and expedient. i) To endeavour to render aid to the members during any strike or lockout brought accident with the sanction of the Association. j) To co-operate and federate with other Organisations in India and abroad having similar object. k) To help in accordance with Indian Trade Unions Act, working classes in India and outside in the promotion of the objects mentioned in this clause. 44. The Association has its own bye-laws.

Clause 4 of 34 the bye-laws reads as follows: "Membership: Membership of the Association shall comprise of Make-up men, Costume men, and Hair Dressers who were admitted as members by the Association & who continue to be members 14.4.85 and all those who shall be admitted hereafter under clauses 6 & 7 of the constitution of the Association including the membership in Family Relief fund, provided he/she agrees & abide by the rules & sub- rules that may form by the Association from time to time." Clause 6 deals with admission of new members. It reads as follows: **ADMISSION OF NEW MEMBERS:-** Any person desiring to become the member of the Association who has attained the age of majority of 18 and who possess a good moral character shall send an application in prescribed form and duly recommended by two members with its prescribed fees. A. Applicant should have been a resident of Maharashtra at least for 5 years. B. Son or Daughter of members who have completed 15 years of membership shall be eligible to be enrolled as members of the Association, provided they fulfil other conditions relating to age and domicile status of 5 years in the State of Maharashtra. 45. These bye-laws have been certified by the Registrar 35 of Trade Unions in exercise of the statutory power. Clause 4, as is demonstrable, violates Section 21 of the Act, for the Act has not made any distinction between men and women. Had it made a bald distinction it would have been indubitably unconstitutional. The legislature, by way of amendment in Section 21A, has only fixed the age. It is clear to us that the clause, apart from violating the statutory command, also violates the constitutional mandate which postulates that there cannot be any discrimination on the ground of sex. Such discrimination in the access of employment and to be considered for the employment unless some justifiable riders are attached to it, cannot withstand scrutiny. When the access or entry is denied, Article 21 which deals with livelihood is offended. It also works against the fundamental human rights. Such kind of debarment creates a concavity in her capacity to earn her livelihood.

51. Presently, we shall advert to the law laid down in Vishaka case. The Court referred to the 1993 Treaty and opined that the meaning and content of Fundamental

Rights in the Constitution are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse.

In that context, the Court observed thus:-

“The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs vs. Teoh*, 128 ALR 535, has recognised the concept of legitimate expectation of its observance in the absence of contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia”.

The three-Judge Bench, while noting the increasing awareness on gender justice, took note of the increase in the effort to guard against such violations. The Court observed that when there is violation of gender justice and working woman is sexually harassed, there is violation of the fundamental rights of gender justice and it is clear violation of the rights under Articles 14, 15 and 21 of the Constitution.

50. Thus, the afore said decision unequivocally recognises gender equality as a fundamental right.

The discrimination done by the Association, a trade union registered under the Act, whose rules have been accepted, cannot take the route of the discrimination solely on the basis of sex. It really plays foul of the statutory provisions. It is absolutely violative of constitutional values and norms.

If a female artist does not get an opportunity to enter into the arena of being a member of the Association, she cannot work as a female artist. It is inconceivable. The

likes of the petitioners are given membership as hair dressers, but not as make-up artist. There is no fathomable reason for the same. It is gender bias writ large. It is totally impermissible and wholly unacceptable.

12. Having considered the judgments and the arguments of the contesting parties, this court is of the view that the judgments relied upon by the applicant would not be applicable to the facts of this case and more particularly in this application under section 9. The validity of the bye-law cannot be testified by this court in an application under section 9. Moreover, the judgment of the Apex Court is in the context of admitting members to an association. Rather, in the present case, the issue is regarding the validity of the appointment of the 4th respondent as chief executive, which is governed by the service regulations and not by the terms and conditions of membership. Even, in the Division Bench Judgment, the issue was regarding filling up the posts in public domains and not in a society. Though equal and fair opportunity are sacrosanct as mandated by Article 14, 16 and 21 of the constitution of India, this court is of the opinion that it would be beyond the scope of the application to go into the validity of the service regulations.

13. The Learned Senior Counsel has relied upon the following judgments on the scope of an application under Section 9 of the Arbitration and Conciliation Act, 1996.

In **Firm Ashok Traders and Another vs. Gurumukh Das Saluja and others (CDJ 2004 SC 249)**, the Hon'ble Apex Court has observed thus:-

17. There are two other factors which are weighing heavily with us and which we proceed to record. As per the law laid down by this Court in M/s. Sundaram Finance Ltd. an application under Section 9 seeking interim relief is maintainable even before commencement of arbitral proceedings. What does that mean? In M/s. Sundaram Finance Ltd., itself the Court has said- "It is true that when an application under Section 9 is filed before the commencement of the arbitral proceedings there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings". Section 9 permits application being filed in the Court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word 'before' means, inter alia, 'ahead of; in presence of sight of; under the consideration or cognizance of'. The two events sought to be interconnected by use of the term 'before' must have proximity of relationship by reference to occurrence, the later event proximately following the preceding event as a foreseeable or 'within sight' certainly. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended (as M/s. Sundaram Finance Ltd. puts it) and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide 'interim measures of protection'. The order passed by the Court should fall within the meaning of the expression 'an interim measure of protection' as distinguished from an all-time or permanent protection.

In **Ashok Kumar and another vs. SBI Officers Association**

(Delhi Circle) through General Secretary and another (CDJ 2013 DHC 328)

"15. I think that the first question which is required to be examined in the instant case is whether the matters relating to expulsion and election fall within the ambit of the arbitration clause as contained in Bye law 27 of the Respondent No.1.

16. It is well settled principle of law that the court seized of an application under Section 9 of the Act can form a prima facie opinion on the preliminary aspects relating to arbitrability of the dispute prior to granting or refusing the interim measures under the said section. This is due to the reason that the court would proceed to consider the grant or non grant of the interim measures only upon the satisfaction that there exists a valid arbitration clause covering the dispute raised before the court. The said preliminary enquiry relating to arbitrability of the dispute is the jurisdictional fact which enables the court to assume jurisdiction on the application and proceed to consider the same on merit. If on the other hand, the dispute itself does not fall within realm of the arbitration, then the court may straightaway proceed to reject the application as the court may not be able exercise its powers under Section 9 of the Act.

17. The position in law has been aptly described by the Supreme Court in the case of *SBP & Co. v. Patel Engineering Ltd. & Anr.* [(2005) 8 SCC 618] wherein the Apex Court has considered the powers of the court or judicial authority at great length when faced with a question as to whether the power to appoint the arbitrator is a judicial power or administrative function. While answering the said question, the Supreme Court also OMP No.163/2013 & OMP No.500/2012 Page 21 of 46 proceeded to observe that the court seized of the application under Section 9 has the power to examine the validity of the arbitration agreement and also to arrive at the finding whether the dispute is covered by the arbitration clause or not. Upon satisfaction of the preliminary jurisdictional facts, the court can proceed to assume jurisdiction over the subject matter. In the words of the Supreme Court speaking through Hon"ble Balasubramaniam for Majority (as his lordship then was), it was observed thus:

"Similarly, Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in

terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication." (Emphasis Supplied)

18. From the mere reading of the observations of the Supreme Court in SBP case (supra), it is amply clear that whenever a party approaches the court by seeking interim protection prior to the commencement of the OMP No.163/2013 & OMP No.500/2012 Page 22 of 46 arbitration proceedings and the other side raises the plea that there exists no arbitration clause or for that matter the dispute is not covered by the arbitration clause, the court is within its power to examine the preliminary aspects relating to arbitrability and thereafter can proceed to decide whether it has jurisdiction to entertain such application or not.

19. The aforementioned observations of Supreme Court in SBP in the context of the section 9 has also been considered by the learned Single Judge of Bombay High Court in the case of Jeweltouch (India) Pvt. Ltd. vs. Naheed Hafeez Quraishi, 2008 (2) ARBLR 321, wherein Hon"ble Chandrachud, J. proceeded to examine the validity of the arbitration agreement in the case of Section 9 petition after considering the position in law post SBP (supra). In the words of Learned Single Judge, it was observed thus:

"Now in view of the judgment of the Supreme Court in SBP and Co. v. Patel Engineering Ltd. it is a settled principle of law that where in the course of the hearing of a Petition under Section 9 of the Arbitration and Conciliation Act, 1996, the existence of an arbitration agreement is disputed by a party against whom relief has been claimed or where such a party contends that the dispute is not arbitrable, the Court has the jurisdiction to decide whether there exists a valid arbitration agreement or whether the dispute is arbitrable in terms of the agreement. The principle which has been formulated by the Supreme Court is as follows :

Section 9 enables a Court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the Section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that OMP No.163/2013 & OMP No.500/2012 Page 23 of 46 the

dispute involved was not covered by the arbitration clause, or that the Court which was approached had no jurisdiction to pass any order in terms of Section 9 of the Act, that Court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the powers of the Court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a Civil Court in the ordinary hierarchy of Courts without anything more, the procedure of that Court would govern the adjudication.

In view of the provisions of Section 9, as interpreted in the judgment delivered by a Bench consisting of seven Judges of the Supreme Court, the basic postulate for the purpose of the present case is that since the existence of an arbitration agreement has been disputed it is for this Court to determine whether there exists a valid arbitration agreement to refer disputes to arbitration. (Emphasis Supplied)"

45. Now, it is time to discuss the scope of interference of this court in the matters of expulsion of the members from association or club which is extremely limited unless there exists manifest illegality which goes into the root of the matter. It is well settled principle of law that the Bye laws or OMP No.163/2013 & OMP No.500/2012 Page 36 of 46 articles of the association are made for the internal management of the association and should not be lightly interfered with by the courts on the basis of the violation of Bye law.

46. Thus, the court's interference in such matters is an exception to the general rule that the internal management of the Society must be preserved, the societies are not allowed to be run by the courts direction and the decision taken by the society should be respected. This view is prevalent in the field and it is also said that the normal rule of suits between private individuals must be distinguished from the suits between the social club, societies and its members. In the case of clubs and societies, the general principle governing the right of the individual shareholder or member of the company would apply. Hence, it is clear that not every violation of Articles or rules or Bye-laws of the society may give

cause of action to the individual member to insist the compliance of the rules and quashment of decision making of the society.

47. This has been held in AIR 1969 Mad 42, S. Krishnaswamy And Ors. Vs. South India Film Chamber of Commerce and Others, wherein the learned Single Judge has observed thus:-

"14. On the question of the balance of convenience and the threatened mischief or injury irreparable or otherwise, regard must be had to the nature of the suit and the particular right asserted like suits against Government, Public Corporations, Municipal Corporations, Statutory bodies. Social clubs and its members. Societies registered under the Societies Registration Act and its members distinguished from litigation between private individuals. In the case of clubs and Societies registered under the Societies Registration Act, the general principles governing the right of suit of an individual share holder or a member of the Company would apply and ordinarily the Court OMP No.163/2013 & OMP No.500/2012 Page 37 of 46 will not interfere with the internal management of the Society at the instance of one or some only of the members of the Society subject to well recognized exceptions (1) where the impugned act is ultra vires of the Society, (2) the act complained of constitutes fraud or (3) whether the impugned action is illegal. The Rules are made by the Society itself for the convenience of its members for regulating their own conduct as members and for regulating the affairs of the Society as an entity. A breach of any Rule made by the Society would not give rise to a cause of action for any member to rush to Court, it must be a case of manifest illegality or where the act of omission or commission is something which goes to the root of the matter. All the members would be bound by the decision taken by the general body though there may be some violation of some Rules provided it is something which could well be condoned and ignored by the general body (Vide Shridhar Misra v. Jaichandra.); Satyavart Sidhantalankar v. Arya Samaj, Bombay. AIR 1946 Bom 516 and Nagappa V.

Madras Race Club." (Emphasis Supplied)

27. The said observations are holding the field till date and has been recently reiterated in the case of [Dr.A.C. Muthiah vs The Board Of Control](#) for Cricket decided on 13th July, 2009:

"39.This Court in its decision in S.Krishnaswamy and others vs. South India Film Chamber of Commerce and others reported in AIR 1969 MADRAS 42 dealt with the scope of the power vested on a civil Court for the grant of injunction under Order 39 Rule 1 and had set out parameters. It also analysed as to what constitutes a prima facie case and as to when a balance

of convenience can set to arise. Useful reference may be made to paragraphs 13 and 14 of the said judgment:- "..... 14. On the question of the balance of convenience and the threatened mischief or injury irreparable or otherwise, regard must be had to the nature of the suit and the particular right asserted like suits against Government, OMP No.163/2013 & OMP No.500/2012 Page 38 of 46 Public Corporations, Municipal Corporation, Statutory bodies, Social clubs and its members, Societies registered under the Societies Registration Act and its members distinguished from litigation between private individuals. In the case of clubs and Societies registered under the Societies Registration Act, the general principles governing the right of suit of an individual share holder or a member of the Company would apply and ordinarily the Court will not interfere with the internal management of the Society at the instance of one or some only of the members of the Society subject to well recognized exceptions (1)where the impugned act is ultra vires of the Society, (2)the act complained of constitutes fraud or (3) whether the impugned action is illegal. The Rules are made by the Society itself for the convenience of its members for regulating their own conduct as members and for regulating the affairs of the Society as an entity. A breach of any Rule made by the Society would not give rise to a cause of action for any member to rush to Court, it must be a case of manifest illegality or where the act of omission or commission is something which goes to the root of the matter. All the members would be bound by the decision taken by the general body though there may be some violation of some Rules provided it is something which could well be condoned and ignored by the general body (Vide *Shridhar Misra v. Jaihandra*, AIR 1959 All 598; *Satyavart Sidhantalankar v. Arya Samaj*, Bombay, AIR 1946 Bom 516 and *Nagappa v. Madras Race Club*, ILR (1949) Mad 808 at pp. 821 to 823 = (AIR 1951 Mad 831 (2) at pp. 835-836)."

48. I also had an occasion to apply the said principle of law while adjudicating another claim relating to expulsion of the member from Delhi OMP No.163/2013 & OMP No.500/2012 Page 39 of 46 Public school society in 166 (2010) DLT 153, [Salman Khurshid vs. Delhi Public School Society & Anr.](#) while deciding I.A No. 10680/2008 in CS (OS) No. 1844/2008, I have approved the decision of Dr. A.C. Muthiah (supra) decided by the Madras High Court and proceeded to base the judgment on the applicability of the same very principle."

14. The ratio laid down in the above judgments is squarely applicable to the present facts of the case.

15. Section 9 of the Arbitration Act reads as follows;

8.Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority

before which an action is

brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first

statement on the substance of the dispute, refer the parties to arbitration.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration

agreement or a duly certified copy thereof.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial

authority, an arbitration may be commenced or continued and an arbitral award made.

9.Interim measures etc.by Court.- A party may, before, or during arbitral proceedings or at any time after the making of the arbitral

16. It is indisputably settled that any relief granted under section 9 can only be an interim measure so as to protect the interest of either of the party in dispute. In the present case, prima facie there is regulation which is in the favour of the 4th respondent. The same has not been testified in the manner known to law till date. Till today, the Arbitrator has not been appointed and the application under section 11 is still pending. The 4th respondent has claimed that the dispute is not arbitrable as contemplated under section 84 of the MSCS Act and has relied upon the judgment reported in CDJ 1968 SC 265, in which the Apex Court has held as follows;

The learned counsel for the petitioners, Mr. S.T.Desai, on the other hand, contends (1) that there is no dispute touching the business of the society; (2) that the petitioners were not claiming through a member as a member;(3) that the Rent Act (Bombay Rents, Hotel & Lodging & House Rates Control Act, 1947) gives exclusive jurisdiction to the court of Small Causes and accordingly the Registrar had no jurisdiction to refer the dispute to his nominee; and (4)that the petitioners should

have been heard before the case was referred to the Registrar's nominee and, therefore, the reference is bad

The Principal questions which arise on the interpretation of section 91 are two : (1) what is the meaning of the expression "touching the business of the society?" and (2) what is the meaning of the expression "a person claiming through a member , " which occurs in section 91(1)(b)?

The answer depends on the words used in the Act. Although a number of cases have been cited to us on similar expressions contained in various other Acts, both Indian and English, in the first instance, it is advisable to restrict the enquiry to the terms of the enactment itself, because the legislature have been changing the words and expanding the scope of reference to arbitrators to the Registrars step by step. The sentences, namely, "Notwithstanding anything contained in any other law for the time being in force" clearly ousts the jurisdiction of civil courts if the dispute falls squarely within the ambit of section 91(1). Five kinds of disputes are mentioned in sub-sections (1): first disputes touching the constitution of society; secondly, disputes touching election of the officer-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly, disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws. The question arises whether the dispute touching the assets of a society would be a dispute touching the business of a society. This would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. In this case, the society is a co-operative bank and ordinarily a co-operative bank cannot be said to be engaged in business when it lets out properties owned by it. Therefore, it seems to us that the present dispute between a tenant of a member of the bank in a building, which has subsequently been acquired by the bank cannot be said to be a dispute touching the business of the bank, and the appeal should fail on this short ground.

The preamble of the Rent Act states

"Whereas it is expedient to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and evictions."

Section 4 of the Rent Act exempts certain premises from its operation but it does not exempt premises belonging to co-operative societies. It is common ground that the

Rent Act applies to the premises in question. Section 11 of the Rent Act deals with the fixing of standard rent, and section 12 provides that "a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act", and it lays down the procedure for the filing of a suit for the recovery of possession by landlord and for other matters. Section 13 provides that a landlord may recover possession of any premises under certain conditions. Section 28 provides for jurisdiction of the courts to deal with the suits and proceedings. Section 29 provides for appeals. If the matter is heard by the Registrar, none of these provisions would apply. We can hardly imagine that it was the intention of the legislature to deprive tenants in buildings owned by co-operative societies of the benefits given by the Rent Act. It seems to us that the Act was passed, in the main, to shorten litigation, lessen its costs and to provide a summary procedure for the determination of the disputes relating to the internal management of the societies. But under the Rent Act a different social objective is intended to be achieved and for achieving that social objective it is necessary that a dispute between the landlord and the tenant should be dealt with by the courts set up under the Rent Act and in accordance with the special provisions of the Rent Act. This social objective does not impinge on the objective underlying the Act. It seems to us that the two Acts can be harmonised best by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act, should apply. In view of these considerations, we are of the opinion that section 91 of the Act does not affect the provisions of section 28 of the Rent Act

17. It is not for this court under section 9 to decide whether the dispute would fall under section 84 of the Act or not. It is to be agitated in the application under section 11.

18. The Hon'ble Apex Court in 2005(8) SCC 618 has held that the Hon'ble Chief Justice or his designate, while considering a petition under Section 11(6) of the Act was bound to decide whether there was a valid agreement, whether the person before him with a request for appointment of an Arbitrator is a party to the arbitration agreement and there was a dispute/a live claim which was capable of being arbitrated upon.

18. In view of the ratio laid down in the above judgment, it is open to the parties to raise the issue of maintainability of arbitration proceedings in the Application under section 11.

19. In so far as the present application is concerned, as held above, the prima facie case is only in the favour of the respondents. The relief of injunction would be beyond the scope of 'interim measure' as contemplated under section 9. If such injunction is granted, it would paralyse the entire activities of the society. Therefore, the balance of convenience is also in favour of the 3rd respondent. If there are irregularities or mismanagement, the same can be agitated before appropriate forum for removal of such officer. Further, the challenge in the claim petition can only be to the appointment of the 4th respondent. Therefore, any finding given by this court would also affect the rights of the parties. Similarly, this court feels that the allegations regarding the influence of a third party in appointments are all unnecessary to this application and hence this court is not inclined to go into the same.

20. In view of the above facts, this court is not inclined to grant the interim injunction. In the result the application is dismissed. No costs.

20.3.2015

rnb

R. MAHADEVAN, J.

O.A.NO.139 OF 2013

DATE : 20.3.2015