

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1734 OF 2008

Bandra Trilok Co-op. Housing Society Ltd.
A Co-operative Housing Society, registered
Under the Maharashtra Co-op. Societies
Act, 1960, having its address at 313,
Dr.Ambedkar Road, Bandra(West),
Mumbai – 400 050. .Petitioner

v/s.

1. The State of Maharashtra
through, the Secretary,
Co-operation & Textiles,
Mumbai.
2. Divisional Joint Registrar
Co-operatives Societies,
Divisional Mumbai,
M.D.Malhotra House,
6th floor, Opp. G.P.O.,
Fort,
Mumbai – 400 001.
3. Deputy Registrar
Co-operatives Societies,
H/West Ward, Sahakar,
Bandra(West)
Mumbai – 400 050.
4. Brijlal M. Ahuja
of Bombay, Indian Inhabitant,
having his office at Bandra
Trilok Co-op. Hsg. Society
Limited,
having his office at
313, Dr. Ambedkar Road,
Bandra(West)
Mumbai – 400 050. .Respondents

Mr.Shiraj Rustomjee, Senior Counsel with Mr. Jai Chhabria & Mr.A.N.Raut
i/b. Desai Desai Carrimjee & Mulla, for the Petitioner.

Mr.Mohit Jadhav, AGP, for the Respondent Nos.1 to 3.

Mr.A.S.Khandeparkar i/b. Mr.S.R.Saudagar, Advocate, for the Respondent No.4.

CORAM : A.A.SAYED, J.

**DATE : 21 APRIL 2016
(IN CHAMBER AT 2.50 P.M.)**

ORAL JUDGMENT:

By this Petition under Article 226 of the Constitution of India, the Petitioner–Society impugns the order dated 28.04.2008 passed by the Respondent No.2 - Divisional Joint Registrar, Co-operative Societies in Revision Application filed by the Petitioner–Society confirming the order dated 17.02.2007 of the Respondent No. 3 - Deputy Registrar Co-operative Societies. The operative part of the order dated 17.02.2007 of the Respondent No. 3 - Deputy Registrar reads as follows :

“

ORDER

As per Maharashtra Co-op. Socy. Act, 1960, and as per the Sec.22(2) of 1961, Act and as per my power I, Dr. P. L. Khandegele, Deputy Registrar, Co-op. Hsg. Socy. H/West (Ward), by this order accept the Application made by Shri Brijlal Meghraj Ahuja for the membership of Bandra Trilok Co-op. Hsg. Society Ltd. Dr. Ambedkar, Bandra(West), Mumbai – 50, in respect of Society's garage being No.GB 8, 9 and 10 and declare him as deemed member.

The Society after entering and after

noting all necessary particulars in their record to inform this office within fifteen days.

The present order dated 17th Feb. 2007 is signed by me today with my seal.

Sd/-

(Dr. P. L.Khandegle)

Dy. Registrar Co-op. Scy. H/W Ward
Mumbai.”

The aforesaid order dated 17.02.2007 under Section 22(2) of the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as MCS Act) was passed by the Deputy Registrar on an Application filed by the 4th Respondent seeking to be declared as member of the Petitioner-Society.

2. The Petitioner – Bandra Trilok Co-operative Housing Society Ltd. is a Tenant Co-partnership Society under the MCS Act and is registered as such on or about 1972. The Petitioner – Society consist of 3 wings comprising of 74 flats and 20 garages. According to the Petitioner – Society, the buildings were intended for residential use and there were no commercial units. The 4th Respondent's father M.C. Ahuja (since deceased) was initially holding Flat No.C-26 of the Petitioner – Society. On 19.09.1976, the Petitioner – Society approved transfer of Garage No.B/10 from one Thomas John Sontumyra to M.C. Ahuja. Garage Nos.B/8 and 9 were acquired by M.C. Ahuja from one Harbans Singh and the transfer of

said garages was approved in the name of M/s. Ahuja Dairy Farm on 30 October 1977. Prior thereto, an NOC was issued on 24.06.1977 by one Mr. M.K. Mudkatte to M.C. Ahuja (since deceased) which states that Garage Nos.G/B 8, 9 and 10 of the Society building had been purchased by 'M/s. Ahuja Dairy Farm' and the Society had no objection if M/s Ahuja Dairy Farm uses the said premises for their business. According to the Petitioner– Society, the said NOC was unauthorized and wrongly issued and the said Mr.M.K.Mudkatte had sold and transferred his premises in the Petitioner Society's building on 18.11.1975 and had no right to issue such NOC on behalf of the Petitioner-Society. Some time in the year 1979, a Complaint was filed against M.C. Ahuja before the Metropolitan Magistrate's Court for illegal change of user of garages to commercial purposes.

3. On 24.01.1993, the General Body Meeting of the Petitioner – Society passed a Resolution (hereinafter referred to as the 1993 Resolution) that in future, garages would not be allowed to be sold to outsiders and that the same would be permitted to be used only for car parking. On 06.08.1993, the aforesaid 1993 Resolution was challenged by M.C. Ahuja in the Co-operative Court by filing Dispute No.324 of 1993, wherein an interim injunction was granted restraining the Petitioner – Society from acting or implementing the 1993 Resolution. On 01.09.1994, M.C.Ahuja expired. On 08.02.1998, the Petitioner – Society passed

another Resolution (hereinafter referred to as the 1998 Resolution) at its General Body Meeting that in future, garages would be recorded only in the name of flat owners and would be used as garages. On 13.08.1999, Letters of Administration of the estate of M.C. Ahuja was issued by this Court in favour of his widow Mrs. Ganga Ahuja. Flat No.C-26 which was standing in the name of M.C.Ahuja was transferred in the name of Mrs.Ganga M. Ahuja in the records of the Petitioner – Society. On 01.09.1999, Dispute No.324 of 1993 which was filed by M.C. Ahuja challenging the 1993 Resolution was dismissed for default by the Co-operative Court. On 21.10.1999, the 4th Respondent filed an Application No.47 of 1999 in the Co-operative Court for setting aside the order of dismissal of the Dispute No.324 of 1993, which Application was ultimately dismissed and the Appeal filed therefrom was also dismissed as stated hereinafter.

4. On 25.10.1999, a letter was addressed by the 4th Respondent to the Petitioner-Society stating that a family arrangement was arrived at between the members of Ahuja family under which Flat No.C-26 went to the share of Mrs.Ganga Ahuja (mother of the 4th Respondent) and garage Nos.G/B 8, 9 and 10 came to his share. On 13.11.1999, the 4th Respondent applied for membership of the Petitioner – Society in respect of the three garage Nos.G/B 8, 9 and 10, under Bye-law No.37 of the Society. On 08.12.1999, Advocate of the Petitioner – Society wrote a letter

to the 4th Respondent stating that the 4th Respondent's father M.C. Ahuja was a member of the Petitioner – Society and that since the Letters of Administration to the estate of the deceased M.C.Ahuja were issued by this Court in favour of Mrs.Ganga Ahuja, the Petitioner – Society could transfer membership in respect of the three garages only in her name. It was further stated that if the 4th Respondent desired to get the membership of the said garages, he would be required to produce registered documents.

5. On 29.01.2000, the 4th Respondent addressed a letter to the Petitioner – Society stating that Deeds of Transfer dated 25.10.1999 in respect of Unit Nos.G/B 8, 9 and 10 had been lodged with the Sub-Registrar of Assurances and enclosed photocopies of three registration receipts. On 20.09.2000, Advocate on behalf of the Petitioner – Society wrote a letter to the 4th Respondent inter alia stating that as per the Letters of Administration granted in favour of Mrs.Ganga Ahuja, the Petitioner – Society could transfer the garages only in her name. It was stated that garage Nos.G/B 8, 9 and 10 were not commercial premises and that the 4th Respondent had illegally taken a water connection from the Petitioner – Society's residential complex and the Petitioner – Society was being penalized and being made to pay the commercial rate. The said letter also referred to the 1993 Resolution and the 1998 Resolution by which it was decided in General Body Meeting not to permit transfer of garages to

outsiders/non-members of the Society. On 03.10.2000, the 4th Respondent's Advocate by his reply to the Advocate of the Petitioner – Society claimed that the 4th Respondent had already acquired deemed membership under the provisions of Sections 22 and 23 of the MCS Act in respect of Unit Nos.G/B 8, 9 and 10.

6. Some time in Oct./Nov. 2000, the 4th Respondent filed Application No.16 of 2000 before the Respondent No.3 – Deputy Registrar under Section 22 of the MCS Act claiming deemed membership in respect of garage Nos.G/B 8, 9 and 10. The Petitioner–Society filed a Reply to the Application on 31.12.2000. On 08.01.2001 an order was passed by the Deputy Registrar in the Application No.16 of 2000 granting deemed membership to the 4th Respondent. That order was reversed by the Divisional Joint Registrar which came to be challenged in this Court and the matter was remanded to the Divisional Joint Registrar. The Divisional Joint Registrar, thereafter, dismissed the Revision Application, which order was challenged by filing Writ Petition in this Court, wherein an interim order came to be passed leaving it open to the 4th Respondent to apply for nominal membership without prejudice to his rights. The Writ Petition ultimately came to be disposed of on 28.09.2006 by setting aside the two orders of the Deputy Registrar and Divisional Joint Registrar and remanding the matter to the Deputy Registrar. In the meanwhile, on 20.12.2001, the Application No.47 of 1999 which was filed in the Co-

operative Court for setting aside the order of dismissal of Dispute No.324 of 1993 came to be dismissed. The 4th Respondent filed Appeal No.181 of 2001 challenging the said order of dismissal dated 20.12.2001, which Appeal was dismissed on 26.03.2002. In the meanwhile, the Petitioner–Society filed Case No.CC/II/68 of 2002 against some garages holders including the 4th Respondent for illegal change of user of garage Nos.G/B 8, 9 and 10 in the Co-operative Court. The said proceedings came to be withdrawn with liberty being granted to the Petitioner – Society to file a fresh dispute.

7. After the matter was remanded by this Court, the impugned order came to be passed on 17.02.2007 by the Deputy Registrar declaring the 4th Respondent as a deemed member of the Petitioner–Society under Section 22(2) of the MCS Act. As indicated earlier, the said order dated 17-02-2007 was confirmed by the Divisional Joint Registrar by the impugned order dated 28.04.2008, which is the subject matter of challenge in the present Petition. On 24.07.2008 the Deputy Registrar appointed an officer to record the 4th Respondent's membership in the Petitioner – Society's record. On 30.09.2008, the present Writ Petition was admitted and the impugned orders were stayed by this Court. It appears that some time in 2007 the Petitioner–Society had also filed suits in the City Civil Court against several persons including the 4th Respondent on the ground of the illegal commercial use of the respective garages held by

them in the Petitioner – Society's building.

8. I have heard learned Senior Counsel for the Petitioner-Society and learned Counsel for the 4th Respondent. I have also gone through the written submissions filed by them. The learned AGP supported the impugned orders.

9. Learned Senior Counsel for the Petitioner-Society invited my attention to the definition of “flat” under the Maharashtra Ownership of Flats Act, 1963 (hereinafter referred to as MOFA), as it initially stood and the subsequent amendments to the definition in 1971 and 1986. The learned Senior Counsel then pointed out the bye-laws of the Petitioner-Society (formed and registered in the year 1972) which defines the term 'flat'.

10. Learned Senior Counsel for the Petitioner-Society submitted that the definition of “flat” under the bye-laws is more or less identical to the definition of “flat” under MOFA (as appearing in the 1971 amendment) and the definition of flat in the bye-laws has clearly been taken from the definition of flat under MOFA, and therefore interpretation of the definition of the term “flat” under MOFA is therefore relevant in construing the definition of “flat” in the said bye-laws. He submitted that the issue whether a stand-alone garage or a garage as an independent unit is a flat

as per the definition of the said term under MOFA is no longer *res integra*. He submitted that the Supreme Court in the case of **Nahalchand Laloochand Private Limited V/s. Panchali Cooperative Housing Society Limited**¹ while dealing with this issue has held that stand-alone garage(i.e. separate garagewhich is not a appurtenant to or attached to a flat) is not a flat within the meaning of the definition of the term flat under the MOFA. He pointed out that in paragraph No. 21 of the judgment, the questions that arose for consideration before the Supreme Court is set out. One of the question was - (i) Whether stand alone “garage” or any other word “garage” as an independent unit by itself is a flat within the meaning of Section 2 (a-1) of MOFA. The learned Senior Counsel submitted that the Supreme Court while answering this issue examined the definition of the term flat in MOFA at the time of its enactment and also the amendments of the year 1971 and 1986. The Supreme Court held that the scope of the bracketed phrase “and includes a garage” has to be seen in the context of the definition given to the word ‘flat’ which is the true indication of the intent of the legislature.

11 The learned Senior Counsel submitted that the impugned orders in the present case proceed on the erroneous basis that stand-alone garage would amount to flat. He submitted that the impugned orders were passed before the decision of the Supreme Court in Nahalchand. He

1 (2010) 9 Supreme Court Cases 536

submitted that the judgment in Nahalchand clearly holds that a stand-alone garage is not a flat within the meaning of definition of flat under MOFA and the very basis of impugned orders are therefore erroneous and untenable in law.

12 The learned Senior Counsel then submitted that 4th Respondent does not fulfill the legal requirements of becoming a member of the Petitioner-Society since the 4th Respondent does not hold a flat in the Petitioner-Society building and holds only garages pursuant to an internal Deed of family arrangement entered into between his family members. The stand-alone garages cannot be considered a flat under MOFA or the bye-laws. The learned Senior Counsel adverted to Rule 19(iii) of MCS Rules which mandates that no person shall be admitted as a member of the Society unless he has fulfilled all other conditions laid down in the Act, Rules and bye-laws. The learned Senior Counsel submitted that if no membership can be granted to the 4th Respondent in law, as he does not fulfill the legal requirement of membership, the provision of deemed membership will have no application.

13 The learned Senior Counsel pointed out that the 4th Respondent is illegally using the garages for commercial purpose contrary to the bye-laws and Resolutions passed by the Petitioner-Society and that MCGM had initiated proceedings against him for illegal user and also

issued notices to him under the Mumbai Municipal Corporation Act (MMC Act). The learned Senior Counsel adverted to the Petitioner-Society's 1993 Resolution stating that in future garages would not be allowed to sold to outsiders and the same would be permitted to be used only for car parking and the garages would be recorded only in the name of the flat owners. He pointed out that the Dispute No.324 of 1993 challenging the Petitioner-Society's 1993 Resolution was dismissed for default by the Co-operative Court on 1st September 1991 and the Application filed by the 4th Respondent for setting aside the said dismissal order, was also dismissed. He submitted that even the Appeal filed therefrom was dismissed and therefore, the Petitioner-Society's 1993 Resolution is valid and subsisting. He submitted that the 1998 Resolution to the effect that in future garages would be recorded only in the name of the flat owners and would be used as a garages, has not been challenged by the 4th Respondent and therefore the said 1998 Resolution is also valid, subsisting and binding.

14 The learned Senior Counsel submitted that the fact that the approval of transfer of garages in favour of the 4th Respondent's father M.C. Ahuja in 1976-1977 does not further the case of the 4th Respondent inasmuch as M.C. Ahuja was at the relevant time holding a flat in the Petitioner-Society building. Moreover, the issue of stand-alone garage did not arise at the relevant time. He submitted that in any event the Application for membership made by the 4th Respondent for membership

of the Petitioner-Society in respect of the garages was made on 13th November 1999 i.e. after the 1993 Resolution and the 1998 Resolution which Resolutions would hold the field and apply to the case of the 4th Respondent. The learned Senior Counsel in support of his contentions apart from Nahalchand (supra) has relied upon the following judgments:

- 1) **Commissioner of Municipal Corporation, Shimla V/s. Prem Lata Sood & Ors. (2007) 11 Supreme Court Cases 40**
- 2) **Shri Vivekanand Nursing Home Trust & Anr. V/s. Union of India & Ors. 2013 1 MHLJ 494**

15 Learned Counsel for the 4th Respondent on the other hand submitted that the order under challenge is an order passed on an Application under section 22 of the MCS Act. The so-called garage Nos. 8, 9 and 10 are infact shops. He contended that Shop/garage Nos.8 and 9 were given to one Harbans Singh as permanent alternate accommodation in lieu of his shops on the land on which the Society building was constructed by the Builders and hence were always considered as shops. On 19th November 1975 shop/garage No.10 was acquired by M.C. Ahuja and the said shop/garage has also been used by the 4th Respondent for commercial activities since then. Pursuant to the transfer, the Petitioner-Society had granted its no objection for commercial user of the said shop/garage No. 10. The learned Counsel for 4th Respondent pointed out that the said transfer was placed before the Petitioner-Society which was duly approved, which is clear from the resolutions/proceedings of the Annual General Meeting of 19th September 1976. So far as transfer of

shop/garage nos. 8 and 9 are concerned, the same was transferred in favour of M/s. Ahuja Dairy Farm from the name of Harbans Singh, who was a proprietor of Dara Decora Furniture Work Shop and who was an original allottee of the said premises in lieu of his earlier shops. The transfer was placed in the agenda of the Annual General Meeting on 13th September 1977 and was approved in the meeting of 30th October 1977. The transfer was made in the name of M/s. Ahuja Dairy Farm and not in any individual name. The learned Counsel submitted that the nomenclature garage was incorrectly used when factually they were always understood to be shops. He submitted that the transfer in favour of the 4th Respondent is merely as a legal heir and not as a new buyer. The Petitioner-Society has not produced either the sanctioned plan or any other document to show that the premises in question were purely garages for car parking. Though MMC has initiated action under Section 53 of the MRTP Act, even in those proceedings MMC has failed to produce any evidence to show change of user and no plans were produced and M.C. Ahuja was acquitted mainly on the ground that no plans were produced and there was no evidence against him.

16 The learned Counsel for the 4th Respondent further submitted that the Petitioner-Society has approved similar transfer of garage/shop from the name of one Inderjit Nikar to M. T. Gomez. The said M. T. Gomez did not have any flat in the Petitioner-Society building. Garage nos. 3 and 4

have similarly been transferred which garages were right from the beginning used for commercial purposes and were never used for parking of cars. The learned Counsel submitted that the Development Control Regulations for Greater Mumbai provide for size of garages which are 8½ feet by 18 feet for standard parking space while the garages in questions are less in size and therefore do not fit within the minimum dimension of standard garage size and the disputed premises were thus constructed as shops although the nomenclature may be used as garage. The learned Counsel relied upon an Agreement which according to him is in respect of only a garage. After the demise of M.C. Ahuja and pursuant to a family arrangement, the 4th Respondent applied for transferring the said shop/garage to his name. The Petitioner-Society's Advocate accepted the form but stated that the transfer could be effected only if the document i.e. the family settlement etc. are registered with the Sub-Registrar. No objection whatsoever was raised for the transfer. The 1993 Resolution and 1998 Resolution are in respect of user of the shops garages in future. However, in the instant case the commercial user was permitted by the Petitioner-Society even prior to the Resolutions.

17 Learned Counsel for the 4th Respondent submitted that the definition of flat in the bye-law 3(vi) of the Petitioner-Society also means residence, office, showroom, shop, godown including a garage, etc. The transfer of garages have been approved much earlier in point of time in

favour of M.C. Ahuja, father of 4th Respondent and the transfer in favour of 4th Respondent was only a consequential process. The 4th Respondent is continuing to use the said shop/garage Nos. 8, 9 and 10 for commercial purpose with written permission from the Joint Secretary of the Petitioner-Society since 1977. The judgment in Nahalchand's case would not be applicable as the said judgment refers to a garage which was admittedly used for parking vehicle. In paragraph 38 of the judgment, it is held that to fit in the definition of "flat" it must meet the twin test namely, whether it is (i) self-contained and (ii) user test. Learned Counsel submitted that in the present case it is clear that the disputed premises although uses nomenclature as garages, they are as a matter of fact shops falling within the definition of word flat for the following reasons:

- (a) The premises are in independent premises forming a part of the Petitioner-Society building;
- (b) The said premises also has a regular water supply for which commercial assessment is being charged. Toilet/ Bathroom attached in the premises as self contained;
- (c) The user of the premises have always been commercial right from its inception i.e. when it was given to Mr. Harbans Singh in lieu of his original shops. The permission to continue the commercial activities was again confirmed by the Petitioner-Society when shop/garage No. 10 was being transferred;

18 The learned Counsel contended that the factual position is that right from inception the disputed premises were been used as a

commercial premises. He submitted that the premises were even allotted to Harbans Singh as commercial premises and merely because the premises are described as garage would not make the said premises garage, when in fact they are shops. Though initially the learned Counsel sought to contend that the judgment of the Supreme Court in Nahalchand would operate only prospectively and would apply only from the date of that judgment and therefore for construing the definition of 'flat', Nahalchand could not be relied upon, during the course of argument he rightly and fairly did not press that contention. He submitted that the impugned orders have rightly been passed by the Authorities below and there was no cause for interference made out by the Petitioner-Society.

19. I have considered the rival contentions urged by the learned Counsel.

20. Section 23(i) of the MCS Act provides that no Society shall without sufficient cause refuse admission to membership to any person duly qualified for membership under the provisions of MCS Act and its bye-laws. Section 22 (2) of the MCS Act lays down that where an Application of any person for membership of the Society has been refused he should be intimated about the same with the reasons within 15 days of the date of the decision or within 3 months from the date of the receipt of the application for admission, whichever is earlier and if the Society fails to

communicate the decision to the applicant within 3 months from the date of receipt of such application, he shall be deemed to have been admitted as a member of the Society. If any question arises whether a person has become a deemed member or otherwise, the same shall be decided by the Registrar after giving a reasonable opportunity of being heard to all the concerned parties. Rule 19 of the MCS Rules deals with the conditions to be complied with for admission for membership etc. Sub-Rule (iii) of Rule 19 provides that no person shall be admitted as a member of a society unless he has fulfilled all conditions laid down in the Act, Rules and bye-laws. In the present case, what is required to be seen essentially is whether the 4th Respondent is duly qualified and fulfills all the conditions to apply for membership and the Petitioner-Society was right in not accepting the 4th Respondent as its member. Both the Authorities below by the impugned orders have held that the 4th Respondent is entitled to become a member of the Petitioner-Society and directed the Petitioner-Society to grant membership to the 4th Respondent. In my view however, both the Authorities fell in error in passing the impugned orders for the reasons which I have indicated hereinbelow. In my view, considering the position of law, even the deeming provisions would not apply in the facts and circumstances of the present case.

21 Bye-law 3(vi) of the bye-laws of the Petitioner-Society defines 'flat' as follows:

“3 (vi) 'Flat' means a separate and self-contained set of premises used or intended to be used for residence, or office, or show-room, or shop, or godown and includes a garage, or dispensary, or consulting room, or clinic, or flour mill, the premises forming part of a building and includes an apartment;”

The definition of flat under the MOFA as it initially stood in 1963 and the subsequent amendments to the definition in 1971 and 1986 read as follows :

As it initially stood in 1963

“2(a) “Flat” means a separate and self-contained set of premises used or intended to be used for residence, or office, showroom or shop or godown (and includes a garage), the premises forming part of a building.”

After the 1971 Amendment

“2(a) “Flat” means a separate and self-contained set of premises used or intended to be used for residence, or office, showroom or shop or godown (and includes a garage), the premises forming part of a building and includes an apartment.”

After the 1986 Amendment

“2(a) “Flat” means a separate and self-contained set of premises used or intended to be used for residence, or office, showroom or shop or godown or for carrying on any industry or business (and includes a garage), the premises forming part of a building and includes an apartment.”

22 From the above, it is seen that the definition of 'flat' in the bye-laws of the Petitioner-Society has clearly been taken from the definition of 'flat' under MOFA and the definitions are more or less similar. The MCS Act and MCS Rules do not define the term 'flat'. The definition of

'flat' under MOFA would therefore be relevant in interpreting the definition of 'flat' under the bye-laws. The Supreme Court in Nahalchand (supra) had the occasion to interpret the definition of term 'flat' under MOFA. One of the four questions framed by the Supreme Court was – (1) whether a stand alone garage or garage as an independent unit by itself is a 'flat' within the meaning of section 2(a-1) of the MOFA? The Supreme Court concluded that a stand-alone garage is not a flat within the definition of flat under MOFA. In paragraph 40 of the judgment, the Supreme Court observed thus:

“...we think that the statutory definition of a “flat” must be construed keeping in view the intent of the legislature and the context of the statute and, seen thus, the phrase, “and includes a garage” in the brackets does not bring in “garage” by itself within the meaning of the word “flat”.

In paragraph 41 the Supreme Court held:

“41. It is clear to us that stand alone “garage” or in other words “garage” as an independent unit by itself is not a “flat” within the meaning of Section 2 (a-1) and we answer Question (I) in the negative. The judgment of the Bombay High Court in K. R. Agarwal (Dr.) v. Balkrishna Jawar to the extent the expression “or garage” has been read after the word “godown” in para 5 (Clause 2) of the Report does not state the correct legal position in what we have already said above.”

23 It is noticed that the impugned orders proceed on the erroneous basis that a stand-alone garage would be a flat and come within the definition of “flat”. The impugned orders were passed prior to the decision of the Supreme Court in Nahalchand which holds that a stand-

alone garage is not a flat within the meaning of definition of “flat” under the MOFA. The fact that the word “and includes garage” are within brackets in the definition under MOFA, and not within brackets in the definition of the Bye-laws of the Petitioner-Society, is of little significance and does not affect or dilute the applicability of the judgment of the Supreme Court in Nahalchand in the present case. The attempt to distinguish Nahalchand on the basis that the two definitions vary, does not commend to me.

24 The records of the Petitioner-Society right from inception describe the premises in question as garages. In the maintenance bills of the Petitioner-Society, the premises in question are also referred to as garages. The Municipal extract also refers to the premises as garages. It appears that MMC had in the year 1979 or thereabout proceeded against M.C. Ahuja (father of the 4th Respondent) under section 53 of the Maharashtra Regional and Town Planning Act, 1966 for change of user of the garages to commercial purposes. The fact that the premises in question are used for commercial purposes would not make them shops unless it is so established before the Court by producing the sanctioned plans of the MMC. Neither the Petitioner-Society nor the 4th Respondent have bothered to produce the sanctioned plans of the MMC before this Court. The fact that MMC had granted a shop and establishment certificate in respect of the premises does not carry the case of the 4th Respondent any further. Such certificates are routinely issued by MMC

with appropriate endorsements of disclaimer. In the Additional Affidavit dated 11-12-2008, the 4th Respondent has annexed a printed Agreement dated 12 October 1962 between the Builders and the purchaser of a garage, wherein in clause 18, it is provided that the tenement shall not be used for any other purposes except for garage or residential purposes. In these circumstances, it is prima-facie difficult to accept the case of the 4th Respondent that the premises in question are shops and not garages. It needs to be emphasized that my aforesaid findings are only prima facie as no sanctioned plans of the MMC have been produced before the Court. The proceedings before the Authorities below who have passed the impugned orders are summary in nature. Though elaborate submissions have been made vis-a-vis the rights of the 4th Respondent and user of the premises for commercial purposes, considering the narrow scope of the Petition, I am not inclined to go into that aspect and the issue of the rights of the 4th Respondent in respect of the premises and user thereof are left open. I am informed that proceedings wherein the issue of user of the premises from garage to commercial are pending in Court. It is an admitted position that the Application of the 4th Respondent for membership of the Petitioner-Society in respect of the garages was made only on 13th November 1999 i.e. after both the 1993 Resolution and 1998 Resolution of the Petitioner-Society and therefore, the said Resolutions would apply to the case of the 4th Respondent.

1993 AND 1998 Resolutions of the Petitioner-Society

25 It would be necessary to make a reference to the 1993 and 1998 resolutions passed by the Petitioner-Society and how the matter proceeded.

(i) On 24th January 1993, the Petitioner passed a resolution at a General Body Meeting to the effect that in future, garages would not be allowed to be sold to outsiders and that the same would be permitted to be used only for car parking.

(ii) The 4th Respondent challenged the Resolution dated 24th January 1993 in the Co-operative Court by filing Dispute No.324 of 1993, in which initially an order was passed granting an interim injunction restraining the Petitioner from acting on or implementing the resolution dated 24th January 1993.

(iii) In 1998, the Petitioner passed another resolution at a General Body Meeting to the effect that in future, garages would be recorded only in the name of flat owners and would be used as garages.

(iv) On 13th August 1999, Letters of Administration to the estate of the deceased, Mr.M.C.Ahuja, was issued by this Court in favour of Mrs.Ganga Ahuja, i.e. wife of M.C.Ahuja, pursuant to which the flat No.C-26 held by the 4th Respondent's father M.C. Ahuja was transferred to the name of Mrs.Ganga Ahuja.

(v) On 1st September 1999, Dispute No.324 of 1993, challenging the Petitioner-Society's resolution dated 24th January 1993 was dismissed for default by the Co-operative Court.

- (vi) On 21st October 1999, the 4th Respondent filed Application No.47 of 1999 in the Co-operative Court seeking to set aside the order dated 1st September 1999 dismissing Dispute No.324 of 1993.
- (vii) The 4th Respondent claims that on 25th October 1999, a family arrangement was arrived at under which Flat No.C-26 went to the share of his mother Mrs.Ganga Ahuja, and garage Nos.8, 9 and 10 came to his share.
- (viii) On 13th November 1999, Respondent No.4 applied for membership of the Petitioner-Society in respect of garage Nos.8,9 and 10 under bye-law No.37 of the Petitioner-Society's bye-laws.
- (ix) In or about October/November 2000, Respondent filed Application No. 16 of 2000 before the Respondent No. 3 – Deputy Registrar under section 22 of the MCS Act claiming deemed membership in respect of garage Nos. 8, 9 and 10.
- (x) On 20th December 2001, Application No.47 of 1999 filed in the Co-operative Court for setting aside the dismissal of Dispute No.324 of 1993, was dismissed by the Cooperative Court. The 4th Respondent filed an Appeal, being Appeal No.182 of 2001, challenging the order dated 20th December 2001, which was dismissed on 26th March 2002.

26 Thus, the challenge to the Petitioner-Society's 1993 Resolution to the effect that in future garages would not be allowed to be sold to outsiders and that the same would be permitted to be used only for

car parking, having failed, the said 1993 Resolution would be valid and subsisting. Moreover, the Petitioner-Society's 1998 Resolution to the effect that in future garages would be recorded only in the name of flat owners and would be used as garages, has not been challenged by the 4th Respondent. Under section 72 of the MCS Act, the final authority of every Society vests in the General Body of Members. In these aforesaid circumstances, it can be safely said that both the 1993 Resolution as well as the 1998 Resolution hold the field and are valid and binding. In my view, the Petitioner-Society would be well within its rights not to grant membership to a 3rd party who is not a holder of any flat in the Petitioner-Society building. Thus, the Petitioner-Society cannot be compelled to grant membership in respect of the said garages to the 4th Respondent, who is not a holder of a flat in the Petitioner-Society building, particularly in light of the two Resolutions of 1993 and 1998 of the Petitioner-Society which specifically forbid the transfer of the garages to a person who is not a member of the Petitioner-Society. Had the mother of the 4th Respondent, Mrs. Ganga Ahuja who is holder of a flat No.C-26 in the Society, applied for transfer of garages to her name from that of M/s Ahuja Dairy Farm (apparently a sole-proprietary firm which belonged to the deceased M.C. Ahuja) there may probably not have been any issue. As a matter of fact, after the demise of M.C. Ahuja, the Letters of Administration was issued in favour of Mrs. Ganga Ahuja, the mother of the 4th Respondent and the said flat No.C-26 was transferred to her name by the Petitioner-Society.

The *inter-se* family arrangement and execution of Transfer Deeds between the 4th Respondent and his mother Mrs. Ganga Ahuja whereby it is claimed that the garages came to the share of the 4th Respondent would *ipso facto* not entitle the 4th Respondent to be a member of the Petitioner-Society in absence of the 4th Respondent holding any flat in the Petitioner-Society. The argument on behalf of the 4th Respondent that the predecessor of M.C. Ahuja, one Harbans Singh who was occupying shops in the property from where he was carrying on business, prior to the construction of the buildings of the Petitioner-Society, and that the premises/garages in question were given to Harbans Singh in lieu of the shops does not take the case of the 4th Respondent any further, in the facts and circumstance of the present case, particularly in the teeth of the 1993 and 1998 Resolutions of the Petitioner-Society. At the highest, the 4th Respondent may have a case in respect of continuance of the user of the premises/garages as commercial purposes but it does not oblige the Petitioner/Society to issue a fresh membership to the 4th Respondent who is not holding any flat in the Petitioner-Society buildings. The Court is informed by the learned Senior Counsel for the Petitioner-Society that after the 1993 and 1998 resolutions of the Petitioner-Society, the Petitioner-Society has not approved any transfer of garages in favour of an outsider.

Partnership Housing Society. The fact that the said premises/garages are used as shop for commercial purposes and the Petitioner-Society had permitted the user of the premises as commercial or otherwise, would not entitle the 4th Respondent to seek membership of the Petitioner-Society in absence of the 4th Respondent holding any flat in the Petitioner-Society. It needs to be borne in mind that this is a case of grant of a fresh and separate membership of the Petitioner-Society on the basis of an internal family arrangement and Transfer Deeds interse between family members. Merely because there is now an internal family arrangement between the 4th Respondent and his mother Mrs. Ganga Ahuja who is the member of the Petitioner-Society (holding a flat No.C-26) would not entitle the 4th Respondent to seek separate membership of the Petitioner-Society in respect of the said garages. For the benefit of the 4th Respondent, it may be stated that the Petitioner-Society had granted NOC in the year 1977 for use of the premises/garages by M/s Ahuja Dairy Farm (apparently a sole proprietary firm of M.C. Ahuja) for carrying on business and had also approved transfer and membership of M/s Ahuja Dairy farm in respect of garage nos. 8 and 9 in the same year ie. 1977. However, at the relevant time, M.C Ahuja was holding a flat (flat No. C-26) in the Petitioner-Society building. It is an admitted position that when the 4th Respondent applied for membership of the Petitioner-Society in the year 1999, the 1993 and 1998 resolutions were holding the field and the 4th Respondent was not holding any flat in the Petitioner-Society building (as at relevant time flat No. C-26

was in the name of Mrs. Ganga Ahuja, mother of the 4th Respondent). In my opinion, the membership of the Petitioner-Society, which is a Housing Society cannot be split in a manner whereby the flat holders and garage holders hold separate memberships which would be contrary to the resolutions of the Petitioner-Society which are in vogue since 1993/1998.

28 Quite apart from the above, in my view, as a matter of first principles, unless the Applicant making an Application under section 22 of the MCS Act is a member of the Society holding a flat, he would not be entitled to the membership of the Petitioner-Society in respect of a garage. Whether the garage is being used for commercial purposes or otherwise is of no consequence. In a Housing Society, the garages shown in the sanctioned plan are meant for parking cars for the benefit of the members of the Society who hold flats in the Society building and not for the benefit of an outsider who is not holding flat in the said Society. Merely because there is an internal family arrangement between the heirs of the deceased member would not entitle an heir to seek a separate membership of the Society and the Society would not be obliged to grant a separate membership to the Applicant in respect of a garage.

29 Reliance on the Development Control Regulations for Greater Mumbai 1991, by the learned Counsel for the 4th Respondent is in my view misplaced as the said Regulations were enacted only in the year

1991 whereas the buildings of the Petitioner-Society were constructed much prior to coming into force of the said Regulations.

30 In **Commissioner of Municipal Corporation, Shimla**,
(supra) the Supreme Court in paragraphs 44 and 45 held as follows:

“44. There cannot be any doubt whatsoever that an owner of a property is entitled to enjoy his property and all the rights pertaining thereto. The provisions contained in a statute like the 1994 Act and the building bye-laws framed thereunder, however, provide for regulation in relation to the exercise and use of such right of an owner of a property. Such a regulatory statute must be held to be reasonable as the same is enacted in public interest. Although a deeming provision has been provided in sub-section (1) of Section 247 of the 1994 Act, the same will have restricted operation. In terms of the said provision, the period of sixty days cannot be counted from the date of the original application, when the building plans had been returned to the applicant necessary clarification and/or compliance of the objections raised therein. If no sanction can be granted, when the building plan is not in conformity with the building bye-laws or has been made in contravention of the provisions of the Act or the laws, in our opinion, the restriction would not apply despite the deeming provision.

45. A legal fiction, as is well-known, must be construed having regard to the purport and object of the Act for which the same was enacted”

31 In **Shri Vivekanand Nursing Home Trust** (supra) it has been held by the Division Bench of this Court Bench at Aurangabad in paragraphs 20, 21 and 22 of the judgment as follows:

"20) *It is clear from the reading of sub-section (8) that the Central Council can pass an order approving to grant or granting permission upon compliance of factors named in sub-section (8), viz. Factors (a) to (g). Thus, only after satisfaction about the existence of the factors mentioned in (a) to (g), the Central Government can grant permission as per sub-section (4). In order to raise the legal fiction about deemed permission or deemed approval, it must be shown to the satisfaction of the Court that the factors, spoken of in sub-section (8) required to be complied with, do exist in the particular medical college or that there is no violation of the provisions of the Act, or Regulations or the prescribed minimum standards. That we think is the Terra firma for raising a legal fiction in accordance with canons of interpretation of statutes.*

21) *In the case of Ishikawajima-Harima Heavy Industries Ltd. Vs. Director of Income Tax reported in (2007) 1 Scale 140, the Supreme Court held in para 36 thus:*

"36. A legal fiction, as is well known, must be construed having regard to the purport and object of the Act for which the same was enacted."

22) *In the case of Calcutta Municipal Corporation Vs. Anil Ratan Banerjee – AIR 1995 SC 659, the Apex Court stated thus in para 2.*

"2. So far as the deemed sanction of the twelve storeyed building applied for on August 24, 1987 is concerned, it cannot be deemed to have been sanctioned on the expiry of thirty days by virtue of Section 319 of the Bengal Municipal Act for the reason that no such permission could have been actually granted under the law then in force in the said area, having regard to the width of the road abutting the respondents' plot and other relevant circumstances. The Division Bench has itself recognized that the deemed permission cannot be inconsistent with the relevant rules and regulations. No deemed permission can be conceived of which is inconsistent with the relevant rules and regulations."

32 Applying the principles of law laid down in the aforesaid judgments, in my view, if no membership can be granted to the 4th Respondent in respect of the garages in law, the provisions of deemed membership under section 22(2) of the MCS Act would have no application in the facts of the present case.

33 The upshot of the above discussion is that the 4th Respondent who is the holder of the stand-alone garages but not the holder of a flat in the Petitioner-Society which is a Housing Society would not be entitled to become a member of the Petitioner-Society and his Application dated 13th November 1999 for membership of the Petitioner-Society in respect of the said garages cannot be granted. The judgment of

the Supreme Court in Nahalchand wherein it is been held that the stand-alone garage as an independent unit by itself is not a flat also supports the case of the Petitioner-Society. In the circumstances, the impugned orders which were passed prior to the law laid down by Supreme Court in Nahalchand and without considering the fact that the 4th Respondent was not a holder of any flat in the Petitioner-Society and which direction contained in the impugned orders would be contrary to the 1993 and 1998 resolutions of the Petitioner-Society cannot be sustained and are required to be set aside.

34 In the circumstances, I pass the following order:

i) The Petition is allowed and rule is made absolute in terms of prayer clause (a) which reads thus:

(a) that this Hon'ble Court in its jurisdiction under Article 226 of the Constitution of India be pleased to issue the Writ of Certiorari or a writ in the nature of certiorari and/or any other appropriate write and/or directions and/or orders thereby calling the Respondents, particularly the Respondent No. 4, to produce the case papers relating to the above matter and the orders passed therein from time to time and after going through the legality, and validity and/or propriety thereof, be pleased to quash and set aside the impugned orders dated 17th February, 2007 and 28th April, 2008 (being Exhibits-A and B hereto) passed by the Respondent No.3 and Respondent No. 2.

- ii) It is clarified that considering the narrow scope of this petition, this Court has not gone into the substantial rights of the 4th Respondent vis-a-vis the premises in question and whether or not the 4th Respondent is entitled to use the premises in question for commercial purposes and the observations in this judgment in that regard shall be considered as only prima facie and will not influence the Court where such issue is pending.
- iii) The 4th Respondent would be at liberty to apply for membership of the Petitioner-Society afresh in the event it is held by a competent Court on the basis of sanctioned plans of Mumbai Municipal Corporation that the premises in question are shops (and not garages).
- iv) There shall be no order as to costs.

(A. A. SAYED, J.)