

Urmila Ingale

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3570 OF 2007

St. Anthony Homes Cooperative
Society Ltd.
10th Road,
Chembur, Mumbai 400 071.

.. Petitioner

Vs.

1. Mr.Nitin K.Gandhi

2. Mrs.Daxa Nitin Gandhi
both residing at 'Utsav'
4th floor, Plot No. 520,
12th Road, Chembur,
Mumbai – 400 071.

3. Dy. Registrar, Cooperative
Society, 'M' Ward,
Mumbai

4. The Divisional Joint
Registrar, Cooperative
Societies, Mumbai
Division, Mumbai.

5. State of Maharashtra
through Govt.Pleader,
High Court, Appellate Side,
Mumbai – 032

.. Respondents

Mr.Rajesh N. Kachare, for the Petitioner.

Mr.Y.V.Divekar a/w Mr.Rohan Karande i/b M/s.Divekar & Co.,
for Respondent Nos. 1 & 2.

Ms.Jyoti P. Jadhav, AGP for Respondent Nos. 3 to 5.

**CORAM : A.A.SAYED &
M.S.KARNIK, JJ.
RESERVED ON : 03rd AUGUST, 2018
PRONOUNCED ON : 28th AUGUST, 2018**

ORDER (PER M.S.KARNIK J.) :

. By this Petition filed under Articles 226 & 227 of the Constitution of India, the Petitioner has prayed for declaration that bye-law No. 7(a) of the Petitioner - Society is constitutional, valid, legal and intra-vires. The Petitioner has further prayed for quashing and setting side order dated 13/10/2003 passed by the Divisional Joint Registrar, Cooperative Societies, Mumbai. The Divisional Joint Registrar by the impugned order allowed the Revision Application filed by Respondent Nos. 1 & 2 and the Petitioner was directed to admit the Respondent Nos. 1 & 2 as members of the Petitioner- Society and issue Share Certificate.

2. The Petitioner is a Society duly registered under the Maharashtra Co-operative Societies Act, 1960 (hereinafter referred to as the 'said Act' for short). The main object of the Society is to provide plots for housing for the Roman Catholics

situated within Bombay. As per the bye-laws only Roman Catholics shall become the members of the Petitioner-Society. The Petitioner claims to be the owner of the entire land having 95 plots in total. Plot No. 483/484 was allotted to Mrs.Merlyn Fernandes and others on lease by agreement dated 29/01/1974. It is the Petitioner's case that as per bye-laws of the Society as well as rules framed from time to time, the Lessee shall not transfer his leasehold rights in respect of the said plot without prior written consent of the Lessor. The main contention of the learned Counsel for the Petitioner is that the Society is established only for the Roman Catholics and only Roman Catholics can be admitted as a member of the Petitioner- Society as provided under the bye-laws and rules and regulations of the Petitioner Society. Learned Counsel for the Petitioner submits that some time in February 1999, the original Lessee i.e. Mrs.Merlyn Fernandes and others sought to sell and assign their purported leasehold rights in respect of the said plot in favour of Respondent Nos.1 & 2 non Roman Catholics. Learned Counsel for the Petitioner invited our attention to the registered bye-laws

of the Society the relevant clause of which reads thus :

“7(a). All persons who have signed the application for registration are original members. Other members shall be elected by the Committee, provided that all members shall be Roman Catholics Every person shall pay Re.1 on applying for admission, for which he shall receive a copy of the bye-laws. In cases where the application is refused, the entrance fee shall be returned.”

3. According to the learned Counsel for the Petitioner transfer of the leasehold rights is contrary to the bye-laws and rules and regulations of the Petitioner -Society since only Roman Catholics can become member of the Society and admittedly Respondent Nos. 1 & 2 are not Roman Catholics. The application of Respondent Nos.1 & 2 made on 20/09/1999 for permission to take lease in their name was rejected vide communication dated 07/11/1999.

4. Learned Counsel for the Petitioner pointed out that Respondent Nos. 1 & 2 filed an Appeal under Section 23 of the said Act before Respondent No.3. - Deputy Registrar, Co-

operative Society, Mumbai for admitting Respondent No. 1 & 2 as members and issuing Share Certificate in their favour. The Deputy Registrar dismissed the Appeal on the ground that Respondent No.1 & 2 have purchased the said plot without obtaining prior permission of the Petitioner - Society.

5. Respondents No.1 & 2 being aggrieved by order dated 28/04/2003 filed Revision Application before Respondent No.4 – the Divisional Joint Divisional Registrar, Co-operative Societies, Mumbai under the said Act. The Revision came to be allowed and the Petitioner- Society was directed to admit Respondent Nos.1 & 2 as a members of the Petitioner - Society and issue Share Certificate. Learned Counsel for the Petitioner referring to the bye-laws contended that the impugned order passed in Revision is illegal since the same goes contrary to the basic provisions of the bye-laws of the Petitioner- Society that only Roman Catholics can become members of the Society. He places his reliance on the decision of the Apex Court in the case of **Zoroastrian Cooperative Housing Society Ltd. and another**

Vs. District Registrar, Cooperative Societies (Urban) and others reported in (2005) 5 Supreme Court Cases 632 in support of his contention that Society registered under the Co-operative Societies Act cannot be directed to admit a member who is not qualified to be a member in terms of its duly registered bye-laws. Learned Counsel therefore submitted that order passed in Revision deserves to be interfered with.

6. Learned Counsel for Respondent Nos. 1 & 2 on the other hand supported the order passed by the Divisional Joint Registrar. According to him, the Deputy Registrar while hearing the Appeal confined himself only to the question that no prior permission was taken from the Society for any assignment and development. He therefore submits that the Petitioner is now estopped from raising a plea that Respondent Nos. 1&2 cannot be admitted as members only because they are not Roman Catholics. Learned Counsel submits that the original resolution denying membership to the Respondents No.1 & 2 has not been produced before the authorities by the Petitioner-Society.

Learned Counsel also invited our attention to the affidavit in reply filed on behalf of Respondent Nos. 1 & 2 on 15/01/2018. In the said affidavit in reply he has invited our attention to the averments in respect of various plots which have been developed by constructing multi-storeyed buildings, most of the occupants of which are non Roman Catholics. He also pointed out that many bungalows have been given on rent the occupants of which are non Roman Catholics. He therefore submits that the stand of the Petitioner - Society about the denial of membership to Respondent Nos. 1 & 2 on the ground that they are non Roman Catholics is completely insignificant and devoid of any substance in view of the subsequent developments.

7. Heard learned Counsel for the parties. The registered bye-laws of the Petitioner - Society more particularly clause 7(a) clearly provides that all persons who have signed the application for registration are original members. Other members shall be elected by the Committee provided that all members shall be Roman Catholics. The Apex Court in case of

Zoroastrian Cooperative Housing Society Ltd. and another (*supra*) which judgment was rendered after the passing of the impugned order, has held that a Society registered under the Co-operative Societies Act cannot be directed to admit a member who is not qualified to be a member in terms of its duly registered bye-laws. The Apex Court has further held that Co-operative Society is not State unless the tests indicated in **Ajay Hasia Vs. Khalid Mujib Sehravardi (1981) 1 SCC 722** case are satisfied. It is further observed that it is not possible to argue that a person has a fundamental right to become a member of a voluntary association or of a cooperative society governed by its own bye-laws. In this context, it would be profitable to reproduce paragraph 34 which reads as under :

“The argument that public policy is as reflected by the constitutional guarantees, which govern rights and obligations has to be approached with caution. It will be easy for State Legislatures to provide in their respective **Co-operative Societies Acts** that no society could be formed or registered under the Act as confined to a group, a sex, a religion or members of a particular persuasion or way of life. But that is different from saying that in the name of open membership, subject to

its bye-laws contemplated by the relevant provisions of the Act, a direction could be issued to ignore the bye-laws and to admit a person who is not qualified to become a member. Moreover, what is public policy in the context of a co-operative society got registered by certain persons coming together and laying down a qualification for membership in that society, is a question that has to be considered essentially in the context of the availability of such a right in India to form such associations and the absence of a prohibition in that behalf contained in the [Co-operative Societies Act](#) and the Rules. In fact, the Act and the Rules contemplate classification of a society and even there, no prohibition has been indicated in respect of the confining of the membership to a class of people. The decisions of the Bombay High Court relied on by counsel for the respondent, in our view, have proceeded on the basis of the concept of open membership without giving adequate importance to the provision in the very section that the open membership is subject to bye-laws of the society or the qualification prescribed for membership in the society. In that context, it is not possible to import one's inherent abhorrence to religious groups or other groups coming together to form, what learned counsel for the respondent called "ghettos". That is certainly an important aspect but that is an aspect that has to be tackled by the legislature and not

by the authorities under the Act directing the co-operative society to go against its own bye-laws or by the courts upholding such orders of the authorities, based on presumed public policy when the Act itself does not warrant it or sanction it.”

8. We find that the Revisional Authority in the impugned order dated 13/10/2003 has relied upon the decision of the Apex Court in case of **Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi reported in AIR 1975 Supreme Court 1470** to hold that there is no provision under the said Act to obtain prior permission of Society before acquiring any interest in the plot of Society.

9. Though there is some substance in the contention of the learned Counsel for Respondent Nos. 1 & 2 that the stand of the Petitioner- Society before the Revisional Authority was that the membership is refused for failure to obtain permission of the Society and not on the ground of Respondent Nos. 1 and 2 being non Roman Catholics, in our opinion, in view of the decision of the Apex Court in case of **Zoroastrian Cooperative Housing Society Ltd. and another (supra)**, the question whether

membership to Respondent Nos.1 & 2 can be refused on the ground that they are non Roman Catholics goes to the root of the matter. No doubt Respondents No. 1 & 2 have taken a stand that on several plots in the Society, multi-storeyed buildings have come up which are occupied by non Roman Catholics. In our opinion, this issue needs to be examined afresh by the Deputy Registrar. The Petitioner - Society in this Petition has raised a plea regarding the contravention of the bye-laws dis-entitling Respondent Nos. 1 & 2 from the membership of the Society. Even the Deputy Registrar in the Appeal filed by Respondent Nos. 1 & 2 has examined the issue only on the ground of obtaining permission of the Society prior to the transfer of leasehold rights. It is in this view of the matter that we are inclined to set aside the orders passed by the Deputy Registrar in Appeal as well as Joint Registrar passed in Revision. The matter needs to be remitted back to the Deputy Registrar for hearing the Appeal filed by Respondent Nos. 1 & 2 afresh taking into consideration the bye-laws No. 7 in the light of the decision of the Apex Court in the case of **Zoroastrian Cooperative**

Housing Society Ltd. and another (*supra*) and also upon considering the stand of the Respondent Nos. 1 & 2 that the Society on several plots in the Society, multi-storyed buildings come up most of the occupants of which are non Roman Catholics. Hence, the following order.

ORDER

- i) The impugned order dated 13/10/2003 passed by the Divisional Joint Registrar, Co-operative Societies, Mumbai is set aside.
- ii) The order dated 28/04/2003 passed by the Deputy Registrar Co-operative Societies, Mumbai is also set aside.
- iii) The Deputy Registrar is directed to hear the Appeal filed by Respondent Nos. 1 & 2 afresh as expeditiously as possible preferably within a period of 12 weeks from today on its own merits in accordance with law.
- iv) We may not be understood to have expressed any opinion on merits of the matter. Needless to mention that the parties would be at liberty to file Affidavits to bring the subsequent events on record if they so desire.

10. The Petition is disposed of with no order as to costs.

(M.S.KARNIK, J.)

(A.A.SAYED, J.)