

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 9828 OF 2018**

- 1 Hemchandra Madhukar Shaligram,
Aged : 58 years,
Occupation : Business,
Ex-Chairman of Shilpa Premises
Co-operative Society Limited,
residing at Flat No. 101, 1st Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.
- 2 Rohit Gulabchand Mehta,
Aged : 70 years,
Occupation : Business,
Ex-Secretary of Shilpa Premises
Co-operative Society Limited,
residing at Flat No. 702, 7th Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.
- 3 Shantikumar Ajit Sinha Kapadia,
Aged : 75 years,
Occupation : Business,
Ex-Treasurer of Shilpa Premises
Co-operative Society Limited,
residing at Flat No. 401, 4th Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.
- 4 Minakshi Vashi Daryanani,
Aged : 71 years,
Occupation : Business,
Ex-Managing Committee Member of

Shilpa Premises Co-operative
Society Limited, residing at
Flat No. 302, 3rd Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.

- 5 Naresh Lalchand Bhambhani,
Aged : 56 years,
Occupation : Business,
Ex-Managing Committee Member of
Shilpa Premises Co-operative Society
Limited, residing at
Flat No. 502, 5th Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.
- 6 Falguni Jayantkumar Pathak,
Aged : 42 years,
Occupation : Performing Artist,
Ex-Managing Committee Member of
Shilpa Premises Co-operative Society
Limited, residing at
Flat No. 501, 5th Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.
- 7 Surendra Lilaram Soneji,
Aged : 76 years,
Occupation : Doctor (Cardiologist),
Ex-Managing Committee Member of
Shilpa Premises Co-operative Society
Limited, residing at
Flat No. 601, 6th Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.

.....Petitioners.

Vs.

- 1 Sonal Sanjeeva Shetty,
Aged : approx. 44 years,
Occupation : Doctor,
residing at Flat No. 701, 7th Floor,
Shilpa Premises Co-operative Society
Limited, Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.
- 2 Shilpa Premises Co-operative Society
Limited, a Co-operative Housing Society,
registered under the provisions of
The Maharashtra Co-operative Societies
Act, 1960 under Registration No.
BOM/GEN/1135 of 1978 and having its
registered address at
Plot No. 64-E, South Avenue,
(Ramkrishna Mission Road),
Santacruz (West), Mumbai – 400 054.
- 3 R.G. Redkar,
Administrator of
Shilpa Premises Co-operative Society
Limited, having address at
Above Bhandari Co-operative Bank
Limited, Bhavan Hetkari Mahajan Wadi,
Ranade Road, Near P.L. Kale Guruji Marg,
Near D'Silva High School,
Kohinoor Cinema,
Dadar (West), Mumbai – 400 028.
- 4 The Deputy Registrar of Co-operative
Societies, H/West Ward,
Above Bhandari Co-operative Bank
Limited, Bhavan Hetkari Mahajan Wadi,
Ranade Road, Near P.L. Kale Guruji Marg,
Near D'Silva High School,
Kohinoor Cinema,
Dadar (West), Mumbai – 400 028.

- 5 The Divisional Joint Registrar of
Co-operative Societies, Mumbai Division,
6th Floor, Malhotra House, Opp. G.P.O.,
Mumbai – 400 001.
- 6 State of Maharashtra,
through Government Pleader,
High Court, Appellate Side,
having their office at High
Court Annexe Building, (PWD)
Building, Fort, Mumbai – 400 032.Respondents.

Mr. Shoaib I. Memon a/w. Iram Memon for the Petitioners.
Smt. Priya A.H.H. Ponda, for Respondent No.1.
Mr. A. A. Kumbhakoni, Advocate General for the Respondent-State.
Smt. M.S. Bane AGP for the Respondent Nos. 4 to 6.

CORAM :- A.S. GADKARI, J.
RESERVED ON :- 31st JULY, 2019.
PRONOUNCED ON :- 18th SEPTEMBER, 2019.

JUDGMENT :-

In pursuance of Order dated 14th January, 2019 passed by the Hon'ble Supreme Court in Special Leave to Appeal (c) No. 458 of 2019, the present Petition is taken up for final hearing and disposal.

2 Heard Mr. Shoaib Memon for the Petitioners, Smt. Priya Ponda, for the Respondent No.1, Mr. A. A. Kumbhakoni, the learned Advocate General for the State and Smt. M.S. Bane, AGP for the Respondent Nos. 4 to 6.

3 By the present Petition under Article 227 of the Constitution of India, the Petitioners have taken exception to the Order dated 21st February, 2018 passed by the Divisional Joint Registrar, Co-operative Societies,

Mumbai Division, Mumbai i.e. the Respondent No.5 herein, in Revision Application No. 559 of 2017, dismissing the said Revision and confirming the Order dated 15th November, 2017 in Application No. 1737 of 2017 passed by the Deputy Registrar, Co-operative Societies, H/West Ward, Mumbai i.e. the Respondent No.4 herein, under Section 78A (1)(b) of the Maharashtra Co-operative Societies Act, 1960 (for short, "*the MCS Act*"), thereby disqualifying the Petitioners from being re-elected, re-co-opted or re-nominated as members of any committee of any Society till the expiry of the period of next one term of the Committee.

4 The record reveals that, by an Order dated 17th July, 2018, this Court granted Rule and interim relief in terms of prayer clause (b) of the Petition. The said Order dated 17th July, 2018 was challenged by the Respondent No. 1 before the Hon'ble Supreme Court by way of Special Leave to Appeal (c) No. 458 of 2019. The Hon'ble Supreme Court on 14th January, 2019 was pleased to dismiss the said S.L.P. on the ground that, the same arises out of interim Order. The Supreme Court, however, requested the High Court to take up the Writ petition and dispose of the same preferably within a period of six months.

As noted earlier in pursuance of the said Order dated 14th January, 2019, passed by the Hon'ble Supreme Court, the present Petition is taken up for hearing and was heard on various earlier occasions.

5 The Petitioners are members and were the Managing

Committee members of the Respondent No.2. The Respondent No.1 is also member of the Respondent No.2-Society. The Respondent No.1 acquired a residential premises in the Respondent No.2 Society by succession from her father. The Respondent No.1 became member of the Respondent No.2 Society in the year 2013.

The Respondent No.1 thereafter, lodged various complaints with the Respondent No.2 Society and the copies of the same were also forwarded to the Respondent No.4 and/or other Authorities established under the MCS Act.

6 In pursuance of the complaints lodged by the Respondent No.1, the Respondent No.4 with a view to inspect the working of the Respondent No.2-Society and to ensure that, the provisions of the MCS Act, Rules and bye-laws of the Society are being properly followed by the Respondent No. 2-Society and also to ensure that, the records and books of accounts are kept in proper form etc., passed an Order dated 2nd March, 2017 under Section 89A of the MCS Act and appointed Shri. Satish Mane, Co-operative Officer, Grade-II to cause inspection of the Respondent No.2-Society. The said Co-operative Officer thereafter, submitted his Inspection Report under Section 89A of the MCS Act dated 11th May, 2017 to the Respondent No.4.

In his Inspection Report dated 11th May, 2017, the said Co-operative Officer noticed in all 19 irregularities and/or deficiencies in the affairs of the Respondent No.2-Society and accordingly gave his suggestions

thereof. As per the said Report, out of 19 irregularities, 4 were pertaining to the jurisdiction of Co-operative Court, 8 were pertaining to the jurisdiction of Registrar, 5 were of trivial in nature and in 2 counts, it was observed that, those do not pertain to the jurisdiction of the said office and the Respondent No.1 was expected to approach appropriate forum for its redressal.

7 In pursuance of the said Inspection Report dated 11th May, 2017, the Respondent No.4 issued a notice dated 20th June, 2017 under Section 78A (1)(b) of the MCS Act to the Petitioners. A copy of the said notice was also sent to the Chairman/Manager of the Mumbai District Co-operative Housing Federation Limited, Fort, Mumbai (for short, "*the Federal Society*") for its opinion. The Respondent No.4 thereafter, heard the Petitioners and Respondent No.1 on various dates fixed by it.

8 The Respondent No.4 after receipt of the say from the Petitioners and Respondent No.2, in the matter sent a letter/communication dated 1st September, 2017 seeking '*consultation*' from the Federal Society, to which the Respondent No.2 was affiliated.

The said communication was sent by an Ordinary Post. The Federal Society refused to accept the said communication, as there was deficit of postal stamp of Rs.10/-. As the Federal Society did not communicate its opinion to the Respondent No.4 within 45 days, in view of second proviso to Section 78A, the Respondent No.4 presumed that, the

Federal Society has no objection to the Order of supersession or removal of members and proceeded to pass Order dated 15th November, 2017 under Section 78A(1)(b), thereby removing the Petitioners from being Managing Committee members and held not to be eligible to be re-elected, re-co-opted or re-nominated as members of any committee of any Society till the expiry of next one term of the committee.

9 While passing Order dated 15th November, 2017, the Respondent No. 4 has taken into consideration in all 15 counts/irregularities as were stated by the Co-operative Officer in his Inspection Report dated 11th May, 2017. The same were treated as charges against the Petitioners. It is observed by the Respondent No.4 that, the communication sent to the Federal Society for consultation has been refused by the Federal Society and therefore, it has been inferred that, the Federal Society does not want to give any consultation in the matter.

It appears that, three major grounds/charges which have weighed in the mind of the Respondent No.4 while passing Order dated 15th November, 2017 are that, (i) as per Bye-laws of 78 to 84, the Respondent No.2-Society did not pass any resolution for grant of parking space to the members. Though, out of 14 members only 8 members were residing in the building, 16 vehicles are being parked. However, the Respondent No.1 has not been allotted a parking space. When the Respondent No.1 demanded for a parking space, the same was denied to her. (ii) the Managing

Committee meeting of the Respondent No.2-Society was being conducted in the house of the Secretary of the Society and the said Secretary used to insult the Respondent No.1. That, the Respondent No.1 has lodged a Complaint on 29th August, 2016 with Santacruz Police Station and, (iii) though, as per the Rules framed under the MCS Act an amount of Rs.25,000/- is permissible to be charged for transfer of a premises of the Society, the Respondent No.2 Society under the pretext of claiming donation, has accepted a sum of Rs.2,50,000/- for transfer of Flat No. 301 from Shri. Varun Khandelwal. That, the Secretary of the Society has given false information pertaining to the said transfer.

10 The Petitioners feeling aggrieved by the said Order dated 15th November, 2017 passed by the Respondent No.4 under Section 78A(1)(b), preferred Revision under Section 154 of the MCS Act, before the Respondent No.5 bearing Revision Application No.559 of 2017.

The Respondent No.5 after evaluating the evidence available on record and after hearing the parties to the said Revision, was pleased to dismiss the same by its impugned Order dated 21st February, 2018.

11 Mr. Memon, learned counsel for the Petitioners submitted that, there are in all 14 members of the Respondent No.2-Society, out of which 12 members are on the side of the Petitioners. The Managing Committee consists of in all 7 members. The tenure of the earlier Managing Committee came to an end on 22nd September, 2016. That, the election of the

Respondent No.2-Society took place on 1st August, 2016 and new Managing Committee came into existence on 23rd September, 2016. He further submitted that, the acts of omission alleged by the Co-operative Officer in his Inspection Report dated 11th May, 2017 are attributed to the earlier Managing Committee. That, no serious lapses can be attributed to the Petitioners to disqualify them from being members of the Managing Committee. He submitted that, the letters referred to by the Respondent No.2 in the impugned Order are prior in point of time than the present Managing Committee came into existence. He submitted that, to remove the Petitioners from being members of the Managing Committee is a drastic step taken under Section 78 of the MCS Act. The said drastic action cannot be resorted to lightly and without regard to the legal rights of the shareholders, as also the members of the Managing Committee. In support of his contention, he relied on the decision in the case of *Little Gibbs Co-op. Housing Vs. The State of Maharashtra & Ors.*, reported in AIR 1972 Bom. 108.

He submitted that, most of the alleged irregularities as per the Inspection Report dated 11th May, 2017 are beyond the jurisdiction of the Registrar and therefore, he cannot take action on it. That, it is only the Co-operative Court, which has jurisdiction to deal with the said alleged irregularities and therefore, the Respondent No.4 has committed grave error in usurping the power of Co-operative Court, while passing the

impugned Order. He further submitted that, it is a well settled principle that, if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. He submitted that, the rule that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden. In support of his contention, he relied on the following decisions of the Hon'ble Supreme Court:-

- (i) Ramchandra Keshav Adke & Ors. Vs. Govind Joti Chavare & Ors. Reported in 1975, AIR 915;
- (ii) Shiv Kumar Chadha Etc. Vs. Municipal Corporation of Delhi, reported in 1193 SCR (3) 522, and;
- (iii) Morgan Stanley Mutual Fund Vs. Kartick Das, reported in 1994 SCC (4) 225: JT 1994(3) 654.

He submitted that, in the present case, the Respondent No.4 before passing Order under Section 78A(1)(b) did not take effective and meaningful consultation from the Federal Society, as the envelop containing communication dated 1st September, 2017 addressed by the Respondent No.4 to the Federal Society has been returned back with remark "*Refused*" on the ground that, there was a deficit of Rs.10/- towards postal stamp to the said envelop. He submitted that, therefore, there was no consultation rendered by the Federal Society to the Respondent No.4 before passing the

impugned Order dated 15th November, 2017. He submitted that, both the Authorities below, in their impugned Orders at paragraph Nos. 66 and 91 respectively, have erred in holding that, the Respondent No. 4 took efforts in getting consultation from the Federal Society, is contrary to the record. He submitted that, in the present case the Respondent No.4 has failed to comply with the legal necessity and mandate of law to get '*consultation*' from the Federal Society as contemplated under Section 78A(1) of the MCS Act. He further submitted that, the requirement of '*consultation*' with Federal Society must be a meaningful consultation. In support of his contention, he relied on a decision in the case of *Ravindra V. Gaikwad & Ors. Vs. The State of Maharashtra & Ors.*, reported in 2002 (2) All MR 489: 2002(5) Mh.L.J. 464.

He therefore, prayed that, the impugned Orders passed by the Respondent Nos. 4 and 5 respectively, be quashed and set aside by allowing the present Petition.

12 Smt. Ponda, learned counsel for the Respondent No.1 vehemently opposed the Petition. Smt. Ponda, produced on record a comparative chart showing composition of committee members and submitted that, the same committee members by interchanging their designations, are heading the Managing Committee of Respondent No.2-Society since long. She submitted that, on her complaints, the Respondent No.4 had sent requisitions to the Petitioners, which were not complied with

by them and therefore, the provision of Section 78A(1)(b) has been rightly invoked by the Respondent No.4 in the present case.

She further submitted that, the notice dated 20th June, 2017 issued by the Respondent No.4 under Section 78A(1)(b), which is mentioned at serial No. 4 in the cause title of the Impugned Order dated 15th November, 2017 passed by the Respondent No.4, was also a communication seeking consultation from the Federal Society, though it was addressed to the Respondent No.2-Society, a copy of the same was sent to the Federal Society for its information and for seeking its opinion. She further submitted that, even if the Federal Society did not receive letter dated 1st September, 2017, it received the said notice dated 20th June 2017 and non-response by the Federal Society to it, would attract second proviso to Section 78A of the MCS Act. Therefore, it has to be construed that, the Federal Society failed to give its consultation to the Respondent No.4 within the stipulated period of 45 days. She submitted that, the Affidavit filed by Shri. Dattatray Vader, the Honorary Secretary of the Federal Society dated 23rd July, 2019 supports her contention. She submitted that, in view of substitution of Section 78 by the 2013 Amendment, the ratio laid down by this Court in the case of *Ravindra V. Gaikwad & Ors. (Supra)* does not hold field. In support of her contention, she relied on the decision in the case of *Sunil Pundlikrao Bhise Vs. Assistant Registrar, Co-operative Societies, Arvi & Ors.* reported in 2010 (2) Mh.L.J. 377.

She submitted that, the Petitioners had not carried out Structural Audit of Respondent No.2-Society, though it was necessary under the law. She submitted that, since the year 2013 the Respondent No.1 is consistently raising her voice against the mismanagement of the Petitioners in the Respondent No.2-Society and the ultimate effect of it, is the impugned Orders herein.

She, further submitted that, the impugned Orders passed by both the authorities below do not require any interference by this Court and the present Petition may therefore be dismissed.

13 In view of the rival submissions, which primarily pertains to '*consultation*' as envisaged under Section 78A of the MCS Act and the contention that, the Federal Society refused to accept, the letter dated 1st September, 2017, thereby not rendering meaningful consultation to the Respondent No.4, this Court by its Order dated 11th July, 2019, directed the Respondent No.4 to produce record from its office, regarding the consultation sought by it, vide its letter dated 1st September, 2017 as mentioned in sub-para of its impugned Order dated 15th November, 2017 (annexed to the Petition at page No. 66), on next date of hearing i.e. on 16th July, 2019. In pursuance of Order dated 11th July, 2019, the Respondent No.4, through the learned AGP, on 16th July, 2019 produced the record from its office before this Court. The record disclosed that, the letter dated 1st September, 2017 issued by the Respondent No. 4 under Section 78A(1) of

the MCS Act seeking '*consultation*' from the Federal Society has been returned to the said Authority with an endorsement "*Refused*" and the date put thereon was "7/10". The reason for refusal as mentioned thereon is "*Weight Excess - Due Rs.10/-*".

In view thereof, by an Order dated 16th July, 2019, the Secretary of the Federal Society was directed to file an Affidavit, placing on record the procedure adopted by the Federal Society in accepting or refusing the communication from the statutory Authorities, such as Respondent No. 4. He was further directed to place on record the other relevant material, as has been directed by Order dated 16th July, 2019. The present Petition was thereafter adjourned to 24th July, 2019.

In pursuance of Order dated 16th July, 2019, Shri. Dattatray Vader, the Honorary Secretary of the Federal Society, personally remained present in the Court and tendered his Affidavit dated 23rd July, 2019 across the bar. In last para on page No.2 of the said Affidavit, he has admitted that, due to insufficient postal tickets on the envelop sent by Respondent No.4, the Clerk of the Federal Society, inadvertently did not accept the same and hence the remark of '*Refused*' was put on the said envelop. In his Affidavit, there was an ambiguity in paragraph No.2 on page No.3 pertaining to letter dated 20th June, 2017 received on 1st July, 2017, as per the photocopy of extract of Register annexed to the Affidavit and therefore, this Court directed Shri. Dattatray Vader, to file additional

Affidavit, explaining it, if necessary.

On 25th July, 2019, Shri. Dattatray Vader, filed an additional Affidavit and in the said Affidavit, it is categorically stated that, the notice dated 20th June, 2017 issued by Respondent No.4 under Section 78A(1)(b) was received by the Federal Society on 1st July, 2017 and the same is accepted with inward Serial No. 759. In his additional Affidavit, he has further reiterated that, the envelop containing the communication dated 1st September, 2017 has been refused by the concerned Clerk, as there was deficit of postal stamp of Rs.10/-.

14 In view of the above, the questions arise for consideration before this Court are-

- (i) Whether '*consultation*' of the Federal Society under Section 78A (1) of the MCS Act is directory or mandatory?
- (ii) Whether refusal to accept communication seeking '*consultation*' from the Federal Society would amount to '*consultation rendered*' by the Federal Society as contemplated under Section 78A(1) of the MCS Act?

15 In view thereof, this Court on 26th July, 2019 requested the learned Advocate General for the State to clarify stand of the State of Maharashtra in that behalf.

The learned Advocate General, accordingly on 31st July, 2019 appeared in the matter. The learned Advocate General, critically analysed the provisions of Section 78 and 78A of the MCS Act. He submitted that, in

the present case, it has been erroneously observed by the Revisional Authority that, the entire committee has been superseded however, as a matter of fact, only the Petitioners being the members of the said Committee have been disqualified under Section 78A(1)(b) of the MCS Act.

The learned Advocate General, with reference to question No.1 above, submitted that, the consultation with the Federal Society is mandatory and not just directory. That, the consultation has to be '*a prior*' and not '*a post-facto*' consultation. The consultation has to be meaningful, effective and not merely superficial. That, the Federal Society has to apply its mind in order to render an effective consultation. While substantiating his submissions, he placed reliance on the following decisions:-

- (i) *Suresh Dyandeo Khumkar & Ors. Vs. State of Maharashtra & Ors.* reported in 1987 Mh.L.J. 474,
- (ii) *Vinod Ghanshyam Meshram & Ors. Vs. Hon'ble Minister of State, Co-operation and Marketing Maharashtra, Mantralaya, Mumbai & Ors.*, reported in 2016(1) Mh.L.J. 367, and;
- (iii) *Ravindra V. Gaikwad & Ors. Vs. State of Maharashtra & Ors.*, reported in 2002 (5) Mh.L.J. 464:2002(2) All M.R.489.

As far as question No.2 posed herein above is concerned, learned Advocate General submitted that, the refusal of the Federal Society in accepting the communication for '*consultation*' does not amount to acceptance, to attract the second proviso of Section 78A of the said Act,

whereby deeming fiction is envisaged. He submitted that, the refusal to accept the said communication by the Federal Society is in fact ‘*no consultation*’ at all and both the Authorities below have committed grave error in holding that, the Respondent No.4 has put in efforts in seeking ‘*consultation*’ from the Federal Society but in vain.

16 The due deliberation with the learned Advocate General leads to the analysis of Sections 78 and 78A of the MCS Act as follows:-

(1). The 97th Constitutional Amendment received the ascent of the Hon’ble President on 12th January, 2012. The same has been published in the Gazette of India on 13th January, 2012. By the said Constitutional Amendment after the Part IX A, the Part IX B has been inserted in the Constitution, which deals with “*the Co-operative Societies*”. The Article 243ZL from the said newly introduced Part IX B deals with the topic of “*supersession and suspension of Board and interim Management*”. The second proviso in the said Article reads as under:

“Provided further that the board of any such co-operative society shall not be superseded or kept under suspension where there is no Government shareholding or loan or financial assistance or any guarantee by the Government.”

[Underline Emphasis Supplied]

(2) In view of the aforesaid constitutional provision, legally it is not possible to suspend or to supersede the Board or the Managing Committee of any co-operative society, for any act or omission of whatsoever nature, where in such a society, there is no Government shareholding or loan or any financial assistance or any guarantee given by the Government. Generally, and normally, Co-operative Housing Societies are such societies and they fall in such category. Therefore, strictly legally, it is usually/normally not possible to either suspend or supersede the Board or the Managing Committee *‘as a whole’* of a Co-operative Housing Society.

(3) However, it is pertinent to note that, the said provision does not apply whenever *‘any member’* (one or more), but not the *‘entire Board’* or the *‘whole Managing Committee’* of such a society, is to be suspended or superseded. The aforesaid Constitutional prohibition applies when action of suspension or supresession is to be taken against *‘the entire Board’* or the *‘whole Managing Committee’* and not against *“some of the individual members of the Board or the Managing Committee”*.

(4) As a result of the aforesaid 97th Constitutional Amendment, the Maharashtra Co-operative Societies Act, 1960 has been amended by Maharashtra Act No. XVI of 2013. Apart from other provisions of the said Act, Section 78 has been substituted in its entirety.

(5) Prior to the aforesaid 2013 amendment, there were provisions in the said Act for disqualification and/or removal and/or supersession of both, the individual member(s) and the entire Board or the whole Managing Committee. However, there was no provision under the said Act for '*suspension*' at all, either of the committee or of the individual members. For the first time, such a provision has been made, enabling '*suspension*' of the Committee by the 2013 Amendment, by way of substitution of Section 78. Nevertheless, as stated hereunder, such suspension is possible of the '*entire/whole Committee*' and not of '*an individual member(s)*'.

(6) By the very same aforesaid 2013 Amendment Section 78A has been inserted, which deals with supersession of both, the entire Board i.e. Managing Committee and also individual member(s), but separately.

(7) The Maharashtra Co-operative Societies Rules 1961 have been framed under the said Act. Rule 63A thereof, which has been inserted therein on 30th August 2014 deals with the procedure to be followed for suspension of the Committee as provided by Section 78 and the Rule 64 thereof deals with the procedure to be followed for removal etc. of the members of the Committee.

(8) A comparison of both the aforesaid provisions will demonstrate *inter-alia* as under:

(a) Section 78 deals with the power of "*suspension*", whereas Section

78A deals with the power of “*supersession*”.

(b) Section 78 applies to the entire Board or Managing Committee and cannot be applied to the individual members of the Board or Committee, whereas, Section 78A is divided into two parts. Sub-section (1)(a) thereof, applies to ‘*a Committee*’ and sub-section (1)(b) applies to ‘*individual member(s)*’.

(c) In view of the aforesaid Constitutional Bar, Section 78 cannot apply to the societies of the type, which are covered by proviso to the Article 243ZL. For the same reason, Section 78A(1)(a) also does not apply to such type of societies i.e. where there is no Government Shareholding or loan or any financial assistance or any guarantee given by the Government. Accordingly, a proviso is specifically added at the end of Section 78 as also sub-section (1)(a) of Section 78A.

However, such a proviso is not made for sub-section (b) of Section 78A(1). Therefore, Constitutionally and resultantly legally, the Managing Committee of a Housing society, which is not covered by such type of societies, as contemplated by proviso to Article 243ZL, cannot be suspended nor can it be superseded. However, individual members of the Managing Committee of such housing societies can be removed under sub-section (1)(b) of Section 78A, though they cannot be suspended under Section 78.

(d) Both the provisions namely Section 78 and 78A thus are independent

of each other and operate in two different spheres. They operate into two different situations and are attracted in a completely different set of circumstances. Therefore, it is not correct to say that, the following procedure under Section 78 is always a pre-requisite for taking action under Section 78A. No doubt, only in one situation stipulated under Section 78A it will be necessary to do so.

(e) The analysis of two sets of circumstances for application of Section 78(1) and 78A can be summarised as under:-

Section 78(1) applies when the committee:

- i) makes a persistent default in performance of its duties or;
- ii) is negligent in the performance of its duties or;
- iii) is otherwise not discharging its functions properly and diligently;
- iv) or there is a stalemate in the constitution or functioning of the committee, occasioned by resignation, disqualification of members of committee or otherwise.

Section 78A applies when the Committee or any member of such Committee:

- i) has committed any act, which is prejudicial to the interest of the society or its members or;
- ii) if the State Co-operative Election Authority has failed to conduct the elections in accordance with the provisions of this Act or;
- iii) where situation has arisen in which the committee or any member of

such committee refuses or has ceased to discharge its or his functions and the business of the society has or is likely to, come to a stand-still or;

iv) if serious financial irregularities or frauds have been identified or if there are judicial directives to this effect or;

v) if there is a perpetual lack of quorum or, where in the opinion of the Registrar the grounds mentioned in sub-section (1) of Section 78 are not remedied or not complied with or;

vi) where any member of such committee stands disqualified by or under this Act for being a member of the committee.

(f) Under Section 78, it is possible to take remedial steps, which is not possible under Section 78A. Therefore, reinstatement is possible, after correctional steps are taken by the Committee, under Section 78, which is not possible under Section 78A. The only consequence of action under Section 78A is appointment of Administrator, followed by fresh elections.

(g) Action under Section 78 does not attract further disqualification, whereas, action taken under Section 78A attracts disqualification as stipulated therein.

(9) The '*Consultation*' with the Federal Society is pre-requisite for taking action under both these provisions. The provisos of both the provisions indicate that the Federal Society is to render its "*opinion*" only. Obviously, therefore, such '*an opinion*' of the Federal Society is not binding on the authority considering the issue of taking or not taking an action

under these provisions.

(10) The various legal aspect, in this regard that are very well settled are to the following effect:

(a) The consultation with the Federal Society is mandatory and not just directory.

(b) The consultation has to be '*a prior*' or previous and not '*a post facto*' consultation.

(c) The consultation has to be meaningful, effective and not merely superficial.

(d) The Federal Society has to apply its mind in order to render an effective consultation.

(e) In order to enable to the Federal Society to render an effective and meaningful consultation not only the show cause notice but also the entire relevant material has to be forwarded/supplied to the Federal Society by the authority.

(f) A time of 45 days from the date of receipt of the entire material must be made available to the Federal Society to apply its mind. Provisos to Section 78 as also 78A provide for a deeming fiction in case the Federal Society fails to communicate its opinion with the said period of 45 days.

(g) Meeting of minds of the Management Committee of the Federal Society is pre-requisite, which is to be reflected by way of a resolution passed by it. A mere communication of the Managing Director cannot be

treated as a sufficient compliance with the Consultation.

(11) The officials of the Co-operative Department handling matters relating to Sections 78 and 78A of the said Act have been sending copies of the show-cause notices itself to the federal societies, even before receipt of the relies of the persons against whom action thereunder is proposed. The only purpose in taking its steps is only to keep the Federal Society apprised of the proposed action and to keep it informed in advance so as to give it sufficient time for considering the matter in its proper perspective. At this stage Consultation or opinion from the Federal Society is neither expected nor anticipated and received. Therefore, there is no double consultation as such.”

17 The net result of the aforesaid discussion and answer to the questions posed in paragraph No.14 would be that,

- i) The ‘*consultation*’ of the Federal Society under Section 78 and 78A(1) of the MCS Act is mandatory and;
- ii) Refusal to accept communication seeking ‘*consultation*’ by the Federal Society would not amount to ‘*consultation*’ rendered by the Federal Society as contemplated under Section 78A(1) read with second proviso to the said Section of the MCS Act.

18 In the present case, admittedly the communication dated 1st September, 2017 sent by the Respondent No.4 to the Federal Society has been refused by the Federal Society for want of deficit postal stamp as

noted hereinabove. Thus, the Federal Society did not receive the said communication dated 1st September, 2017 at all and therefore, the second proviso to Section 78A envisaging deeming fiction cannot be applied and/or attracted to the present case.

The effect of the same is that, the Respondent No.4 has failed to comply with the legal necessity and mandate of law for getting effective '*consultation*' as contemplated under Section 78A(1) of the MCS Act and therefore, both the Authorities below have committed serious error in holding that the Respondent No.4 had put in sufficient efforts in seeking '*consultation*' from the Federal Society.

19 At this stage, it is to be noted here that, the office of the Respondent No.4 is situated at P.L. Kale Guruji Marg, Dadar (West) and office of the Federal Society is situated at N.G.N. Vaidya Marg, Fort, Mumbai. Both the offices i.e. the office of Respondent No.4 and office of the Federal Society are situated in Mumbai. As the requirement of '*consultation*' from the Federal Society is mandatory, it would have been appropriate for the Respondent No.4 to depute a person to deliver the said communication dated 1st September, 2017 to the Federal Society by hand delivery, instead of sending it through Post. The delivery of communication for '*consultation*' as embodied under Section 78 and 78A of the MCS Act and its receipt by the Federal Society for '*rendering effective consultation*' is a mandate of law and therefore, the Respondent No.4 ought to have

taken appropriate care in effecting its service upon the Federal Society.

It is to be further noted here that, Section 78 or 78A of the MCS Act do not specify the procedure for delivery or effective service of communication for consultation on the Federal Society. The Co-operative Department may consider to adopt appropriate procedure in that behalf to fulfill the mandate of law and also with a view that, the mandate of law does not get vitiated.

20 In the present case, in his Inspection Report dated 11th May, 2017, the Co-operative Officer found in all 19 irregularities and/or deficiencies in the affairs of the Respondent No.2 Society, out of which the Respondent No. 4, while passing its impugned Order dated 15th November, 2017 has taken into consideration 15 grounds/ irregularities as charges against the Petitioners. Except the grounds/charges, which have been weighed in the mind of the Respondent No.4 and reproduced in paragraph No.9 here-in-above, according to me, most of the charges are trivial in nature. In view thereof, the Respondent No.4 ought not have disqualified the Petitioners from being Committee Members as held by it in the impugned Order. The observations made in the case of *Little Gibbs Co-op. Housing (supra)* that, this is a drastic action, therefore, cannot be resorted to lightly and without regard to the legal rights of the shareholders as also the members of the Managing Committee and such action has to be taken only to protect the interest of the Society, or the community at large,

squarely and aptly applicable to the present case in hand.

21 This leads me to consider the contention of the learned counsel for the Respondent No.1 that, the notice dated 20th June, 2017 issued by Respondent No.4 under Section 78A(1)(b) was also a communication seeking '*consultation*' from the Federal Society, though it was addressed to the Respondent No.2 Society, a copy of the same was sent to the Federal Society for its information for seeking its opinion.

 It is to be noted here that, the notice dated 20th June, 2017 issued by the Respondent No.4 was in fact '*a notice*' under Section 78A(1)(b) of the MCS Act. The heading of the said notice makes this aspect abundantly clear. A minute perusal of the said notice would indicate that, at its end, it is mentioned that the same was addressed to the Petitioners herein and the copy of the same was sent to the Federal Society with request to give its opinion to the Respondent No. 4. It is further to be noted here that, the copy of the said notice was also sent to the Respondent No.1. In context thereof, the communication dated 1st September, 2017 was specifically sent by Respondent No.4 to the Federal Society for seeking its consultation only. With the said communication dated 1st September, 2017, a copy of the notice dated 20th June, 2017 issued under Section 78A(1)(b) along with other documents was also annexed. Thus, the said two documents i.e. notice dated 20th June, 2017 issued under Section 78A(1)(b) and communication dated 1st September, 2017 seeking consultation from

the Federal Society are two distinct and separate documents and therefore, the notice dated 20th June, 2017 cannot even remotely be inferred or construed as a letter or communication '*for consultation*' from the Federal Society. Therefore, there is no substance in the contention of the learned counsel for the Respondent No.1 that, the notice dated 20th June, 2017 issued under Section 78A(1)(b) of the MCS Act be construed as communication seeking '*consultation*' from the Federal Society.

22 In view of the aforesaid discussion, the Petition deserves to be allowed.

The impugned Orders dated 15th November, 2017 passed by the Respondent No.4 in Application No. 1737 of 2017 under Section 78A(1)(b) of the MCS Act and the Order dated 21st February, 2018 passed by the Respondent No.5 in Revision Application No. 559 of 2017 under Section 154 of the MCS Act are hereby quashed and set aside.

The Petition is accordingly allowed.

(A.S. GADKARI, J.)