

3 November 2023.

(This is the corrected copy of the judgment)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CIVIL APPELLATE JURISDICTION**  
**WRIT PETITION NO. 10965 OF 2018**

1. Ghanshyam Malhotra
2. Mrs. Poonam Ghanshyam Malhotra.
3. Mrs. Manju Narendra Malhotra
4. Mitesh Narendra Malhotra
5. Mrs. Kamlesh Keval Gandhi  
alias Kamlesh Malhotra.
6. Mrs. Meena Vijay Mehta alias  
Meena H. Malhotra.
7. Mr. Gautam Ramanbhai Patel
8. Ms. Sonzal Gautam Patel

**...PETITIONERS**

**V/s.**

Vithalnagar Co-op. Hsg. Society  
Ltd.

**.....RESPONDENT**

**WITH**  
**WRIT PETITION NO. 8875 OF 2018**  
**WITH**  
**CIVIL APPLICATION NO. 1764 OF 2018**  
**IN**  
**WRIT PETITION NO. 8875 OF 2018**

Vithalnagar Co-operative Housing  
Society Ltd.

**...PETITIONER**

V/s.

1. Ghanshyam Malhotra
2. Mrs. Poonam Ghanshyam

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Malhotra.

3. Mr. Mitesh N. Malhotra

4. Mrs. Manju N. Malhotra

5. Mrs. Kamlesh Keval Gandhi  
alias Kamlesh Malhotra.6. Mrs. Meena Vijay Mehta alias  
Meena H. Malhotra.

7. Mr. Gautam Ramanbhai Patel

8. Ms. Sonzal Gautam Patel

...RESPONDENTS

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**Mr. Shiraz Rustomjee**, Senior Advocate a/w. Mr. Viral Amin a/w. Ms. Shreya Parikh and Mr. Yash Oza i/by. M/s. B. Amin & Co., for the Petitioner in WP-8875-2018 and for Respondents in WP-10965-2018.

**Mr. Subodh Pathak** i/by. Mr. Pravin G. Sawant, for the Petitioner in WP-10965-2018 and for Respondent in WP-8875-2018.

CORAM : SANDEEP V. MARNE, J.

Reserved On : 9 October 2023.

Pronounced On: 3 November 2023.

**JUDGMENT :**

1. **Rule** in both the Petitions. Rule is made returnable forthwith and with the consent of the parties, Petitions are taken up for hearing.

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### **A. THE CHALLENGE**

2. Leasehold rights in respect of Plot situated in the Cooperative Housing Society is the subject matter of this battle that is taking place between the Society on one hand, and the members and purchasers of the plot on the other. The Society has terminated the lease for violation of terms and conditions thereof and seeks ouster of the members *qua* that plot and seeks declaration of purchase transaction effected by the member to be illegal. The purchasers are struggling to retain leasehold rights assigned in their favour by the members after termination of lease by the Society.

3. These two petitions raise challenge to the Judgment and order dated 4 May 2018 passed by Maharashtra State Co-operative Appellate Court, Mumbai in Appeal No.4/2017. These are cross petitions filed by both the Society as well as by members/purchasers who are aggrieved by different directions issued by the Maharashtra State Co-operative Appellate Court in the same impugned Judgment and order. Appeal No. 4/2017 was instituted by members and purchasers challenging the Judgment and order dated 26 September 2016 passed by the Cooperative Court, Mumbai in Dispute No.186/2014. That Dispute was instituted by the Society seeking possession of the plot, declaration of assignment executed by members in favour of the purchasers as illegal as well as seeking permanent injunction against members and purchasers. The dispute was allowed by the Cooperative Court by judgment and order dated

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26 September 2016 directing vacation of plot and handing over possession thereof to the Society as well as granting a declaration that the Deed of Assignment dated 11 December 2006 is illegal and void. The Cooperative Court also granted permanent injunction against members and purchasers from creating third party rights in respect of the plots. Enquiry was also directed into mesne profits till handing over of possession of the plot to the Society. The Maharashtra State Co-operative Appellate Court by its Judgment and order dated 4 May 2018 has partly allowed the appeal filed by the members and purchasers by partly setting aside Co-operative Court's decision to the extent of relief of vacation of the plot and handing over its possession to the Society, grant of permanent injunction and enquiry into mesne profits. The Maharashtra State Co-operative Appellate Court has however upheld direction declaring the Deed of Assignment be illegal and void. Both society as well as Member / Purchaser are aggrieved by the decision of the Maharashtra State Co-operative Appellate Court. The Society has filed Writ Petition No. 8875/2018 to the extent of disturbing the order of the Co-operative court with regard to direction for eviction and handing over possession of the plot, permanent injunction and enquiry into mesne profits. On the other hand, the members and purchasers have filed Writ Petition No. 10965/2018 challenging the Co-operative Appellate Court's decision to the limited extent of declaring the Deed of Assignment to be illegal and void. Since both petitions emanate out of common judgment and order of the Co-

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operative Appellate Court, both petitions are heard and decided by this common judgment.

## B. FACTS

4. Vithal Nagar Co-operative Housing Society was registered under the provisions of the then Bombay Co-operative Societies Act, 1925 on 27 October 1947. On 14 October 1956, the Society purchased a vast tract of land from the then Bombay Housing Board (now known as the 'Maharashtra Housing and Area Development Authority') vide a registered Conveyance Deed under the Juhu Vileparle Development Scheme (JVPD). The Bombay Co-operative Societies Act, 1925 was repealed and the Maharashtra Co-operative Societies Act, 1960 (**the Act of 1960**) was enacted. The Society contends that it got deemed to be registered under the provisions of Act of 1960 and its bye-laws also were deemed to be registered under the Act of 1960. The Society was classified as a 'Tenant Ownership Housing Society' under Rule 10(5)(a) of the Maharashtra Co-operative Societies Rules, 1961.

5. The Society allotted several plots to its members on lease for a term of 999 years. On 10 December 1965, Plot No.64 was allotted in the name of Harbhagwandas Malhotra, who apparently paid consideration of Rs.5416/-. It is the contention of members and purchasers that the total consideration paid by the Society for purchase of the entire parcel of land was Rs.6,03,000/- and the

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amount of Rs.5416/- paid by Shri. Harbhagwandas Malhotra was commensurate to the area of plot allotted to him. Shri. Harbhagwandas Malhotra passed away on 18 May 1965. On a complaint made by the adjoining plot holders, the Society addressed letter to the deceased member on 24 February 1979 calling him upon to fence the property so that the same was not used as a dumping ground or was not encroached upon. The legal heirs of Harbhagwandas Malhotra applied to the society for transfer of lease. The society executed a fresh deed of lease on 27 February 1981 in favour of legal heirs of Harbhagwandas Malhotra namely viz. Shantidevi Malhotra, Shri. Ghanshyam Harbhagwan Malhotra, Shri. Narendra Harbhagwan Malhotra and Smt. Poonam Ghanshyam Malhotra (collectively referred to as '**Malhotras**').

6. It appears that Plot No.64 was not developed by Malhotras for considerable period, which was causing nuisance to the other members of the society. The Society alleges that the Plot was being used as a dumping ground and was also being encroached upon. In the Annual General Meeting of the society, Mr. Ghanshyam Malhotra made a statement that he would develop the property within a period of four months. However, the development did not commence as promised. In the meantime, Harbhagwandas's wife Shantidevi passed away on 29 May 1991. Once again Mr. Ghanshyam Malhotra undertook to construct the plot in Annual General Meeting held on 6 September 1992. On 28 September 1992, the Society called upon Mr. Ghanshyam Malhotra to fulfill

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his undertaking of developing the plot. However, Plot no.64 continued to remain vacant. The Society ultimately undertook the work of fencing Plot no.64 on 16 November 1993 by incurring cost of Rs.28,600/-.

7. On 30 August 1988, Malhotra's wrote to the society that they were receiving enquires for purchase of the plot and there was ambiguity in Society's transfer charges. It was stated that the transfer charge of a plot with structure was Rs.2000/- per sq. yard but for open plot, the same was fixed at 50% difference in the sale and purchase price with a view to discourage the members from trading the plots. Malhotras therefore requested the Society to charge Rs. 4,000/- per sq. yard for transferring the plot. On 23 December 1998, the Society issued a letter to Mr. Ghanshyam Malhotra certifying that the membership in the name of Mr. S.B. Malhotra was transferred after his death in the name of four legal heirs and that the Share Certificate alongwith leasehold rights of Plot no.64 stood in the name of the said four persons. On 15 June 2003, the Society once again called upon Mr. Ghanshyam Malhotra to construct Plot no. 64. On 7 August 2003, Malhotras once again assured the Society that construction would be commenced after obtaining housing finance. On 10 August 2003, Annual General Meeting allowed time of one month to Malhotras to remove unauthorized persons from plot and to commence construction within six months, failing which the Society was to take action. However, the construction was not commenced and, on the

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complaint received from the adjoining plot owners, the Society once again called upon Malhotras on 25 November 2003 to take action on the complaint. On 26 May 2005, the Society again reminded Malhtoras about their failure to fulfill the promise of developing the plot.

8. In the meantime, an Administrator came to be appointed for the Society vide Order dated 9 September 2005 passed under Section 78 of the Act of 1960 by the Registrar. It is Society's case that the Administrator took charge of the affairs of the Society on 15 October 2005. In the meantime, Malhotras sent letter dated 9 October 2005 to the Society enquiring about the formalities required for assignment of the plot.

9. On instructions of the Administrator, an advocate addressed notice dated 28 March 2006 to Malhotras accusing them of committing breaches of the lease agreement in the form of not developing the property for residence, being irregular in payment of Society's dues, permitting strangers to occupy the plot, attempting to assign the plot to Mr. Gautam Patel without Society's prior permission and violating Rules, Regulations and Bye-laws of the Society. The Notice stated that on expiration of three calendar months from the date of notice, the lease of Plot no.64 would stand terminated, cancelled and revoked under Clauses 4(1) and 4(2) of the Lease Deed dated 27 February 1981. On the same day i.e. 28

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March 2006, a separate communication was addressed to Mr. Gautam Patel calling him upon not to enter upon or remain on Plot no.64.

10. On 27 May 2006, Malhotras replied the Notice of termination challenging Administrator's jurisdiction to cancel the lease. On 16 June 2006, the Advocate of Smt. Manju Malhotra wrote to the Advocate of the Society denying any negotiations with Mr. Gautam Patel and stating that in her capacity as one-third co-owner of the plot, she had not authorized Mr. Patel to do any acts in respect of the plot.

11. In the above factual background, Malhotras filed Dispute No. 378/2006 (renumbered as Dispute No. 185/2014) before the Co-operative Court challenging the Notice of termination dated 28 March 2006. The said Dispute continues to pend before the Cooperative Court.

12. On 11 December 2006, Malhotras executed Deed of Assignment in favour of Mr. Gautam Ramanbhai Patel and Miss. Sonzal Gautam Patel (**Patels**) in respect of Plot no.64.

13. The elections to the Managing Committee of the Society were held and a new Managing Committee was elected in December 2006. The Special General Body Meeting of the Society resolved to

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release a Public Notice in newspapers for a declaration of acts of the Administrator as not binding on the Society. Accordingly, on 9 January 2007, the elected Secretary of the Society published Notice in Free Press Journal disowning the acts of the Administrator as not binding on the society. It is the case of Malhotras and Patels that on account of failure of the elected members to submit M-20 bonds with the Deputy Registrar as mandated under Section 73 of the Act of 1960, such Managing Committee Members automatically stand vacated the office. Malhotras and Patels also claim that on 27 April 2007, Society's Secretary issued a notice to the Administrator, Shri. S.M. Mohite questioning the appointment of the Advocate who had issued termination notice.

14. The Society's elected Managing Committee ratified the termination Notice dated 28 March 2006 issued at the behest of the Administrator in its meeting held on 31 May 2007. The Society thereafter issued Show Cause Notice dated 1 August 2007 to Malhotras for their expulsion from membership on account of termination of their lease. On 8 September 2007, Resolution for expulsion of Malhotras was adopted by the SGM of the society. It appears that the Deputy Registrar did not grant approval for expulsion of Malhtoras from membership. The decision of the Deputy Registrar came to be upheld by Divisional Joint Registrar, by this Court and the Supreme Court and has attained finality. Thus Malhotras continued as members of the Society.

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15. The Society thereafter filed Dispute No. 186/2014 (Old No, 378/2006) before the Cooperative Court seeking recovery of possession of Plot from Malhotras and Patels and for cancellation of the Deed of Assignment. On 8 November 2008, the Annual General Meeting of the society ratified the earlier decision of the Managing Committee with regard to termination Notice dated 28 March 2006. In the meantime, litigation took place between the parties on the issue of removal of seven out of nine Managing Committee members who had failed to file M-20 bonds within the specified period of their election. The Deputy Registrar issued show cause Notice dated 9 January 2011 for removal of those members. Society, after unsuccessfully challenging the said notice before the Divisional Joint Registrar, filed Writ Petition No. 578/2012 before this Court, which came to be disposed of by judgment and order dated 10 August 2012 directing holding of fresh elections to the Managing Committee of the society. It is society's contention that though fresh elections were directed to be conducted, this Court specifically held that the issue of non-execution of M-20 bonds need not be gone into as the Society had agreed to hold fresh elections. On the contrary, it is the case of Malhtoras and Patels that the consequence arising out of failure to file M-20 bonds and vacation of offices by Managing Committee members continue to remain operational.

16. After conducting fresh elections, the new Managing Committee resolved on 29 November 2012, to ratify the work

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done, resolutions passed and the decisions taken by the earlier General Body and Managing Committee including the Notice for termination of lease issued on 28 March 2008. The General Body also passed a Resolution on 22 February 2013 ratifying the resolutions, decisions and actions of earlier General Body and Managing Committee including the termination Notice.

17. Malhotras and Patels filed an application challenging the maintainability of the Dispute filed by the Society on the ground of lack of authority to file the same, since the Managing Committee members had vacated their offices on account of failure to file M-20 bonds. After rejection of the application, and its confirmation by the Co-operative Appellate Court, Malhotras and Patels filed Writ Petition No. 3260/2014 before this court, which dismissed the same by its order dated 19 September 2014. It is Society's contention that since the decisions of the Managing Committee and the General Body were ratified by the subsequent elected body, the Dispute filed based on decisions of earlier Managing Committee was maintainable as non-filing of M-20 bonds was merely an irregularity.

18. The Cooperative Court thereafter proceeded to decide Dispute No. 186/2014 filed by the society. By its judgment and order dated 26 September 2016, the Co-operative Court partly allowed the Dispute directing Malhotras and Patels to quit, vacate

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and handover quiet, vacant and peaceful possession of Plot no.64 to the society. It declared that the Deed of Assignment dated 11 December 2006 executed in Patels' favour was illegal, *non-est*, void and bad in law. It granted injunction against Malhotras and Patels from selling, transferring, alienating, creating third party rights or disposing off Plot no.64 or from entering upon the same. It also directed conduct of enquiry of mesne profits as per law from the date of Dispute till handing over of possession of the plot to the Society.

19. Malhotras and Patels filed Appeal No. 4/2017 before the Maharashtra State Cooperative Appellate Court challenging the decision of the Cooperative Court. By impugned Judgment and order dated 4 May 2018, the Maharashtra State Cooperative Appellate Court has proceeded to partly allow the Appeal of Malhotras and Patels by partially setting aside the Judgment and order dated 26 September 2016. The directions of the Co-operative Court for eviction of Malhotras and Patels, granting injunction against them and direction for conduct of enquiry into mesne profits are set aside. The Cooperative Appellate Court has however held the Deed of Assignment to be illegal, *non-est*, void and bad in law.

20. Malhotras and Patels are aggrieved by the judgment and order dated 4 May 2018 passed by the Maharashtra State Co-operative Appellate Court and have filed Writ Petition No. 10965/2018. The Society is also aggrieved by the decision of the Maharashtra State

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Co-operative Appellate Court to the extent of setting aside Direction Nos. 2, 4 and 5 and has filed Writ Petition No. 8875/2018.

### **C. SUBMISSIONS**

21. Extensive submissions are canvassed on behalf of both the sides. They have also filed written notes of arguments. The broad submissions canvassed by Mr. Rustomjee, the learned senior advocate appearing for the Society and by Mr. Pathak, the learned counsel appearing for Malhotras and Patels are summarized below:

#### **C.1 SUBMISSIONS ON SOCIETY'S BEHALF**

22. Mr. Rustomjee, the learned senior advocate would appear on behalf of the society and submit that the Maharashtra State Co-operative Appellate Court has erred in holding the termination Notice to be bad in law. That it has committed an error in holding that the termination notice was issued beyond the Administrator's term. That the Administrator had taken charge of society's affairs on 15 October 2005. Even if it is assumed that he had taken the charge on 1 October 2005, the termination notice dated 28 March 2006 was within the period of six months for which tenure, his appointment was made. Inviting my attention to Section 78 of the Act of 1960, as it stood in the year 2007-08, Mr. Rustomjee would submit that the appointment of Administrator is '*to manage the*

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*affairs of the Society for a period not exceeding six months*'. That since the appointment is for the purpose of managing the affairs of the Society, the period of six months is required to be interpreted to mean that the Administrator would enjoy full tenure of six months from the date of taking over charge of the society's affairs. Inviting my attention to Section 77, he would submit that the acts of an officer of the Society done in good faith are otherwise not invalidated merely on account of subsequent discovery of a defect in his appointment.

23. Mr. Rustomjee would further submit that the Cooperative Appellate Court has erred in holding that termination of lease was beyond Administrator's powers. That under Section 78(2), the Administrator has power to exercise all or any of the functions of the Committee or of any officer of the society and to take all such actions as may be required in the interest of the society. That since the Administrator has power to exercise all functions of the committee, the same would include even the power to terminate lease. In this connection he relies on the judgment of Single Judge of the Jharkhand High court in ***Sahakari Padhadhikar Sahakari Gruh Nirman Samiti Ltd v.s. State of Jharkhand***, WP(C) 3450/2010. He would submit that the judgment of the Apex Court in ***Joint Registrar of Co-op. Societies, Kerala vs. T.A. Kuttappan and Others*** (2000) 6 SCC 127 is clearly distinguishable in the facts of the present case.

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24. Mr. Rustomjee would further submit that the termination of lease-deed was even otherwise validly ratified by the Society and that the Co-operative Appellate Court has not appreciated the effect of such ratification. Relying on judgment of ***Sri Parmeshwari Prasad Gupta versus The Union of India*** (1973) 2 SCC 543, ***Maharashtra State Mining Corpn. V/s. Sunil, s/o Pundikarao Pathak*** (2006) 5 SCC 96 and ***National Institute of Technology and another v/s. Pannalal Choudhury and another*** (2015) 11 SCC 669, he would submit that ratification can be utilized to subsequently validate an invalid or unauthorized act and that such validation operates retrospectively from the date of the act. He would also rely on Judgment of Single Judge of this Court in ***Pravinkumar R. Salian vs Chief Minister and Minister of Co-operation, Mumbai and others*** 2004 (2) Mh.L.J. 12. He would submit that non-filing of M-20 bonds cannot affect ratification dated 31 May 2007 and 12 November 2007 as held by this Court in its order dated 19 September 2014. That in any case the termination notice has again been ratified by the Managing Committee and General Body after holding fresh elections. That even the order dated 19 September 2014 of this Court does not hold that the Managing Committee was incompetent or disqualified on account of non-filing of M-20 bonds. Relying on Section 72 of the Act of 1960, he would submit that since the final authority of every Society vests in the General Body, ratification by General Body of termination of the lease would otherwise validate the action of Administrator, if found to be invalid

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by this Court. About Public Notice dated 9 January 2007, he would submit that the same was restricted only to specified acts of the Administrator *inter alia* with regard to TDR and transfer charges, which were never ratified by the General Body. That such Public Notice therefore cannot be construed to mean disowning of Notice of termination issued by the Administrator.

25. Mr. Rustomjee would further submit that the result of expulsion proceedings cannot have any impact on the termination of lease on account of use of the word 'or' in clause 4(1) of the lease deed. That therefore prior expulsion is not a condition precedent for effecting termination of lease. That this Court has also clarified in its order dated 17 March 2016 that the decision on validity of termination of lease would not be influenced by the observations in the order of the expulsion proceedings. That expulsion proceedings were decided on technical ground of inadequate service of expulsion notice and not on merits.

26. Mr. Rustomjee would further submit that upon service of termination notice, no further acts were required to be done by the Administrator, for effecting termination of lease. Despite grant of multiple prior opportunities to Malhotras to rectify their breaches for over 40 years, they failed to take any remedial action and admitted the breaches. That therefore no further opportunities were required to be given to Malhotras. That since Notice specifically stated that upon expiration of three months the lease would stand

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terminated, there was no necessity of taking any action to effect such termination. That affidavit of Advocate Rupa Kadam and Administrator Shri. S.M. Mohite were never placed before the Co-operative Court and sought to be produced directly at appellate stage. Therefore the same cannot be relied upon. Mr. Rustomjee would further submit that breach of conditions of lease is admitted on the part of Malhotras who had failed to develop the plot by making construction thereon, keeping it clean and hygienic and attempting to assign it without prior permission of the society. That therefore the society is entitled to terminate the lease as per the covenants of lease.

**27.** On the issue of validity of Deed of Assignment dated 11 December 2006, Mr. Rustomjee would contend that the Co-operative Appellate Court has rightly held the same to be invalid. That there are concurrent findings of both the Courts which need not be disturbed by this Court in exercise of jurisdiction under Article 227 of the Constitution of India. Neither Malhotras sought nor Society granted any permission for execution of Deed of Assignment in favour of Patels. That the three letters (30 August 1998, 9 October 2005 and 9 January 2006) relied upon by Malhotras do not seek any permission to transfer the Plot in favour of Patels. In any case, mere filing of application cannot substitute the requirement of 'prior permission'. Those letters merely made vague enquiries with the society about prior permission and can, by no stretch of imagination, be treated as application for transfer of

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plots in favour of Patels. He would rely upon judgment of the Apex Court in *Zoroastrian Co-op. Hsg. Soc. Ltd. And another versus District Registrar, Co-op. Societies (Urban) and Others* (2005) 5 SCC 632 in support of his contention that bylaws of society imposing requirement of prior permission before transfer are valid in law.

## **C. 2 SUBMISSIONS ON BEHALF OF MALHOTRAS & PATELS**

28. Mr. Pathak would appear on behalf of Malhotras and Patels in support of their Writ Petition No.10965/2018 as well as to oppose Society's Writ Petition No.8875/2018. He would submit that findings recorded by the Co-operative Appellate Court about illegality in termination Notice need not be disturbed as no patent illegality is pointed out in those findings by the Society. That the Co-operative Appellate Court has rightly held that the Administrator has issued Notice for termination after expiry of his tenure and that he did not otherwise have any authority to take vital policy decisions such as termination of lease of a member. He would rely upon judgment of the Apex court in *T. A. Kuttappan* (supra) in support of his contention that the Administrator cannot take policy decision such as enrollment of new members, which function can only be performed by an elected body.

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29. Mr. Pathak would submit that the Society's Dispute itself was not maintainable as the same was shown to have been filed against 'past members' and therefore outside the purview of section 91 of the Act of 1960. That the Dispute was filed on the strength of resolution of the Managing Committee in the meeting dated 11 November 2007, when the Managing Committee had already vacated the office on account of failure to file M-20 bonds under Section 78(1)(A) of the Act of 1960 and Rule 58 of the Rules of 1961. That both the pleadings in Dispute application as well as evidence produced before the Co-op. Court made it abundantly clear that the Dispute was filed only on account of expulsion of Malhotras from membership. That since expulsion itself is found to be invalid, the Dispute filed to seek eviction of Malhotras is automatically rendered infructuous. That the dispute is filed on the basis of invalid and non-existent Resolution of the Managing Committee dated 11 November 2007 and the same ought to have been dismissed on that ground. Mr. Pathak would further submit that there was no cause of action for filing of the Dispute by the Society once the expulsion was held to be bad in law. That a Dispute under Section 91 before the Co-operative Court is not maintainable against non-members/third parties who acquire interest in the property as held by the Apex Court in the case of *Margret Almeida and others vs Bombay Catholic Cooperative Housing Society Limited and others* (2012) 5 SCC 642.

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30. On the issue of termination, Mr. Pathak would contend that the plot has been allotted to Malhotras for a tenure of 999 years on payment of rent of Rs. 1/- per annum. That in such circumstances the lease is akin to ownership. In support of his contention, he would place reliance on judgment of this Court in *Lavasa Corporation Ltd. V.s. Jitendra Jagdish Tulsiani*, (2018) 5 AIR Bom.R.553. That the rights of Malhotras in Plot no.64 are sought to be taken away in a casual manner by the Society by issuance of a simple notice. That such rights, which are akin to ownership rights, cannot be unilaterally extinguished by a cooperative society. That the society did not even follow any principles of natural justice and unilaterally terminated the lease.

31. About the actions of Administrator, Mr. Pathak would submit that the Appellate Court has rightly held that the Administrator did not have any jurisdiction as on 28 March 2006 to effect termination of lease. Inviting my attention to Public Notice issued to Respondent society, he would submit that the society itself has disowned the acts of the Administrator and cannot now selectively seek to enforce his singular decision of terminating the lease of Malhotras. That society cannot approbate and reprobate.

26. In respect of the findings of the Appellate Court declaring Assignment Deed as illegal, Mr. Pathak would contend

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that the said finding is *ex-facie* erroneous and perverse. That the finding is recorded on a factually erroneous assumption that permission of society was not sought before executing deed of assignment. He would invite my attention to the two letters sent by Malhotras to the Society on 30 August 1998 and 9 October 2005 and letter dated 9 January 2006 addressed to the Deputy Registrar seeking permission for transfer of the plot. That the last letter dated 9 January 2006 was addressed to the Deputy Registrar complaining about Society's action in not providing relevant information about procedure for transfer of plot with a clear indication that failure to provide the same would entail grant of deemed permission. That the Assignment Deed was executed only after expiry of the period specified in the last notice issued to the Deputy Registrar on 9 January 2006. Relying on the judgment of this court in *Venus Co-op. Housing Society and anr versus Dr. J.Y. Detwani and Ors.* 2002 SCC Online Bom. 1457, *Sneh Sadan Co-op. Hsg. Soc. Ltd V/s State of Maharashtra* AIR 2004 Bom. 315 and *Ramesh Himmatlal Shah V/s. Harsukh Jadhavji Joshi* (1975) 2 SCC 105. He would submit that Society's NOC is not required for transfer of lease. That no harm or prejudice would be caused to the Society on account of execution of assignment by Malhotras in favour of Patels. He would pray for dismissal of Society's Petition and for allowing the Petition of Malhotras and Patels.

#### **D. REASONS AND ANALYSIS**

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**33.** After having considered the submissions canvassed by the learned counsel appearing for the parties, following two board issues arise for determination (i) whether lease of Malhotras is validly terminated by Notice dated 28 March 2006 issued at the behest of the Administrator and (ii) whether Assignment Deed dated 11 December 2006 executed by Malhotras in favour of Patels is valid in law and/or binding on the society. Peripheral to these broad issues are various other issue of maintainability of Dispute of Society, which is raised contending that the Dispute was filed without any valid authority and in absence of any cause of action. Before proceeding to decide the two broad issues, it is necessary to deal with the issue of maintainability of Dispute of Society strenuously raised by Mr. Pathak.

#### **D.1 MAINTAINABILITY OF DISPUTE OF SOCIETY**

**34.** Mr. Pathak has raised the issue of maintainability of Society's Dispute contending that there existed no cause of action for filing the same. The lack of cause of action is sought to be inferred on an assumption that the Dispute was based on expulsion of Malhotras from membership of the Society, and since the expulsion is set aside right upto the Apex Court, the Dispute itself is not maintainable. It is difficult to accept that the Dispute was premised solely on expulsion of Malhotras from membership of the Society. The Dispute was essentially

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premised on termination of lease. Therefore Malhotras and Patels cannot be permitted to pick and choose stray words/sentences in the Dispute Application to draw an inference that expulsion was the sole cause for filing of the Dispute by the Society. In order dated 17 March 2016 passed in WP-1557/2015 relating to expulsion proceedings, this Court has clarified that the decision on validity of termination of lease deed would not be influenced by the observations made in the order of the expulsion proceedings. The objection of lack of cause of action therefore merits rejection.

**35.** Maintainability of the Society's Dispute is also sought to be questioned on the basis of lack of authority by the members of managing committee to file the same as they stood disqualified to remain as members of Managing Committee. It is difficult to comprehend as to how Malhotras and Patels can raise this issue, which is already decided against them and the decision is upheld by this Court by order dated 19 September 2014 passed in WP-3260/2014. It would be relevant to reproduce the relevant paragraphs of that Order:

The petitioners' contends that the said dispute is filed by the respondent-society through its secretary. Petitioners further contend that the secretary as well as the other office bearers of the society were disqualified under the provisions of Section 73(1AB) of the Maharashtra Co-operative Societies Act, 1960 (In short '**MCS Act**') and, therefore, not competent to file the said dispute. The election to managing committee of the respondent-society was

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held in the year 2006 and it seems that managing committee members did not furnish bond as contemplated under Section 73(1AB) of the MCS Act within the stipulated time and, therefore, order Section 78 of the MCS Act came to be passed. Matter came up to this Court and the learned Single Judge of this Court, by the order dated 10.8.2012 passed in Writ Petition No.578 of 2012, directed fresh election to the managing Committee. In pursuance of these directions, the fresh election to Managing Committee of the Disputant- Society was held on 11.11.2012 and the new Managing Committee came to be elected. The new Managing Committee by the resolution dated 29.11.2012 ratified all the acts of the earlier Managing Committee from 2007. Subsequently, General Body of the respondent- Society passed resolution dated 22.2.2013 and by this resolution, acts of the earlier Managing Committee including filing of the aforesaid dispute also came to be ratified.

12. .... The dispute was filed by the respondent- society through its secretary. The contention is that the said secretary was disqualified under Section 73(1AB) of the MCS Act. However, the fact remains that the secretary was a member of the respondent-society. In these circumstances, in my considered opinion, representation by the Secretary of the respondent-society, in the said dispute can, at the most be said as irregular, and this irregularity can always be ratified. As stated above, the new Managing Committee, which came in power subsequent to the election held in 2012 as well as General Body of the respondent-society ratified filing of the dispute by the respondent-society through the then Secretary .

15 The learned Judge of the Co-operative Appellate Court relied upon the provisions of Section 77 of the MCS Act, 1960 coupled with the subsequent resolutions passed by the Managing Committee as well as the General Body of the respondent-society and held that the dispute filed by the respondent-society cannot said to be not maintainable. I do not find any fault in this finding. Mr. Govilkar, learned counsel for the petitioners, in this regard, submitted that the issue whether the action of the respondent-society was in 'Good Faith' or not, will have to be decided by the registrar under the provisions of Sub-section (3) of Section 77 of the MCS Act, 1960. It is true that under the said provision,

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registrar is competent to decide the question of 'Good Faith' . However, that does not prohibit the Co-operative Court from considering the same. The finding is, accordingly, recorded by the Co-operative Court that the act of the respondent-society of filing dispute through its Secretary is in good faith and this act can be ratified subsequently by the new Managing Committee. In my considered view, this finding is in consonance with the law and cannot be disturbed.

16 That apart, petitioners subsequent to the impugned order, filed Miscellaneous Application No.46 of 2014 before the Co-operative Appellate Court requesting expeditious hearing of the dispute no.CC/IV/217 of 2008 by the trial Court. The request of the petitioners is accepted by the Co-operative Appellate Court and the Co-operative Court was directed to dispose of respondent's dispute as expeditiously as possible and preferably within a period of three months from 12.9.2012, i.e., the date of the order. On this ground also, I am not inclined to interfere in the said writ petition since the dispute is already being expedited.

36. Thus, the objection of Malhotras and Patels about maintainability of Dispute on account of alleged disqualification of members of managing Committee for failure to file M-20 Bonds has already been repelled by this Court. I therefore no not find any merit in the objections raised by Mr. Pathak about maintainability of the Dispute Application filed by the Society.

37. On the issue of validity of termination Notice, Malhotras and Patels have succeeded before the Cooperative Appellate Court and Society is aggrieved by Co-operative Appellate Court's decision. The Appellate court has essentially held termination Notice to be invalid on twin grounds of the

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same being issued after expiry of tenure of Administrator and lack of authority to take policy decision of termination of lease of a member.

## **D. 2 TENURE OF ADMINISTRATOR**

38. So far as the tenure of Administrator is concerned, his appointment was made vide order dated 9 September 2005. The appointment of Administrator was done by the Registrar under the provisions of Section 78 of the Act of 1960, which is prior to its amendment on 14 February 2013 vide Maharashtra Act 16 of 2013 read thus :

### **78. Power of removal of committee or member thereof.-**

(1) If, in the opinion of the Registrar, the committee of any society or any member of such committee makes default, or is negligent in the performance of the duties imposed on it or him by this Act or the rules or the bye-laws or commits any act which is prejudicial to the interests of the society or its members, or wilfully disobeys directions issued by the State Government, or by the Registrar for the purposes of securing proper implementation of co-operative policy and development programme approved or under taken by the State Government or is otherwise not discharging its or his functions properly and diligently or where a situation has arisen in which the committee or any member of such committee refuses or has ceased to discharge its or his functions and diligently and the business of the society has or is likely to come to a stand-still, or where any member of such committee stands disqualified by or under this Act for being a member, the Registrar may, after giving the committee or the member, as the case may be, an opportunity of stating its or his objections, if any, within 15 days from the date of receipt

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of notice and after consultation with the federal society to which the society is affiliated, by order,-

(a) (i) in remove the committee, and

(ii) to appoint a committee consisting of three or more members (who shall not be the members of the committees so removed) of the society in its place, or appoint one or more Administrators who need not be members of the society, but who shall not be the members of the committee so removed to manage the affairs of the society for a period not exceeding six months, which period at the discretion of the Register, be extended by a further period not exceeding three months, so, however, that the total period does not exceed nine month in the aggregate:

Provided that, the Registrar shall have the power to change the committee or any member thereof or the administrator or administrators appointed under paragraph (ii) at his discretions even before the expiry of the period specified in the order made under this sub-section;

(b) remove the member and appoint any person as member of such committee in his place, or direct the society elect or appoint a member in his place, for the remainder of the term of office of the member so removed]

Provided that, the member who has been so removed, shall not be eligible to be relected, re-appointed re-nominated, or re-co-opted, as a member of the Committee till the expiry of the period of next one full term of the committee from the date on which he has been so removed or till such lesser period as may be laid down under the provisions of Section 73-FFF or 144-E, as the case may be.

1-A) When a notice is issued against any committee or member under sub- section (1), if resignation from any office is tendered by the committee or member, it shall not be valid or effective until two months have elapsed from the date of issue of the notice or until it is permitted to be accepted by the Registrar, whichever is earlier.

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(2) The committee or administrative so appointed shall, subject to the control of the Registrar and to such instructions as he may from time to time give, have power to exercise all or any of the functions of the committee or of any officer of the society and take all such action as may be required in the interests of the society.

The committee or administrator appointed as aforesaid shall notwithstanding anything contained in the bye-laws, have power to call a special general meeting of the society to review or to reconsider the decision or the resolution taken or passed at the general meetings called by the previous committee or to endorse action taken by it.

(2-A) The Registrar may fix the remuneration payable to the administrators and any expenses of management which shall be payable out of the funds of the society within such time and at such intervals as the Registrar may fix, and if such remuneration or expenses are not paid within such time or at intervals the Registrar may direct the person having custody of the funds of the society to pay to the administrators such remuneration and expenses in priority to any other payments (except land revenue, any arrears of land revenue, or any sum recoverable from the society as arrears of land revenue) and he shall, so far as the funds to the credit of the society allow, comply with the orders of the Registrar.

(3) If at any time during any period, or extended period referred to in sub- section (1), it appears to the Registrar, that it is no longer necessary to continue to carry on the affairs of the society as aforesaid, the Registrar may by an order <sup>1\*\*\*\*</sup> direct that the management shall terminate; and on such order being made, the management of the society shall be handed over to a new committee duly constituted.

(4) The Committee or administrator shall, at the expiry or termination of it or his term of office, arrange for the constitution of a new committee in accordance with the bye-laws of the society:

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<sup>2</sup>Provided that, if a new committee is not, or cannot be, constituted at the expiry or termination of the term of office of the committee or administrator, for any reason beyond the control of the committee or administrator, the term of office of the committee or the administrator, as the case may be, shall be deemed to be extended, until the new committee is duly constituted

(5) All acts done or purported to be done by the committee or administrator during the period the affairs of the society are carried on by the committee or administrator appointed under sub-section (1) shall be binding on the new committee.

39. Thus, under Section 78, as it stood as on 9 September 2005, the Administrator could be appointed for a period not exceeding six months. The Cooperative Appellate Court has therefore held that since the Administrator was appointed on 9 September 2005, his tenure expired after six months on 8 March 2006. The Notice of termination is issued by the advocate as per instructions of the Administrator on 28 March 2006. It is on this count that the Cooperative Appellate Court has held that the decision to terminate the lease is taken by the Administrator after expiry of his tenure under Section 78. Mr. Rustomjee has contended that the words used in of Section 78A(1)(a)(ii) are '*to manage the affairs of the society for a period not exceeding six months*'. According to him, the appointment of the Administrator is for the purpose of '*managing the affairs of the society*' and the period of six months is specified for such '*management*'. I am unable to agree. Under

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Section 78A(1)(a)(ii) of the Act of 1960, the Registrar's power to appoint an Administrator by removal of its Managing Committee is circumscribed by specifying outer time limit of six months. Thus, initially the Registrar cannot appoint an Administrator for period exceeding six months. It follows therefore that, once the Registrar makes the appointment of Administrator for a period of six months, it is not for the Administrator to take his own sweet time to take over affairs of the society and then continue after expiry of the period specified in his appointment. To put it in other words, the Administrator cannot, by his acts, extend the statutory period prescribed under Section 78A(1)(a)(ii). Such power of extension can only be exercised by Registrar himself, which in present case was admittedly not done. In my view therefore the Co-operative Appellate Court cannot be faulted for recording a finding that the tenure of Administrator came to an end after six months of his appointment on 9 September 2005. If Mr. Rustomjee's contention that the Administrator must be permitted to utilize the period of six months for '*managing the affairs of the society*' is accepted, in a given case the Administrator may delay taking over of charge of affairs of the society and by his voluntary actions, extend the period of his tenure. Such an interpretation sought to be advanced by Mr. Rustomjee would be contrary to the statutory scheme and cannot be countenanced.

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40. I am therefore in agreement with the findings recorded by the Cooperative Appellate Court that the Administrator's tenure had come to an end by the time Notice for termination of lease was issued on 28 March 2006. Mr. Rustomjee's reliance on provision of S.77 of the Act of 1960 would not cut any ice. Section 77 reads thus:

**77. Acts of societies etc., not to be invalidated by certain defects.**- (1) No act of a society or a committee or any officer, done in good faith in pursuance of the business of the society shall be deemed to be invalid by reason only of some defect subsequently discovered in the organisation of the society, or in the constitution of the committee, or in the appointment or election of an officer, or on the ground that such officer was disqualified for his office.

(2) No Act done in good faith by any person appointed under this Act, the rules and the bye-laws shall be invalid merely by reason of the fact that his appointment has been cancelled by or in consequence of any order subsequently passed under this Act, Rules and the Bye-laws.

(3) The Registrar shall decide whether any act was done in good faith in pursuance of the business of the society; and his decision thereon shall be final.

41. In my view, Section 77 would not protect an act done or decision taken by an Administrator beyond the tenure of his appointment. In any case, under sub-section (3) of Section 77, it is the Registrar who alone can decide whether the act was indeed done in good faith or not. Society has not sought any declaration from the Registrar to the effect that the action of the

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Administrator in issuing termination notice on 28 March 2006 was done in good faith and that therefore it stood protected under Section 77.

**D. 3 ADMINISTRATOR'S POWER TO TAKE DECISION FOR TERMINATION OF LEASE**

42. The Cooperative Appellate Court has also held that the Administrator was not empowered to direct termination of lease. It has held that termination of lease was a serious policy decision which could not have been taken by the Administrator and could be taken only by the elected Managing Committee. There can be no doubt to the proposition that the appointment of Administrator in the present case was done as pro tem measure with a view to ensure conduct of elections of the Managing Committee. The question therefore is whether the Administrator could have taken decision to terminate the lease of member of the society. From the events narrated above, it is clear that the Society was repeatedly in correspondence with Malhotras with regard to failure to develop the Plot and to keep it clean and hygienic. The correspondence in this regard started since the year 1979 when Mrs. Pritam Kaur Uppal - holder of adjoining plot - had complained to the Society on 29 January 1979 about Plot No. 64 being used as a dumping ground causing nuisance and the Society had addressed letter to Malhotras on 24 February 1979. The issue of failure to construct on the part of Malhotras was taken up in AGMs held

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on 10 December 1989 and 6 September 1992 and Malhotras were once again called upon to fulfill the undertaking of developing the plot on 28 September 1992. There was some correspondence from Malhotras assuring the society that the construction would commence on 10 August 2003. Society's AGM adopted resolution for granting time of six months to Malhotras to commence the construction. Upon receipt of one more complaint from Mrs. Uppal, the Society issued the last letter to Malhotras on 26 May 2005 in which the ultimatum given to Malhtoras was as under :

*Please note that you have failed to develop the property as promised and thus the Society will have no other alternative but to initiate appropriate action in the matter against you which will be at your cost and consequences.*

**43.** This is the last communication by the Society to the Malhotras which did not envisage termination of lease but merely initiation of 'appropriate action'. After 26 May 2005, till the Administrator was appointed on 9 September 2005, the Society did not take any action as threatened in the letter dated 26 May 2005. There was time gap of about 4 months between last letter of Society and appointment of Administrator. The Society however waited and did not issue termination notice. The Administrator's appointment was made on 9 September 2005 for a period of six months. When his appointment ended on 8 March 2006, apparently the elections were not held till

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December 2006. The Administrator apparently left the charge over affairs of the society on 26 December 2006. The question therefore is whether when the Managing Committee of the Society was patient enough for so long in not taking any action against Malhotras, could the Administrator have taken the decision of terminating their lease during short tenure of six months? The answer to this question, to my mind, appears to be in the negative.

**44.** In *T.A. Kuttapan* (supra), the Apex court has considered the issue as to whether an Administrator could take a policy decision to enroll new members in a society. The case arose out of the provisions of Kerala Co-operative Societies Act, 1969, Section 32 of which empowers the Registrar to supersede the Committee or Management and to appoint an Administrator. Even under the Kerala Act, the Administrator has power to exercise all, any of the functions, of the Committee or officer of the Society and to take all actions as may be required in the interest of the Society. Since Mr. Rustomjee has sought to distinguish the judgment in *T.A. Kuttapan*, it would be necessary to reproduce sub-section (4) of Section 32 of the Kerala Act, which reads thus:

**32(4)** The committee or administrators so appointed shall, subject to the control of the Registrar and to such instructions as he may from time to time give, have power to exercise all or

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any of the functions of the Committee or of any officer of the Society and take such action as may be required in the interests of the society.”

45. Provisions of Section 78 of the Act of 1960 are already reproduced above, however for the sake of comparison, sub-section (2) of Section 78 is reproduced as under:

**78. Power of removal of committee or member thereof**

(2) The committee or administrative so appointed shall, subject to the control of the Registrar and to such instructions as he may from time to time give, have power to exercise all or any of the functions of the committee or of any officer of the society and take all such action as may be required in the interests of the society.

46. Thus, the provisions of Section 32(4) of the Kerala Act and Section 78(2) of the Act of 1960 appear to be similar. After considering the provisions of Section 32(4) of the Kerala Act, the Apex Court held in para-7 of its judgment in *T.A. Kuttapan* as under:

7. .... Enrollment of new members would involve alteration of the composition of the society itself and such a power should be exercised by an elected committee rather than by an administrator or a committee appointed by the Registrar while the Committee of Management is under supersession. This Court has taken the view, it did, bearing in mind these aspects, though not spelt out in the course of the judgment. Even where the language of Section 30-A of the Karnataka Act empowering a Special Officer to exercise and perform all the powers and functions of the Committee of Management of a cooperative society fell

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for consideration, this Court having expressed that view, we do not think, there is any need to explore the difference in the meaning of the expressions "have power to exercise all or any of the functions of the committee" in the Act and "exercise all or any of the functions of the committee" in the Karnataka Act as they are not different and are in substance one and the same and difference in language will assume no importance. What is of significance is that when the Committee of Management of the cooperative society commits any default or is negligent in the performance of the duties imposed under the Acts, rules and the bye-laws, which is prejudicial to the interest of the society, the same is superseded and an administrator or a committee is imposed thereon. The duty of such a committee or an administrator is to set right the default, if any, and to enable the society to carry on its functions as enjoined by law. Thus, the role of an administrator or a committee appointed by the Registrar while the Committee of Management is under supersession, is, as pointed out by this Court, only to bring on an even keel a ship which was in doldrums. If that is the objective and is borne in mind, the interpretation of these provisions will not be difficult.

47. Thus in *T.A. Kuttappan* the Apex Court, in uncertain terms, has held that the duty of the Administrator is merely to set right the default (for which his appointment is made) and to enable the Society to carry on its functions. To reiterate the words used by the Apex Court Administrator's duty is only '*to bring on an even keel a ship which was in doldrums*'. It is therefore difficult to accept the contention of Mr. Rustomjee that Administrator can take a decision even to terminate the lease of a member. Mr. Rustomjee has contended

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that since the property of the Society was under jeopardy, the Administrator was justified in taking urgent decision of termination of lease. Having narrated the history of correspondence between the parties, it is difficult to believe that there was any urgency for Administrator to terminate the lease. He could have waited for conduct of elections and for the elected Managing Committee to take a decision.

48. In the light of law expounded by the Apex Court in *T.A. Kutapan*, Mr. Rustomjee's reliance on judgment of a learned single Judge of the Jharkhand High Court in **Sahkari Padadhikari Sahkari Gruh Nirman Samiti Ltd.** holding in facts of that case that the Administrator has power to allot a plot is misplaced.

26. The judgment of the Apex Court in *K. Shantharaj and another versus M. L. Nagaraj and Ors. (1997) 6 SCC 37* is relied upon both by Mr. Rustomjee and Mr. Pathak in support of their respective contentions about powers of an Administrator. In *K. Shantaraj*, the Administrator enrolled new members and gave the schedule of programme for conducting the elections to the Committee. Mr. Pathak draws attention to Paragraphs 4, 7 and 8 of the Judgment which read thus:

4. The indisputable facts are that the committee was superseded by the who has been appointed by the Government to age the affairs of the Society, pending further

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action. During the period of the administration, the Administrator had enrolled new members and given the schedule of programme for conducting the elections to the Committee. The respondents challenged the order of appointment of the Administrator. The learned Single Judge, while setting aside the order of appointment, held that the Administrator has no power to enrol new members; but he could conduct elections to the Committee of the Society as per the schedule of the programme. That was confirmed by the Division Bench. The material provisions in that behalf are contained in Sections 30 and 30-A of the Karnataka Cooperative Societies Act, 1959 (for short "the Act).

7. The Division Bench after elaborate consideration has agreed with the above conclusion reached by the learned Single Judge and held thus:

"Accordingly, he is not entitled to enrol new members. But it has to be noted that the wording of Section 33(2) of the Kerala Cooperative Societies Act is slightly different from the wording of Section 30 of the Act. In the Kerala Act, the Administrator has power to exercise all or any of the functions of the committee, whereas in the Karnataka Act, the Administrator can only exercise all or any of the functions of the committee. Moreover, as stated earlier, the difference in the authority vested in an Administrator and a Special Officer, as is made in the Karnataka Act is not considered in the Kerala decision. The difference in the authority vested in an Administrator and a Special Officer in the Karnataka Act, is very significant which is absent in the Kerala Act. In that view of the matter, the dictum laid down by the Division Bench of the Kerala High Court, cannot have any application while determining the comparative authority of an Administrator and a Special Officer appointed under Sections 30 and 30-A of the Karnataka Act respectively. In view of what is stated above, we confirm the decision of the learned Single Judge and dismiss these appeals. The direction regarding election given by the learned Single Judge shall be carried out by

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the respondent concerned within two months from the date of receipt of a copy of this judgment."

8. Shri Santosh Hegde, learned Senior Counsel, contends that since **the Administrator has power to conduct elections, by necessary implication, he has power to update the electoral lists by either enrolling the new members or substituting the legal representatives of the members in accordance with the bye-laws, therefore, he has power to enrol the members.** We find that there is no force in the contention. The power of Administrator given under the statute to conduct elections should be confined within the parameters set under the relevant provisions of the Act, rules and bye-laws. The Division Bench has minutely and carefully gone into all the questions and agreed with the learned Single Judge that the Administrator has no power to enrol new members, but he has the power to organise election process in accordance with the provisions of the Act, the rules and the bye-laws of the Society. In view of the matter, we think that the High Court has not committed any error of law warranting interference.

*(emphasis supplied)*

On the other hand, Mr. Rustomjee attempts to distinguish the judgment by contending that the decision of the Administrator to enroll new members in ***K. Shantaraj*** was not set aside by the Apex Court but was made subject to the decision of the general body of members. In the present case, the general body has already ratified the act of the Administrator of issuing the termination notice. The Apex Court has followed and approved ***K. Shantaraj*** in ***T.A. Kuttappan*** and has further supplemented the view by holding as under:

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8. Thus, we are of the view that this Court in *K. Shantharaj* case [(1997) 6 SCC 37] took the view that an administrator or a Special Officer in the Karnataka Act is not vested with the power to enrol new members of the cooperative society in this context. While reiterating that view in regard to the Kerala Act, **we afford further reasons to support the said view** and dismiss these appeals, though for reasons different from those expressed by the High Court. However, in the circumstances of the case, there shall be no orders as to costs.

*(emphasis supplied)*

49. While the Society is now relying on Administrator's notice of termination, it wanted to disown all the actions of the Administrator by issuing a Public Notice informing the public at large that the acts of the Administrator are illegal and not binding on the Society. Though Mr. Rustomjee was at pains to point out that the Society disowned only specified acts of the Administrator which does not include termination of Malhotras lease, it is difficult to accept such contention as the Notice clearly refers to '*certain policy decisions as well as issuing permissions for transfer of lease of plot etc.*'. Thus the notice itself classifies 'certain policy decisions' from 'permissions for transfer, development of plots, values of TDR, use of premises for commercial purposes and membership of the Society'. In my view, termination of lease of a member would undoubtedly fall under the expression 'policy decision'. It is therefore difficult to accept Mr. Rustomjee's contention that the Public Notice did not repudiate Administrator's decision of termination of lease of Malhotras. To add to the problems of the Society are Affidavits sworn by the Advocate issuing termination

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Notice dated 28 March 2006 and of the Administrator himself pointing out lack of instructions/power to issue termination notice and illegalities therein. Society's own Secretary's issued notice to the Administrator questioning the appointment of that advocate. Advocate Rupa Kadam has sworn an Affidavit dated 11 December 2010 stating that the termination notice dated 28 March 2006 drafted and sent by her is null and void and not enforceable. Additionally, the Administrator Mr. S.M. Mohite has sworn in an Affidavit dated 24 December 2010 stating that he was advised by the advocate to withdraw the termination notice which he had inadvertently instructed her to issue. The Society's Secretary has also questioned the authority of Advocate Rupa Kadam to issue such notice. Mr. Rustomjee has contended that the said affidavits of the Advocate and Administrator were neither produced nor proved before the Cooperative Court and therefore should be discarded altogether. Even if the said affidavits are discarded, the inherent errors in the actions of the Administrator in issuing the notice after the end of his tenure and exceeding his authority in taking policy decisions would still remain uncured.

50. I therefore have no hesitation in my mind that the termination notice dated 28 March 2006 is wholly erroneous and rightly set aside by the Cooperative Appellate Court.

**D.4 RATIFICATION OF NOTICE OF TERMINATION OF LEASE**

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51. The next issue is about ratification of the termination Notice dated 28 March 2006 by the Managing Committee and General Body of the Society. After removal of the Administrator, elections were held and Managing Committee resumed affairs of the society and adopted Resolution dated 31 May 2007 ratifying the decision taken by the Administrator. That decision was once again ratified by the General Body of the Society on 12 November 2007. However, the elected Managing Committee's authority came under cloud on account of failure to file M-20 Bonds within specified time. Therefore, after fresh elections, the Managing Committee as well as General Body has once again ratified the decision of the Administrator to terminate the lease vide notice dated 28 March 2006.

52. Mr. Rustomjee has contended that subsequent ratification of an invalid or unauthorised act would validate the same. Reliance in this regard is placed on the judgment of the Apex Court in *Sri Parmeshwari Prasad Gupta* (supra) in which the Apex Court has held in paras-12 to 14 as under :

12. To put it in other words, as the meeting of the Board of Directors Held on December 16, 1953 was invalid, so the resolution to terminate the services of the plaintiff was inoperative.

13. Then, the question for consideration is, what is the effect of the confirmation of the minutes of the meeting of the Board

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of Directors held on December 16, 1953 and the action of the Chairman in terminating the services of the appellant by his telegram and letter, dated December 17, 1953, in pursuance to the invalid resolution of the Board of Directors to terminate his services, in the meeting of the Board of Directors held on December 23, 1953?

14. The of the meeting of the Board of Directors held on December 23, 1953 shows that one item of business was the confirmation of the minutes of the meeting of the Directors held on December 16, 1953. The confirmation of the minutes of the meeting of the Directors held on December 16, 1953 would not in any way show that the Board of Directors adopted the resolution to terminate the services of the appellant passed on December 16, 1953. It only shows that the Board passed the minutes of the proceedings of the meeting held on December 16, 1953. But the resolution of the Board of Directors to confirm the action of the Chairman to terminate the services of the appellant by his telegram and letter dated December 17, 1953 would show that the Board ratified the action of the Chairman. Even if it be assured that the telegram and. the letter terminating the services of the appellant by the Chairman was in pursuance to the invalid resolution of the Board of Directors passed on December 16, 1953 to terminate his services, it would not follow that the action of the Chairman could not be ratified in a regularly convened meeting of the Board of Directors. The point is that even assuming that the Chairman was not legally authorised to terminate the services of the appellant, he was acting on behalf of the Company in doing so, because, he purported to act in pursuance of the invalid resolution. Therefore, was open to a regularly constituted meeting of the Board of Directors to ratify that action which, though unauthorized, was done on behalf of the Company. Ratification would always relate back to the date of the act ratified and so it must be held that the services of the appellant were validly terminated on December 17, 1953. The appellant was not entitled to the declaration

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prayed for by him and the trial Court as well as the High Court was right in dismissing the claim.

**53.** The issue in *Sri Parmeshwari Prasad Gupta* was entirely different. In that case, the Board Resolution which authorised chairman to terminate services of the appellant was found to be invalid. However, subsequently the Board of Directors, in a validly conducted meeting, confirmed the Resolutions adopted by it in its previous invalid meeting. It is in the light of these circumstances that the Apex Court held that, it was open to the regularly constituted meeting of the Board of Directors to ratify the Chairman's decision taken based on invalid meeting of Board of Directors. Thus the company had an authority to pass a Resolution to dismiss the Appellant but a defect was noticed in the meeting of Board of Directors. In the present case, on the other hand, the Administrator lacked inherent authority to take a decision of termination of lease, on counts both of expiration of its tenure as well as non-vesting of powers to take policy decision of termination of lease.

**54.** Mr. Rustomjee has also relied upon the judgment in *Maharashtra State Mining Corporation* (supra). This case also involved service dispute relating to authority of Managing Director to dismiss an employee. In that case, it was found that the Managing Director did not have authority to dismiss the employee. But the Supreme Court noticed that the Board of

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Directors subsequently ratified the decision of the Managing Director. It is in this factual background that the Apex Court held in paras-7, 9 and 10 as under :

7. The High Court was right when it held that an act by a legally incompetent authority is invalid. But it was entirely wrong in holding that such an invalid act cannot be subsequently "rectified" by of the competent authority. Ratification by definition means the making valid of an act already done. The principle is derived from the Latin maxim *ratihabitio mandato aequiparatur*, namely, "a subsequent ratification of an act is equivalent to a prior authority to perform such act". Therefore ratification Assumes an invalid act which is retrospectively validated.

9. The same view has been expressed in several cases in other jurisdictions. Thus in *Hartman v. Hornsby* it was said:

" 'Ratification' is the approval by act, word, or conduct, of that which was attempted (of accomplishment), but which was improperly or unauthorisedly performed in the first instance."

10. In the present case, the Managing Director's order dismissing the from the service was admittedly ratified by the Board of Directors on 20-2-1991 and the Board of Directors unquestionably had the power to terminate the services of the respondent. On the basis of the authorities noted, it must follow that since the order of the Managing Director had been ratified by the Board of Directors such ratification related back to the date of the order and validated it.

55. The Judgment in *Maharashtra State Mining Corporation* thus deals with a situation involving lack of

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authority to punish employee in hierarchical set up. It does not deal with a situation of ratification of a decision is taken by someone who had ceased to be a part of the organisation. The judgment therefore will not have any application to the facts of the present case.

56. The judgment is *National Institute of Technology* (supra) is relied upon by Mr. Rustomjee. This case again arose out of a service dispute wherein the Respondent therein had committed financial and administrative irregularities while functioning as Registrar/Deputy Registrar (Accounts). He was dismissed from service on 16 August 1996 by the order passed by the Principal Secretary. The Apex Court however found that the Board of Governor had approved the previous actions of Principal Secretary in passing Respondent's dismissal order. It is in the light of that factual position that the Apex Court held that the irregularity in passing the order by lower officer in rank was cured by the competent authority (Board of Governors).

56. Judgment of single Judge of this Court in *Pravinkumar R. Sali* (supra) is relied upon by Mr. Rustomjee which again arises out of a service dispute and involved a question whether the Chairman of Board of Directors alone had authority to initiate either disciplinary proceedings or to issue suspension order against the Chief Executive Officer (Petitioner

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therein) and whether the said decision can be subsequently ratified by the Board of Directors? This Court held:

14. It is well settled that for the purpose of ratification, the action by a person must have been taken or done on behalf of the ratifying person, and not on his own behalf or on behalf or at the instance of someone else. It is only when a person takes any action on behalf of some other person, that such other person can ratify the action of the former and not in a case where the former takes the action on his own behalf or for someone else. In *Keighley Maxsted & Co. vs. Durant* (carrying on business as BRAYAN Durant & Co, reported in (1901) A C 240, dealing with the doctrine of ratification, while referring to the ruling of Jindal C.J in *Wilson vs. Tumman*. (6 M and Gr. 236), to the effect that "That an act done for another by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is known and well-established rule of law. In that case, the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract to the same extent as by, and with all the consequences which follow from the same act done by his previous authority." It was held that the principal limitation to the doctrine that a person can, by ratifying another's act, render that act on his own in law, lies in the rule that a person cannot be said in law to ratify another's act, unless that other, in doing the act, purported or assumed, or intended to do it as such persons agent, and this rule applies equally whether the doctrine of ratification is invoked to enable a person to take the benefit of an act, or to render him liable therefore as a principal, or justify an act as done by lawful authority. A person who does an act on his own behalf cannot afterwards justify it as done on behalf of another or rely on the other's subsequent assent to such act. Certainly the ratification by a person of what has been already done in his name or what has been done on his behalf, even though was

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without his prior specific authority can have a retrospective effect and can be treated as equivalent to his previous consent. When an act is done in the name of a person and for his benefit and in his interest, but without his knowledge or specific consent in that regard, by some other person, then the subsequent ratification by the person, on whose behalf the act was done, would render the act as much his own as if he had originally authorised the same to such other person. However, a person who does an act on his own behalf cannot afterward justify it as having been done on behalf of another or even rely on the other's subsequent assent to such act, more particularly when a right accrues in favour of a third party on account of absence of previous authority from other person to the person who had performed the action.

15. Once it is seen that the order/notice issued on 7th August, 2002 did not disclose that the said action was on behalf of the Board of Directors of the Society, and on the contrary it discloses to be the order of the respondent No. 3 pursuant to directions by the respondent No. 2, it is not permissible to the respondents to contend that the action taken by the respondent No. 3 was ratified by the Board of Directors. Further, it is to be noted that the claim of ratification is not supported by any documentary evidence. It is merely a claim by the respondent No. 3. The learned Advocate for the respondent has not pointed out single piece of document which can reveal act of the ratification on the part of the Board of Directors. **For valid ratification, three conditions must be satisfied. Firstly, the person whose act is sought to be ratified must have acted for the other, secondly, the other person on whose behalf the act was performed by the former, must be a competent person to perform the act which has been performed and must continue to be so competent legally even at the time of ratification, and thirdly, the person ratifying the act do so with full knowledge of the act ratified. All these conditions should be established by cogent materials to be placed on record by the person who wants to claim the benefit of ratification.** In the case in hand, apart from mere claim of ratification, no material is placed on record to establish such

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claim of ratification of the action of the respondent No. 3 by the Board of Directors.”

57. All the four decisions relied upon by Mr. Rustomjee relate to service disputes where disciplinary powers are exercised by an Officer inferior to the appointment authority. In those cases, even the incompetent/inferior officer is the part of the organisation but the scope of his powers does not include the power to dismiss a particular level of employee. In the present case, the fact situation is entirely different. The person who gave instructions to issue termination Notice dated 28 March 2006 was not even clothed with the jurisdiction to act as Administrator on the date of issuance of Notice. He did not have jurisdiction to take any policy decision, as extreme as terminating lease of a member, which divests such a member of right in property. To permit ratification of such decision would be akin to ratifying dismissal order of an employee passed by a retired official subsequently by a serving officer. Therefore, though there can be no dispute to the general proposition that in a given case, order of unauthorised officer can be later ratified by the authorised officer, that principle would not be attracted to the present case. The submission of Mr. Rustomjee about conferment of valid status to an invalid order of termination of lease on account of ratification deserves to be repelled.

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**D. 5 MERITS OF DECISION TO TERMINATE LEASE**

58. Having held that the Termination Notice itself was bad in law, it is not really necessary to examine the merits of the reason why the Notice of termination was issued. Suffice it to add here that the Society was seeking to divest a member of his/her right in the property, which according to Mr. Pathak is akin to ownership in light of virtual perpetual lease of 999 years on payment of nominal rent of Rs.1/-. It is therefore highly debatable as to whether such an extreme decision could be taken on the grounds of failure to carry out construction or to keep the plot clean and hygiene. It is also debatable as to whether such an extreme decision could be taken in a unilateral manner by serving three months' notice. Also questionable is the manner in which decision to terminate lease is taken and implemented. Instead of passing an order of termination, an advocate was instructed to serve a notice. However, since the termination notice is held to be bad on account of lack of authority on the part of the Administrator to issue the same, I am not deciding the said issues and all contentions on the merits of the decision for termination are left open.

59. I accordingly answer the first issue that the Notice of termination of lease dated 28 March 2006 is invalid and has rightly been set aside by the Co-operative Appellate Court.

## D.6 VALIDITY OF ASSIGNMENT DEED

60. The next issue is about the validity of Deed of Assignment dated 11 December 2006. The Assignment Deed is held to be illegal, *non-est* and bad in law by the Cooperative Appellate Court essentially on the ground that Malhotras did not obtain prior consent of the society for assignment of the lease. There is no dispute to the position that, the lease-deed contains a specific covenant restraining the Lessee from assigning, underletting or parting with possession of the Plot without written consent of the Lessor. Clause-14 of the lease-deed reads thus :

14. Not to assign, underlet or part with the possession of the demised plot and premises at any time during the said term hereby granted without the written consent of the Lessor for that purpose previously had and obtained much consent not to be withheld in the case of a responsible and respectable tenant being a registered member of the Society PROVIDED ALWAYS and it is hereby agreed that on every permitted disposition or devolution of or dealing with the demised plot and premises under or by virtue of these presents the Lessees shall pay to the Lessor half the amount or value of any, premium or other consideration received by the Lessees from the purchaser or transferee or underlessee in respect of the demised plot and premises and shall also pay to the Lessor half the extra amount received by the Lessees from the purchaser transferee or underlessee over and above the capital cost with interest thereon at 6

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per cent per annum upto a limit of one-third of the capital cost.

27. Malhotras and Patels also do not dispute existence of the above conditions in the lease. They have however taken twin defences in that regard. The first defence is about three letters sent by Malhotras to seek permission from the Society for transfer of the lease and the second defence is about requirement to obtain such prior permission of the society. As far as the defence of submission of three letters by Malhotras on 30 August 1998, 9 October 2005 and 9 January 2006 are concerned, it is seen that Malhotras did not actually inform the society in any of the three letters that they intended to assign the lease in favour of any particular person/entity. It would be apposite to reproduce the said three letters:

(i) Letter dated 30.08.1998:

30-8-98

The Chairman  
Vithalnagar Co-op. Hsg. Soc. Ltd.  
JVPD Schene  
Mumbai 400 049.

Dear Shri Gopal Hansra Jani,

As you are aware we have our plot No.64 in Vithalnagar Society on N.S. Road No.12 admeasuring 465 sq.yd. Due to certain family reasons we have not been able to develop the plot.

We are getting to enquiries for the purchase of the plot, but we are unable to negotiate the terms in the absence of clarity about the society transfer charges. We understand that

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the transfer charges for a plot with a structure is Rs.2000/-per sq.yd.

Regarding open plots, according to information given to us, and as per the bye-laws which framed more than 40 years back, to discourage trading of plots, the transfer charge is 50% of the difference in the sale and purchase prices less other costs, but at today's market price of land this will be a prohibitive and exorbitant amount for any deal to materialise.

Ours is the only plot in the Society and we shall be glad if you can kindly consider a charge of Rs.4000/- per sq.yd. for transferring our plot.

We hope the managing committee will appreciate the difficulty in present slack circumstances and depressing market conditions and take a pragmatic view of the entire matter and accept our above mentioned proposal.

Thanking you for an early reply.

Yours truly,  
for Ghanshyam Malhotra & Others

Address  
7A,HilltopApts  
49/49A, Pali Hill  
Bandra Mumbai  
400050

**(ii) Letter dated 09.10.2005:**

Date: 09/10/05

From:-  
Ghanshyam Malhotra & Others  
presently residing at  
Flat no.7-A,7<sup>th</sup> floor,  
49-49-A,Hill Top Apts,  
Pali Hill, Near Pali Market,  
Bandra (W), Mumbai.

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To,  
The Chairman/Secretary,  
Vithal Nagar C.H.S.,  
JVPD Scheme,  
Juhu, Mumbai.

Ref:- Plot no.64 of our society i.e. Vithal Nagar  
C.H.S.

Respected Sir,

I, the undersigned, is one of the Joint Plot Holders of Plot no.64 & would like to request you as stated hereinunder:-

We, intend to assign our plot & hence we would like to know from the society that, as per Co-operative Society's Act, what are the formalities required to be fulfilled in the event of our assigning rights, titles & interest of our plot to the persons whom we so desire.

Your co-operation & early action in this regard shall be highly appreciated.

Thanking you,  
Yours Sincerely  
Sign/-  
Ghanshyam Malhotra  
(Self & for & on behalf of others)

**(iii) Letter dated 09.01.2006**

Date: 09/01/2006

From,  
Ghanshyam Malhotra  
Flat No. 7-A, Hill Top Apartments,  
49/49A, Pali Hill, Bandra (W),  
Mumbai-400050.

To  
The Dy. Registrar of Co-operative societies.  
K/West Ward, Bandra (E),

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Mumbai-400051.

Respected Sir,

**Ref: My letter dated 09/10/2005, in respect of Plot No. 64 and share certificate No.82 of Vithalnagar CHS Ltd., Juhu, Mumbai-400 049.**

I, the undersigned Shri Ghanshyam Malhotra, Members of the Vithalnagar CHS Ltd., having its registration No. B-326 of 1947, situated at 2 floor, Jal Hind Club, Plot No. 51, Jai Hind Society, N. S. Road No.11, J.V.P.D. Scheme, Vile Parle (West), Mumbai- 400 056., Intend to assign/transfer all our (i.e. myself and my family member's) right, title and interest in plot No. 64 as well as in shares certificate no. 82 to Mr. Gautam R. Patel and his daughter Ms. Sonzal G. Patel (Proposed transferees).

You are aware of the fact that you have appointed Shri S. M. Mohite as administrator of above referred Vithalnagar CHS Ltd. and accordingly, I was given to understand that he is in charge of above referred society, since first week of October 2005 and I was given to understand that he is in regular contacts with you.

I would like to bring it to your notice that by my application dated 09/10/2005, received by administrator on 10/11/2005 (Copy of which is annexed herewith), I have requested to know the procedure in respect of assignment /transfer of above referred plot and shares. Thereafter the proposed transferee shri Gautam R. Patel several times contacted administrator Mr. S. M. Mohite personally and requested him to reply in respect of my above referred letter and also requested him to give NOC, so that transaction can be completed as stated hereinbefore. I regret to inform you and put it on record that despite these genuine attempts, till date no reply has been given by the administrator Shri S. M. Mohite for the reason(s) best known to him.

In view of the aforesaid circumstances, sincerely request you to use your good office and immediately direct the administrator Shri S. M. Mohite to issue the NOC letter as

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well as inform us the procedure required to be followed in respect of assignment / transfer of above referred plot no. 64 and share certificate no. 82 of Vithalnagar CHS Ltd. in the name of proposed transferees Mr. Gautam R. Patel and his daughter who have given their consent letter in respect of proposed assignment / transfer of above referred plot no. 64 and share certificate no. 82 which is annexed herewith.

I, therefore further request you to direct the administrator Shri S. M. Mohite to give the NOC within 30 days from the receipt of this letter by you, failing which please note that it shall be deemed that no NOC in writing is required and the transaction as stated hereinbefore, shall be completed without any further reference to the administrator of Vithalnagar CHS Ltd in this regard.

Your co-operation and appropriate direction in this regard to the administrator Shri S. M. Mohite shall be highly appreciated.

Thanking you in anticipation

Yours sincerely

Sign/-

Ghanshyam Malhotra

(as self and for and on behalf of others  
i.e. my family members)

Encl.: (1) Letter dated 09/10/2005, as stated above

(2) Consent of the proposed transferee is enclosed.

**62.** The first letter dated 30 August 1998 merely discloses the fact that Malhotras were getting enquiries for purchase of the Plot. Malhtoras claimed in that letter that the Society was charging hefty transfer charge of 50% of difference in sale and purchase prices less other costs for transfer of only plots whereas for transfer of plots with construction were only

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Rs.2000/- per sq.yard. Malhotras therefore requested that for transfer of that plot (without construction) society may charge transfer charge of Rs. 4,000/- per.sq.yard. Therefore, this letter dated 30 August 1998 cannot be construed as an application seeking prior permission for transfer/assignment.

**63.** The second letter of Malhtoras of 9 October 2005, merely made an enquiry about the formalities required to be fulfilled '*in the event of our assigning the plot*'. Again, letter dated 9 October 2005 cannot be treated as an application seeking prior permission.

**64.** The third letter is addressed by the Malhotras to the Deputy Registrar on 9 January 2006. By that letter, Malhotras, referring to their earlier application dated 9 October 2005 submitted to the Administrator, stated that they did not receive any reply from the Administrator. In their letter dated 9 January 2006 they however disclosed for the first time that they intended to assign/transfer plot no.64 to Mr. Gautam R. Patel and Ms. Sonzal G. Patel. Malhotras requested the Deputy Registrar to direct the Administrator to issue NOC letter as well as information about procedure for transfer of plot. The issue is whether letter dated 9 January 2006 addressed directly to the Deputy Registrar can be treated as an application for issuance of NOC made to the society. No doubt Malhotras were entitled to approach the Registrar under Section 79 (2) of the Act of 1960

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if society was refusing to issue NOC. However when the NOC was never applied to the society, there was no question of direct approach being made to the Deputy Registrar. In my view therefore even the third application dated 9 January 2006 addressed to the Deputy Registrar cannot be termed as an application submitted to the Society for issuance of prior permission.

65. Here it must be borne in mind that the prior permission is not just for admission of transferee as a member but for transfer of the lease. In the present case, the Society is the owner of land including Plot No. 64 and Malhotras are merely the lessees. In such circumstances, the case involves transfer of leasehold rights without the permission of the lessor. Therefore reliance of Mr. Pathak on judgments in *Venus Co-op. Housing Society, Sneh Sadan Co-op. Hsg. Soc. Ltd and Ramesh Himmatlal Shah* (1975) 2 SCC 10, would not be applicable to the facts of the present case. All the three judgments relate to grant of NOC by a Society for transfer of flats and do not govern the situation of transfer of leasehold rights without the permission of the lessor.

66. Mr. Pathak has laid heavy reliance on the judgment of Single Judge of this Court in **Lavasa Corporation Limited** (supra). The issue before this Court in that case was about applicability of provisions of Real Estate (Regulation and

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Development) Act, 2016 in case of agreement to lease. Therefore, that judgment would not have any applicability in the present case.

67. I am therefore of the view that the Co-op. Appellate Court has not committed any patent error in holding that the Assignment Deed executed without obtaining prior permission of the Lessor society is invalid and *ab-initio* void. In this connection, reliance of Mr. Rustomjee on *Indu Kakkar v/s. Haryana State Industrial Development Corporation Limited* (1999) 2 SCC 37 appears to be apposite. In that judgment, the issue was about right of the society to refuse permission to a member (plot holder) to erect commercial building on the plot of the society. The Apex court held in para-19 as under :

19. In fact, the question is not whether there is any legal bar for the allottee to make assignment of the plot. The real question is whether the assignee has a legal right to claim performance of any part from the allottor. The answer of the said question depends upon the terms of allotment. Assignment by an act of the parties may cause assignment of rights or of liabilities under a contract. As a rule, a party to a contract cannot transfer his liabilities under the contract without consent of the other party. This rule applies both at the common law and in equity (vide para 337 of Halsbury's Laws of England, Fourth Edition Vol. 9). Where a contract involves mutual rights and obligations, an assignee of a right cannot enforce that right without fulfilling the correlative obligations. The aforesaid principle has been recognized by a Constitution Bench of this Court in *Khardah Co. Ltd. v. Raymon and Co. (India) (P) Ltd.*<sup>1</sup> T.L. Venkataramiah, J. who spoke for the Bench has observed thus:

"The law on the subject is well settled and might be stated in simple terms. An assignment of a contract might

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result by transfer either of the rights or of the obligations thereunder. But there is a well-recognised distinction between these two classes of assignments. As a rule obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. On the other hand rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties.

68. The judgment of the Apex Court in *Zorastrian CHS* (supra) holds in para-41 and 42 as under :

41. Section 10 of the Transfer of Property Act relieves a transferee of immovable property from an absolute restraint placed on his right to deal with the property in his capacity as an owner thereof. As per Section 10, a condition restraining alienation would be void. The section applies to a case where property is transferred subject to a condition or limitation absolutely restraining the transferee from parting with his interest in the property. For making such a condition invalid, the restraint must be an absolute restraint. It must be a restraint imposed while the property is being transferred to the transferee. Here, Respondent 2 became a member of the Society on the death of his father. He subscribed to the bye-laws. He accepted Section 30 of the Act and the other restrictions placed on a member. Respondent 2 was qualified to be a member in terms of the bye-laws. His father was also a member of the Society. The allotment of the property was made to Respondent 2 in his capacity as a member. There was really no transfer of property to Respondent 2. He inherited it with the limitations thereon placed by Section of the Act and the bye-laws. His right to become a member depended on his possessing the qualification to become one as per the bye-laws of the Society. He possessed that qualification.

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The bye-laws provide that he should have the prior consent of the Society for transferring the property or his membership to a person qualified to be a member of the Society. These are restrictions in the interests of the Society and its members and consistent with the object with which the Society was formed. He cannot question that restriction. It is also not possible to say that such a restriction amounts to an absolute restraint on alienation within the meaning of Section 10 of the Transfer of Property Act.

42. The restriction, if any, is a self-imposed restriction. It is a restriction in a compact to which the father of Respondent 2 was a party and to which 2 voluntarily became a party. It is difficult to postulate that such a qualified freedom to transfer a property accepted by a person voluntarily, would attract Section 10 of the Act. Moreover, it is not as if it is an absolute restraint on alienation. Respondent 2 has the right to transfer the property to a person who is qualified to be a member of the Society as per its bye-laws. At best, it is a partial restraint on alienation. Such partial restraints are valid if imposed in a family settlement, partition or compromise of disputed claims. This is clear from the decision of the Privy Council in *Mohd. Raza v. Abbas Bandi Bibi*<sup>15</sup> and also from the decision of the Supreme Court in *Gummanna Shetty v. Nagaveniamma*<sup>16</sup>. So, when a person accepts membership in a cooperative society by submitting himself to its bye-laws and secures an allotment of a plot of land or a building in terms of the bye-laws and places on himself a qualified restriction in his right to transfer the property by stipulating that the same would be transferred back to the society or with the prior consent of the society to a person qualified to be a member of the society, it cannot be held to be an absolute restraint on alienation offending Section 10 of the Transfer of Property Act. He has placed that restriction on himself in the interests of the

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collective body, the society. He has voluntarily submerged his rights in that of the society.

27. I therefore answer the second broad issue of validity of Deed of Assignment in favour of the Society by upholding the directions of the Cooperative Court and Maharashtra State Cooperative Appellate Court in declaring the Deed of Assignment dated 11 January 2006 to be illegal, *non-est* void and bad in law.

69. Before proceeding further to determine the exact nature of Order that can be passed in the present petition, it must be observed that Mr. Pathak has relied upon numerous other judgments, applicability of which, in my view, is not really relevant to the broad issues taken up for consideration. I therefore do not wish to burden in this judgment, which has already become lengthy, to deal and decide applicability of those judgments in the present case.

#### **D.7 RELIEF THAT CAN BE GRANTED**

70. Having answered the issue of validity of termination Notice in favour of Malhotras and Patels and the issue of validity of Assignment Deed in favour of the Society, the next issue is about the exact relief that could be granted in favour of either of the contesting parties. The Deed of

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Assignment is rendered void essentially on account of failure of Malhotras to obtain prior permission of the Society. Patels entered into transaction with full knowledge of consequences of getting the assignment in their favour without prior permission of the Lessor-Society. Malhotras had requested the Society to reduce the transfer charges for assignment of open plot from 50% difference in purchase and sale price to Rs. 4000 per sq. yard. Levy of such hefty premium for transfer of leasehold rights in unconstructed Plot was perhaps the reason why Malhotras (and possibly Patels) shied away from obtaining prior permission of the Society for such transfer. It is difficult to believe that Patels were not aware of impending termination of lease of Malhotras by the Society. There is evidence to indicate that Patels had entered on the Plot well before execution of Assignment and infact the society had addressed a separate communication to Patels on 28 March 2006 intimating termination of lease of Malhotras. Thus before execution of the assignment, Patels were fully aware that they were purchasing leasehold rights in the Plot, which were terminated by Notice dated 28 March 2006. Therefore, Patels are not bonafide purchasers without notice. In such circumstances, having taken the risk of purchasing the Plot with full knowledge of termination, the only possible relief that Patels can seek is to seek refund of consideration paid under the assignment from Malhotras by filing appropriate proceedings. Alternatively, if Malhotras apply to the Society for issuance of NOC for

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assignment of Plot to Patels and Society grants such NOC, a fresh Deed can be executed in favour of Patels by making necessary adjustment of consideration already paid under the earlier Deed. It is for Patels and Malhotras to take a decision in this regard.

71. Thus the net result of the Order of the Co-operative Appellate Court, which I am upholding, is that Malhotras would continue to remain as members and lessees of the Society and Patels would not acquire any right, title or interest in the Plot. Malhotras can apply to the society seeking permission for assignment of leasehold rights to any person/entity, including Patels, and after obtaining Society's permission, Malhotras can assign their leasehold rights. In the event, the Society unreasonably fails or refuses to grant permission or imposes any unreasonable conditions for grant of permission, Malhotras can exercise appropriate remedy under the Act of 1960/Rules of 1961 against the Society for issuance of its permission for assignment of the leasehold rights. Since the decision of the Administrator to issue termination Notice is set aside on account of lack of authority, it will be open for the Society to take a fresh decision as is advised with regard to continuation of the lease.

72. I therefore find the judgment and order passed by the Cooperative Appellate Court to be unexceptionable. It is

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upheld. Both the petitions filed by the Society as well as by Malhotras and Patels are devoid of merits. Accordingly, Writ Petition Nos. 8875 of 2018, 10965/2018 are dismissed without any orders as to costs. Interim Applications, pending if any also stand disposed of. Rule is discharged in all the Petitions.

**SANDEEP V. MARNE, J.**

**Note :** Corrections are carried out pursuant to speaking to the minutes order dated 8 January 2024 in the cause-title only.