

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.13147 OF 2024

Prakash Raghunath Saave
(Promoter of deregistered Harmony
Plaza Premises Co-operative Society)

...*Petitioner*

V/s.

1. The State of Maharashtra
through Co-operation Minister
2. Divisional Joint Registrar,
Co-operative Societies, Konkan
Division, Navi Mumbai.
3. Assistant Co-operative Registrar,
Co-operative Societies Palghar
4. M/s. Jainam Builders Bhagidari
Sanstha By & through its partner
Navinchandra Kishanlal Shah
5. Dhananjay Hiraji Sankhe
6. Sou. Madhavi Hiraji Sankhe
7. Sou. Bhanumati Hirichandra
Kansara
8. Sudhir Harishchandra Patil
9. Shohilal Nathulal Sutar
10. Smt. Meena Avinash Patil
11. Smt. Sharla Vasant Kavar

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12. Durgeshkumar Harswarup
Agrawal
13. Smt. Trupti Manish Patil
14. Smt. Renuka Shantilal Jain
15. Shantilal Kalulal Jain
16. Pritam Kamlakar Gharat
17. Aashish Kamlakar Gharat
18. Smt. Aasha Ashok Pardeshi
19. Shri. Nilesh Bacchubhai
Bhanushali
20. Shankar Gumansingh
Rajpurohit
21. Smt. Bandhini Balkrishna Patil
22. Smt. Vidyakant Tilakdhari Jha
23. Smt. Jayanti Mithalal Rathod
24. Smt. Kamla Bherulal Jain
25. Smt. Kanchan Santosh Jain
26. Mahendrashingh Bhawarsingh
Bhatti
27. Smt. Shantidevi Hukaram Mali
28. Chatarsing Bhavanisingh Tanvar
29. Ramjan Ummed Ali Gilani
30. Smt. Vidyakumari Pukhraj Mali
31. Virendra Jagaram Chaudhari
32. Smt. Pushpadevi Babulal Jain
33. Tansukhlal Bhawarlal Jain
34. Mohan Meghaji Chaudhari

35. Smt. Priya Mohan Chaudhari
36. Smt. Vandana Vasudeo Naik
37. Smt. Tejal Rahul Naik
38. Premchand Ramchandra Matlani
39. Shabir Ajij Memon
40. Shankarsingh Gumnamsingh
Rajpurohit
41. Smt. Anita Kumari Shankarsingh
Rajpurohit
42. Roshan Tulshiram Prajapati
43. Udyan H. Saave
44. Vasudeo Babu Naik
45. Rahul Naik
46. Rajendra Laxman Churi
47. Smt. Dhanashree Tabib
48. Tarun Prakashsingh Ponda
49. Ramanbhai Shyamji Shah
50. Santosh Aatmaram Sankhe
51. Mahesh G. Rana
52. Smt Smita Raajen Gandhi
- 53- Smt. Shanti Navin Mithiyas
54. Nevhil Henni Maithiyas
55. Rajesh Bhairulal Jain
56. Vilas Harishchandra Churi
57. Smt. TabsumNasimulgani Mulla
58. Ganpatsingh Vasantsingh
Rajput

59. Smt. Jaya Premchand Matlano
60. Roshan Tulsiram Prajapati
61. Yatindra Haricharan Sharma
62. Smt. Manju Sharma
63. Rakesh Navinchandra Shah
64. Rakesh Sohanlal Jain

...Respondents

Mr. Sarthak S. Diwan *for the Petitioner.*

Mr. Y.D. Patil, *AGP for Respondent Nos.1 to 3-State.*

Mr. Rohan Savant *with Mr. Gaurav Lele for Respondent No.4.*

CORAM : SANDEEP V. MARNE, J.

Judgment reserved on : 18 February 2025.

Judgment pronounced on : 04 March 2025.

Judgment :

1) The broad issues that arise for consideration in the present Petition are as under:

- (i) Whether it is lawful for the Registrar to prescribe, by way of a Circular, higher number of persons than the one prescribed in sub-section (1) of Section 6 of the Maharashtra Co-operative Societies Act, 1960 (**MCS Act**), who need to sign an application for registration of a cooperative society?

- (ii) If the answer to the above question is in the affirmative, whether the prescribed percentage of flat purchasers in such Circular can be applied in relation to the total number of flats sanctioned and/or completed or whether the same needs to be applied in relation to the total number of flats sold at the time of filing of application for registration of the society?

2) Above questions arise in the light of challenge set up by the Petitioner to order dated 21 August 2024 passed by the Hon'ble Minister (Co-operation) dismissing the Appeal preferred by him and confirming the order dated 8 November 2023 passed by the Divisional Joint Registrar of Co-operative Societies, Konkan Division, Navi Mumbai, allowing Miscellaneous Application No.39 of 2023 filed by Respondent No.4-Developer thereby ordering de-registration of cooperative society formed by the flat purchasers, which was registered vide Certificate dated 26 July 2017.

3) Brief facts leading to the filing of the present Petition are that Respondent No.4-M/s. Jainam Builders has constructed a building named- Harmony Plaza Premises on land bearing Survey No.112/3/1, opposite S.T. stand, Boisar Tarapur Road, Boisar (West), Taluka and District-Palghar. Initially the construction of the building was commenced by another developer, M/s. Harmony Developers, which was a partnership firm and which had completed construction of 25 units in the

building. M/s. Harmony Developers entered into development agreement dated 18 August 2008 with Respondent No.4- M/s. Jainam Builders and transferred development rights in the land in favour of Respondent No.4. This is how Respondent No.4 became promoter of the said building and constructed 198 units in the building including the initial 25 units constructed by M/s. Harmony Developers. It appears that by the year 2017, Respondent No.4 had sold 83 units out of total 198 units constructed in the building. The shop purchasers decided to form a cooperative Society and preferred an application for registration thereof before the Assistant Registrar, Co-operative Societies, Palghar Taluka. The Assistant Registrar issued certificate of registration dated 26 July 2017 thereby registering Harmony Plaza Premises Co-operative Society. Respondent No.4 got aggrieved by registration of the Society formed by the unit purchasers and accordingly filed Miscellaneous Application No.39 of 2023 before the Divisional Joint Registrar seeking de-registration of the society under the provisions of Section 21A of the MCS Act. The application was opposed by the Society as well as by the shop purchasers by filing reply. The Divisional Joint Registrar allowed the application preferred by Respondent No.4 by order dated 8 November 2023 and directed de-registration of the society with further direction for appointment of Official Assignee to look after affairs of the society. Petitioner, who was the Chief Promoter of the Society filed appeal before the Hon'ble Minister challenging order dated 8 November 2023. The appeal is however rejected by the Hon'ble Minister by order dated 21

August 2024. Accordingly, Petitioner has filed the present Petition challenging the decisions of the Divisional Joint Registrar and the Hon'ble Minister.

4) Mr. Sarthak Diwan, the learned counsel appearing for the Petitioner would submit that the Divisional Joint Registrar has grossly erred in directing de-registration of the society ignoring the position that Respondent No.4-Developer was deliberately avoiding formation and registration of the society with a view to avoid payment of maintenance in respect of unsold units to the society. He would rely upon provisions of Section 6 of the MCS Act in support of his contention that requisite number of persons for registration of a housing society is only 10 whereas 83 promoters had applied for registration of the society. He would rely upon judgment of this Court in ***Janabai Shripat Patil and Ors. V/s. The Hon'ble Minister for Co-operation and Ors.***¹ in support of his contention that administrative circular issued by the Registrar cannot override requirement of the statute. He would also rely upon judgment of this Court in ***Padmavati Construction Co. & Ors. V/s. State of Maharashtra and anr.***²

5) Mr. Diwan would then refer to provisions of Circular dated 23 March 2016 and submit that even if the said Circular is held to be applicable, the prescribed percentage of flat purchasers will have to be necessarily considered in relation to

¹ Writ Petition No.8200 of 2023, decided on 21 November 2024.

² (2007) 1 Bom CR 609

the total flats sold and not in relation to total flats constructed/sanctioned. He would submit that the judgment of this Court in ***Mukesh Makandas Mehta Vs. The State of Maharashtra***³ conclusively rules that prescribed percentage under Section 154B-2 of the MCS Act is referable to the number of flats sold and not the number of flats sanctioned by the Planning Authority. He would submit that though the judgment in ***Mukesh Makandas Mehta*** (supra) is rendered in the context of provisions of Section 154B-2 of the MCS Act, the same analogy would apply to the present case, which deals with a situation prior to coming into force of Section 154B-2 in the MCS Act. He would submit that as on the date of filing of application for registration of Society, only 83 shops were sold and all the shop owners had participated in registration of the Society. Thus, the application was preferred by 100% shop purchasers thereby meeting the requirement prescribed under the circular dated 23 March 2016. He would thus pray for setting aside orders passed by the Divisional Joint Registrar and the Hon'ble Minister.

6) Petition is opposed by Mr. Rohan Savant, the learned counsel appearing for Respondent No.4. He would submit that under Section 6 of the MCS Act, Registrar has jurisdiction to prescribe higher percentage of persons needed for formation and registration of the Society. That in exercise of such power, the Registrar issued Circulars dated 29 November 2010 and 23 March 2016 prescribing 60% and 51% of unit purchasers

³ 2024 SCC Online Bom 1296

respectively, in relation to total number of flats sanctioned or constructed in a building. That the said Circulars have been issued by the Registrar in exercise of powers conferred upon him under Section 6 of the MCS Act and are accordingly binding. So far as the judgment of this Court in ***Janabai Shripat Patil*** (supra) Mr. Savant would submit that same is rendered in ignorance of provisions of sub-section (1) of Section 6 of the MCS Act as well as in ignorance of judgment of Division Bench of this Court in ***Anil Jadwani and Ors. V/s. The State of Maharashtra and Ors.***⁴, and is accordingly *per incuriam*. That the judgment in ***Padmavati Construction Co.*** (supra) merely contains a stray observation about administrative circular is not overriding requirement of the MCS Act, which observation again is made in ignorance of provisions of sub-section(1) of Section 6 of the MCS Act. He would submit that after judgment in ***Padmavati Construction Co.*** (supra) the Division Bench has rendered the judgment in ***Anil Jadwani*** (supra) recognising jurisdiction of the Registrar to issue circular prescribing requirement of higher number of persons than 10 for registration of the society. He would submit that in ***Anil Jadwani*** (supra) this Court held that the earlier circulars of 2 May 1980 and 24 July 1992 were not issued in exercise of amended provisions of sub-section (1) of Section 6 of the MCS Act and were held to be inoperative. That taking note of judgment of Division Bench in ***Anil Jadwani*** (supra) the Registrar issued circular dated 29 November 2010 in exercise of power under provisions of sub-

⁴ Writ Petition No.660 of 2010, decided on 6 October 2010.

section (1) of Section 6 of the MCS Act prescribing that 60% of the purchasers of units constructed or sold must apply for registration of society. That the percentage was subsequently reduced vide circular dated 23 March 2016 to 51%. He would submit that both the circulars dated 29 November 2010 and 23 March 2016 thus have statutory force.

7) Mr. Savant would submit that total number of shops in the building are 198 and therefore, 83 shop purchasers could not have applied for formation and registration of co-operative Society, which is in the teeth of circular dated 23 March 2016. He would submit that provisions of Section 154B-2 of the MCS Act has no application to the present case as the said provision is brought into effect on 9 March 2019. Even under Section 154B-2 of the MCS Act, either 5 persons or 51% of total number of flats as per sanctioned plan, whichever is higher, is required for formation of registration of society. He would submit that Section 154B-2 merely gives statutory flavour to the requirement prescribed in the circular dated 23 March 2016. He would submit that ratio of the judgment in ***Mukesh Makandas Mehta*** (supra) cannot be made applicable in respect of the requirement prescribed in the circular dated 23 March 2016. That the judgment in ***Mukesh Makandas Mehta*** (supra) is rendered while interpreting the provisions under Section 154B-2 of the MCS Act where the language is entirely different than the language employed in circular dated 23 March 2016. Mr. Savant would accordingly submit that the concurrent findings recorded

by the Divisional Joint Registrar and the Hon'ble Minister do not warrant interference by this Court in exercise of jurisdiction under Article 227 of the Constitution of India. He would accordingly pray for dismissal of the Petition.

8) I have also heard Mr. Patil, the learned AGP for Respondent Nos.1 to 3-State, who opposes the Petition and supports the orders passed by the Divisional Joint Registrar and the Hon'ble Minister (Cooperation).

9) Rival contentions of the parties now fall for my consideration.

10) In the present case, the Divisional Joint Registrar has exercised jurisdiction under the provisions of Section 21A of the MCS Act for directing de-registration of the society by recording satisfaction that there was misrepresentation at the time of registration of the Society by the applicants. The Divisional Joint Registrar relied upon report submitted by the Assistant Registrar on 20 January 2020. That report reflected that though sanctioned plan approved construction of only 174 flats /shops, total number of 198 flats/shops are actually constructed in the building. That though there are 40 residential flats in the building, the Society is registered as 'premises society'. The report further indicated that since 174 flats are sanctioned in the approved plans, 104 flats/shops representing 60% of total flats sanctioned ought to have participated in proposal for formation of Society, whereas only 83 promoters participated in the said

proposal. The Divisional Joint Registrar, after taking into consideration the report of the Assistant Registrar, held that the promoters had produced false information and documents while seeking registration of the Society. The Divisional Joint Registrar accordingly directed de-registration of the Society mainly on the ground that 60% flat/shop purchasers were not part of the proposal as required under circulars dated 29 November 2010, 23 March 2016 and 3 March 2017.

11) The findings recorded by the Divisional Joint Registrar have been confirmed by the Hon'ble Minister referring to Circulars dated 29 November 2010 and 23 March 2016. The Hon'ble Minister however taken into consideration reduced requirement of '51%' prescribed in the circular dated 23 March 2016, which was erroneously considered as '60%' by the Divisional Joint Registrar. The Hon'ble Minister held that since total units are 198, the requisite number of 51% persons for formation of society was at least 101.

12) Factual position in the present case is that the sanctioned plan dated 14 March 2005 of Zilla Parishad, Thane sanctioned 134 shops and 40 flats (174 units in the building). However Respondent No.4-Developer appears to have carried out construction in violation of sanctioned plan of 14 March 2005 by constructing 198 units in the building. As per the circular dated 29 November 2010, 60%-unit purchasers were required to apply for registration of the society, which requirement is reduced to

51% vide circular dated 23 March 2016. In the present case, since the application for registration was filed after 23 March 2016, the correct requirement was 51% of constructed/sanctioned units for applying for registration of the society. To this extent, the Divisional Joint Registrar has erred in applying the numerical figure of '60' for determining the minimum percentage of units constructed/sanctioned in the building. Hon'ble Minister has corrected the said error by applying correct percentage of '51' by taking into consideration the Circular dated 23 March 2016.

13) Before proceeding further on the issue of society's promoters fulfilling the requirement of minimum percentage of persons prescribed in the circular dated 23 March 2016, it would be first necessary to answer the fundamental issue as to whether prescription of minimum percentage of unit holders for registration of society in the said Circular causes any violence to provisions of Section 6 of the MCS Act. This is the first issue formulated in the opening portion of the judgment. This issue would not have ordinarily arisen as none of the parties ever argued before the Divisional Joint Registrar or Hon'ble Minister that Registrar did not have power to prescribe higher number of persons than the one prescribed under sub-section (1) of Section 6 of the MCS Act for registration of a cooperative society. The issue has essentially cropped up on account of reliance by Petitioners on judgment rendered by this Court in ***Padmavati***

Construction Co. (supra), which is followed by the co-ordinate Bench in **Janabai Shripat Patil** (supra).

14) To answer issue No.1, it would be necessary to take into consideration provisions of Sub-Section (1) of Section 6 of the MCS Act which provides thus:

6. Conditions of registration

(1) No society, other than a federal society, shall be registered under this Act, unless it consists of at least ten persons or such higher number of persons as the Registrar may, having regard to the objects and economic viability of a society and development of the co-operative movement, determine from time to time for a class of societies, (each of such persons being a member of a different family), who are qualified to be members under this Act, and who reside in the area of operation of the society:

15) Thus, under Section 6(1) of the MCS Act, the minimum number of persons required for formation and registration of a cooperative society (other than a federal society) is 10. However, sub-section (1) of Section 6 of MCS Act has been amended by Mah. Act 20 of 1986, under which the Registrar has been conferred with power to prescribe higher number of persons for formation and registration of the Society having regard to the objects and economical viability of the society and development of the cooperative movement for each class of societies. Thus upto 1986, any co-operative society could be registered with 10 members applying for such registration. However, after the amendment of 1986, it is lawful for the Registrar to prescribe higher number of persons required for the registration of the Society for different classes of societies.

16) Petitioners have relied on judgment of coordinate Bench of this Court in ***Padmavati Constructions*** (supra) in support of their contention that the Registrar cannot prescribe higher number of persons than the one prescribed in Section 6 of the Act. This Court held in paragraph 11 as under:

11. The submission that an inadequate number of persons have joined together in the formation of the co-operative society in the present case has no merit whatsoever. 27 out of 34 flat purchasers joined in the application for registration of the co-operative society. Section 6 of the Maharashtra Co-operative Societies Act, 1960 requires that a society cannot be registered unless it consists of atleast 10 persons. **The requirement of the Act cannot be overridden by an administrative circular.** Be that as it may, in any event 27 out of 34 flat purchasers would meet even the requirement of 60% which is stipulated under the policy directives of the State Government. Finally the last submission to the effect that the revisional authority had reappreciated the facts and has transgressed the limits of the revisional jurisdiction cannot be accepted. The Deputy Registrar had rejected the application for registration of a co-operative society on the ground that a minimum of 60% of the flat holders have not joined together in the application. This ex facie was erroneous. The Deputy Registrar allowed extraneous material on the record in his decision making, in that he came to the conclusion that since common amenities are to be provided for the flat holders of three buildings, the amenities could not be divided if the registration of the three buildings was to be made independently. The Divisional Joint Registrar affirmed the conclusion of the Deputy Registrar. As already noted above, the flat purchase agreements contained a specific provisions in regard to the manner in which separate and independent societies would be formed of the purchasers of units in the building constructed on the retained land on the one hand and the balance land on the other. The manner in which the conveyance can be executed either to the respective co-operative societies or to a confederation of the societies is also spelt out in the agreements. The agreements also contained provisions in regard to the user of the common amenities. In this view of the matter, the issue of registration of a co-operative society could not have been derailed by a reference to considerations which had no bearing on the obligation of the promoter to form a co-operative society in accordance with law. For all these reasons, no case for

interference under Article 226 has been made out. The Petition shall stand dismissed. The Petitioners shall pay costs quantified at Rs.10,000/- each to the State of Maharashtra and to the Fifth Respondent.

(emphasis and underlining supplied)

17) In my view however the judgment in ***Padmavati Constructions*** (supra) is rendered in the facts of that case. In that case, out of 34 flats, 27 purchasers had applied for registration of the society and had accordingly met with the requirement of 60% of total flats. Therefore, it was held that rejection of application for registration of society by the Deputy Registrar on account of non-meeting of requirement of 60% of flat holders in joining together in the application was factually erroneous. However, this Court made a passing reference in paragraph 11 of the judgment that '*the requirement of the Act cannot be overridden by an administrative circular*'. In my view, the above stray observation made by this Court in ***Padmavati Constructions*** (supra) cannot be read as if this Court has laid down a ratio that circular issued by the Registrar under the provisions of sub-section (1) of Section 6 of the MCS Act prescribing higher number of persons required for registration of society would be ineffective and needs to be ignored. It is settled position of law that observations in the judgment are not to be construed as statute and that the observations must be read in the context in which they appear. It is held in ***Haryana Financial Corporation and Another V/s. Jagdamba Oil Mills and Anr.***⁵ as under:

⁵ (2002) 3 SCC 496

19. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. **Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes.** To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton* (at p. 761) Lord MacDermot observed: (All ER p. 14C-D)

"The matter cannot, of course, be settled merely by treating the *ipsissima verba* of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished Judge."

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21. **Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.**

(emphasis supplied)

18) The above principles are restated by the Apex Court in ***Ashwani Kumar Singh V/s. U.P. Public Service Commission and Ors.***⁶

19) In ***Padmavati Constructions*** (supra), this Court neither had occasion to notice nor attention of this Court was drawn to the provisions of sub-section (1) of Section 6 of the MCS

⁶ 2003 11 SCC 584

Act, under which Registrar is empowered to issue Circular prescribing higher number of persons required for registration of particular class of society. In my view therefore, judgment of this Court in ***Padmavati Constructions*** (supra) cannot be read in support of an absolute proposition of law that Circular issued by the Registrar in exercise of power under sub-section (1) of Section 6 of the MCS Act would cease to have any effect and that a society can be registered in ignorance of minimum percentage prescribed by the Registrar in such Circular.

20) As a matter of fact, after delivering of judgment in ***Padmavati Construction*** (supra) the Division Bench of this Court had an occasion to deal with Registrar's power to prescribe higher number of persons required for registration of society under sub-section (1) of Section 6 of the MCS Act. In ***Anil Jadwani*** (supra) decided on 6 October 2010, the Division Bench of Court had an occasion to deal with the issue of validity of order passed by the Divisional Joint Registrar ordering de-registration of the Society on the ground of non-meeting of requirement of 60% by flat purchasers signing an application for registration of co-operative society. As on 6 October 2010, Registrar had not issued any Circular prescribing minimum persons required for formation of co-operative housing society. This Court took note of amendment effected to sub-section (1) of Section 6 the MCS Act in the year 1986 whereby power was conferred on the Registrar to prescribe higher number of persons than 10 for registration of a particular class of society. However,

circular dated 2 May 1980 was sought to be relied upon for the purpose of contending that 60% flat purchasers were required to sign the application for registration of a co-operative housing society. This Court held that circular issued by the State Government on 2 May 1980, prior to amendment of the MCS Act in 1986, could not be treated as circular issued by Registrar in exercise of power under sub-section (1) of Section 6 of the MCS Act. This Court was also presented with another circular issued by the Registrar on 1 January 1993, by which checklist was prescribed while dealing with applications for registration of the cooperative housing societies. This Court found that even under the Circular dated 1 January 1993, the Registrar did not prescribe higher number of persons required for registration of cooperative housing society in exercise of power under sub-section (1) of Section 6 of the MCS Act. This Court therefore held that as on the date of rendering the judgment in **Anil Jadwani** (supra) on 6 October 2010, no Circular was issued by the Registrar prescribing minimum 60% of persons joining the application for registration of co-operative housing society. The Division Bench held in paragraph Nos.7 to 12 of the judgment as under:

7. So far as conditions of registration of a Cooperative Society are concerned, it is sub-section 1 of Section 6 of the Cooperative Societies Act which is relevant. It reads as under:

XXXX

8. The Maharashtra Cooperative Societies Act was enacted in the year 1961. At that time for making an application for registration of a society including a Cooperative Housing Society, which is not a federal society only 10 persons were required.

There was no power conferred on any authority to prescribe higher number of persons. That provision was incorporated in the Act by Maharashtra Act 20 of 1986. In other words, till 12-5-1986 when Maharashtra Act 20 of 1986 came into force, only 10 persons were required to sign an application for registration of a Cooperative Housing Society. By Section 5 of Maharashtra Act 20 of 1986, power was conferred on the Registrar to specify such higher number of persons than 10, as the Registrar may, having regard to object and economic viability of the society and development of the cooperative movement, decide for a class of a society. The Respondents rely on a Government Circular dated 24th July, 1992 to claim that higher number of persons than 10 is specified for signing an application for registration of a Cooperative Housing Society. Perusal of the Circular dated 24th July, 1992 shows that it merely modifies the Government Circular dated 2nd May, 1980. The Government Circular dated 24th July, 1992 lays down that by Government Circular dated 2nd May, 1980 it was provided that 90% of the promoters should sign the application for registration of Cooperative Housing Society. Now, that condition is relaxed and now only 60% of the promoters can sign an application for registration of a Cooperative Housing Society. It is relying on this Circular it is contended that 60% of the flat purchasers must sign an application for registration of a Cooperative Housing Society. Therefore, it becomes necessary to see the Circular dated 2nd May, 1980. Perusal of the Circular shows that it does not refer to any provision in the Act under which it has been issued. It is paragraph 3 of this Circular which is relevant for our purpose. It reads as under:

3. The procedure of registration of Cooperative Housing Societies prescribed under this Circular clearly and distinctively specifies the various stages of the procedure and the requirements of the various documents, as will be seen from the accompaniments (Annexures "I" to "X" and forms 'X' 'Y' 'Z') to this Circular. The procedure should be invariably followed by the registering authorities while registering Cooperative Housing Societies in the State.

9. Thus, these Circular lays down the procedure for registration of a Cooperative Housing Society. Annexure "VIII" of which heading is "Instructions for filling in the Form "A" and statement 'A', 'B' and 'C' (Application for Registration of a Cooperative Housing Society)." Paragraph 1 & 4 of that Annexure reads as under:

1. The application for registration should be in Quadruplicate.

2.....

3.....

4. Minimum 90% promoters should sign against their names in all the 4 copies of the Statement "A".

According to Respondents, this Circular is issued by the State Government under Section 4 of the Cooperative Societies Act. Section 4 reads as under:

4. A society, which has as its object the promotion of the economic interests or general welfare of its members, or of the public, in accordance with cooperative principles, or a society established with the object of facilitating the operations of any such society, may be registered under this Act:

Provided that, no society shall be registered if it is likely to be economically unsound, or the registration of which may have an adverse effect on development (of the co-operative movement, or the registration of which may be contrary to the policy directives which the State Government may, from time to time, issue)

10. It is submitted on behalf of the Respondents that Section 4 contemplates the State Government issuing policy directive in relation to registration of a Cooperative Society and that 1980 Circular is a policy directive issued by the State Government.

11. In our opinion, this submission is incapable of being accepted. As noted above, this Circular was issued in the year 1980, when the provision of Section 6 required only 10 persons to sign the application for registration, and there was no power given by Section 6 to any authority to specify any higher number of persons. Thus, if 1980's Circular is taken to be a policy directive issued under Section 4, then it will be contrary to the provisions of Section 6, which requires only 10 persons to sign the application for membership. If 1980's Circular is taken to contain policy directive of the State Government, then it will result in amending the provision of Section 6 and it is impossible that by policy directive the State Government can amend the provisions of the Statute. In 1986, by Section 6 of the Maharashtra Act 20 of 1986, power to specify higher number of persons was conferred on the Registrar. Therefore, even if it is assumed that under Section 4 while issuing policy directive the State Government could issue a policy directive in relation to number of persons required to sign the application for registration of a society, then the State Government ceased to have that power, once by Maharashtra Act 20 of 1986 that power was conferred on the Registrar, and therefore, when the State

Government issued the Circular dated 24th July, 1992, there was no provision made in the Cooperative Societies Act to which that Circular could be referred. One more aspect, in our opinion, which is relevant is that the order of the State Government dated 10th March, 1995 issued under Section 7 of the Cooperative Societies Act shows that even according to the State Government, by its Circulars of 1980 and 1992 it did not prescribe higher number of persons than 10 for signing an application for membership. Section 7 of the Cooperative Societies Act confers power on the State Government to exempt any society or class of societies from any of the requirement of the Act as to registration, subject to such conditions as Section 7 itself may impose. In exercise of its power under Section 7, the State Government has issued an order dated 10th March, 1995, which provided that requirement of sub-section 1 of Section 6 of the Act, that there should be minimum number of 10 persons for signing an application for registration of a Cooperative Housing Society will not apply in relation to Cooperative Society whose plinth area of the flat is less than 700 sq.ft. and the society exhaust the entire FSI. If by the Circulars of 1980 & 1992 the State Government had prescribed the higher number of persons than 10, then in the above referred order of 10th March, 1995 the State Government would not have referred to the requirement in sub-section 1 of Section 6 of minimum 10 persons signing the application for membership. In our opinion, therefore, the authorities were not justified on relying on the 1980 & 1992's Circulars of the State Government to hold that more than 10 persons are required to sign the application for registration of a Cooperative Housing Society.

12. Though, the authorities in their order have not relied on the Circulars issued by the Registrar dated 1-1-1993, before us reliance was placed on that Circular. Perusal of the Circular issued by the Registrar dated 1-1-1993 shows that the purpose of that Circular is to give to the sub-ordinate officers a check list in relation to registration of a Cooperative Housing Society. The purpose of that Circular does not appear to be to specify the higher number of persons to apply for registration of a Cooperative Housing Society. Perusal of that Circular shows that the Circular gives separate check list for different kind of societies. The First Class of societies of which check lists were given are the tenant ownership housing societies. Then the check lists are given of tenant co-partnership housing societies, which are sponsored by the Builders. There clause 28 incorporated the requirement of 60% promoters signing the application. The Third Class of society of which check list is provided is a cooperative society of open plots. All these societies,

where land and buildings are on lease hold or ownership basis, but the societies are proposed by persons other than builders. Perusal of the check lists shows that the requirement of 60% promoters signing an application is included. But it is clear that this requirement is included because of the Government Circulars of 1980 and 1992 and is not included because of any order passed or determination made by the Registrar in exercise of the powers conferred on him by Section 6, after that Section was amended by Maharashtra Act 20 of 1986. **Perusal of provisions of sub-section 1 of Section 6 shows that the determination of higher number of persons is to be made by the Registrar by taking into consideration various things and aspects.** It is apparent that the Circular dated 1-1-1993 cannot be termed as determination made by the Registrar in exercise of the power under sub-section 1 of Section 6 of the Act. It is thus clear that neither the Government Circulars 1980 and 1992 result in prescribing higher number of persons than 10 for signing an application for registration of a cooperative Housing Society nor the Circular of the Registrar dated 1-1-1993 achieved that. Therefore, as on the date on which the society was registered in the present case, the requirement of law was that at least 10 persons who have taken the flats should sign the application for registration of a society and therefore, as admittedly, that many persons had signed the application in the present case, there was no justification for the Divisional Joint Registrar to de-register the society.

(emphasis supplied)

Though the Division Bench judgment in **Anil Jadwani** (supra) deals with a slightly different issue of existence of Registrar's Circular at the relevant time in exercise of power under sub-section (1) of Section 6 of the MCS Act, it does ultimately recognise the power of the Registrar to prescribe higher number of persons required for registration of particular class of society.

21) In **Janabai Shripat Patil** (supra) coordinate bench of this Court has followed the judgment in **Padmavati Construction Co.** (supra) and has held in paragraph Nos.20 and 21 as under:-

20. Mr. Shah has premised his arguments on the non-satisfaction of requirement of 61% while filing the Application for registration. Though not submitted in so many words, the submission appears to be that as the number of flat purchasers were stated to be 192, for the purpose of meeting the requirement of 61%, the requisite number would be about 118 members and the application states that 75 members have signed amounting to 68%. According to his submissions, the portrayal of requisite number of members without the adequate numbers being available in fact amounts to misrepresentation.

21. There is no dispute that the Respondent No.4 falls within the definition of “housing society” as per Section 2(16) of the MCS Act. More than 10 members qualified to be admitted as members have joined together in making the application for registration. **The decision of *Padmavati Construction* (supra) is a sufficient answer to the contention about inadequate number of members endorsing the application for registration based on the policy directives issued vide the Government Circular dated 23rd March, 2016. The decision re-iterates the well settled position in law that the requirement of the Act cannot be overridden by an administrative circular.**

(emphasis supplied)

Careful perusal of the findings recorded in judgment in ***Janabai Shripat Patil*** (supra) would indicate that attention of this Court was not invited atleast to two aspects. Firstly, this Court has not noticed the provisions of sub-section (1) of Section 6 of the MCS Act conferring power on the Registrar to prescribe higher number of persons required for formation of a co-operative housing society. Therefore, the observation made by this Court in paragraph 21 of the judgment that ‘*the position of law is well settled that the requirement of the Act cannot be overridden by an administrative circular*’ is without noticing Registrar’s statutory power under Section 6 of the MCS Act to prescribe higher number of persons required for formation of co-operative housing society. This Court has not noticed that the Circular is traceable

to exercise of statutory power. If the statute confers power on the Registrar to prescribe higher number of persons for registration of a cooperative society, the circular issued by the Registrar in exercise of that power cannot be held to be unenforceable merely because the prescription of number of persons for formation of a society therein exceeds the one provided in Section 6 of MCS Act.

22) Also, while rendering the judgment in ***Janabai Shripat Patil*** (supra) attention of this Court was not invited to the judgment of the Division Bench in ***Anil Jadwani*** (supra), in which this Court has specifically recognised the power of Registrar to issue circular prescribing higher number of persons than 10 for registration of a co-operative housing society. In fact, the Registrar took note of the Division Bench judgment in ***Anil Jadwani*** (supra) and thereafter issued circular dated 29 November 2010 in exercise of power under sub-section (1) of Section 6 of the MCS Act prescribing that minimum 60% of total flats /units sanctioned or constructed must join together for registration of a co-operative society. Circular dated 29 November 2010 specifically refers to the judgment in ***Anil Jadwani***. The circular is actually issued to fill in the lacunae noticed by this Court in ***Anil Jadwani*** where the circular issued by the State Government on 2 May 1980 coupled with the circular of the Registrar on 1 January 1983 prescribing a mere checklist were being utilised for the purpose of enforcing 60% requirement for registration of co-operative housing society. Since Division Bench of this Court held in ***Anil Jadwani*** (supra) that Registrar was

yet to issue any circular prescribing higher number of persons required for registration of co-operative housing society, the Registrar stepped in and took corrective action by issuing circular dated 29 November 2010, which reads thus:-

जा.क्र. गुरु 'डी' ३ संस्था नोंदणी २०१० सहकार
आयुक्त व निबंधक, सहकारी संस्था महाराष्ट्र राज्य,
पुणे यांचे कार्यालय
दिनांक :- २९ नोव्हेंबर, २०१०.

:: परिपत्रक::

महाराष्ट्र सहकारी संस्था अधिनियम १९६० व महाराष्ट्र सहकारी संस्था नियम १९६१ मधील तरतूदीनुसार सहकारी गृहनिर्माण संस्थांची नोंदणी केली जाते. सदर अधिनियमाच्या नियम ६ मधील तरतूदीनुसार निबंधक (सहकार आयुक्त) यांना आवश्यकते नुसार बदल करण्याचे किंवा सुधारणा करण्याची तरतूद आहे.

त्यानुसार या कार्यालयाने क्र. गृह/संस्था नोंदणी/चेक लिस्ट/ई-२/८७. दिनांक ९ एप्रिल. १९८७ व दिनांक १ जानेवारी, १९९३ रोजी परिपत्रके काढली होती. त्याच प्रमाणे कृषि व सहकार विभाग, मंत्रालय, मुंबई-३२ यांनी क्र. सीएसएच-१०७१/२५८३१-१४-सी, दिनांक २ मे. १९८० व सहकार व वस्योद्योग विभाग, मंत्रालय, मुंबई-३२ यांनी क्र. सगृयो-१०९२/२००४/प्र.क्र. ४४/१४-सी, दिनांक २४ जुलै १९९२ रोजी परिपत्रके काढली होती. उपरोक्त शासनाने काढलेले दोन परिपत्रके हे त्यांना अधिकार नसतांना काढलेली असल्याने व या कार्यालयाने काढलेली परिपत्रके सहकार कायद्यातील नियमांशी सुसंगत नसल्याने मा. उच्च न्यायालयाने रिट पिटीशन नं. ६६०/२०१० च्या अनुषंगाने निर्णय देतांना चारही परिपत्रके कायद्याशी सुसंगत नसल्याने रद्द करण्यात आलेली असून, निबंधक यांनी सहकार कायद्यातील नियमांशी सुसंगत असलेली सुधारीत परिपत्रक काढण्यासाठी आदेशीत केले आहे.

महाराष्ट्र सहकारी संस्था अधिनियम १९६० मधील कलम ४ अन्वये एखादी सहकारी संस्था नोंदणी करणेपूर्वी त्या संस्थेची आर्थिक सक्षमता पडताळणे किंवा सर्वसाधारण कल्याणाचे संवर्धन करणे आवश्यक आहे. तसेच ती शासनाच्या धोरणा विरुद्ध नसली पाहिजे.

तसेच महाराष्ट्र सहकारी संस्था अधिनियम १९६० चे कलम ८ अन्वये विहित नमुन्यात संस्था नोंदणीचा अर्ज असला पाहिजे. ज्या व्यक्तीकडून / जिच्या वतीने असा अर्ज करण्यात आला असेल अशी व्यक्ती संस्थेसंबंधी निबंधकास आवश्यक वाटेल अशी माहिती पुरविल.

तसेच महाराष्ट्र सहकारी संस्था नियम ४ व ५ मध्ये नोंदणी प्रस्तावावर करावयाची विहित पध्दती व तरतूदी नमूद केल्या आहेत. त्यानुसार सहकारी गृहनिर्माण संस्था नोंदणीसाठी या कार्यालयाने दिनांक ९ एप्रिल, १९८७ व दिनांक १ जानेवारी, १९९३ रोजीच्या परिपत्रकासोयत चेक लिस्ट सोडल्या तथापि सोबत सुधारित चेकलिस्ट दिल्या आहेत.

महाराष्ट्र सहकारी संस्था अधिनियम १९६० मधील कलम ६ अन्वये सहकारी संस्था नोंदणीसाठी किमान १० व्यक्तींची अट असली तरी त्याच कलमान्वये सहकारी संस्थांचे निबंधक (सहकार आयुक्त) यांना संस्थांच्या उद्देशानुसार विशिष्ट प्रकारच्या सहकारी संस्थासाठी किमान व्यक्तींच्या अटीसंबंधातील संख्या वाढविणे संदर्भात अधिकार प्रदान करण्यात आलेले आहेत. त्यानुसार सहकारी गृहनिर्माण संस्थांच्या बाबतीत सामायिक देखभाल, समान उद्दिष्टे, सभासदांचे बहुमत, इमारत दुरुस्ती व देखभाल, अभिहस्तांतरण इ. बाबींचा अंतर्भाव असल्याने व अशा संस्थांची आर्थिक सक्षमता प्रबळ असलेचे दृष्टीने व सध्या इमारत बांधणीमध्ये १० पेक्षा कित्येक पटीने अधिक गाळे / फ्लॅट असणारी टावर्स / संकुले

एकाच फ्लॅट / भूखंडावर उभी राहात असल्याने, गृहनिर्माण संस्थांच्या नोंदणीकरीता वरील सर्व बाबी विचारात घेता नोंदणीसाठी, महापालिका किंवा तत्सम प्राधिकरणाकडून मंजूर आराखड्यानुसार एकूण बांधल्या जाणाऱ्या अथवा बांधून पूर्ण झालेल्या सदनांच्या / गाळ्यांच्या ६० % इतके गाळे धारक नोंदणी प्रस्तावात स्वाक्षरीसहित सामील होणे आवश्यक राहिल.

उपरोक्त नमूद केलेल्या बाबी विचारात घेवून गृहनिर्माण संस्थांची नोंदणी करण्यात यावी.

(राजगोपाल देवस)
सहकार आयुक्त व निबंधक
सहकारी संस्था, महाराष्ट्र राज्य, पुणे.

(emphasis supplied)

23) Circular dated 29 November 2010 has been superseded and replaced by fresh Circular dated 23 March 2016 which alters and reduces the prescribed percentage from 60 to 51. In my view therefore the Circular dated 23 March 2016 has been issued by the Registrar in exercise of statutory power conferred under sub-section (1) of Section 6 of the MCS Act and the same cannot be treated as 'policy directive' as observed in ***Janabai Shripat Patil*** (supra). In fact, this Court has erroneously considered the Circular dated 23 March 2016 as 'government circular' ignoring the position that same is actually issued by the Registrar under the provisions of sub-section (1) of Section 6 of the MCS Act. This Court did not notice in ***Janabai Shripat Patil*** (supra) that under provision of Section 4 of the MCS Act, the State Government is empowered to issue policy directives in relation to registration of the societies. Section 4 of the MCS Act provides thus:

4. Societies which may be registered.

A society, which has as its objects the promotion of the economic interests or general welfare of its members or of the

public, in accordance with co-operative principles or a society established with the object of facilitating the operations of any such society, may be registered under this Act:

Provided that, no society shall be registered if it is likely to be economically unsound, or the registration of which may have an adverse effect on development of the co-operative movement, or the registration of which may be contrary to the policy directives which the State Government may, from time to time, issue.

24) In **Anil Jadwani** (supra), this Court has noticed the difference in the power conferred on State Government under Section 4 of the MCS Act to issue policy directives from the power vested in the Registrar in prescribing higher number of persons for registration of particular class of society under sub-section (1) of Section 6 of the MCS Act and has held that the power to prescribe higher number of persons than 10 for registration of a society can be exercised only by the Registrar under sub-section (1) of Section 6 of the MCS Act and that the same cannot be exercised by the State Government under proviso to Section 4 of the MCS Act. In **Janabai Shripat Patil** this Court has not noticed this distinction in the provisions of Sections 4 and 6 of the MCS Act nor the attention of this Court was invited to judgment of Division Bench in **Anil Jadwani**. In my view therefore the observations made by this Court in the judgment in **Janabai Shripat Patil** (supra) about requirement of the Act cannot be overridden by administrative circular is *per incuriam*.

25) It is therefore held that the Registrar has power to prescribe a greater number of persons than 10 required for

registration of particular class of societies. Consequently, the Circulars issued by Registrar on 29 November 2010 and 23 March 2016 in exercise of power under sub-section (1) of Section 6 of the MCS Act are enforceable and no society can be registered in violation of the prescribed percentage in the said two circulars.

26) It would also be apposite to take into consideration the provisions of Chapter XIII-B of the MCS Act inserted by the Amendment Act of 2019, which came into effect from 9 March 2019. Chapter XIII-B has been inserted in the MCS Act for making separate and special provisions in respect of co-operative housing societies. By Section 154B of the MCS Act, other provisions of the MCS Act are excluded from being applied to co-operative housing societies, while some of the provisions are made applicable *mutatis mutandis* to such housing societies. The registration of a housing society is now dealt with under the provisions of Section 154B-2 of the MCS Act, which provides thus:-

154B-2. Registration of co-operative societies

(1) No tenant co-partnership housing society shall be registered under this Act, unless it consists of at least five persons (each of such persons being a Member of different family) or at least fifty-one per cent. (of total number of flats as per sanctioned plan) flat purchasers or intending Members and who are qualified to become Member under this Act, whichever is higher, joins the registration proposal of housing society to be registered.

(2) No tenant ownership housing society shall be registered under this Act, unless it consists of at least five persons (each of such persons being a Member of different family) or at least fifty-one per cent. (of total number of plots as per proposed or sanctioned lay- out plot purchasers and who are qualified to become Member

under this Act, whichever is higher, joins the registration proposal of housing society to be registered.

(3) No Association of society shall be registered unless it has at least five housing societies as its Members.

(4) No Co-operative Housing Association shall be registered unless it has at least two housing societies or other legal bodies as its Members.

(5) Nothing in this section shall be deemed to affect the registration of any society made before the commencement of the Maharashtra Co-operative Societies (Amendment) Act, 2019.

(6) The word "limited" or "unlimited" shall be the last word in the name of every society with limited or unlimited liability, as the case may be, which is registered or deemed to be registered under this Act.

Explanation-For the purpose of this section, the expression "Member of a family means a wife, husband, father, mother, dependent son or unmarried dependent daughter.

27) Thus, under the provisions of Section 154B-2, tenant co-partnership housing society or tenant ownership housing society cannot be registered unless it consists of at least 5 persons or at least 51% of total number of flats /plots in the sanctioned plan joined together for registration of the society. Thus, so far as co-operative housing societies are concerned, the minimum requirement of 10 persons is reduced to 5 persons under Section 154B-2 of the MCS Act, to ensure that housing society can be formed in respect of smaller buildings with less than 10 flats. However, the minimum percentage prescribed in circular dated 23 March 2016 (51%) is now given a statutory flavour under the provisions of Section 154B-2 of the MCS Act. In the present case, since registration of society has taken place before coming into effect of Section 154B-2 of the MCS Act, provisions of that

Section are irrelevant. The same are however, taken note of for the limited purpose of observing that even under the amended Section 154B-2, 51% flat purchasers must join together for registration of housing society on account of use of the word 'whichever is higher'. Provisions of Section 154B-2 are also relevant for the purpose of deciding the second issue formulated for answer.

28) In my view therefore, the Registrar is fully empowered to prescribe that 51% flat purchasers must join together for registration of cooperative housing society under circular dated 23 March 2016. The first issue is answered accordingly.

29) Coming to the second issue, the same relates to application of prescribed numerical figure of '51%' in circular dated 23 March 2016 to the exact number of flats/units in the building. The circular dated 23 March 2016 seeks to apply the said numerical value of 51% to total number of flats sanctioned or constructed. After amendment of MCS Act by insertion of Chapter XIII-B, the requirement is now that minimum 5 persons or atleast 51% (of the total number of flats as per sanctioned plan) flat purchasers must join the registration proposal. It would be advantageous to compare the provisions of the circular dated 23 March 2016 and Section 154B-2 of the Act:

Circular dated 23 March 2016	Section 154B-2
51% Tenement Holders of the total flats/tenements to be <u>constructed or already completed</u> under the Plan sanctioned by the Municipal Corporation or	No tenant co-partnership housing society shall be registered under this Act unless it consists of at least five persons (each of such persons being a member of different family)

such other Authority would be required to participate in the Proposal for Registration under their signature.	or atleast fifty one percent (of total number of flats as per sanctioned plan) flat purchasers or intending members and who are qualified to become member under this Act, whichever is higher, joins the registration proposal for housing society to be registered.
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30) The requirements of Circular dated 23 March 2016 are slightly different than the requirement under Section 154B-2 of the MCS Act. While Section 154B-2 of the MCS Act seeks to apply 51% requirement to ‘total number of flats as per sanctioned plan’, the Circular seeks to apply the requirement of 51% to “the total flats/tenements to be constructed or already completed under the Plan sanctioned by the Municipal Corporation”. Thus, under the Circular dated 23 March 2016, the requirement of 51% can be made applicable even to the total number of ‘flats completed’. Thus, the mischief likely to be played by the developer under Section 154B-2 by not constructing 51% flats as per sanctioned plan, would not apply in case of Circular dated 23 March 2016 as the society can be formed of 51% flats ‘constructed’.

31) Mr. Diwan has placed reliance on my judgment in ***Mukesh Makandas Mehta*** (supra) where this Court had an occasion to discuss the requirements under Section 154B-2 of the MCS Act. He has relied on observations made in paragraph 44 of the judgment as under:

44. It is Petitioner’s contention that total number of units in the building ‘Silver Utopia’ are 19. Therefore 51% of units would

mean 10 units, whereas only 8 unit purchasers (consisting of only 5 persons/entities) had made application for registration of society. Careful reading of the provision would indicate that the bracketed portion of '(each of such persons being a Member of different family)' is applicable only to 'at least five persons' and not to 'fifty-one percent of total number of flats'. Therefore, when condition of 'total number of flats' is to be applied, it is not necessary that the purchasers thereof must be members of different family. Secondly, the expression 'at least fifty-one per cent (of total number of flats as per sanctioned plan) flat purchasers or intending Members' would indicate that fifty-one percent figure would apply not to 'total number of flats' but to 'flat purchasers'. Therefore, the statutory scheme is such that the application for registration of a housing society can be made either by 5 persons (who need to be members of different family) or by 51% flat purchasers, whichever is higher. To illustrate, if a building consists of 20 flats and 16 flats therein are sold, at least 8 such flat purchasers must join in formation of society. Conversely, if in the same building, only 8 flats are sold, 4 such flat purchasers cannot form a society and the condition of 5 persons of different families signing the application for registration of the housing society would apply. If the provision is read the way Mr. Sawant wants me to read i.e. to apply the percentage of '51' to total number of flats, the same would destroy the very objective behind making special provision for registration of a housing society. To illustrate, in a building wherein 100 flats are sanctioned in the Plan, if the developer delays construction and obtains part occupancy certificate and constructs and sells only 40 flats, cooperative housing society will not be formed till the developer exceeds construction of 51 flats and sells them. Thus, making a special provision of registration of a cooperative housing society would become counterproductive as such interpretation would then make registration of a cooperative housing society more difficult than a non- housing society, which can be registered with only 10 persons under Section 6. In my view therefore, the numerical value of '51%' will have to be applied to 'flat purchasers' and not to 'total number of flats as per sanctioned plan'. In the present case, only 9 Units were sold at the relevant time and 8 unit purchasers applied for formation and registration of housing society, thereby meeting the requirement under Section 154B-2 of the MCS Act.

32) The above observations in paragraph 44 of the judgment in ***Mukesh Makandas Mehta*** are made while interpreting

provisions under Section 154B-2 of the MCS Act. The present case is governed by the Circular dated 23 March 2016 as the application for registration of society was made before amendment of MCS Act by which Section 154B-2 came to be inserted therein. As observed above, the requirements under the Circular and in Section 154B-2 of the MCS Act are entirely different. Also, the observation in Para 44 of the judgment in ***Mukesh Makandas Mehta*** (supra) are made to deal with a situation where the developer fails to construct 51% flats out of the sanctioned ones. The observations are essentially made to deal with larger projects where the developer completes construction in a phased manner where, though plans get sanctioned for development of the entire layout, but the developer does not complete construction of all sanctioned units. In such circumstances, application of requirement of 51% to 'total flats sanctioned' would result in a situation of non-formation of society for a considerable period of time. In a given case, where the planning authority has sanctioned 100 flats, but the developer completes construction of only 40 flats, secures part occupancy certificate, and is unable to complete construction of remaining building and neglects to maintain the constructed portion of the building. In such case also, application of 51% requirement to total flats sanctioned would operate to the disadvantage of flat purchasers, who would not be able to manage affairs of the building by forming a collective body. However, whether the observations made in ***Mukesh Makandas Mehta*** (supra) in the facts of that case would apply to every case of 51% purchasers of

sold flats forming a society becomes questionable. To illustrate, if the developer sells 12 out of 100 sanctioned flats, whether 7 flat purchasers can form a society and make the developer member of such society in respect of 88 unsold flats becomes questionable. Whether formation of such society would be advisable where 7 flat purchasers would be taking the responsibility of maintaining the building when the developer is yet to sell 88 balance flats is also questionable. I am not delving deeper into this aspect as provisions of Section 154B-2 of the MCS Act are not applicable in the present case. The issue is left open to be decided in an appropriate case. For the present case, it is sufficient to observe that provisions of Section 154B-2 MCS Act were not even available when Petitioners made application for registration of society and therefore the judgment in ***Mukesh Makandas Mehta*** (supra) rendered while interpreting the provisions of Section 154B-2 of the MCS Act, would have no application here.

33) In the present case, there is no room for mischief by the developer as he has completed construction of all sanctioned units. All that was needed was some patience on the part of unit purchasers to await sale of 51% of the units. Registration of society before sale of 51% units would require the developer to become member of society in respect of more than 51% unsold units and pay maintenance in respect thereof. In my view therefore, circular dated 23 March 2016 will have to be necessarily interpreted to mean that the prescribed percentage of 51% would apply to total number of flats constructed or

completed as per the sanctioned plans. The second issue formulated above is answered accordingly.

34) After having answered both the issues for consideration, it is now time to turn back to the facts of the present case. The total number of flats constructed as per the sanctioned plans are 174 as there appears to be some dispute about additional units being constructed as per sanctioned plan. Therefore 89 unit purchasers ought to have joined in formation of the society. However, only 83 unit purchasers filed application for registration of the society. Therefore, the society could not have been registered at the relevant time in absence of fulfillment of requirement of 51% of 174 constructed flats joining together for formation of society. Therefore, the order of de-registration does not suffer from any flaw. It also appears that the society is registered as 'premises society' as if the same comprises only of commercial units, though 40 flats are sanctioned and constructed.

35) By now more than 51% units might have been sold in the building and the unit purchasers can form a society if 89 or more unit purchasers can join in signing the application for registration. This would also cure the technical defect of registration of particular class of society.

36) Petition is accordingly dismissed. It would however be open for the unit purchasers to file a fresh application for

registration of society if 89 or more unit purchasers can file application for registration. There shall be no orders as to costs.

[SANDEEP V. MARNE, J.]