

(1998) 08 GUJ CK 0049
In the Gujarat High Court

Anjaliben Nikhilchandra Mehta and Another

APPELLANT

Vs

Prabhakar Bapurao Fansalkar and Others

RESPONDENT

Date of Decision : 29-08-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Co-operative Societies Act, 1961 — Section 36, 91(1), 96, 96(1), 96(1)(a)

Specific Relief Act, 1963 — Section 19, 19(b), 20, 20(2), 21

Transfer of Property Act, 1882 — Section 3

Citation : (1999) 2 GLR 1198

Hon'ble Judges : H.L. Gokhale, J

Bench : Single Bench

Judgement

H.L. Gokhale, J.—A co-operative housing society, now known as Prabhat Colony Co-operative Housing Society, situated at Vaghodia Road, Vadodara, was promoted by one Shri Jaywantrao Ramchandra Chauhan. One Shri Prabhakar Bapurao Fansalkar joined the said society by entering into an agreement on 25-8-1966 with the said society. The said society was represented in the agreement by its promoter Shri Chauhan. That agreement provided that as and when the housing colony is developed, this Shri Fansalkar will be put in possession of plot No. 2 in a category that was described as "B" type. The construction of the housing complex was to be done by the society. The cost of the constructed plot was estimated at Rs. 12,551/- out of which 40% was to be paid at the time of signing of the agreement. That 40% amount was worked out at Rs. 5,272/- which was paid by Shri Fansalkar at the time of signing of the agreement.

2. It appears that subsequently there were controversies amongst the members of the society with respect to the escalation of the cost etc. The above referred Shri Fansalkar was removed from his membership for alleged breaches on his part by invoking Section 36 of the Gujarat Co-operative Societies Act, 1961. That action of the society was disapproved by the District Registrar of the Co-operative Societies on 1st January 1982. On 2nd February 1982 said Shri

Fansalkar offered to pay the entire amount that was claimed by the society. That letter was addressed to the Registrar of the Co-operative Societies with a copy to the society. The society, however, declined to receive that amount by its letter dated 22-4-1982 and preferred an appeal. The appeal filed by the society against the decision of the District Registrar was dismissed on 2nd November 1983. In the meanwhile, said Shri Fansalkar came to know that the plot which was supposed to be allotted to him was sub-divided by the society into two parts and was allotted to one Shri Nikhilchandra Mehta and one Shri Dinkarrao Ahirrao. He, therefore, raised a dispute bearing Arbitration Case No. 411 of 1984 in the Court of Board of Nominees under the provisions of the above Act. That dispute was filed on 28-3-1984. The society was joined as respondent No. 1, the above referred Jaywantrao Chauhan was joined as respondent No. 2, the person from whom the land of the society was purchased, namely, one Pratapbhai Solanki, was joined as respondent No. 3, and Nikhilchandra Mehta and Dinkarrao Ahirrao were joined as respondent Nos. 4 and 5 respectively. The principal prayers in the said dispute when translated into English read as follows:

(1) It may be declared that since the disputant is a lawful member of the respondent-society with respect to plot No. 2 of B type, respondent-society is lawfully bound to hand over the same to the disputant and that the disputant has a prior and superior right to retain the said flat No. 2 of B type.

(2) The respondent-society be directed to hand over plot No. 2 of B type to the disputant peacefully and in case the said plot No. 2 of B type is in possession of respondent Nos. 4 and 5 or any other person illegally, then the said illegal occupation be removed and the disputant be handed over possession thereof either from the respondent No. 1 - society or from the person who is having the illegal possession thereof.

3. Subsequently, the pleadings were completed, evidence was led and the Board of Nominees decided the dispute in favour of the disputant and by his judgment and order dated 21-7-1994 the learned Nominee granted the declaration as sought for. He also directed the respondent Nos. 4 and 5 to hand over the peaceful possession of the two sub-plots along with the construction thereof to the disputant. In Para 3 of his order, the learned Nominee also directed the disputant to pay an amount of Rs. 12,551 on various counts (plus Rs. 3,000/-) to the first respondent-society within a period of 30 days thereof. This was towards the amount claimed by the society as referred earlier in paragraph No. 2 above. It appears that the above referred Shri Mehta died on 14-12-1980 and hence when the dispute was raised initially itself he was joined as respondent No. 4 through his widow Smt. Anjaliben. The above referred Shri Dinakarrao Ahirrao died during the pendency of the trial on 12-9-1989 and hence his wife Smt. Indiraben was brought on record during the trial.

4. Smt. Anjaliben Mehta and Smt. Indiraben carried the matter in appeal before the Co-operative Tribunal by filing Appeal No. 245 of 1994. The Tribunal dismissed the appeal by its judgment and order dated 29-8-1997. Being

aggrieved by both these judgments and orders, this Special Civil Application has been filed invoking Article 226 of the Constitution of India. It is material to note at this stage that above mentioned Shri Fansalkar also died on 16-12-1995 during the pendency of the appeal and hence his wife Smt. Neelaben was brought on record and therefore, in this petition the title of the proceeding shows her as representing deceased Prabhakar Fansalkar. After this petition came up for admission this Court (M.S. Shah, J.) issued notice with ad interim relief as sought by the petitioners in terms of prayer Clauses 15(C) and 15(D). That interim relief stayed the operation of the two orders as well as the proceedings of the Execution Petition No. 89 of 1997 which respondent No. 1 herein had initiated in the meanwhile. A limited stay was granted to begin with which was continued from time to time. When the matter came up before me, it got adjourned on a couple of occasions. It was lastly heard on 14-8-1998. Shri N. D. Nanavati with Shri M. D. Buch have appeared for the petitioners. Shri Christie appeared for respondent No. 1 and Shri Nilesh Pandya has appeared for respondent No. 2. Respondent No. 3 has been duly served.

5. After the matter was heard at length on 14-8-1998, it was requested by all the learned Counsels that it may be treated as part-heard. The arguments were practically completed on that day and hence it was suggested by the learned Counsel that it may be heard and disposed of finally at this stage itself. The request was made on this footing that whereas both the petitioners are widows staying in the concerned two tenements with their families, respondent No. 1 is also a widow and she is required to stay at some place other than the one which was allotted to her husband when he became the member of the respondent No. 2-society. Hence, it was suggested by all the learned Counsels that whatever be the appropriate order it may be passed finally at this stage itself. Subsequently, when the matter came up before me on 18-8-1998, it was suggested by Shri Nanavati, learned Counsel appearing for the petitioners, that in case the Court is against the petitioners, possibility of awarding appropriate compensation instead of specific performance be examined. That suggestion was made without prejudice and hence to consider that suggestion it was thought fit that the valuation of the houses involved in this litigation be called for. That was because, as suggested by Shri Christie for respondent No. 1, the valuation should be one factor to be considered in this behalf. Hence, by my order dated 18-8-1998 I directed both the parties to file an affidavit enclosing therewith a report of an architect or a Government valuer stating therein as to what is the constructed area of the houses, what is the open space available and what, in his rough estimate, can be the value of the property. I have also directed respondents to state as to what is the present housing arrangement available to respondent No. 1 and to her sons and as to what is the condition of those houses and on what terms the houses were purchased/occupied. When the matter reached thereafter on 27-8-1998, Shri Christie, learned Counsel for respondent No. 1, filed the valuation report of the concerned premises made by Shri Suresh Kothari, registered architect and valuer. He has also filed the affidavit of Smt. Neela

Fansalkar. The affidavit or the report of the architect to be given by the petitioners was not ready. They sought time and tendered the same on the next day, i.e., 28-8-1998 whereafter the arguments based thereon were completed and the matter is being disposed of today.

6. Shri Nanavati, learned Counsel appearing for the petitioner, principally made two submissions. His first submission was that the kind of dispute that was raised by the first respondent was not one which could be said to be falling u/s 96 of the Gujarat Co-operative Societies Act, 1961. For our purpose, it is the Sub-clauses (a) and (b) of Section 96(1) which are relevant. They read as follows:

96. Disputes :- (1) Notwithstanding anything contained in any other law for the time-being in force, any dispute touching the constitution, management or business of a society shall be referred in the prescribed form either by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if the parties thereto are from amongst the following:

(a) a society, its committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society.

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society.

If one looks to the plaint filed in the dispute, it would be seen that according to the disputant, respondent Nos. 3 and 4 thereof (petitioners herein) are trespassers. They are not members of the society. Besides, respondent No. 3 to the dispute is the original land owner. Shri Nanavati submitted that a litigation against such persons could not be taken to the Nominee under the provisions of Section 96 because, they are neither members nor past members or persons claiming through a past member or a deceased member of a society or a society which is a member of the society. That is the requirement of Section 96(1)(b). He submitted that it could not be filed u/s 96(1)(a) also. Hence, in the submission of Shri Nanavati, the entire proceeding was without any jurisdiction. The second submission of Shri Nanavati was that though the dispute was filed under the Co-operative Societies Act, it was essentially for enforcing the rights of the disputant arising out of the agreement entered with the society and therefore, it was in the nature of specific performance of a contract. Apart from submitting that, such a prayer could not be made in a dispute under the Co-operative Societies Act, he alternatively submitted that this was not a case where specific performance was required and that worse comes to worse, compensation would be the appropriate relief.

7. With respect to the provisions contained u/s 96 of the Co-operative Societies Act, Shri Nanavati drew my attention to two judgments of the Hon"ble Supreme

Court, firstly to Deccan Merchant Co-operative Bank v. Dalichand reported in AIR 1969 SC 1230 and then to the judgment in the case of Gujarat State Co-operative Land Development Bank Ltd. Vs. P.R. Mankad and Others, . Based on these two judgments, Shri Nanavati submitted that one has to look to the dispute as drafted by the disputant. He submitted that according to the disputant, the petitioners were trespassers and the prayer made in the nature of specific relief was outside the powers of the Nominee. Shri Nanavati also relied upon a recent judgment of the Hon''ble Supreme Court in the case of Usha Ranjan Bhattacharya v. Abinash reported in 1998 (5) SC 321 in this behalf.

8. Shri Christie, learned Counsel for respondent No. 1, on the other hand, submitted that the present dispute was undoubtedly a dispute touching the management or the business of a co-operative society. He submitted that on the one hand the disputant was a member whereas as far as respondent Nos. 4 and 5 are concerned, they could be joined as the respondents under the provisions of Section 99(3)(a) of the Gujarat Co-operative Societies Act. Section 99(3)(a) reads as follows:

99. (3)(a) If the Registrar or his Nominee or Board of Nominees is satisfied that a person, whether he be a member of the society or not, has acquired any interest in the property of a person who is a party to a dispute, he may order that the person who has acquired the interest in the property may join as a party to the dispute; and any decision that may be passed on the reference by the Registrar or his Nominee or Board of Nominees shall be binding on the party so joined, in the same manner as if he were an original party to the dispute.

Shri Christie submitted that the dispute had arisen in view of the society not acting on the agreement which gave certain rights to a member. The prayer was essentially against the society. In the meanwhile, if the property had changed hands and if some others had been inducted, the Registrar or his Nominee had every right to proceed against such person u/s 99(3)(a) of the Act. Shri Christie submitted that in the present case instead of Registrar doing that, after a dispute is presented to him, the disputant himself had joined the concerned persons as respondents at the outset. According to Shri Christie the object of the provision was to bring such persons within the proceeding so that all parties concerned are before the authority concerned and the controversy is decided in all its aspects. Any other interpretation would make the provision ineffective.

9. In my view, the submission of Shri Christie is well taken and the dispute raised cannot be said to be outside the jurisdiction of the Nominee and the authorities cited by Shri Nanavati do not help him. In Deccan Merchants Bank's case (supra), the bank wanted to execute the arbitration award against the tenants of certain property and they were sought to be evicted. The tenants contended that they were protected by the provisions of the Bombay Rent Act and the action to evict them could not be proceeded under the Maharashtra Co-operative Societies Act. It was in that context that the Hon''ble Supreme Court held that such a controversy could not be taken to the forum under the Co-operative Societies

Act. The relevant provision of the Maharashtra Co-operative Societies Act, 1961 regarding disputes, namely, Section 91(1) is *pari materia* with the provisions of Section 96 of the Gujarat Cooperative Societies Act. In Gujarat Slate Co-operative Land Development Bank's case (*supra*) it was a dispute between the co-operative society and its employees for whom a separate forum is available in the Labour Court and it was in that context that the Hon'ble Supreme Court held that the controversy could not be taken to the forum under the Co-operative Societies Act. In the case of Usha Ranjan Bhattacharya (*supra*) the question was as to who was the lawful successor of the deceased member in a Co-operative Housing Society and it was, therefore, that the Hon'ble Supreme Court held that the said controversy could not be taken to the Co-operative Tribunal under the West Bengal Co-operative Societies Act, 1973. In the present case, it is a controversy raised by a member against the society seeking to enforce his rights arising under an agreement entered into with the society. Such a member cannot be told that because some others are inducted into that property, the forum under the co-operative law is not available to him. The dispute is essentially concerning the business and management of the affairs of the society and it is precisely to deal with such type of situations that a specific provision has been made u/s 99(3)(a) of the Co-operative Societies Act. In view of the aforesaid discussion, in my view, no fault can be found with the authorities below entertaining the dispute before them.

10. The next submission of Shri Nanavati is that the petitioners were bona fide purchasers and were ignorant of the prior contract between respondent No. 1 and the society. He, therefore, submitted that the specific relief in the nature of specific performance of the contract was not warranted. He drew my attention to various provisions of Specific Relief Act, 1963, particularly, to Section 19(b) thereof. Alternatively, Shri Nanavati submitted that in any case, various facts of this controversy will have to be borne in mind and u/s 20 of the Specific Relief Act, the Court will always have a discretion not to decree specific performance but to award compensation, if deemed fit.

11. The first submission of Shri Nanavati in this behalf was that the petitioners were not knowing that the particular plot had already been allotted to respondent No. 1 earlier. The petitioners have become members of the society on 15-10-1979. In the meanwhile, the entries in their favour had come to be made in the record of rights, on 4-10-1978. As against that, Shri Christie, learned Counsel for the respondent No. 1, submitted that respondent No. 1 had the membership certificate issued on 22-5-1967. Unless the membership of respondent No. 1 was determined validly, the same could not be passed over to anybody else. The endorsement had to be made to that effect on that very share certificate and no new certificates could be issued in this fashion to some others. In any case, it has come on record through the statement of earlier referred Shri Chauhan made before the City Survey Officer, Vadodara, on 30-9-1978 that the construction had come up that time to the lintel level. That can be seen from Para 2 of that statement which is taken on record before the Nominee at Exh.

103 and which is referred in the discussion on point No. 6. Shri Christie also relied upon a judgment of a single Judge of this Court reported in 1972 GLR 773 in the case of Jesingji Khodaji v. Rameshchandra, in this behalf. In Para 20 of that judgment, the learned Judge after considering a number of earlier judgments has observed as follows:

The Explanation (II) to Section 3 of the Transfer of Property Act must be read with the first part of the definition as to when a person is said to have a notice of a fact. If the purchasers failed to make any inquiry or wilfully abstained from making such an inquiry, they are deemed to have a notice of the fact of the previous contract and they cannot escape their inability by a bare statement that they were bona fide purchasers for value without notice. Mere bare denial would not be enough because he would be imputed with a constructive notice if somebody else other than the vendor was in possession and if he failed to make any inquiry with regard to the nature of his possession.

Shri Christie, therefore, submitted that any intending purchaser had a duty cast on him to make necessary inquiries and if he failed to make one, he shall be deemed to have a notice of the fact of the previous contract and that by making a bare statement one cannot escape from one's responsibility. It is, therefore, that the learned Nominee has held on issue No. 8 that it cannot be said that respondent No. 4 to the dispute was a bona fide purchaser of the property. In the discussion on issue No. 1, the learned Nominee noted that respondent No. 4 had not paid the necessary fee for membership. That apart, as stated above, the fact remains that whereas the society was formed way back in the year 1966 the petitioners herein were becoming members in the year 1979 and when the structure that had come up on the concerned plot upto lintel level was available for anybody to see, it was expected of them that they would make the necessary inquiries. There is no use in simply saying that in the City Survey Record their names came to be entered in October 1978 and at that time the name of respondent No. 1 was not there in that record. At that time, respondent No. 1 herein was admittedly & persona non grata for the society and his name would not be there in the revenue record since the society would not do it. The petitioners were becoming members of the society 12 years after its formation and when anybody could see the construction that had come up to a particular level, it was expected of them to inquire as to in whose place they were coming as members. Section 19 of the Special Relief Act provides that a specific performance of a contract may be enforced against (a) either party thereto; (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for a value who has paid his money in good faith and without notice of the original contract. In the instant case, any diligent entrant would have made necessary inquiries about any other contract with respect to membership or otherwise concerning these premises and hence, in my view, the observation made by the learned Judge in 1972 GLR 773 will apply in full force.

12. Shri Nanavati relied upon a judgment of the Hon"ble Supreme Court in the case of Smt. Annapoorani Ammal Vs. G. Thangapalam, to contend that specific performance can be granted only against the executants of the contract. When the judgment is seen, observations to such effect therein are made entirely in the facts of that case and Section 19(b) of the Specific Relief Act, 1963, was not under consideration in that case. The said section does permit specific performance of a contract against a person other than the party to the contract when that party is claiming under either of the parties by a title arising subsequently to the contract to be enforced. In the instant case, the petitioners are opposing the enforcement of the contract on the basis of their title which they claim from the society and, as stated above, it cannot be said that they have acted diligently in the matter and they are deemed to have a notice of the prior contract as held by the learned single Judge in 1972 GLR 773. Besides, Section 99(3)(a) of the Gujarat Cooperative Societies Act specifically permits an action against such third parties. Hence, in my view, the above submission of Shri Nanavati that the petitioners were bona fide purchasers in good faith and without notice of the original contract cannot be accepted.

13. The last submission of Shri Nanavati is that even so the circumstances of the present case have to be examined and at the highest compensation would be proper relief. Whereas, on the one hand, the disputant is trying to claim the possession of plot No. 2 of B type in its entirety on the basis of the agreement entered in the year 1966, the very plot has subsequently been sub-divided into present plots 2A and 2B by the society way back in the year 1978-79 along with all other plots. The first petitioner has been put in possession of her plot on 19-6-1981 and the second petitioner on 10-9-1981 and since then they are in occupation thereof. The first petitioner has paid an amount of Rs. 52,000/- whereas the second petitioner has paid an amount of Rs. 55,000/- for the plot and the constructed house. Shri Nanavati submitted that although Section 97(b) of the Co-operative Societies Act permits a dispute to be raised within six years from the date of the disputed act or omission, that is the outer limit. For that matter, Section 54 of the Limitation Act provides for filing a suit for specific performance within 3 years. In the instant case, undoubtedly, the dispute has been filed on 28-3-1984 and it is stated in the dispute that it is filed after the appeal of the society was rejected by the Joint Registrar on 2nd November 1983. Shri Nanavati submits that the petitioners have been put in possession of the plots since 6-9-1981. He, therefore, submits that undoubtedly the action of respondent No. 1 is a belated one, if not time-barred. Shri Nanavati has also drawn my attention to the fact that both the petitioners are widows and also to the statement made in the affidavit of Shri Vinay Mehta, son of the petitioner No. 1. As far as his family is concerned, it is stated in para 3 of the affidavit that they are in all five persons staying in his tenement. As far as second petitioner is concerned, there are 11 members staying in that tenement. Shri Mehta has stated his income is roughly around Rs. 10,000/- per month whereas two sons of deceased Dinakarrao Ahirrao earn around Rs. 7,500/- and Rs. 4,000/-

respectively. Shri Nanavati also drew my attention to the fact that as far as respondent No. 1 is concerned, it is stated in her affidavit that she is presently staying in a rented accommodation along with her handicapped daughter. On a query made by me, Shri Christie, on instructions, informed that the house is of two rooms and a kitchen.

14. In these circumstances, Shri Nanavati prays for a discretionary alternative u/s 20 of the Specific Relief Act. Section 20 of the said Act reads as follows:

20. Discretion as to decreeing specific performance:

(1) The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.

(2) The following are the cases in which the Court may properly exercise discretion not to decree specific performance:

(a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(b) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(c) where the defendant entered into the contract under the circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1 : Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of Clause (a) or hardship within the meaning of Clause (b).

Explanation 2: The question whether the performance of a contract would involve hardship on the defendant within the meaning of Clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The Court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

Shri Nanavati drew my attention to a judgment of the Hon''ble Supreme Court in the case of Damacherla Anjaneyulu and Another Vs. Damcherla Venkata Seshiah and Another, . In that case the Hon''ble Supreme Court has taken the subsequent development into consideration as well as the hardships which would have been caused by granting specific performance. The Hon''ble Supreme Court had directed the party concerned to pay the approximate present value of the concerned land with interest and provided at the same time that in the failure of paying any of the instalments as provided in that order, an interest of 12% will be imposed and the amount will be recovered as if executing a decree. Shri Nanavati has also relied upon another judgment in the case of Kallathil Sreedharan and Another Vs. Komath Pandiyala Prasanna and Another, wherein the Hon''ble Supreme Court has stated as follows in para 9 thereof:

9. Section 20 of the Specific Relief Act, 1963 deals with discretion and jurisdiction to the Court. It says that the Court is not bound to grant such relief merely because it is lawful to do so, but at the same time it enjoins that the discretion of the Court should not be arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. It would thus be seen that the discretion given to the Court of equity is required to be exercised not arbitrarily but on sound and reasonable basis guided by judicial principles.

The same approach is taken by a Division Bench of the Calcutta High Court in a recent judgment in the case of Sen Mukherjee and Co. Vs. Smt. Chhaya Banerjee, of that judgment the Division Bench has noted that the relief under the Act is having its roots in equity. The discretion has to be exercised on sound and reasonable guidelines and the reasons thereof ought to be stated. The Court also held that the circumstances mentioned in Sub-clauses (a), (b) and (c) of Section 20(2) were not exhaustive.

Shri Nanavati also submitted that in these circumstances appropriate remedy could only be compensation although he submitted for that one has to make a prayer. Inasmuch as this submission was coming from the petitioners, he did not dispute the jurisdiction of this Court to pass appropriate orders in view of the provisions contained in the Explanation to Section 21 of the Specific Relief Act.

15. Since this was the submission made by Shri Nanavati, he was asked as to what should be the adequate compensation. According to Shri Nanavati one parameter could be the interest which the respondent No. 1 would have earned on the amount that the erstwhile member had paid to the society. The 40% construction amount plus share certificate and the membership contribution when rounded up would come to around Rs. 6,000/-. Since this amount was paid way back in the year 1966 at the normal rate of 12% interest it would become Rs. 96,000/- by 1998. The second aspect to be considered would be the rent the party concerned was required to pay during the interregnum. In spite of my specific order dated 18-8-1998 in the affidavit-in-reply filed by Smt. Neela Fansalkar nothing is stated about the rent which she is required to pay for her

presently occupied premises. On a query from the Court and on instructions from her son present in Court, Shri Christie informs that the rent amount is Rs. 100 per month. The petitioners have been put in possession sometime in June 1981. Thus, by the end of August 1998 the respondent No. 1 was required to stay in rented premises for a period of about 206 months. Thereby, the rent required to be paid will come to around Rs. 20,600. There is also a factor of cost of litigation which the respondent No. 1 had to bear. The compensation on this footing would come to Rs. 96,000/- plus Rs. 26,600/- plus cost of a long-drawn litigation, all on an outside to Rs. 1,40,000/-. On the other hand, the house property (including the land) occupied by the petitioners as per the valuation submitted by the architects on both sides is valued at around Rs. 10 lakhs after deducting the depreciation. Since the respondent No. 1 had contributed an amount of 40% towards the construction and the construction had come up to the lintel level (when the petitioner became members) then, the claim of respondent No. 1 on that footing would come to around Rs. 4 lakhs. At the same time, it is also relevant to note that the action of the disputant was a bit belated action. Whereas the petitioners were put in possession in June 1981, the dispute was filed in March 1984. The petitioners must have made a number of improvements over these years in these two houses in which they stay. As per the submission of the disputant, respondent No. 1 has a claim over both the houses and the land, the valuation of which is around Rs. 10 lakhs. On the other hand, it is material to note that the original plans were revised further, way back in the year 1978 and according to those plans, the constructions were made and the petitioners were put in possession in the year 1981. The amount paid by the disputant towards 40% of the total cost was around Rs. 6,000/-. The material with respect to revision of the plans has not been brought to my notice but, undoubtedly, a society can alter the plans by following the necessary laws. It can always, therefore, be submitted that whatever may be the amount paid by the original member, in view of the alternation of the plans what was finally allotted to them was the half of the original plot of land towards which their contribution was adjusted. In fact, I am told that all the plots have been sub-divided and thereafter the present housing complex is developed and occupied. If one looks at this way, the respondent No. 1 can claim only 40% amount pertaining to one unit and not the entire land. Looking to all these circumstances and in deference to the suggestion from the Court and in pursuance to the discussion which has taken place in the Court, Shri Nanavati has filed an affidavit affirmed by Shri Binoy Nikhilchandra Mehta who holds power-of-attorney for petitioner Nos. 1 and 2. It is stated in para 1 thereof that he maintains that the learned Member of the Board of Nominee did not have jurisdiction u/s 96 of the Gujarat Co-operative Societies Act. Alternatively, however, it is submitted that compensation would be the appropriate relief and in para 2 of the affidavit it is stated that the petitioners are willing to offer a compensation of Rs. 3,00,000/- to the respondents in the manner set out therein. It is stated thereafter in the subsequent three clauses thereof as follows:

1. Rs. 55,500/- shall be paid to the respondent-plaintiff by petitioner Nos. 1 and 2 jointly on or before 15-9-1998.

2. Balance amount of Rs. 2,44,500/- shall be paid in 15 equal monthly instalment of Rs. 16,300/-. The first of such instalments shall be paid on or before 15-10-1998 and remaining instalments shall be paid regularly on 15th of succeeding months till 15-12-1999.

3. I state that the amount mentioned in para 2 above, is agreed to be paid to respondent-plaintiff without prejudice to the right of the petitioner Nos. 1 and 2 to recover the same from respondent No. 2 society with interest as may be permissible under law.

On a query to Shri Christie, he states that it is not an adequate compensation. If one says that respondent No. 1 has a claim on the entire plot, then, 40% of Rs. 10 lakhs would come to Rs. 4 lakhs whereas if the entitlement of respondent No. 1 is held to be one unit, that is half of the land, then the appreciated entitlement comes to Rs. 2 lakhs. The contribution of the respondent No. 1 with interest, rent lost and cost would not exceed Rs. 1,40,000/-. In the circumstances, the offer of Rs. 3 lakhs made by the petitioners is quite reasonable and just. It is true that the petitioners have sought time to make that payment over certain period. But they are also people from middle class and their financial position has also got to be considered. In the arrangement proposed by them, Rs. 55,000/- are to be paid by 15-9-1998 and the remaining amount in instalments by 15-12-1999. In the matter before Hon"ble Supreme Court in the case of D. Anjaneyulu (supra) where one of the parties was a businessman, the Hon"ble Supreme Court had given time of six months for paying the amount of Rs. 1,25,000/-. In the instant case, we are concerned with two middle class families and the amount involved is Rs. 3 lakhs. In the circumstances, the request to grant instalments as prayed for is quite just and fair.

16. The amounts to be paid to respondent No. 1 will help her by the end of 1999 to shift to another accommodation (in case she intends to) inasmuch as her present house is said to be a dilapidated one. In the facts of the present case, in my view, one cannot insist on more than what is being offered by the petitioners. The alternative to this is to award specific performance in favour of respondent No. 1 whereby two families will be on street and both are large families staying in two small tenements. As against that, respondent No. 1 does have a house to stay presently though it is stated that it is a dilapidated one. It appears that her two sons are well settled in the meanwhile and are staying in their own houses. In the event of any difficulty arising in the meanwhile, she has certainly her sons to look forward to.

17. For the reasons stated above, the orders passed by the Courts below are "interfered with to this limited extent that instead of specific performance of the contract and a direction to hand over the possession, the same will be substituted by award of compensation of Rs. 3 lakhs to be paid by the petitioners

to respondent No. 1 in instalments as recorded above. This petition is accordingly disposed of.

18. Shri Nanavati undertakes on behalf of the petitioners to this Court that the petitioners will file the affidavits of all the adult members of the two families stating that firstly, they will abide by the above terms and secondly, until the aforesaid amounts are cleared, they will not part with the possession of the two tenements or create any third part rights in any manner whatsoever and that they will approach this Hon"ble Court and obtain leave in the event of any difficulty.

19. As stated above and as held by the Hon"ble Supreme Court in the case of D. Anjaneyulu (supra), in the event of petitioners failing to pay any of the instalments, the same will carry the interest of 12% from the date of default and the terms provided in this order will be executable as a decree.

20. The amounts to be paid by the petitioners are on their behalf as well as on behalf of the society. This is because, the specific performance to put respondent No. 1 in possession was directed by the authorities below against the respondent-society and against the petitioners. Thus, the aforesaid liability is a joint and several liability of the petitioners and of the society. Although the petitioners have undertaken to pay this amount to respondent No. 1, it will be open for them to take necessary steps to recover whatever is the amount which is due to them from the society after their inter se shares are appropriately decided by appropriate authority in the event any such dispute is initiated.