

(2008) 11 GUJ CK 0032
In the Gujarat High Court

Case No : Special Civil Application No"s. 10543 and 10544 to 10546 of 2008

Devavrat Shivaprasad Bhatt

APPELLANT

Vs

Housing Urban Development Corporation (HUDCO) and
Others

RESPONDENT

Date of Decision : 11-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60
Constitution of India, 1950 — Article 300A
Income Tax Rules, 1962 — Rule 24
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 29
Registration Act, 1908 — Section 17(1)
Transfer of Property Act, 1882 — Section 54

Citation : AIR 2009 Guj 43 : (2009) 1 GLH 202 : (2009) 1 GLR 183

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Vikram J. Thakor, for the Appellant; Mauna M. Bhatt, for Respondent 1, for the Respondent

Judgement

Jayant Patel, J.—In all the petitions, as common questions arise for consideration, they are being considered by this common judgement.

2. Heard Mr. Thakore for the petitioners in all the petitions, Mr. M.R. Bhatt, learned Counsel for respondent No. 1 Corporation in all the petitions, respondent No. 2 is joined in capacity as the recovery officer of the Tribunal who has exercised the statutory power pursuant to the Judgement and Award of the Tribunal and therefore, no individual interest exist of him. Respondent No. 3 is the custodian of respondent No. 4 Society, who has remained personally present and has made submission as recorded hereinafter. The presence of respondent No. 5 as such is not required since respondent No. 5 floated the scheme at the initial stage and in any case, no Judgement and Award has been passed against respondent No. 5 by the Tribunal. The matter is heard for final disposal.

3. The short facts of the case appears to be that the petitioners are the members

of Viratnagar Cooperative Housing Society Ltd. (hereinafter referred to as "the Society"), respondent No. 4 herein. The Society during the period when it was under the control of developer/builder/promoter, had taken loan from respondent No. 1 Corporation (hereinafter referred to as "HUDCO"). It appears that as per the scheme of the society, all residential units were constructed during the period of 1993 and they were two types, viz. A-type and B-type. The cost of A-type was fixed at Rs. 65,000/-, whereas B-type was fixed at Rs. 95,000/-. As per the petitioners, the scheme was floated by respondent No. 5 viz. Kalikund Consultancy Services Pvt. Ltd. (hereinafter referred to as the "developer") and the members concerned in B-type had to pay Rs. 25,000/- and the remaining amount of loan was to be treated as of Rs. 70,000/- payable by the concerned member in installment. As per the petitioners, they contributed Rs. 25,000/- and the remaining amount of about Rs. 69,400/-/Rs.70,000/- was to be made available from the loan of HUDCO and to be paid by the petitioners in installment. The pertinent aspect is that the loan was to be procured by the Society from HUDCO and not by the petitioners concerned in their individual capacity. As per all the petitioners, they continued to make the payment of the installments and there was some default. The District Registrar exercised the power for appointment of custodian in place of the Managing Committee of the Society and at present, the custodian, respondent No. 3 herein is holding the charge and the affairs of the Society. As the installments were not being paid in time by all the members simultaneously and the loan remained unpaid, respondent No. 1 herein initiated proceedings before the Debt Recovery Tribunal, Ahmedabad, (DRT) for recovery of the amount of loan being OA No. 369/98. In the proceedings before the DRT, the concerned members of the society, whose details were available with HUDCO were joined as party defendants in the proceedings. However, the DRT, as per the Judgement dated 20.02.2006, did not pass the Award against the members in their individual capacity, nor against the builder/developer, but passed the order against the Society, its Chairman and the Secretary for Rs. 2,23,25,524.97 Ps. with the simple interest @ 12% p.a. from 30.12.1998 until realization. It has also been ordered that the applicant therein(HUDCO) shall be entitled to sell the mortgaged property for realization of the certified dues. It appears that based on the said Judgement and Order of the Tribunal, the recovery proceedings came to be initiated by HUDCO against the Society being Recovery Proceedings No. 68/06 and the whole property of the Society was contemplated to be sold by public auction and for such purpose, a notice was also issued and at that stage, the petitioners have approached to this Court for challenging such action of issuing notice so far as they relate to their tenement in occupation, viz. tenement No. 65, 88, 116, & 11 respectively of the concerned petitioners of the present group of petitions. It deserves to be recorded that the petitioners also prayed for the direction to the respondent No. 2 Recovery Officer to accept the amount of Rs. 34,971/-, 11,670/-, 36,140/- from the petitioners of Special Civil Application Nos. 10543, 10544 and 10545 of 2008 respectively, whereas, in the case of petitioner of Special Civil Application No. 10546/08, since the contention was that the full amount has been paid, the

prayer is made to direct the Recovery Officer to issue No Due Certificate and to drop the proceedings against tenement No. 11 of the petitioner.

4. It may be recorded that pursuant to the order passed by this Court, the alleged amount as recoverable by the Society from the petitioners which is quantified in the petition by the petitioners have been deposited by the petitioners pending the petition. The custodian has also remained present in the Court pursuant to the notice issued by this Court and has declared before the Court that so far as the loan amount of the petitioners is concerned qua their particular tenement, as per the record of the Society, the same is fully paid. However, he stated that as all the members of the Society did not pay their respective installments well in time and only some made the payment, such amount though credited by the Society with the respondent Corporation, since it was not the full amount, the respondent No. 1 Corporation has credited the said amount towards the outstanding installment and as a result thereof, the amount though paid already by the petitioners concerned, did not create a situation of nil amount since the loan with the respondent No. 1 Corporation was not qua the individual tenement holder. He therefore submitted that though no amount is recoverable by the Society towards outstanding installments of the loan from the concerned petitioners (after the amount deposited pursuant to the interim order), the respondent No. 1 Corporation continues to assert the right over all the properties of the Society including the tenements of the petitioners for recovery of the amount pursuant to the Judgement and Order of the Tribunal and therefore, No Due Certificate from the respondent No. 1 Corporation is not received, otherwise the Society has not to recover the amount from the concerned petitioners in view of the full payment made of their respective loan qua that particular tenement of the concerned petitioners.

5. Whereas on behalf of the respondent No. 1 Corporation, the contention is that the loan was given by the respondent No. 1 Corporation to the Society and as per the various terms and conditions of the loan agreement, the Society had agreed to abide by the observance of the conditions and it included the prohibition of transfer or alienation of any right and the payment of the loan by way of installment in a consolidated manner. It was submitted that if some members of the Society have paid the installment to the Society, and in turn deposited with the respondent No. 1 Corporation, but if some of the remaining members have not paid the installments, the same is not a full compliance to the conditions of the loan agreement and as per the loan agreement, since the respondent No. 1 Corporation is entitled to appropriate the payment first towards the outstanding interest, the liability of the Society as per the loan agreement would continue to subsist irrespective of the payment made by its members inter se and if the full amount is not paid by the Society, may be on account of non-payment of the concerned installment by their respective members, the respondent No. 1 Corporation will be within its rights to recover the outstanding dues by way of execution of the Judgment and Award of the Tribunal, particularly from the whole area of the property held by the Society. It was submitted that if

the loan is treated as bifurcated amongst the individual members of the Society inter se, the consequence would arise that the respondent No. 1 Corporation may not be in a position to sell the whole property of the society and only certain tenements may be available for disposal, which would be neither feasible nor would fetch the appropriate price of the property and consequently, recovery as per the Judgement and Award of the Tribunal would be frustrated. It was submitted that in view of the loan agreement, there is no individual right with the concerned member of the Society who has been allotted tenement since the property vest to the Society and the members concerned cannot individually resist to the execution or recovery of the amount on the ground that the concerned member has already paid the full amount of the tenement concerned allotted to him and therefore, the execution/recovery cannot be effected from the tenement which is allotted to him. It has been submitted that if such bifurcation is read, the whole Judgement and Award of the Tribunal would be redundant and consequently, the respondent No. 1 Corporation would not be in a position to recover the amount and therefore, as the basis of the petition is not acceptable, the petitions may be dismissed for stalling the recovery proceedings before the recovery officer of the Tribunal.

6. It is an admitted position that the Judgement and the Award has been passed by the Tribunal for recovery of Rs. 2,23,25,524.97 Ps. with interest @ 12% p.a. from 30.12.1998 until realization. It is also true that as per the Judgement and the Award of the Tribunal, it is observed that the applicant shall be entitled to sell the mortgaged property for realization of the certified dues. It is also true that the application/Suit of the Corporation against remaining defendants is dismissed with costs. So far as the other defendants viz. other than the Society, its Chairman and Secretaries are concerned, it has been observed by the Tribunal as under:

Now, the question whether the claim should be allowed against all the defendants. Evidence on record reveals that the applicant had sanctioned and disbursed the loan to the defendant No. 1-Society. Defendants No. 2 and 3 had executed documents, in official capacity, on behalf of defendant No. 1. Defendant Nos. 1 to 3 would be liable to discharge the debt. As far as defendant No. 4 is concerned, he is promoter/developer. There is no privity of contract between him and the applicant. Considering the scope of the application u/s 19 of the Act, I am skeptical about fastening liability on defendant No. 4. As far as remaining defendants are concerned, I fail to understand why they came to be impleaded in this proceeding. It appears that they are tenement/flat owners. Defendant Nos. 1 to 3 might have allotted the tenements/flat to the above persons. By no stretch of imagination, they are either necessary or proper parties. If the Tribunal is called upon to adjudicate the rights of the occupants of the tenements/flats, the very object of the Act would be defeated. I am, therefore, of the opinion that no Recovery Certificate can be issued against occupants.

Thereafter, at para 13, in the concluding observations, it has been observed inter

alia as under:

The application is required to be dismissed against the remaining defendants.

7. Under these circumstances, it can be said that the Judgement and the Award has been passed by the Tribunal against the Society, its Chairman and Secretary for the whole amount and the outstanding loan amount is made recoverable by sale of the mortgaged property. But the pertinent aspect is that the amount ordered as recoverable comprises of various tenements/flats held by various members including the petitioners herein and as per the provisions of the Gujarat Cooperative Societies Act ("the Act" for short), the Society though technically is the owner of the property, but as per the provisions of the Act read with Rules and bylaws, the allotment of the plot/tenement/flat is made by the Society to its various members for their exclusive rights as owner/tenant/occupier in such immovable property. Therefore, the allottee members of the tenement are neither third party nor transferor nor can be said as holding interest adverse to the respondent Corporation, but all such member allottee are having interest in the property of the Society as per the Transfer of Properties Act, for any facilities in absolute qua the tenement/flat already allotted to them so far as it relates to right to occupy and enjoy the property, may be subject to the ownership of the Society.

8. The rights of the member allottee in any housing cooperative societies can broadly be classified into two categories; first is as tenement- co-partnership Society and another is tenement-ownership Society. The Division Bench of this Court had an occasion to consider such issue for the rights of the member allottee in a Cooperative Housing Society while examining the question of conveyance and question of transfer of such rights of such member allottee. It was inter alia observed by the Division Bench in the said Judgement reported in AIR 1980 Guj 62, in the case of "Mulshanker Kunverji Gor and Ors. v. Juvansinhji Shivubha Jadeja", at para 5 as under:

We have no doubt in our minds that Section 42 of the Gujarat Co-operative Societies Act, 1961, inter alia, exempts from compulsory registration instruments relating to shares in a society notwithstanding that the assets of such society consist wholly or in part of immovable property. Shares in a co-operative housing society have a necessary relation to the immovable properties which the society constructs and which are allotted by the society to its members. It is necessary, therefore, to find out what an instrument of transfer relating to "shares in a society" conveys to the transferee. It has been argued that there are two types of co-operative housing societies. One type is called "tenant co-partnership society". Another is called "tenant ownership society". A "tenant co-partnership society" is a society where the land is owned by the society and upon which houses are constructed by the society for the benefit of its members. It is the co-operative venture of all the members of a co-operative housing society which brings into being the houses which the members in their turn may occupy. They are constructed out of its own assets and out of the moneys borrowed by it. The

debt discharged by the society by collecting periodical contributions from them in specified amounts. In such a society it is the society in which the land and the buildings in the eye of law vest. The learned District Judge has on facts found in the instant case that the society in question is a tenant co-partnership society. Therefore, when a member of such a co-operative housing society transfers his shares to another with the approval of the society, he not only transfers the shares but also, as a necessary incident thereof, transfers his interest in the immovable property which has been allotted to him. What Section 42, Clause (a), therefore, exempts from the rule of compulsory registration is an instrument relating to "shares in a society" which carry with them, necessary incident, member's interest in the immovable property occupied by him. We say so because both the land on which the house has been constructed by the society and the house itself vest in the society in the eye of law. It is therefore difficult to uphold the argument raised by Miss Shah that with the transfer of "shares in such a society", what are transferred are merely the shares in the society and not the right to occupy the house which necessarily flows from the allotment of the houses by the society to its members. In case of a "tenant co-partnership society", "shares in a society" which a member holds appear to us to be inseverable from his interest in the immovable property which has been allotted to him for his occupation and enjoyment. Now, it is necessary for us to make it clear that the expression "shares in a society" used in Clause (a) of Section 42 connotes shares in the assets of the society which include the immovable properties of the society which the society has allotted to its members for enjoyment and occupation. Looking at it from another angle, we find that since the immovable property - the land and the house - vest in the society, no title is transferred to the purchaser with the transfer of shares. Title continues to remain with the society. Right to occupy and enjoy it is transferred by the transfer of his shares by one member to another. This expression does and cannot therefore embrace within its sweep any personal interest, independent of the society, which a member may have in the immovable property which he occupies. Such a situation arises in case of "a tenant ownership society". It has been argued that in "a tenant ownership society". the land belongs to the society and the superstructure thereupon is constructed, not by the society out of its funds but, by the member out of his personal funds. In such a case, when by an instrument a member transfers his "shares in the society" to another person, he not only transfers his shares but also his right to occupy and enjoy the land belonging to the society and the super-structure which he has constructed out of his personal funds and which belongs to him personally. The transfer of such a superstructure cannot be effected except under a registered conveyance because Clause (a) of Section 42 does not exempt from compulsory registration the transfer of a member's personal immovable property - not belonging to the society - to another. It is therefore clear that in case of "a tenant co-partnership society", the transfer of shares necessarily carries with it the transfer of member's interest in the immovable property allotted to him and that such a transfer can be brought about without a registered instrument because Clause (a) of Section 42 carves

out an exception to the rule enunciated in Sub-section (1) of Section 17 of the Registration Act, 1908. In case of "a tenant ownership society", shares carrying with it, as necessary incident, the member's interest in the land which belongs to the society can be transferred without a registered instrument but the super-structure cannot be transferred except under a registered instrument contemplated by Sub-section (1) of Section 17 of the Registration Act, 1908 read with Section 54 of the Transfer of Property Act because the expression "shares in a society" used in Section 42 of the Gujarat Co-operative Societies Act, 1961 casts its net upon land which belongs to the society but does not reach the super-structure which exclusively belongs to the member and which has nothing to do with the member's. "shares in a society.

(Emphasis supplied)

9. The Apex Court had an occasion to consider the question as to whether a flat in a Tenant Cooperative Housing Society under the Maharashtra Cooperative Housing Societies Act, (which is more or less at par with Gujarat Cooperative Societies Act) is liable to attachment and sale in execution of decree against the member in whose favour or in whose benefit the same has been allotted by the Society or not. In the said decision in the case of Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi, , it was inter alia observed by the Apex Court at paragraph Nos. 17 & 18 as under:

17.

There is no absolute prohibition in the Act or in the Rules or in the Bye laws against transfer of interest of a member in the property belonging to the Society. The only transfer which is void under the Act is one made in contravention of Sub-section (2) of Section 47 (see Section 47(3)). We have not been able to find any other provision anywhere" to the same effect. In the scheme of the provisions a dichotomy is seen between share or interest in the capital and interest in property of the Society.

18. This right or interest to occupy is a species of property. We have to consider whether this right to the particular property is attachable and saleable in execution of the decree against the judgment-debtor. It is contended by Mr. Chatterjee, amicus curiae, that Section 31 of the Act completely bars attachment and sale of the said property in execution of the decree. We have already pointed out the difference in language between Section 29 and Section 31 and also made reference to Section 47(1)(b) in that connection. There is nothing in the language of Section 31 to indicate that the right to occupation which is the right to be sold in auction is not attachable in execution of the decree. There is nothing in Section 31 to even remotely include a prohibition against attachment or sale of the aforesaid right to occupation of the flat. Once Section 31 is out of the way, we are left with Section 29 wherein we do not find even a provision at prior consent for transfer of share or interest in such property. The only restrictions u/s 29(2) are that the member may not transfer his interest in the

property prior to one year and the transfer is made to an existing member of the Society or to a person whose application for membership has been accepted by the Society. It is true that bye-law 71D says that a member to whom a tenement is allotted shall not assign or underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing Committee, but there is nothing to show that contravention of this bye-law makes the assignment void under the Act unlike in the case of a transfer being void u/s 47(3). There is no impediment to ratification of the assignment by the Committee particularly in view of the legal position arising out of the conjoint, effect of Section 29, Rule 24 and bye-law 9. Section 29 read with Rule 24 shows that there is no prohibition as such against transfer of a share to a member or even to a non member if he consents to be a member and makes an application for membership by purchasing five shares as provided under bye-law 9. Reading the aforesaid provisions there is no reason to think that there is any question of refusal of membership of the Society to a non-member if he is qualified otherwise and makes an appropriate application in which case the transfer of shares will be operative and thus the assignment of the right to occupation will hold good. Further it is significant that u/s 146(a) of the Act, contravention of Sub-section (2) of Section 47 is punishable u/s 147 of the Act. Contravention of any bye-law is, however, no offence. We therefore, unhesitatingly come to the conclusion that this species of property, namely the right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property in this case in execution of the decree are valid under the law.

(Emphasis supplied)

It was further inter alia observed in the said decision by the Apex Court at para 19 as under:

19. Multi-storeyed ownership flats on co-operative basis in cities and big towns have come to stay because of dire necessity and are in the process of rapid expansion for manifold reasons. Some of these are: ever growing needs of an urban community necessitating its accommodation in proximity to cities and towns, lack of availability of land in urban area, rise in price of building material, restrictions under various rent legislations, disincentive generated by tax laws and other laws for embarking upon housing construction on individual basis, security of possession depending upon fulfilment of the conditions of membership of a society which are none too irksome. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the legislature, must be in express terms. We have failed to find one.

(Emphasis supplied)

Further, concerning to the attachability of such rights in immovable property, it was also observed at para 24 as under:

It is contended by Mr. Chatterjee that Section 60, Civil Procedure Code, does not specify that this species of property is liable to attachment. The argument, however, fails to take note of Section 60 being not exhaustive as such. It refers also to any other saleable property, movable or immovable, whether the same be held in the name of the judgment-debtor or by another person on his behalf. We have held that the right to occupation of a flat is property both attachable and saleable. Specific non-inclusion of a particular species of property u/s 60 is, therefore, not of any consequence if it is saleable otherwise. In the result the judgment of the High Court is set aside and the judgment-debtor's chamber summons dated 28-3-1972, stands dismissed. The appeal is allowed, but there will be no order as to costs except that the Court-fees will be payable by the appellant.

(Emphasis supplied)

10. This Court in the case of Vrajlal Jagjivandas Pandya Vs. Jaswantlal Shivilal and Another, had once again an occasion to consider the question as to whether the rights of the member allottee in a plot of land allotted to him by the Society or in a building built up and allotted to him by the Society is transferable or heritable or whether liable to attachment in execution of the decree u/s 60 of the Act or not. In the said decision, after taking into consideration the above referred decision of the Apex Court in the case of Ramesh Himmatlal Shah (supra), had observed inter alia at para 6 that:

....it cannot be gainsaid that the member has not only the right, title and interest in the plot of the land allotted to him by the society or in the building built and allotted by the Society to the member, but those rights were transferable and heritable.

11. The aforesaid shows the legal position that the rights of the member allottee in a housing society are the rights in immovable property which are inheritable, attachable and saleable.

12. This Court in the case of Gordhanbhai N. Vaghela v. Maruti Co-op. Housing Society and Ors. reported at 2002(3) GLH 747, while examining the question for exercise of the power by the Society, for expulsion of the members in a Housing Cooperative Society and thereby to terminate the rights of such members in a housing society, had observed inter alia at para 9 as under:

Further in a housing cooperative society, after a person becomes member, a plot or a flat or a tenement is being allotted to him in his capacity as a member and may be that as against the allotment the person concerned when admitted as a member would be required to make payment to the society. However, the allotment of the plot/flat/tenement to a member in a housing cooperative society is a valuable right and, therefore, right to property, even transfer of property and

some interest, is created in the property namely, the plot/flat/tenement as the case may be on account of such allotment in capacity as member of the society. It may be that technically the society is the owner of the said portion which is allotted to the member, but it cannot be said that the person has no valuable interest in the property. When the membership right of a person is coupled with the interest over the property which is allotted to him, his expulsion as a member becomes more serious action. Not only that, it is also a known fact that a plot or flat or tenement, which is allotted by the society to a member concerned is like a shelter of the family of the member concerned possibly after investment of life savings and, therefore, the power u/s 36 of the Act, which may be exercised against the member by the society cannot be lightly considered as consequently it results into deprivation of the property allotted to such member.

(Emphasis supplied)

13. Hence, as per the above referred decision of this Court, rights of the member allottee in a plot/flat/tenement has been treated as with the valuable interest in the property and if taken away, may result into deprivation of the property allotted to the member and consequently, the deprivation of shelter to a family of a member concerned which may even acquire possibly after investment of lifetime savings by such members.

14. This Court in the case of Abhinav Co.op Housing Society Ltd. v. Jageshkumar Chinubhai Shah and Ors. reported in 2003(1) GLH 455, had an occasion to consider the question about the recovery to be made by the Society from the individual members when a composite loan was taken by the society from the Bank. More or less, similar question was to be considered as in the present group of the petitions. The only distinction was that the Bank was not the respondent No. 1 Corporation, but was Mehsana District Central Cooperative Bank Ltd. In the said case, it was observed inter alia by this Court at para 8 as under:

However, the question would be what will be the extent of the liability of the member when a composite loan is taken by the society for the purpose of construction of flats or houses for allotment to its members. In a given case, it may vary from facts to facts, but the society and all properties of the society would be subject to the charge of the said loan amount and normally separate, distinctive account qua each flat would not be maintained by the Bank. So far as the rights of the financial institutions vis-a-vis the member and the society are concerned or vis-a-vis the properties of the society are concerned, normally it can be construed that if the society has taken a composite loan and if all the members are similarly situated and the loan amount is equally distributed amongst all members, the liability will be in proportion thereof. If a few members pay up the amount by showing bonafide and as law abiding members, and if some members intentionally or otherwise do not pay up the amount then, in my view, the situation would not be the same. So far as the rights of the Bank are concerned, it is true that the Bank can recover the loan amount from the whole of the properties of the society which may include all the properties which are

occupied by the members of the society, but so far as the rights of the members inter se are concerned, I am of the view that the society must consider a reasonable and rather fair interpretation of the liability qua each member. It is for the society to apportion and distribute the liability in proportion to the amounts spent from the loan amount in respect of the members concerned. The members who have already paid the amount fully considering their proportion of liability cannot be made to suffer on account of other members who have not paid the loan amount. As such, so far as the inter se rights of the members of society are concerned, it can be reasonably construed that if such loan amount is not paid and the recovery is to be enforced by the society, it will be qua the properties which are in occupation of the members who have not paid the amount and it cannot be enforced qua the properties which are in possession of the members who have already paid the full amount.

Thereafter, the ultimate directions were given in the facts of that case.

15. It is true that in the said case, it was the dispute between the Society and the members inter se on the ground that transfer shall not be effected and this Court had no occasion to consider the question regarding the enforceability of the rights by the Bank as the decree holder, but there was no reason for not to apply such principles at the time of execution of the decree holder by the Bank against the whole property of the Society which includes the property allotted to the members who has already paid the loan amount to the Society and the members who have defaulted to make the payment of the loan amount to the Society. It is true that when the loan is taken by the Society in a composite manner, at the first brush, one might say that it is the duty of the Society to apportion and distribute the liability and to recover the amount from its respective members to the extent as was agreed and if there is failure on the part of the Society to make such proper arrangement, the rights of the Bank which is mortgagee and ultimately, the decree holder cannot be made to suffer. At the same time, if the rights of such individual member allottee in a particular flat/tenement or plot are distinguishable, and separable, attachable, and saleable separately as per the above referred decision of the Apex Court in the case of Ramesh H. Shah (supra) read with the decision of this Court in the case of Vrajlal J. Pandya (supra) and also the Division Bench Judgement of this Court Mulshankar Kunvarji Gor (supra), there is no reason to exclude its applicability at the time of execution of the decree/award by the Bank for execution of the decree/award in its favour. On the contrary, the application of such principle appears to be in conformity with the legal provisions for separate, distinguishable, identifiable, attachable and saleable interest of the individual member allottee in a particular tenement/flat/plot of the Society. Not only that, but application of such principles at the time of execution of the decree/award would be in the larger public interest and to maintain the principles of no injury so as to maintain the basic principles of equity of no sufferance of injury or no punishment (financial) or deprivation of the shelter of a family without there being any fault or default or breach of an obligation to pay the proportionate

amount of outstanding loan on the part of the concerned member allottee. It can hardly be disputed that in all urban and semi urban areas, people hardly get shelter, unless the major chunk of life savings is invested in acquisition thereof. If a person, being a law abiding citizen, is desirous to acquire the flat/tenement/or plot, for his shelter, he may be required to acquire the rights as the member allottee of the housing cooperative society. If such person is a law abiding citizen and honours his obligation by paying the financial liability qua the Society and consequently, the loan amount of the Bank, and if the other member allottee commits default in paying the same, no principles of equity and justice would extend the liability upon the persons who have already paid up the amount. If the member allottee has already paid up the amount to the fullest extent in proportion of his share, as agreed, and in the event of other members having committed default in payment, the execution is made against the property of law abiding and bonafide member who has already honoured the liability, it may not only result into deprivation of the shelter of family of such member allottee for no fault on his part, but it may also result into leaving room to confer benefit upon defaulting member allottee not directly, but by indirect method, since he has to face the same consequence at par with the law abiding member who has already paid the loan amount and has honoured his liability. Such would also result into encouraging the tendency on the part of the member allottee concerned not to pay up the outstanding loan amount individually as and when it becomes due. If rights are not read as separable, same consequence is to follow upon every member allottee of the Society. Such consequently would result into non-payment of the loan by the members, may be due to intentional or unintentional tendency to honour the financial liability as agreed by him at the time when the tenement/flat/plot was allotted to him. The same may also in effect operate against the interest of the Bank, may be in the capacity as the mortgagee or otherwise who is to get back the loan amount with interest from the Society. Therefore, it appears that application of such principle of proportionate liability and separable interest of member allottee, which otherwise is separately attachable and saleable, if considered at the time of execution, the same would be in the larger public interest and would also sub serve the ends of justice by causing no injury to the law abiding and bonafide member allottee and to make accountable to only those member allottee who have committed default in honouring the obligation as was agreed for repayment of the loan.

16. If the contingency has arisen of creation of additional financial liability by payment of the installment by member allottee well in time and the remaining members having not paid the installment well in time and as a result thereof, the amount paid by the member allottee is appropriated first towards the interest of the loan by the Bank, and therefore, the principal is shown as outstanding, or there is more liability created, the same can be taken care of on the proportionate basis by the Society to the extent of default committee and default attributable to the concerned member allottee and if there is any dispute on the said aspects, the recovery officer or the executing authority can consider the

evidence and finally decide such questions and thereafter, the recovery can also be effected to that extent.

17. Therefore, it is not impossible to apply such principles at the time of execution by separating the rights of each member allottee and consequently, make the recovery effective qua the particular tenement/flat/plot allotted to the concerned member. The modalities, working method, its calculation, the mode may differ in each case, but the applicability of such principles is not impossible on the ground as sought to be canvassed by the learned Counsel for the respondent No. 1 Corporation.

18. The aforesaid leads to examine the question as to whether such aspects can be considered by the recovery officer while executing the recovery certificate or not? Section 29 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 provides that the provisions of second and third Schedule to the Income Tax Act and Income Tax Rules, 1962, as in force from time to time shall as far as possible apply, but with the proviso that in place of the "assessee" the reference shall be to the "defendant". Accordingly, if the provisions of second Schedule for recovery are considered, as per part-III, it provides for attachment and sale of the immovable property. Such attachment of the immovable property of the defaulter(which is the Society in the present case) can be generally or by separately identifying the internal composition on tenement/flat/plot of such defaulter society upon the information being provided by the Society to the Recovery Officer. Once the information has come before the Recovery Officer, the same can be considered or the Recovery Officer can also direct the Society to furnish such information and if not furnished, he can get it prepared through Court Commissioner or otherwise. If such information are received, or produced on record, the attachment can be qua such individual member allottee with the defaulting Society as per clause 50 of the aforesaid provisions of the Schedule. Not only that, but clause 60 provides that where the immovable property has been sold for execution of the certificate, the defaulter or any person whose interest are affected by sale (in the present case could the member allottee of a society), may at any time, within 30 days of the sale, apply to the Recovery Officer to set aside the sale upon his depositing the amount specified in the proclamation of the sale, may be with the penalty or without penalty and certain additional amount as specified. Clause 62 provides for setting aside of the sale, where the defaulter has no saleable interest. Therefore, if the interest of the defaulter Society is separately associated with the rights of the member allottee in a particular tenement/flat/plot, such provision shall also be taken care of. As the interest of each member, as observed earlier is separable, distinguishable, separately attachable and saleable, such aspects can be, as per the Scheme of the second Schedule, considered by the Recovery Officer at the time of execution of the certificate and the execution can be effected on the basis of the rights of the Society being associated with a particular member allottee in a particular tenement/flat/plot, as the case may be.

19. Even otherwise also, if the sale of immovable property has taken place and the objections are filed, may be by way of an application to set aside the sale or otherwise, as per clause 60 of the second schedule, any person whose interest is affected by the sale has the right to apply to the Recovery Officer and it is required for the Recovery Officer to decide such objections. If the sale of the property of the Society is to take place on account of the default by "A" particular member allottee, and such property includes the rights of "B" particular member allottee, then it can be said that "B" particular member allottee would be adversely affected by the sale, unless the sale is to take place of the property of the Society in association with individual rights of "A" particular member allottee who has committed default in execution of the "B" member allottee who has not committed any default.

20. Therefore, in view of the aforesaid separately attachable and saleable interest of individual allottee member, the composite recovery for the whole property of the Society can be said as bad in law.

21. The attempt was made on the part of the learned Counsel for the respondent No. 1 Corporation to contend that if execution is made based on separate and distinguishable right of member allottee in each tenement/plot, the Bank may not be in a position to get the offer for the whole plot of the Society and therefore the recovery would be frustrated cannot be countenanced because if the rights of the member allottee are separate, distinguishable, attachable and saleable, the recovery at the time of execution by sale of the property is required to be made accordingly and cannot be given a go by and if given a go by would result into great injustice to the law abiding and bonafide member allottee who has honoured the obligation agreed by him, but as observed earlier, would also be against the larger public interest of residents of the locality in urban and semi urban area who have occupied or acquired the tenement/flat/plot, as the case may be being shelter of life of himself or the family. Merely because the Bank may not get a good offer of the property, such principles cannot be given a go by. Further, in any case, the Bank would be in a position to recover the full amount, may be after bifurcation and proportionate recovery from each member since in any case, the individual tenement/flat/plot can always be sold in execution of the decree and the money can be realized. The total money may be available on account of the sale by individual tenement/flat/plot in occupation of the allottee member concerned, may be more, but in any case, would not be less than the total price of the land. Therefore, if the Bank is ultimately in any case in a position to recover full outstanding amount by sale of the individual tenement/flat/plot of the allottee member concerned who has committed default, no prejudice will be caused to the Bank. Therefore, the said contention cannot be accepted.

22. The attempt was made by the learned Counsel for the respondent Corporation to contend that various conditions of the loan agreement which were entered into by the Society after getting consent of the respective member

allottee concerned at the relevant point of time do include various obligations cast upon the Society and no separate distinguishable right of the member allottee and therefore, it was submitted that such individual rights of member allottee in a tenement/plot/flat deserves to be ignored in view of the decision of the Apex Court in the case of Zoroastrian Cooperative Housing Society Ltd. v. the District Registrar, Cooperative Societies and Ors. reported in 2005 SC 2306.

23. In my view the reliance upon the said decision is ill-founded inasmuch as in the case before the Apex Court, it was a question of agreement imposed by the member of the Society through the bylaws and not by way of a contractual arrangement. Further, even if the bylaws are read at par with the agreement entered into between the members inter se, there is no specific agreement for waiving or extinction of the rights by the member allottee of the Cooperative Societies, even if such member allottee has already paid the full outstanding amount of the loan qua particular tenement/flat. A restriction accepted by the member concerned cannot be read as a complete ban upon the enforceability of the lawful rights, if otherwise exist in the property. Further, in the case before the Apex Court, it was inter alia observed by the Apex Court at para 37 that:

A transfer could be effected to the person qualified to be a member of the society and with the consent of the society could straightway be declared to be an absolute restraint on alienation and consequently an interference with his right to property protected by Article 300A of the Constitution of India.

24. In the present case, if the conditions are read as accepting the restrictions inspite of the loan already fully paid by the allottee member concerned, it would result into cessation of all rights whatsoever in the property by the allottee member concerned and such interpretation may also result into interference with the right to property protected by Article 300A of the Constitution of India since the member is to lose the interest in the property for all time to come for no fault on his part whatsoever, but for the fault on the part of the other member allottee concerned who has committed default and has not honoured his obligation to discharge the liability of loan. Therefore, it appears that the decision upon which the reliance is placed by the learned Counsel is of no help to the respondent No. 1 Corporation.

25. If the facts of the present case are examined, it appears that the Recovery Officer has not proceeded for execution of the recovery certificate by treating the rights of each member allottee in the tenement/flat which is a part of ownership of the Society. The Recovery Officer ought to have directed the Society to produce the details of each members and payment made by such individual members and the apportionment of the liability and non-payment thereof by each individual members. The Recovery Officer ought to have proceeded for sale of the property by issuing notice to individual member concerned in association with the Society to the extent of the liability apportioned as per the record of the Society and it is only upon the failure by the member allottee concerned to pay up the amount of his share and the liability, the Recovery Officer ought to have

proceeded for sale of the tenement/flat in occupation of the member allottee concerned. It appears that in the present case, the Recovery Officer has proceeded as if the property of the Society is one but by ignoring the separate distinguishable and separately attachable and saleable rights of the member allottee concerned in the property of the Society.

26. Hence, the impugned sale proclamation cannot be sustained in law. It will be required for the Recovery Officer to undertake the exercise by calling for the details from the Society or he may cause it to be produced through the Society or may ensure the preparation thereof. If any dispute exist about the payment of the amount by the member of the Society and consequently the credit in the loan account, the same may also be examined and finalized by the Recovery Officer. Opportunity may be given by the Recovery Officer to the member allottee concerned to pay up the outstanding amount, failing which, such tenement/flat in occupation of the member allottee concerned with the ownership rights of the Society can be sold in execution of the recovery certificate as per the procedure provided in the above referred Schedule - II read with Section 29 of the relevant Act. At that stage, the Society shall take into consideration the amount already deposited by the petitioner concerned and shall also give credit of the amount paid by the petitioner pending the petition. If the proportionate liability exist after apportionment qua each individual member allottee concerned, who has been allotted respective tenement/flat, any amount is payable, it will be required for the petitioner concerned to pay the same and if ultimately found by the Recovery Officer, as declared by the administrator before this Court that the petitioners concerned have honoured their liability in full to the extent of the proportionate amount attributed to them, the property of the petitioners concerned would not be sold in execution of the recovery certificate, which is subject matter of the petition.

27. Hence, in view of the aforesaid observations and discussions, the impugned notice (Annexure-A) for the sale proclamation deserves to be quashed and set aside and hence, quashed and set aside. It is directed that the Recovery Officer, respondent No. 2 herein shall proceed for execution/recovery of the amount as per the recovery certificate, after taking into consideration the observations made hereinabove and in accordance with law.

28. The petitions are allowed to the aforesaid extent. Rule made absolute accordingly. No order as to costs.