(1973) 10 BOM CK 0003

In the Bombay High Court

Case No : Letters Patent Appeal No. 80 of 1972 and Civil Application No. 3260 of 1972

Ramesh Himmatlal Shah APPELLANT

Vs

Harsukh Jhadavji Joshi RESPONDENT

Date of Decision : 31-10-1973

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 11, 60

Citation : (1974) 76 BOMLR 375

Hon'ble Judges : Mukhi, J;Bhole, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Bhole, J.—An important point of law under the provisions of the Maharashtra Co-operative Societies Act, 1960 (hereinafter called "the Societies Act") arises in this Letters Patent Appeal against the judgment and order passed by my learned brother Vaidya J. in the appeal by the judgment-debtor against the order of the learned Judge of the City Civil Court dismissing the Chamber Summons taken out by him. An ex parts decree for a sum of Rs. 20,000 and odd was passed in the suit by the decree-holder, on March 31, 1970. The decree-holder then took out a warrant of attachment of Flat No. 9 in the building belonging to Paresh Co-operative Housing Society Ltd., a Society registered under the Societies Act. The flat was attached on August 8, 1970 after serving the warrant on the judgment-debtor in the jail at Rajkot. He appears to have been convicted in a criminal case and was, therefore, suffering imprisonment at Rajkot. The decree-holder thereafter applied for the sale of the said flat and a warrant of sale was accordingly issued on October 16, 1970. A copy of it was served on the judgment-debtor again in the jail.

2. During the course of the execution proceedings the judgment-debtor''s brother Hasmukh Joshi took out a Chamber Summons challenging the execution on the ground that the said attached flat did not belong to the judgment-debtor but

belonged to him and that the attachment therefore should be raised. The Chamber Summons was made absolute but on appeal this Court set aside the order and remanded the matter for rehearing. After the matter was remanded the learned Judge of the City Civil Court dismissed the Chamber Summons on September 30, 1971. By that time the judgment-debtor was out of the jail and therefore after some time in the year 1972 he filed a suit to set aside the money decree against him. He also took out a Notice of Motion on February 20, 1972 for the stay of the execution. The Notice of Motion was, however, dismissed on March 14, 1972.

3. In the midst of all these proceedings a draft proclamation for sale was settled and there was a proclamation for sale. The sale ultimately took place and the flat was sold to one Bhupendra Shah for a sum of Rs. 24,000. The sale is not yet confirmed.

4. The judgment-debtor then filed a Chamber Summons on March 20, 1972 praying for the dismissal of the execution petition filed by the decree-holder and for setting aside the warrant of attachment and proclamation of sale on the ground that the flat being a flat in a co-operative housing society was not liable to be attached and sold. It was also stated that there is no saleable interest of the judgment-debtor in the said property in terms of Section 60 of the CPC and that therefore the property is not liable to attachment. The Chamber Summons was resisted by the decree-holder on the ground of delay on the part of the judgment-debtor in moving the Court and taking of the summons for the reason that his interest was not subject to attachment u/s 60 of the Civil Procedure Code. The learned Judge of the City Civil Court, who heard the Chamber Summons, dismissed it, although the judgment of this Court in Kaluram Puranmal v. S.S. Malpathak (1971) O.C.J. Suit No. 507 of 1964, decided by Vimadalal J., on September 11, 1971 (Unrep.) was cited before him. He distinguished the facts- and circumstances of the case in the original suit before this Court with the facts and circumstances in the Chamber Summons wherein the judgment-debtor did not refer to any Bye-laws of the Society where the impugned flat was. That decision of the learned Judge of the City Civil Court was challenged in appeal by the judgment-debtor.

5. It was contended before Vaidya J. See Vaidya J.''s Judgment at (1972) 75 BomLR 649 by the appellant-judgment-debtor that the learned Judge of the City Civil Court had ignored Section 20 of the Societies Act as also the Bye-laws of the Co-operative Housing Society and that the learned Judge wrongly distinguished the instant case from the one which was decided by Vimadalal J. On the other hand, it was contended for the decree-holder that even though the flat was a flat in a co-operative housing society, the judgment-debtor had. sufficient saleable interest, which belonged to him as a member of the Society under the Societies Act as well as the Bye-laws. While discussing the interest of the members of the Society Vaidya J. agreed with the view of Vimadalal J. expressed in his judgment in the above referred suit before him. After

considering1 Section 29(2) of the Societies Act and also the Bye-laws 71 to 74 as well as the approved tenancy regulations, Vaidya J. came to the conclusion that the tenant in a co-operative housing society cannot part with a flat by way of sale or otherwise without the previous consent of the Society. After referring to Manohar Ramchandra Sarfare Vs. The Konkan Co-operative Housing Society Ltd. and Others, , f.b a Pull Bench decision of this Court and Vyankatraya v. Shivrambhat ILR (1883) Bom. 256 Vaidya J. found that an auction-purchaser cannot get any right or interest in a flat of a member of a co-operative housing society as he had no saleable interest or disposing power in respect of a flat without the previous consent of the Society. Accordingly, therefore, he set aside the order passed by the learned Judge of the City Civil Court on the Chamber Summons of the judgment-debtor and made it absolute. This order, therefore, is now challenged here in this Letters Patent Appeal. The important point of law that arises here for our consideration, therefore, is whether an allottee of a flat in a co-operative housing society registered under the Societies Act has saleable interest in the flat capable of being attached and sold in execution of a decree by a Court.

6. Now, so far as the facts and circumstances of this case are concerned, it appears from the record that the judgment-debtor is not even a member of the Paresh Co-operative Housing Society, which owns the impugned flat and which was attached during the course of the execution proceedings. One Chande and Mrs. Chande were the allottees of the said flat and were also the members. There was some agreement between Mr. and Mrs. Chande on the one part and the brother of the judgment-debtor and his wife on the other, under which the judgment-debtor had paid a sum of Rs. 18,000 towards the price of the flat out of the moneys held by him in a bank. Although the judgment-debtor is not even a member of the Paresh Co-operative Housing Society, yet the creditor in order to execute his money decree attached the flat and also took steps to sell it as if it is the property of the judgment-debtor. It also appears from the judgment of the learned Judge of the City Civil Court in the Chamber Summons taken out by the brother of the judgment-debtor that he decided as he was bound to only the interest of the judgment-debtor''s brother but while deciding that interest of the brother the learned Judge naturally took into consideration the moneys which in fact were paid as consideration for the flat not by the brother but the judgment-debtor. There was, therefore, no question in the Chamber Summons taken out by the brother of the judgment-debtor, on the ground that the flat belonged to him, of deciding the interest of the judgment-debtor, with whom we are concerned. In spite of that, however, the learned Judge of the City Civil Court, who decided the Chamber Summons taken out by the judgment-debtor, with which we are concerned, observed in the beginning that he had already held that it was the judgment-debtor who had interest in the flat. If all these circumstances are taken into consideration, the matter in our view could have been disposed of by deciding the question as to whether the judgment-debtor had or had not any interest in the flat as a member of the Paresh Co-operative Housing Society, but

since an important point of law arising out of the provisions of the Societies Act has been decided in the appeal from the judgment and order of the Chamber Summons and since this is an appeal challenging that decision, we have also to decide this point of law.

7. In order to understand the interest of a member of a co-operative housing society, it would be useful to relate the scheme of the Societies Act as well as to look at the Rules and the Bye-laws made under the Act. But for the development of the co-operative movement in the State of Maharashtra a large number of our middle class population would not have improved and would not have benefitted in various fields of activities including housing. The Preamble of the Societies Act therefore shows that the Act was for the orderly development of the co-operative movement in the State in accordance with the relevant directive principles of the State policy enunciated in the Constitution of India. We are here concerned only with a particular kind of Society viz. a co-operative housing society registered under the Societies Act. Under the Societies Act there are quite a few societies, which are classified as well as sub-classified as societies. Under the rules mentioned above the fifth classification is "Housing Society." Under these Rules such a society is sub-classified in three categories, viz., (a) Tenant Ownership Housing Society, (b) Tenant Co-partnership Housing Society and (c) other Housing Societies. The first category (a) includes Housing Societies where land is held either on lease-hold or free-hold basis by societies and houses are owned or are to be owned by members; the second category (b) includes Housing Societies which hold both land and buildings either on lease-hold or free-hold basis and allot them to their members and the third category (c) includes House Mortgage Societies and House Construction Societies. The Society, with which we are concerned, is a tenant co-partnership housing society, where a flat is allotted to a member. Every housing society has to be registered under the Societies Act, If we look at Chapter III of the Societies Act, we notice the provisions as regards the qualification of a person who may become a member, the provisions as regards their rights, the provisions as regards restrictions on holding of shares and transfer or charge of share or interest. No person shall be admitted as a member of a Society unless the Society is registered and unless he is qualified to hold shares according to the Bye-laws of the Society. A person shall cease to be a member of a Society on his resignation being accepted or on the transfer of the whole of his share or interest in the Society to another member or on his death or removal or expulsion from the Society. He has to pay to the Society the fees and then only he can exercise his right as a member. The Society has to transfer the share or interest of its member to a person nominated by him or if no person has been so nominated, to such person as the Committee thinks to be the heir or legal representative of the Society''s member. Even at the time when the Society is wound up, the liquidator can investigate all the claims against the Society of the creditors and contributors. The assets after final report of the liquidator have to be divided amongst its members by the Registrar with the previous sanction of the State Government.

8. The Rules under the Societies Act also deal in detail with the question of registration, rights and liabilities of the members incurred, the duties and privileges of the Society and its members, management and inspection, disputes and arbitration, liquidation and other details. Before a person can be admitted as a member of a Society, he has to apply in writing in a prescribed form. His application has to be approved by the Society''s Committee. The member has to fulfil all other conditions and the duties and the rules and the Bye-laws. Under the rule of procedure for transfer of shares no transfer of shares can be effective unless it is made in accordance with the provisions of the Bye-laws and the transfer is registered in the books of the Society. There are rules regarding liquidation and disposal of the surplus assets. It is common ground that the model Bye-laws of the Co-operative Housing Society Ltd, are also the Bye-laws of the Society with which we are concerned; they also deal with the object of the Society, with the membership of the Society, with the qualifications of the members of the Society and with the declaration that they have fulfilled the test as laid in the Bye-laws of the Society. There are also Bye-laws as regards the transmission of interest as regards share capital and limit to members'' share holding, loans and loan stock, meetings, committees and their powers and all other matters pertaining to the smooth working of the Society. If a transfer has to be made with the previous permission of the Society, a form of transfer is also prescribed. There are Regulations relating to the tenancies to be granted by the Society to members in respect of the houses held by the Society in Form A. We will, therefore, have to examine the relevant provisions of the Societies Act, the Rules, Regulations as well as the Bye-laws for the purpose of finding out whether a member of a co-operative housing society has any interest and if he has any interest, the nature of his interest. We have also to find out whether such interest is transferrable and whether such interest therefore can be attached and sold.

9. Sections 29 and 31 of the Societies Act are important for the purpose of deciding the issue, with which we are concerned. Sections 4 and 6 are also significant. u/s 4 a Society, which has as its object, the promotion of economic interest or general welfare of its members or of the public in accordance with the co-operative principle or a Society established with the object of facilitating the operation of any such society, may be registered under the Societies Act. No Society can be registered u/s 6, unless it consists of at least ten persons, who are qualified to be members under the Act and who reside in the area of operation of the Society. There are also restrictions on the transfer of or charge on shares or interest. u/s 29 subject to the provisions of Section 28, which deals with share capital of Zilla Parishads and Panchayat Samitis, as to the maximum holding of the shares, a transfer of or charge on the share or interest of a member in the share capital of a Society shall be subject to the conditions laid down there. A member shall not transfer any share held by him or his interest in the capital or the property of any Society or any part thereof, unless he has held such share or interest for not less than one year and the transfer is made to a

member of the Society or to a person, whose application for membership has been accepted by the Society. In other words, under Bye-law 71A also whenever a member to whom a dwelling house/tenement or flat has been allotted by the Society does not require it for his own use, he may hand it over to the Society for using the same and under Bye-law 71B he shall not assign, underlet, vacate or part with the tenement or any part thereof without the previous consent in writing of the Managing Committee. Under a Bye-law the Society may offer the flat to any person in its discretion for temporary occupation for the period indicated by the original allottee on such clear understanding provided therein. All these provisions therefore clearly show that a member is prohibited under the statute to transfer any share or any interest in the capital or the property of the Society of which he is a member. If he wants to do so, he shall have to inform the Society and return the flat, which was allotted to him by the Society. The Society can. allot temporarily to other person on such condition as the Society thinks fit. He is also prohibited under Bye-law 71B not to assign, underlet or part with possession of his flat or any part thereof without, the previous consent in writing of the Managing Committee.

10. It is better also at this juncture to notice the Regulations relating to tenancies to be granted by the Society to members and which is given in Form A of the Bye-law. The prohibition is again repeated here and no tenant can part with the possession of the tenement or any part thereof without the previous consent in writing of the Society. Each tenant has to comply and satisfy all the regulations, Bye-laws, rules and conditions and execute all such work as may be required to be done by every public, local or other authority. The Society under this regulation appears to become the landlord of the flat and therefore the tenant has to permit the Society or their agents with or without its workmen and others at all reasonable time to enter upon the tenement to examine and to repair and if it is to be repaired give a notice in writing to the tenant of the same. The Society also sees that a tenant does not become a nuisance to other members. Regulation 20 in Form A is important and under it if rents and charges or any of them or any part thereof shall be unpaid for fourteen days after becoming payable or if any of the agreements on the tenant''s part contained in it shall not be performed or observed or if at any time the tenement or any part or any interest therein becomes occupied by or vested in any person, who is not a member of the Society or the heir or legal representative or the nominee of a member under the Bye-laws of the Society the Society may, by giving to the tenant or to one living on the tenement one calendar month''s previous notice in writing to that effect, determine the tenancy and on the expiration of such notice the tenancy shall forthwith determine. u/s 30 of the Societies Act there is a provision for transfer of share or interest on death of member to his nominee or to his legal representative. Under the Bye-laws also the transfer, after his death, can be to his nominee or to his legal representative. Neither under the Regulations nor under the statute therefore can a member part with possession of the flat to any person, who is not a member of the Society. Of course the

nominee or the legal representative can occupy after his death. If he parts with the possession to a stranger, the Society is at liberty to give him a calendar month''s notice and determine his tenancy. The allotment, therefore, is determined if a member commits breach of Bye-laws, Rules or the provisions of the Societies Act or if he hands over possession to a stranger, who is not a member of the Society.

11. The point then before us is whether such interest of the judgment-debtor after he is allotted a flat and as restricted by the provisions of the Societies Act, Rules, Bye-laws and Regulations, can be attached and sold in execution of a decree. The relevant provisions of Section 60 of the CPC are as follows:

60. Property liable to attachment and sale in execution of decree.- The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:....

12. What is to be attached under this provision is the property. The "property" is also described in the section. Land, house or a building, moneys, bank notes, cheques, bills of exchange, hundis, promissory notes, Government security bonds or other securities for money dues and shares in a corporation are shown as properties liable to attachment and sale. It is also provided that all other saleable property, which is either movable or immovable and which belongs to the judgment-debtor, can be attached. It is further provided that the other saleable property, which can be either movable or immovable and over which or over the profits of which a judgment-debtor has a disposing power and which he could exercise for his own benefit can also be attached and sold. The property should be shown to be held in the name of the judgment-debtor1 or by any other person benami for him or any trustee for him. Therefore, the first condition u/s 60 is that the thing that could be attached should be movable or immovable property. The second condition is that it should either belong to the judgment-debtor or over which he has a beneficial disposing power. The important point therefore that arises here for our consideration is whether the interest, which is restricted by the provisions and the rules etc. of the Societies Act and the Bye-laws of the housing society, is property. If it is property, whether it is movable or whether it is immovable; if it is property, does it belong to the judgment-debtor or whether the judgment-debtor has beneficial disposing power which he may exercise? Mr. Zaiwalla, the learned advocate for the appellant, has contended here that the interest which is spelt out by the provisions of the Societies Act as well as the Bye-laws is property because, according to him, an allottee has a right to be in the flat which is allotted to him by the Society. It is contended that

he has right, title and interest in such a flat because according to him he has a right to occupy or even allow somebody to occupy though with the permission of the Society. It is, therefore, urged that such a member of the Society can transfer the flat. Mr. Zaiwalla says that the judgment-debtor is the allottee of the flat and has also a disposing power over his interest. He relies on the provisions of the Societies Act as well as the Bye-laws and contends here that under the provisions an allottee, who is the judgment-debtor, can not only sublet the flat and grant a licence to somebody else but also allow a, care-taker to take care of the flat and even lease the flat. The burden of Mr. Zaiwalla''s contention is that if something can be transferred though with the permission of the Society, that something- is the interest which can be transferred. It is, therefore, urged that in such a case when a judgment-debtor has a disposing power over his interest, his interest can not only be attached but also sold.

13. Now we have seen that the primary requisite for a person to be allotted a flat in a co-operative housing society is that he should be a member of the Society. Without his becoming a member he is nobody in the Society. There are also qualifications for a person to become a member. Under Bye-law 8-a no person shall be admitted as a member of the Society who already owns a house or a plot in Bombay City or suburban area in his own name or in the name of any of his dependants or of his family member, such as wife (husband), children etc. and whose need of a plot or a block in the opinion of the General Body are not considered pressing or deserving or who has failed to furnish full or accurate information abut a house or a site owned by him, in Form "E". Besides these tests he has also to hold at least five shares in the Society. He cannot become a member unless he declares in writing the residential building or the site, if any, owned by him or by any of the members of his family or his dependants anywhere and has to state the reason why it is necessary for him to have a house in a housing Society. If any false information is given on these facts, he is dismembered. He cannot even hold more than one flat or plot in the Society either in his name or in the name of any member of his family. Until he becomes a member, he cannot exercise the rights of a member. If his shares are transferred or forfeited or cancelled or repaid, he ceases to be a member. Such are, therefore, the conditions which are necessary to be fulfilled by a person before lie becomes entitled to become an allottee of a flat by the Society. There are not only these hurdles in the way of a person, who becomes an allottee of a fiat in a Society, but there are also many more hurdles. Under Bye-law 12(g) a member can be expelled from the Society if such a member has without the previous written permission of the Managing Committee let or sublet or given on care-taker or leave licence basis or used for accommodating paying guests or disposed of in any other manner any portion of the dwelling accommodation, shops, godowns, or garages. Under Form "A" of the Bye-laws there are regulations and that is also the condition under the 4th regulation. The right to occupy subject to the regulations as well as the rules of the Society will continue so long as he observes and performs the regulations. Under Regulation 20 if the

rent which is fixed by the Society remains unpaid for fourteen days after becoming payable, his so-called tenancy can be determined with one calendar month''s notice. If an allottee hands over possession to somebody else who is not a member of the Society or who is not after his death an heir or a legal representative of a nominee, the tenancy can be determined with one calendar month''s notice in writing. His tenancy shall forthwith be determined after the period of expiration of such notice.

14. His rights therefore are very limited and he is not permitted even to transfer his shares or interest. There is Schedule II to the Bye-laws, which is a form of transfer and in this Schedule there is no mention of any interest. This form which is prescribed under the Bye-laws shows that an allottee can only transfer of course with the permission of the Society his share and loan stock bonds standing in his name in the books of the Society. They are to be accepted by the person to whom the shares and loan stock bonds are transferred. u/s 29 of the Societies Act there are restrictions on transfer of share or interest. Subject to the provisions of Section 28 a transfer of or charge on the share or interest of a member in the share capital of a Society shall be subject to such conditions as may be prescribed. A member is prohibited from transferring any share also u/s 29(2) held by him or any interest in the capital or the property of the Society or any part thereof unless he held share or interest for not less than one year and unless the transfer is made to a member of the Society or to a person whose application for membership has been accepted by the Society. He is, therefore, prohibited under this statute to transfer his share or interest which he has in the flat. There is, yet, again, a prohibition u/s 31. The share or interest of a member in the capital of a Society or in the loan-stock issued by the Society shall not be liable to attachment or sale under any decree or order of a Court for or in respect of debt or liability incurred by the member. Section 31, therefore, clearly prohibits attachment or sale under any decree or order of a Court in execution proceedings as a result of a debt incurred by the member. What then is the effect of all these conditions attached to the interest of an allottee, who is allotted a flat after he becomes a member?

15. Is it, therefore, as urged by Mr. Zaiwalla a right to occupy simpliciter? We have seen that his right to occupy depends upon so many factors. Unless and until he observes all the Bye-laws, he has no right whatsoever; unless and until he is clothed with the membership of the Society by shares, he cannot be entitled to any interest whatsoever. In other words his right to occupy a flat in the building of the Society flows by reason of his status as a shareholder and therefore a member. The right to occupy the flat allotted to him are all bundled together and they are indivisible. One cannot be divorced from the other. The interest of an allottee is the interest of a member, who has not only purchased the share but who has also purchased the loan-stock bonds as a result of which he has a right to occupy the flat allotted. We have seen that there is a firm prohibition under Sections 29 and 31 and neither shares nor interests of a member of a housing society can be attached or sold under any decree of the

Court. If, therefore, his right to occupy cannot be divorced from his membership, from his shares, from his loan-stock which he holds, his interest to occupy cannot be separated. The interest of an allottee cannot be attached because it is neither a transferable right nor therefore a saleable right. Membership in a Society of a person cannot be separated from the right to enjoy the flat.

16. A question whether a dispute between a Co-operative Housing Society and its members or between two members of the same Society relating to the recovery of rent or, possession of any person in the Society in accordance with the rules and Bye-laws of the Society, can be decided by the Registrar u/s 54 of the Societies Act or whether such a dispute can be decided by the Court under the Rent Act was before the Full Bench of this Court in Manohar v. Konkan Co-op. Housing Socy. This Court has then considered the nature of relationship between a Co-operative Housing Society and a member of the Society to whom a tenement has been allotted in accordance with the rules and the Bye-laws of the Society. After going through the Bye-laws and the regulations the Full Bench has also observed during the course of its judgment that a tenement in a co-operative housing society is allotted to a member not because he agrees to pay any money or renders any service but because he is a member of the Society and holds a certain number of shares. A cooperative housing society is formed with the express object of providing its members houses. This Court was of the view in that case that the transaction between the Society and the member is not a lease and that the right to occupy a tenement is dependent upon the occupant''s continuing to be a member of the Society. Therefore, the Full Bench has also taken a view that this is a kind of special relationship between the Society and the allottee and the primary consideration is that he should be a member first and last before he could have any other privilege given by the Society to him.

17. The nature of payment by a member is also quite different from the nature of payment, which ordinarily any other person who occupies a flat would pay. A member is required to pay not only the loan, rent which may be an economic rent and the taxes but also a certain ratio of the cost of the building and also the service charges. The payment also includes the maintenance, repairs, insurance and therefore the rent which a member has to pay under the regulation is governed by considerations which are materially different from that which an ordinary occupier of a flat has to pay. It appears to us, therefore, that his membership cannot be divorced from his interest and his interest also is delimited by various rules and Bye-laws.

18. The learned advocate for the appellant relies on (1) Mukti Lal Agarwala Vs. Trustees of The Provident Fund of The Tin Plate Co. of India Ltd. and Others, Rudra Perkash Misser v. Krishna Mohun Ghatuck ILR (1886) Cal. 241 (3) Smt. Radharani Dassi Vs. Smt. Binodamoyee Dassi and Others, and (4) Province of West Bengal and Another Vs. Bholanath Sen and Another, for the purpose of showing that the interest of the judgment-debtor in the flat owned by the

housing society is property u/s 60 of the Civil Procedure Code. We do not think that any of these cases will help Mr. Zaiwalla. In the first of these cases the Supreme Court was dealing with the word "property" mentioned in the Insolvency Act. That was in respect of the money standing to the credit of an insolvent in the provident fund. In the second of these cases the Calcutta High Court was dealing with the judgment-debtor''s right to get by division a quantity of land which had been reserved by him for his own use, but which at the time of the execution sale was in the possession of the donee of the estate, the land never having been appropriated by measurement as provided in the deed. Because it was a transferable claim and therefore capable of being attached the Court held that it could be sold. The two other cases cited by Mr. Zaiwalla are also irrelevant.

19. It is then contended by Mr. Zaiwalla that if his right is otherwise the property even if there is a restriction, it can be attached and sold in execution of a decree. It is contended by him that in the instant case the interest of the judgment-debtor is more than the personal right in the property because according to him he can assign that interest. Because he could assign that interest, therefore he says that there must be his interest in the flat. He relies for this purpose on (1) Katai Mia and Others Vs. Sukhamayee Chaudhurani, and (2) Soma Veerappa Vs. Muthurasappa Chettiar and Another, In the Letters Patent Appeal before the Assam High Court a question of an oral lease of an agricultural land was there and before the Madras High Court a question as regards six shares in private limited company was there. Surely the shares in a private limited company or a piece of land are properties. They cannot be compared in any way with the interest of an allottee in a Co-operative Housing Society. Therefore such an interest as we have before us of an allottee in a Housing Society cannot even be said to be a property which can be attached and sold. If we go to the logical end of the contentions raised by Mr. Zaiwalla, then the right to occupy by an allottee can be sold to one, the share held by him to another and the loan stocks which he holds to a third person. Such a thing can never happen because all the three things are bound to one another. Neither is divisible from the other. The characteristics of the interest held by an allottee cannot be seen, if we only look at his right to occupy or at his snares or at his loan bonds. We can see his full right only when we see all the indivisible characteristics of his interest. In this view of the matter it would be very difficult for us to accept the contention of Mr. Zaiwalla.

20. It appears to us therefore that the view taken by our learned brother Vaidya J. whose order is challenged here, is correct; but the other learned advocate Mr. Dalai for the appellant has also raised other objections. The first objection is that the judgment-debtor cannot raise the issue of attachment and sale at the time of confirmation of sale. The second objection is that the judgment-debtor has no locus standi whatsoever because in his affidavit in support of the Chamber Summons he does not say that he is the owner of the flat. The second objection can be disposed of very easily. The decree-holder admittedly has attached the so-

called interest of the judgment-debtor in the flat owned by the housing society on the ground that it belongs to him and that the judgment-debtor has interest in it. If that is the basis on which he has proceeded against the judgment-debtor and if that is the ground on which he has not only attached his interest but also sold it, he cannot now turn round and say that because the judgment-debtor is vague in his affidavit as regards his own status vis-a-vis the flat, he has no locus standi whatsoever to take up a contention that his interest can neither be attached nor sold. This contention, therefore, cannot certainly be sustained.

21. Before we discuss the first objection, it would be better if we relate a few facts. The decree-holder obtained a money decree against the judgment-debtor and took out a warrant of attachment of flat No. 9 in Paresh Co-operative Housing Society at Santacruz, Bombay. This flat was attached on August 8, 1970 and a warrant of attachment was served on the judgment-debtor while he was in jail at Rajkot. The decree-holder then offered for sale the flat and a warrant of sale was also issued and after determining the terms of the proclamation, a proclamation of sale was also issued in respect of the flat. At that time also the judgment-debtor was in jail. At that stage of the proceedings the judgment-debtor''s brother Hasmukh Joshi took out a Chamber Summons challenging the execution on the ground that the flat did not belong to the judgment-debtor but belonged to him and that the attachment should be raised. His Chamber Summons was made absolute but in appeal that order was set aside and the matter was remanded back. The judgment-debtor''s brother''s Chamber Summons was finally dismissed on September 30, 1971. It is after that that the judgment-debtor being1 out of jail in, October filed a suit to set aside the decree. He was not successful in his Notice of Motion to prevent the execution. His suit is still pending. The flat was offered for sale again in the meanwhile and at that stage he took out a Chamber Summons praying for the dismissal of the execution application and for setting aside the warrant of attachment and the proclamation of sale on the ground that his interest in the flat of the co-operative housing society was not liable to attachment and sale. It is contended that such a contention as is taken in the Chamber Summons cannot at such a late stage be taken because his contention would be barred by the principle of constructive res judicata. The other learned advocate Mr. Dalai for the appellant relied on two cases of this Court reported in Mahadeo Sunder Mehta Vs. Khanderao Sitaram Tipnis, and Shankar Ramkrishna v. Daga Tanaji (1947) 50 BomL.R 610 . In the former of the two cases Lokur J. was dealing with a proceeding under Order XXI, Rule 66 of the Civil Procedure Code. That was a case where the judgment-debtor failed to appear on receiving a notice issued to him under Order XXI, Rule 66, CPC and after the terms of the proclamation for sale were settled by the Court, he made an application asking for a fresh panchanama and therefore offered all the property to be sold. That application was granted and a fresh proclamation was issued. Thereafter he made an application stating that he was an agriculturist and the proceedings should be transferred to the Collector for sale of the property. The Darkhast was therefore ordered to be transferred to the

Collector. That order was challenged before this Court. Lokur J. relied on Sopana Appa Awatade Vs. Dattatraya Krishnappa Hundekari, where it has been observed that when an order for sale was passed under Order XXI, Rule 64, it was a preliminary order, which may be subsequently modified, if any of the judgment-debtors appears in reply to the notice under Order XXI, Rule 66 and proves that he was an agriculturist. Lokur J. on that basis took a view that the order as to whether the sale was to be held by the Court itself or by the Collector was a judicial order and that it has to be passed after consideration of the question whether any of the judgment-debtors was an agriculturist at the date of the order of sale and when a notice was given to the judgment-debtor under Order XXI, Rule 66, it was his duty to put forward his contention that he was an agriculturist on the date of the order of sale. If he fails to raise such a contention at that time and the Court passes an order that his sale should be held by itself, then that order is binding on the judgment-debtor. In that ease the judgment-debtor had also asked for a fresh panchanama of the property, which application was granted and therefore the proclamation issued. It is in this way that the Court proceedings of sale were allowed to go on for three years thereafter and after that the judgment-debtor came forward with an application that he was an agriculturist. It was held that it was not open to him to subsequently put forward that contention. It is clear that in that case the question as to whether the judgment-debtor was an agriculturist or not was raised. It was not a pure question of law but a mixed question of law and fact. For that purpose evidence ought to be led for finding out whether the judgment-debtor was or was not an agriculturist.

22. A similar question was also raised before Chagla, acting C.J., as he then was, in the other case. The judgment-creditor presented a darkhast for execution of his mortgage decree and a notice was issued to the judgment-debtor under Order XXI, Rule 66 of the Civil Procedure Code. The judgment-debtor failed to appear in answer to the notice and the Court ordered that the proclamation be issued and the sale was fixed on a certain date. On that date the judgment-debtor appeared and applied to the Court that being an agriculturist he should be allowed to satisfy the decree by paying instalments. On the question whether it was open to the judgment-debtor to raise a contention about his status at that stage it was held that as the judgment-debtor had applied after the date of sale was fixed, his status had to be investigated. The principle of constructive res judicata was brought into operation and therefore his application was rejected. In this case also Mahadeo Sunder v. Khanderao Sitaram was referred to. Therefore this was also a case where the status of the judgment-debtor was to be investigated and because he raised there his contention at a late stage it was held that he could not raise such a contention. Now in so far as the facts and circumstances of our case are concerned, we have seen that the judgment debtor was in jail for a long time during the execution proceedings and came out only some time in 1970 and filed a suit. Then he took out the Chamber Summons. We are here concerned with statutory prohibition whereunder neither

the share nor the interest of a member of a Co-operative Housing Society can either be attached or sold. We are, therefore, concerned only with a pure question of law. We have not before us a mixed question of law and fact but even if that is so, we are of the opinion that in a given set of circumstances the judgment-debtor can ask for relief on the ground of his status, if he is entitled to, at any time before the sale is confirmed. Unless the sale is confirmed, it is no sale. After all if judgment-debtors1 are given some benefits and privileges under social and economic legislation, unless the application is vexatious those benefits should not be lightly brushed aside before the sale is confirmed. After all the sale before it is confirmed will be of no use to the auction purchaser; he must have his confirmation certificate. If, therefore, his sale is not confirmed and if the judgment-debtor attempts in a given set of circumstances to reap the benefit of the legislation, he should be allowed to do so. When we have to implement and interpret social legislations, which give social or economic benefits to people, the intention of the Legislature must be given effect to.

23. So far as we are concerned, we have to deal with a pure question of law. The question of investigation here does not arise. If the share or the interest of a member cannot be attached and sold under a decree because of statutory prohibition it just cannot be said that this question cannot be decided because the judgment-debtor has taken such a plea at a late stage. In our case the plea was taken much before the confirmation of sale. The auction-purchaser has neither any right nor can be entitled to unless and until the sale is confirmed. If the sale as well as the attachment are more or less a nullity the Court must take notice of it and must decide that issue.

24. In Aidal Singh and Others Vs. Khazan Singh and Others, the Division Bench of the Allahabad High Court was considering in execution proceeding, a question as to whether an objection that the house belonged to an agriculturist and that the house therefore cannot be attached can be raised. It was observed, and with respect rightly, by the Division Bench that even if an objection is not taken in the execution proceeding but if the Court otherwise becomes cognizant of the fact that the property attached was the house of an agriculturist, it would be its duty to withdraw the attachment. In another case before the Rajasthan High Court the Division Bench also took the view in Mubarak Begam and Another Vs. Sushil Kumar and Others, that if the Court comes to the conclusion that in fact there has been no auction and the sale is a nullity, then in that case the Court would have the power to set aside that sale even though there may be no application under Order XXI, Rule 90. We are also of the view that in proper cases the judgment-debtor certainly can raise an issue of law as in this case if he gets a benefit and protection as a result of the legislation. After all we are living in a socialistic and democratic state. The Constitution lays down that certain benefits should be given to the have-nots and also to the haves. The provision under a social legislation cannot therefore be watered down by irrelevant considerations. In so far as the facts and circumstances of our case are concerned we think that the judgment-debtor has taken an objection and raised a pure question of law in

good time. The contention raised by the other learned advocate Mr. Dalai for the appellant that his objection is barred by the principle of constructive res jucticata, therefore, will be of no use. "When the attachment and sale is null and void, it can be ignored. He can always challenge an attachment, which is a nullity and impeach the same and if in a case he does it properly, he cannot be asked to go out of Court.

25. The judgments in (1) Ganjhu Upendra Singh Vs. Ganjhu Meghnath Singh, and (2) Sundararajulu Naidu v. Papiah Naidu AIR [1938] Mad. 623 dealing with the rights which cannot be alienated under the statute more or less support our view. The Courts have taken the view that if there is a prohibition, it must have its own course. We, therefore, think that there is no substance in this appeal. The appeal is dismissed.

26. Rule in Civil Application No. 3260 of 1972 is also discharged. In view of the circumstances of the case there will be no order as to costs.

Mukhi, J.

27. I agree that this Letters Patent Appeal must be dismissed for the reasons, which have been set out in the judgment of my learned brother Bhole J. which I have had the opportunity of reading, but in view of the importance of the question, which we have had to decide, I would like to make some observations of my own, particularly as the matter concerns what are known as ownership flats in co-operative housing societies formed under the Maharashtra Co-operative Societies Act, 1960.

28. Now, it is a matter of common general knowledge that in popular parlance flats in co-operative housing societies are referred to us "ownership flats" and a person, who "purchases" such a flat is referred to as "a flat owner". Of course, it is implicit that in any event such a flat owner is necessarily to be a member of the Society and continue to remain a member, if he is to be entitled to such rights as may flow from his "ownership" of the Society''s flat.

29. In the matter before us it is substantially clear that what was sought to be attached and sold in execution of the decree was Flat No. 9 in a building belonging to Paresh Co-operative Housing Society Ltd., a Society registered under the Maharashtra Co-operative Societies Act, 1960. It is in my view necessary to, therefore, find out as to what is the legal concept of what is popularly known as an "ownership flat."

30. In Manohar Ramchandra Sarfare Vs. The Konkan Co-operative Housing Society Ltd. and Others, , f.b which was a decision of the Full Bench of this High Court, certain observations were made as to the relationship between a Co-operative Housing Society and its members, to whom the Society had allotted a tenement.

31. It was also observed in that case that the right to occupy a tenement was dependent upon the occupant''s continuing to be a member of the Society.

32. In order to ascertain the legal connotation of expression "flat owner", it is necessary to notice the relationship between the member to whom the tenement has been allotted and the Society and in this context it is appropriate to refer to the observations in the Full Bench decision referred to above, which were made after a reference to the Act, the Rules, and the Bye-laws and regulations of the Society. It was observed (p. 1006) :

The mutual rights and obligations of a co-operative housing society and its members are, therefore, quite different from those of a landlord and a tenant. The relationship is of a special type, which is governed by special laws made for this purpose, viz. the Co-operative Societies Act and the rules, by-laws and regulations made thereunder. Even though, therefore, a member, to whom a tenement is given for occupation, is described in the by-laws and the regulations as a tenant, he is not a tenant in the sense in which this term is used in the Transfer of Property Act or in the Rent Act, nor is the Society his landlord.

33. For the purpose of the present case it is only necessary to notice as to what is the interest of a ''flat owner'' in the tenement, which he is permitted to occupy under the Act and the Rules, as well as the Bye-laws and the regulations of the Society. If a reference is made to the Act, the Rules and the Bye-laws and the regulations of the Society it becomes at once clear that the first and the foremost requirement, or if I may call it a condition-precedent, to any right or the relationship is that the person concerned has to become and remain a member of the Society and in order to become a member of the Society and become eligible for the allotment of a tenement, the person concerned has to obtain five shares of the Society. Rule 10 of the model Bye-laws, which we are told is applicable in the present case, provides that

No person shall exercise the rights of a member of the Society unless he is admitted as such as laid down in By-law No. 6 and holds not less than five fully paid shares in the Society and his name has been entered in the register of shares.

34. The second ingredient is the contribution, which a member has to make either in the form of loan-stock or in the form of deposit and which represents the cost of the tenement, which is to be allotted to him. Such deposit is referred to as a deposit from the member and normally does not carry interest. This amount is shown in the appropriate register against the name of the particular member. It is a matter of common knowledge that the flats in co-operative housing societies1 consist of different accommodations and may be small or large and, therefore, the amounts to be paid by the member as deposit, or towards loan-stock must vary according to the area and sometime other factors, such as the floor, the view and the direction it faces.

35. The third ingredient is that by reason of the membership of the Society and the payment of the deposit with the aggregation of which the building is built or acquired, the member or the "flat owner" becomes entitled to be allotted a

tenement and he then acquires the right to the use of that particular tenement and occupation thereof. This may be called the right of occupation.

36. A reference may be made to a judgment of this High Court in Kaluram Puranmal v. S.S. Malpathak (1971) O.C.J. Suit No. 507 of 1964, decided by Vimadalal J., on September 11, 1971 (Unrep.) in which Vimadalal J. considered the question of ownership in a flat in a co-operative housing society. On a reference to the relevant Bye-laws and to the regulation in Form A he observed as follows:

It is to my mind quite clear that the persons in occupation of the flats pursuant to their being the holders of shares in the said Society are not the owners thereof.

37. Again after referring to the Full Bench decision in Manohar v. Konkan Co.-op. Housing Socy. at p. 1006 Vimadalal J., after noticing that the member was not a tenant nor the Society his landlord but that the relationship between the two was of a special type under the Co-operative Societies Act, rules, bye-laws and regulations made thereunder, stated.

from the judgment it appears that though a member is called a tenant in the bylaws, he has merely a right of occupation of that tenement allotted to him.

38. It would, therefore, appear that the "flat owner" who is necessarily a member of the Society and who has contributed to the1 construction cost of the building by either making a deposit or subscribing to the loan-stock gets in return merely the right to occupation of the particular tenement allotted to him, subject of course to the bye-laws and regulations of the Society. The totality of these three ingredients, which I have referred to, constitute the interest of the '''' flat owner.''''

39. During the course of the hearing it was suggested that the judgment-debtor had an interest in the flat in so far as he had the right to enjoy or occupy it and that this right by itself was without reference to the holding of shares or loan-stock or deposit, saleable property. It was then urged that this saleable property could be attached u/s 60 of the Civil Procedure Code.

40. This contention of the appellant has been rightly rejected by us as would appear from the judgment delivered by my learned brother Bhole J. with which I am in complete agreement.

41. It is appropriate at this stage to mention that the proceedings, which have culminated in this Letters Patent Appeal, would show a peculiar feature in so far as it has been overlooked that the judgment-debtor is not even a member of the Society in which the flat is situate. It is to be noticed that the flat in question i.e. flat No. 9 originally belonged to one Mr. and Mrs. Chande and stood in their names upto November 28, 1971. Thereafter the flat was transferred and the same is standing in the joint names of Smt. Shashikala Harsukh Joshi (wife of the judgment-debtor) and Shri Hasmukh Jadhavji Joshi (brother of the judgment-debtor). This fact has been set out in the affidavit of the judgment-debtor dated

March 28, 1972 in support of the Chamber Summons dated March 28, 1972.

42. If, therefore, the judgment-debtor is not even a member of the Paresh Co-operative Housing Society Ltd. in whose building the flat in question is situate, then it is difficult to understand what interest, far from any saleable property, the judgment-debtor can be said to have in the said flat.

43. It has been suggested that the money for payment of Rs. 18,000 for the "purchase" of the flat from Mr. and Mrs. Chande was provided by the judgment-debtor and the order of the learned Judge of the City Civil Court dated September 30, 1971 made on the Chamber Summons dated September 11, 1970 filed by the judgment-debtor''s brother Hasmukh shows that it was common ground that the amount of Rs. 18,000 was paid by the defendant by cheque out of his own account in the Bank of India. Now, it is obvious that the money was paid to Mr. and Mrs. Chande and by reason of such payment the judgment-debtor may have certain rights in relation to the money but that is not to say that such a payment creates in the judgment-debtor himself an interest in the flat itself. As I have stated, the scheme of the Act, the Rules, and the Bye-laws and regulations of the Society clearly provide that no rights can enure to any person in the property of the co-operative housing society unless and until he is a member and recognised as such by the Society.

44. Thus, we have a position, where the flat in question stands jointly in the name of the judgment-debtor''s wife and the judgment-debtor''s brother who, it would follow and it does not seem to be disputed, are the members of the Society, The judgment-debtor has no shares of the Society, is not a member of the Society and can conceivably have no rights as such against the Society or in relation to the flat.

45. Assuming for argument''s sake that he has a right to occupation of the flat although I am unable to see how any such right can be claimed, and substantiated, it can never be said that such a right to occupation is saleable property within the meaning of Section 60 of the Civil Procedure Code.

46. I may mention that there is one other aspect, which requires to be noticed and that is that under the scheme of the Co-operative Societies Act and as set out in Section 31 of the Act, the share or interest of a member is not liable to attachment or sale under any decree or order of a Court. Section 31 may be reproduced with advantage.

31. The share or interest of a member in the capital of a society, or in the loan-stock issued by a housing society, or in the funds raised by a society from its members by way of savings deposit, shall not be liable to attachment or sale under any decree or order of a Court for or in respect of any debt or liability incurred by the member; and accordingly, neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1920, nor any such person or authority under any corresponding law for the time being in force, shall be entitled to, or have any claim on, such

share or interest.

If, therefore, the interest of the "owner" of a flat in a co-operative housing society is the totality of the ingredients, which I have set out above then it would follow that without a transfer of shares to a third party, such third party cannot acquire any interest in the society''s flat and as already stated in the judgment delivered by my brother Bhole J. the right of occupation cannot be taken in isolation or considered by itself to be ''saleable property'' within the meaning of Section 60 of the Civil Procedure Code. Now if the judgment-debtor had in fact been a member of the Society and had held five shares in his name which is a requirement under the Act, the Rules, and the Bye-laws and regulations of the Society even then without the transfer of the said shares (with the permission of the Society) the rights of the judgment-debtor could not have passed to any third party. It requires to be repeated that Section 31 contains a statutory prohibition to the shares being attached or brought to sale under any decree or order of a Court for and in respect of any debt or liability incurred by the member. Thus the Society can never be called upon to transfer the shares without the application of the member as Transferor.

47. What I have stated above shows that from the very commencement the effort of the appellant to obtain an order of attachment of Flat No. 9 in Paresh Co-operative Housing Society Ltd. and then bring it up to an auction sale was misconceived.

48. In these circumstances it is obvious that the order of attachment and the subsequent auction sale are clearly illegal and can never be sustained. An argument was raised by the appellant that by reason of the application of the doctrine of constructive res judicata the judgment-debtor could not take up the plea that the property, viz. Flat No. 9 in the building owned by Paresh Co-operative Housing Society Ltd. was not liable to attachment u/s 60 of the CPC in the manner done. This argument overlooks the fact that the question whether a flat in a building owned by a co-operative housing society is saleable property and therefore liable to attachment is a pure question of law and, as stated by Vimadalal J. in Kaluram Puranmal v. S.S. Malpathak referred to above, it does not matter if the point has not been pleaded because when it becomes apparent to the Court on the material on record and on a construction of the Co-operative Societies Act, the Rules, and the Bye-laws and regulations of the Society that the attachment is prohibited by law then it perhaps becomes not only appropriate but the duty of the Court to take cognizance of the matter on the basis of the record itself and hold that the attachment was illegal, In (Thakur) Bageshwari Charan Singh Vs. Bindeshwari Charan Singh and Others, it was held that the doctrine of constructive res judicata should not be applied to nullify a prohibition in law. The head note reads as under:

Civil P.C. (1908), Section 11 -Law forbidding doing of certain thing-Failure of defendant to plead in previous suit positive bar does not prevent him in raising it in the subsequent suit.

49. In my view the principle is clear. If the doing of something is prohibited by law and the matter comes to the notice of the Court and no facts are required to be investigated, then the Court cannot shut its eyes and perpetuate an illegality.

50. It is to be noticed that both in Section 60, CPC and Section 31 of the Co-operative Societies Act the words used are "shall not be liable to attachment". This in my view creates a positive prohibition.

51. In a Division Bench decision of this High Court M. and S.M. Rly. Vs. Rupchand Jitaji and Others, it was held while considering Section 60 of the CPC that waiver of benefit thereunder cannot be allowed. This is what was stated in relation to Section 60(1) of the Civil Procedure Code.

...the salary of a servant of a railway company to the extent of Rs. 100 is not liable for attachment. The prohibition of a transfer by a railway servant is based on the ground of public policy, and it is not open to such a person to contract himself out of such a provision or to waive its benefit because the public is interested not only in the performance from time to time of the duties but also in the fit state of preparation of the party having to perform them. (p. 157).

It is obvious, therefore, that when Section 60 of the CPC and Section 31 of the Co-operative Societies Act say that certain properties shall not be liable to attachment, it will not be open to a judgment-debtor to say that notwithstanding the prohibition he would allow the property to be attached or that by not taking up a contention that the property is not liable to attachment it can nevertheless be attached notwithstanding the statutory prohibition. In the result I would dismiss the appeal.

BY THE COURT

52. At this stage an oral application is made by Mr. Dalai for leave to appeal to the Supreme Court. It is rejected.