

(2009) 02 CAL CK 0018

In the Calcutta High Court

Case No : A.S.T. No. 91 of 2008 with C.A.N. No. 5572 of 2008, W.P. No. 334 (W) of 2008

Ranjit Bose and Ors

APPELLANT

Vs

E. and N. F. Railway Credit Co-operative Society Ltd., and
Another

RESPONDENT

Date of Decision : 25-02-2009

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 37
Constitution of India, 1950 — Article 16, 16(1), 16(4), 226, 32
Multi-State Cooperative Societies Act, 1984 — Section 35, 35(3), 42, 42(e), 43
Multi-State Cooperative Societies Act, 2002 — Section 122, 123, 126, 45, 45(5)

Citation : (2009) 02 CAL CK 0018

Hon'ble Judges : Pratap Kumar Ray, J; Manik Mohan Sarkar, J

Bench : Division Bench

Advocate : Anupam Chatterjee, Kishore Mukherjee and Ms. Ramyani Mukherjee, for the Appellant; Jayanta Mitra, Asoke Banerjee, Asis Chakraborty and Ms. Chaitali Bhattacharya for the Respondent Nos. 1 and 2, Ms. Manasi Bhattacharya for the Respondent Nos. 3 to 5, Mr. Sanat Kumar Roy and Dipanjan Datta for the Addition of Parties, for the Respondent

Judgement

Pratap Kumar Ray, J.—Challenging the interim order dated 14th February, 2008 passed in the writ application W.P. 334 (W) of 2008, this appeal has been preferred by one Sri Ranjit Bose, since deceased, who was respondent no.4 in the writ application. The interim order challenged under the said appeal registered as AST 91 of 2008 read such:

"The petitioners are questioning the order of one S.D Indoria, Chief Director (Co-op) in the office of the Central Registrar of Co-operative Societies, dated December 31, 2007 directing the Chairman of the first petitioner not to appoint any employee in the co-operative society during the progress of the election process.

The first petitioner is a multi-state co-operative society governed by the

provisions of the Multi-State Co-operative Societies Act, 2002. Since election of the society was not held for a long time for constituting the board of directors, an order was made by this Court directing the central registrar to take necessary steps for holding the election. There is no dispute that the process initiated by the central registrar is in progress. When the election process was in progress, the society decided to appoint certain persons on temporary basis. Feeling aggrieved, the fourth respondent filed an application intending to initiate arbitration proceedings. He also applied for interim relief. When his applications were pending, the chief director issued the impugned order. The question is whether the chief director was competent to make the order.

While Mr. Bandyopadhyay, senior counsel for the petitioners, argued from day one that the order was not made by the authority as an arbitrator appointed to adjudicate the dispute raised by the fourth respondent, Mr. De, senior counsel for the fourth respondent, contended that the authority made the order only in the capacity of an arbitrator, and hence the petitioners were not entitled to approach the writ court. His contention was that their remedy, if any, was u/s 37 of the Arbitration and Conciliation Act, 1996. For ascertaining whether the order was actually made by the authority as an arbitrator, Ms. Bhattacharyya, counsel for the authorities, was directed to produce the records in original. She has submitted today that she is not in a position to produce the records, but she has received written instructions from the authorities clearly stating that the authority issuing the impugned order did not issue it in the capacity of an arbitrator appointed in any dispute case, but in the capacity of an official in the office of the central registrar.

On these facts, the question has arisen whether the authority was at all competent to make the order. While Mr. Bandyopadhyay has said that the authority had no power to make such an order as he made, Mr. De has submitted that in view of the provisions in s. 122 of the 2002 Act the authority was quite competent to issue the order. He has said that during progress of the election process there was absolutely no justification for the members of the erstwhile board, a defunct one, to go on making appointment, and thus creating an unbearable liability of the society. He has said that at the meeting concerned no item on the agenda was there regarding recruitment of any employee to be appointed in the society. His contention is that documents were fabricated and apparent fraud was committed by the persons concerned. On these facts he argues that the authority was competent to give directions in his administrative capacity.

After going through the provisions in s. 122, I am unable to accept Mr. De's contention. Section 122 empowered the central government to give certain directions to specified multi-state co-operative societies in public interest. The order in question was not issued by the central government. The authority acted completely without jurisdiction. He had no power to give the directions which he gave regarding appointment made by the society. The matter was agitated by

the fourth respondent by initiating a dispute case. A duly appointed arbitrator was to consider the question of making any interim order. A duly appointed arbitrator was to consider the question of making any interim order. These all are my tentative views expressed for the purposes of admission and interim relief, and subject, definitely, to the final opinion to be expressed in the case. On these facts and in the face the provisions of law, I am satisfied that the petitioners have made out a strong prima facie case for admission and stay.

For these reasons, I admit the writ petition and order that during its pendency operation of the impugned order dated December 31st, 2007 shall remained stayed. I however, make it clear that all appointments made by the society and in connection wherewith the impugned order was made shall abide by the result of the writ petition. The respondents shall file opposition within six weeks, as prayed for; reply, if any, shall be filed by one week thereafter. List the writ petition for final hearing after eight weeks."

2. The writ application was moved by E & N F Railway Junior Co-operative Credit Society Limited, a society registered under the Multi State Co-operative Societies Act, 2002 represented by the Chairman and by one Prafulla Kumar Dutta, Secretary/Chief Executive of the said Credit Society as writ petitioners, assailing the decision dated 31st December, 2007 passed by Chief Director (Cooperative) office of Central Registrar of Co-operative Societies, Government of India, Ministry of Agriculture, Department of Agriculture & Cooperation whereby and whereunder the temporary appointments made in total 110 in numbers by the Board of the said Co-operative Society during the time when election process already started for election of the Board of Directors by appointing one Returning Officer to conduct the election in terms of order passed by the High Court at Calcutta in earlier writ petition No.19370 of 2005, was declared as unjustified and violative of free and fair election and with that finding the said officer restrained the Co-operative Society from giving any appointment letter and from appointing during election process. The impugned letter of the Chief Director, Cooperative which was the subject matter of writ application reads such:-

"No.L-11014/41/02-L & M(Pt)

Government of India

Office of Central Registrar of Cooperative Societies

Ministry of Agriculture

Department of Agriculture & Cooperation

Krishi Bhawan, New Delhi

Dated: December 31, 2007

To

The Chairman,

E&NF Railway Junior Cooperative Credit Society Ltd.,
Eastern Railway, DRM Office Building,
Sealdah, Calcutta-700 014

Sub: Appointment of employees in E & NF Railway Junior Cooperative Credit Society Ltd. during the pendency of the election process.

Sir,

It has been brought to the notice of the Central Registrar that the Society has engaged 85 candidates for the post of Record Sorter-cum-Chaser while the election process in the Society is in motion. It is alleged that these appointments have been made after appointment of the Returning Officer to conduct elections of the Society pursuant to the directions y the Hon. High Curt of Calcutta.

2. You are aware that pursuant to the orders of Hon. High Court of Calcutta in writ petition no.19370 of 2005 dated 3.10.2007 the Returning Officer was appointed vide this Office Order dated 16.11.2007 to conduct the elections of members of Board of Directors and office-bearers of the Society. The elections process is going on and the Returning Officer, as understood is in process of finalizing the members list eligible to participate in the election. It has been brought to the notice that the alleged above said appointments have been made after the appointment of the Returning Officer and initiation of the election process. The appointment of such a large number of employees by an out going Board while the election process is on does not seem to be justified and violative of the principle of free and fair election. You are,

therefore, hereby directed to refrain from making any such appointments during the election process if there is any such move on your part.

3. This issues with approval of Joint Secretary (C&C) and Central Registrar of Cooperative Societies.

Yours faithfully, (S.D. Indoria) Chief Director(Co-op)

Copy to: Shri Ranjit Bose, 92, Sonar Bongala D.P. Nagar, Belghoria, Kolkata-700 056"

3. This writ application was opposed at the admission stage but the Learned Trial Judge on 14th February, 2008 admitted it despite the contention raised by the respondents that appointments were per se illegal due to breach of statutory provisions of the concerned Co-operative Act and in particular due to the reason that long back in 2001 practically Board of Directors became a defunct body who had no jurisdiction to take any decision/resolution to appoint said 110 candidates in different posts particularly when already the election process started by intervention of the present appellant and other members of the Society approaching the issue to the High Court at Calcutta in the earlier writ application.

4. As the Learned Trial Judge passed the order of stay of the impugned decision

of the Chief Director (Co-operative), this appeal was preferred for quashing the said order of stay as passed.

5. While hearing the stay application it appeared before us that there was a prima facie case made out to grant stay of the impugned order under appeal. Argument advanced that the Board of the said Society became defunct in view of statutory limitation of its tenure for a period of 3 years as per sub Section 3 of Section 35 of the Old Act of 1984 or under sub Section 5 of Section 45 of New Act, 2002 for 5 years as the case may be, which by any stretch could not be extended for indefinite period till the completion of election and assumption of charge in the office by a new Board. The writ petitioner respondent however, urged that on the strength of proviso of said section, the tenure of the Board is for indefinite period. As the entire lis is centred round the point whether board's life is statutorily limited or indefinite empowering it to take a resolution of appointment of 110 employees, the Court passed an order of stay of the impugned order by hearing the respective parties and on considering their respective stand as taken by filing different affidavits namely application for appropriate order, opposition thereof, and reply etc. by the order dated 26th February, 2008 which reads such:-

"Heard the learned Advocates appearing for the parties.

Challenging the judgement and order dated 14th February, 2008 passed by the learned Trial Judge in W.P. No.334 (w) of 2008, this appeal has been preferred along with the stay application by one of the respondents of the writ application.

The stay application is taken up for hearing.

By the impugned order under appeal the learned trial judge passed an order of stay of the impugned decision of the writ application till the disposal of the writ application and also directed that all appointments made by the Society will abide by the result of the writ application. The impugned decision of the writ application was the decision of Central Registrar of Co-operative Societies as conveyed by a letter of Chief Director (Co-operative) dated 31st December, 2007 whereby and whereunder the E. & NF Railway Junior Co-operative Credit Society, a Multi State Co-operate Society controlled and regulated by the Multi State Co-operative Societies Act, 2002 was directed to refrain from making appointments of large number of candidates totaling more or less 110 as disclosed by the present appellant (in the letter it is mentioned as 85) in terms of the letter of appointment issued by the Secretary of the said Co-operative Society for the reason that already election process was started and, as such, any appointment during such period would be violative of principles of fair election. The impugned decision of the writ application reads such:-

" It has been brought to the notice of the Central Registrar that the Society has engaged 85 candidates for the post of Record Sorter-cum-Chaser while the election process in the Society is in motion. It is alleged that these appointments have been made after appointment of the Returning Officer to conduct elections

of the Society pursuant to the directions by the Hon. High Court of Calcutta.

2. You are aware that pursuant to the orders of Hon. High Court of Calcutta in writ petition NO.19370 of 2005 dated 3.10.2007 the Returning Officer was appointed vide this Office Order dated 16.11.2007 to conduct the elections of members of Board of Directors and office bearers of the Society. The elections process is going on and the Returning Officer, as understood is in process of finalizing the members list eligible to participate in the election. It has been brought to the notice that the alleged above said appointments have been made after the appointment of the Returning Officer and initiation of the election process. The appointment of such a large number of employees by an out going Board while the election process is on does not seem to be justified and violative of the principle of free and fair election. You are, therefore, hereby directed to refrain from making any such appointments during the election process if there is any such move on your part.

3. This issues with approval of Joint Secretary (C&C) and Central Registrar of Cooperative Societies."

6. The learned trial Judge passed an order on 14th February, 2008 the ordering portion of which read such:

" For these reasons, I admit the writ petition and order that during its pendency operation of the impugned order dated December 31st, 2007 shall remain stayed. I, however, make it clear that all appointments made by the society and in connection wherewith the impugned order was made shall abide by the result of the writ petition. The respondents shall file opposition within six weeks, as prayed for, reply, if any, shall be filed by one week thereafter. List the writ petition for final hearing after eight weeks..."

It has been submitted by the learned Advocate for the appellant while moving the stay application that the appointment letters were issued by the Secretary of the said Co-operative Society on the basis of the resolution of the Board of Directors dated 1st October, 2007 whereby the Board of Directors created temporary posts of Record Sorter-cum- Chaser (Semi-Clerical duties) in the scale of Rs.2750-70-3800-75-4400. The learned Advocate for the appellant submits that there was no agenda of the meeting of the Board of Directors on 1st October, 2007 about creation of any post and consideration of the appointment therein. It is further contended that Board of Directors is not the competent authority to consider any decision of appointment and to issue any appointment letter and Secretary of the said Society is not a competent person to issue any appointment letter as the power vested with the Chief Executive Officer of the said Co-operative Society in terms of Section 52(f) of the said Co-operative Societies Act, 2002. It has been further urged that the Board of Directors is a defunct body in view of the very fact that last election held in 1998 when the Board of Directors came into power that is ten years back and as per the statutory provision even if the Co-operative Societies Act, 2002 is applied, tenure

is only for a period of five years in terms of Section 45(5) of the said Co-operative Societies Act, 2002 which earlier was for 3 years only. It has been further submitted that a defunct body has no power to take any decision of appointment and further more during election process by issuing the appointment letters they have practically burdened the Society to bear the expenditure more or less 80 lacs per year whereas the Society is earning a profit of more or less 5 to 6 lacs per year and as such, it is submitted that a decision for appointment also was prejudicial to the interest of the Society.

The learned Advocate for the respondents/writ petitioner has opposed the stay application by contending, inter alia, that in terms of proviso of Section 45(5), the Board of Directors could not be considered as a defunct body and their life statutorily was extended till their successors are elected and/or nominated under the Act. It has been further contended that as per the bye-laws the Board of Directors is entitled to issue appointment letter to the officers concerned. It is further urged that even if the appointment letter was bad in law as there is a scope for raising dispute under the said Co-operative Societies Act, the writ petitioners ought to have raised a dispute case before the appropriate forum.

Having regard to the rival contentions of the parties, we are of the view that for considering the stay application we need not to go into the details which to be considered at the time of final hearing of the appeal save and except the relevant statutory provisions in the field.

From the very nature of the impugned order it appears that the decision of Central Registrar of Co-operative Societies as conveyed by Chief Director (Co-operative) dated 31st December, 2007 was stayed by the learned trial Judge on the ground that the gentleman has no authority to issue such a letter under the statute and directed that appointments, if any, should abide by the result of the writ application. From the statute, namely, Multi State Co-operative Societies Act, 2002 for brevity referred to as Co-operative Societies Act, 2002, it appears that the Chief Executive Officer is the competent authority to deal with any appointment of the post in the Multi State Co-operative Society in accordance with the bye-laws. Section 52 Clause (f) reads such:-

"52. The Chief Executive shall under the general superintendence, direction and control of the board, exercise the powers and discharge the functions specified below, namely:-

..... (f) making appointments to the posts in the Multi-State cooperative society in accordance with the bye-laws"

7. Under the bye-laws of the Society it appears that Clause 46 is the relevant provision whereby Board of Directors' power has been mentioned. Under Clause 45 sub-clause (vi) the Board of Directors may appoint salaried and non-salaried officers and may define their duties. The relevant provision of Clause 45(vi) of bye-laws reads such:-

"45. Powers of Board of Directors:

..... (vi) To appoint salaried or non salaried officers and to define their duties"

On a reading of Section 52(f) of the Co-operative Societies Act, 2002 and the Clause 45(vi) it appears that the Chief Executive Officer is the sole authority to make appointment to the post the category of which has not been at all defined, as such, it will mean the posts of salaried or non-salaried officers as well as the general employees of the Societies. The resolution of the Board of Directors was relating to creation of temporary posts of 110 which are semi-clerical posts and appointment letters were issued accordingly by the Secretary of the Co-operative Society. Even if there is a valid resolution of the Board of Directors on 1st October, 2007 for argumendo, still then the Secretary of the said Cooperative Society under the statute got no power as it appears prima facie from Section 52(f) of the said Co-operative Societies Act, 2002. Besides, it appears that term of elected members of the Board of a Cooperative Society even if the Co-operative Societies Act, 2002 is applied in the instant case is not exceeding five years from the date of election in terms of Section 45(5). Section 45(5) reads such: -

"45(5)- The term of office of the elected members of the board shall be such, not exceeding five years from the date of elections, as may be specified in the bye-laws of a multi-state co-operative society.

Provided that elected members shall continue to hold office till their successors are elected or nominated under the provisions of this Act or the rules or bye-laws and assume charge of their office."

Under the proviso of the said Section the tenure of the office not exceeding five years cannot be extended and the logical meaning of the proviso would be that within five years period if election is held before completion of five years, the elected members of the Board will continue to hold office till their successors are elected and/or nominated. But it does not mean that even the election is held beyond the five years period, the elected members of the Board will continue for indefinite period which practically happened in the instant case as admittedly the Board of Directors were elected in the year 1998 and thereafter no election has been held as yet which means that for the last ten years the old Board of Directors are continuing which is not the purpose of the statutory provision u/s 45(5) proviso which has been taken resort to, for the purpose of retaining power by the Board of Directors as has been submitted by the learned Advocate for the respondents/writ petitioners and we are of the prima facie view now that Section 45(5) is squarely attracted herein to consider the issue as to whether the Board became the functus officio after completion of five years period with effect from the year 1998 that is exactly in the year 2003. If it is considered at the time of hearing of the appeal that the Board of Directors practically became a defunct body, naturally the effect would be that their decision/resolution dated 1st October, 2007 also was not legally maintainable whereby they created posts of

110 person. Now, we are prima facie satisfied that the appointment letters ought not to have been issued by Secretary of the Co-operative Society and also prima facie satisfied by application of Section 45(5) on issue of tenure of the elected members of the Board to the extent of five years only. Beside during election process whether without any specific agenda said Board is empowered to take a major policy decision of creation of posts for appointment of so many candidates, which to be addressed, when appeal to be heard.

Having regard to such, we may prima facie conclude subject to final hearing of the appeal that the appointment letters were dehors of the statutory provision. Now the question is, if any appointment letter is dehors of statutory provision and effect of such appointments is restrained by the impugned decision dated 31st December, 2007 communicated by the Chief Director (Co-operative), whether writ court would pass any stay of the impugned decision, which as a result of stay would revive the alleged illegal order of appointment. The answer has been given by the Apex Court in the case Chandra Singh vs. State of Rajasthan, reported in (2003) 6 SCC 542 at para 43, a judgement of Division Bench comprising of Three Hon'ble Judges of the Apex Court, by referring the earlier views expressed in the case S.D.S Shipping (Pvt.) Ltd. vs. Joy Container Services Company (Pvt.) Ltd. reported in 2003(4) SC 44 holding, inter alia, that the High Court and the Apex Court when exercising power under Article 226 or Article 32 of the Constitution of India as the case may be, may not strike down any illegal order although it would be lawful to do so, when it is opposed to public policy or a case where quashing of an illegal order would revive any illegal order. Full Bench of Kerala High Court considered that issue in the year 1968 in the case A.M. Mani vs. Kerala State Electricity Board, reported in A.I.R 1968 Ker 76(F.B) at page 79 para 8 of the said report by holding that no writ to be issued, the effect of which would be nothing but to perpetuate the illegal order. Similar view has been expressed by the Division Bench of Patna High Court in the case Devendra Prasad and Others Vs. State of Bihar and Another, by holding that the writ jurisdiction should not be exercised to quash an illegal order, the effect whereof would be to revive another illegal order.

Having regard to those settled legal positions, we are of the prima facie view that due to stay of the impugned decision as passed by the learned trial Judge on the logic that it was issued by a person having no authority, which means an illegal order, the effect has been withdrawal of ban to implement the appointment decision as taken by the said Board and the effect of the appointments made by the Secretary as well as resolution of the Board of Directors regarding creation of the posts which prima facie was done on breach of statutory power. Hence, we are of the view that there should be a stay of the impugned order under appeal till the appeal is finally heard by us, by applying the legal tests as observed and accordingly, there will be a stay of impugned order under appeal, till appeal is heard finally.

Having regard to the very nature of the issue, we are of the view that the writ

application should be disposed of along with the appeal. Accordingly, the writ application is taken up in our list for hearing along with the appeal itself as while disposing of the appeal, we have to consider the matter on merit touching the issue involved in the writ application.

Let there be an affidavit-in-opposition of the writ application by two weeks from date, reply thereto, if any, by one week thereafter and those to be annexed in the informal paper books for which a direction is made by us for submitting informal paper books by four weeks from date.

As all parties are appearing, service of notice of appeal and compliance of other formalities stand dispensed with.

Let the appeal be posted for hearing four weeks hence.

The stay application accordingly stands disposed of with the aforesaid findings by granting stay of impugned judgment/order under appeal.

Stay of this order as prayed for by Mr. Kalyan Bandopadhyay, learned Senior Advocate stand refused."

8. By the said order dated 26th February, 2008 the writ application was also directed to be heard along with appeal and parties consented to such as the respective parties filed different affidavits disclosing their stand. Court further directed in the said order to file respective opposition of writ application and reply thereof and to submit those in the paper book by dispensing with notice of appeal and other formalities as required for hearing of the appeal.

9. Accordingly, concerned appeal and the connected writ application both were heard on diverse dates.

10. Along with this appeal another appeal was heard being AST no.90 of 2008 arose out of rejection of the writ application W.P. No.2367 (W) of 2008 moved by the present appellant and others praying, inter alia, direction of the High Court for expeditious completion of election as the Returning Officer was causing delay to complete it. However, Learned Trial Judge rejected the said writ application.

11. Time to time, different orders have been passed considering the interest of democratic norms of a Co-operative Society to complete the Voter List by appointing a Special Committee consisting of three Learned Advocates appearing in the matter on behalf of respective parties before us and the Learned Advocate appeared on behalf of the Returning Officer. Committee of Advocates after much labour completed the voter list. The Court in the said appeal directed Returning Officer to declare the election schedule. It was done in December, 2008 fixing the election programme. The issue therein involved and the election process, to be dealt with while deciding the said appeal. This fact is mentioned herein in this appeal for the reason that election of the Co-operative Society still is in uncertain stage as the Returning Officer as yet despite submission of election programme could not complete the final publication of voter list for which we are hearing one

contempt application as has been filed by the present appellant in the said appeal.

12. During pendency of hearing of this appeal, the sole appellant Ranjit Bose ceased to be the member of the Co-operative Society as he retired from service. In his place, other members existing prayed for continuation of the appeal by filing application for addition of parties in the appeal and on consent of the parties said application was considered by the order dated 12th May, 2008 which reads such:-

"The application for addition of parties, being CAN 2435 of 2008 is taken up for hearing. The applicants are members of the E. & N. F Railways Junior Co-operative Credit Society Limited and they have interest in the lis.

Learned Advocate appearing for the Board whose election was held long back in the year 1998 being respondent nos.1 and 2, has raised no objection.

The application for addition of parties is allowed.

The application for transposition, being CAN 2434 of 2008 is taken up for hearing.

Leave is granted to the added parties to file Supplementary Affidavit in support of their transposition application.

The matter is posted on Wednesday next (14.5.2008) at 2 PM as first item.

On the next date, as fixed, the respondent nos.4 and 5 are directed to submit the complete voters list before this Court and to produce all the records connected therewith."

This appeal has been continued by the added appellants.

13. From the respective affidavits filed by the parties namely the writ application, opposition, reply, application for appropriate order, opposition, reply and memo of appeal the following facts are admitted.

The co-operative Society is a credit Co-operative Society who lends money to the members. The nature of the society being a Multi State Co-operative Society being controlled by Multi State Co-operative Society Act, 1984 earlier referred to as Old Act which stood repealed in view of coming into effect the Multi State Co-operative Societies Act, 2002, earlier referred to as New Act.

14. Section 126 of the Multi State Co-operative Societies Act, 2002, hereinafter for brevity referred to as Act, 2002 saved different action under Multi-State Co-operative Societies Act, 1984 which read such:-

"126. Repeal and saving.-

(1) The Multi-State Co-operative Societies Act, 1984 (51 of 1984) is hereby repealed.

(2) Without prejudice to the provisions contained in the General Clauses Act,

1897 (10 of 1987) with respect to repeals, any notification, rule, order, requirement, registration, certificate, notice, decision, direction, approval, authorisation, consent, application, request or thing made, issued given or done under the Multi-State Co-operative Societies Act, 1984 (51 of 1984) shall, if in force at the commencement of this Act, continue to be in force and have effect as if made, issued, given or done under the corresponding provisions of this Act.

(3) Every Multi-State Co-operative Society, existing immediately before the commencement of this Act which has been registered under the Co-operative Societies Act, 1912 (2 of 1912) or under any other Act relating to co-operative societies in force, in any State or in pursuance of the provisions of the Multi-unit Co-operative Societies Act, 1942 (6 of 1942) or the Multi-State Co-operative Societies Act, 1984 (51 of 1984) shall be deemed to be registered under the corresponding provisions of this Act, and the bye-laws of such society shall, insofar as they are not inconsistent with the provisions of this Act, or the rules continue to be in force until altered or rescinded.

(4) All appointments, rules and orders made, all notifications and notices issued and all suits and other proceedings instituted under any of the Acts referred to in sub-section (1) shall, insofar as they are not inconsistent with the provisions of this Act, be deemed to have been respectively made, issued and instituted under this Act, save that an order made canceling the registration of a Multi-State

Co-operative society shall be deemed, unless the society has already been finally liquidated, to be an order made u/s 86 for its being wound up.

(5) The provisions of this Act shall apply to-

- a) any application for registration of a Multi-State Cooperative society;
- b) any application for registration of amendment of byelaws of a Multi-State co-operative society,

pending at the commencement of this Act and to the proceedings consequent thereon and to any registration granted in pursuance thereof.

(6) Save as otherwise provided in this Act, any legal proceeding pending in any court or before the Central Registrar or any other authority at the commencement of this Act shall be continued to be in that court or before the Central Registrar or that authority as if this Act had not been passed."

15. It is an admitted position that under the old Act of 1984, election of the present Co-operative Society held in the year 1998 for constitution of Board of Directors. Life of the said Board was for 3 years with effect from 9th September, 1998 when such Board assumed charge under sub Section 3 of Section 35 the old Act. Sub Section 3 of Section 35, stood amended by extending the tenure maximum 5 years by section 45 sub section 5 of Act, 2002. The said Co-operative Act, 2002 got its effect from 19th day of August, 2002 by notification No. GSR./571(E) dated 16th August, 2002. Before 19th August, 2002 accordingly

the life of the present Board of Directors who are still functioning ended in terms of sub Section 3 of Section 35 of said old Act, 1984 subject to proviso which is the nucleus of lis to identify the tenure of the Board.

16. Learned Advocate for the appellant submits that under sub Section 3 of Section 35 of Co-operative Act, 1984, the tenure of the Board was for 3 years and by proviso the life of the Board could not be extended for an indefinite period to frustrate the main object and purpose of the Act. As a counter of the said point it is the submission of the respondent writ petitioner that life of the board who assumed office in the year 1998 though admittedly was for a tenure of 3 years under the old Act, 1984, but having regard to the proviso of sub Section 5 of Section 45 of Act, 2002 read with sub Section 3 of Section 35 of Act, 1984, the elected members are continuing to hold office till their successors are elected or nominated under the provision of the said Act and assume charge of their office and as such when the new Act came into effect from 19th August, 2002 the life of the present Board of Directors continued by dint of the said proviso for an indefinite period.

17. It is the contention of the appellant that beside the tenure issue as raised and thereby Board became a defunct body, when the election process already started, the Board had no power and jurisdiction to appoint 110 persons as temporary staff and particularly when High Court in earlier writ application directed the Returning Officer to complete the election of new Board of Directors. It has been further contended that the appointment decision/resolution as taken was not done following the statutory provision of said Co-operative Society Act, 2002 as under the provision of the said Act, bye-laws and Rules framed thereon it is the Chief Executive Officer u/s 52 of the said Act of 2002 who was empowered to appoint employee in the posts concerned in the Multi State Cooperative Society. Board has no function to exercise said power of the Chief Executive Officer as the function of the Board and the Chief Executive Officer have been specified in the Act itself. In support of such, the provisions of Section 49 and 52 have been referred to from Act, 2002, which reads such:-

"49. Powers and functions of board.-

(1) The board may exercise all such powers as may be necessary or expedient for the purpose of carrying out its functions under this Act.

(2) Without prejudice to the generality of the foregoing powers, such powers shall include the power to admit members;

b) to interpret the organisational objectives and set up specific goals to be achieved towards these objectives;

c) to make periodic appraisal of operations;

d) to appoint and remove a Chief Executive and such other employees of the society as are not required to be appointed by the Chief Executive;

- e) to make provisions for regulating the appointment of employees of the Multi-State Co-operative society and the scales of pay, allowances and other conditions of service of, including disciplinary action against, such employees;
- f) to place the annual report, annual financial statements, annual plan and budget for the approval of the general body;
- g) to consider audit and compliance report and place the same before the general body;
- h) to acquire or dispose of immovable property;
- i) to review membership in other co-operatives;
- j) to approve annual and supplementary budget;
- k) to raise funds;
- l) to sanction loans to the members; and
- m) to take such other measures or to do such other acts as may be prescribed or required under this Act or the bye-laws or as may be delegated by the general body.

52. Powers and functions of Chief Executive:- The Chief Executive shall under the general superintendence, direction and control of the board, exercise the powers and discharge the functions specified below, namely:-

- (a) day-to-day management of the business of the Multi-State co-operative society;
- (b) operating the accounts of the Multi-State co-operative society and be responsible for making arrangements for safe custody of cash;
- (c) signing on the documents for and on behalf of the Multi-State co-operative society;
- (d) making arrangements for the proper maintenance of various books and records of the Multi-State cooperative society and for the correct preparation, timely submission of periodical statements and returns in accordance with the provisions of this Act, the rules and the bye-laws;
- (e) convening meetings of the general body of the Multi-State co-operative society, the board and the Executive Committee and other committees or sub-committees constituted under sub section (1) of section 53 and maintaining proper records for such meetings;
- (f) making appointments to the posts in the Multi-State cooperative society in accordance with the bye-laws;
- (g) assisting the board in the formulation of policies, objectives and planning;

- (h) furnishing to the board periodical information necessary for appraising the operations and functions of the Multi-State co-operative society;
- (i) appoint the person to sue or be sued on behalf of the Multi-State co-operative society;
- (j) present the draft annual report and financial statement for the approval of the board within thirty days of closure of the financial year;
- (k) performing such other duties, and exercising such other powers, as may be specified in the bye-laws of the Multi-State co-operative society."

18. This point has been countered by the respondents writ petitioners by contending that Secretary of the Board is the Chief Executive Officer u/s 51 where Chief Executive Officer has been defined as any officer under whatever designation it may be called appointed by the Board as a full time employee. It is further contended that u/s 49 of the Act, 2002 the Board got the power under sub Section 2(e) to make the provision for regulating the appointments, fixing the pay scale and others, as such the decision taken by the Board to appoint 110 employees on consulting Job Analysis committee who submitted a favourable report, was not bad in law. The Learned Advocate for the appellant further has argued that such appointment of 110 temporary appointees without following any recruitment procedures and without taking care of the financial burden of the Society was absolutely illegal and on that context in their affidavit it has been disclosed that the Co-operative Society would suffer loss on account of payment of salary, allowances and benefits to the appointees concerned as already 134 employees are working in the Co-operative Society and additional 110 employees if are appointed it would cause a burden to the society. This point has been countered by the respondent by contending, inter alia, that a committee was set up to identify the viability and the economic condition of the Society to appoint and as per their opinion matter was resolved taking a decision for appointment and it was justified.

19. The appellant further has urged that as the Board became a defunct body and even on application of said proviso, tenure could not be extended for an indefinite period as the proviso should be interpreted in the angle of democratic norms of setting up of a Co-operative Society and election of it by the members thereof, the action itself was illegal and per se void. Further argument advanced that applying the principle of de facto doctrine action could not be saved though learned Advocate for the respondents contended otherwise about applicability of said de facto doctrine.

20. On behalf of the appellants following judgements have been referred to in support of their respective contentions as raised:-

- i) Pulin Behari Das vs. King Emperor reported in 15 CLJ 517
- ii) Rabia Bai Vs. The Custodian-general of Evacuee Property,

- iii) Pushpadevi M. Jatia Vs. M.L. Wadhavan, Addl. Secretary, Government of India and Others,
- iv) The Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another,
- v) Central Bank of India Vs. C. Bernard,
- vi) Krishna Kishore Firm Vs. The Govt. of A.P. and others, .
- vii) B.C. Chaturvedi Vs. Union of India and others,
- viii) U.P. State Road Transport Corporation and Others Vs. Mahesh Kumar Mishra and Others,

21. On behalf of the respondents the following judgements have been relied upon:-

- (i) When provisions are clear and unambiguous Court have to give its full effect, reference: AIR 2003 SC 2103
- (ii) Proviso of sub Section 5 of Section 45 is a substantive provision itself as legislature did not want to keep in vacuum the operation of Board. Ref: Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others, .
- (iii) On effect of proviso. Ref. Kedarnath Jute Manufacturing Co. Vs. Commercial Tax Officer, Calcutta and Others, , S. Sundaram Pillai and Others Vs. `R. Pattabiraman and Others,
- (iv) On the point that existing Board will continue to hold office. Ref.: Grundt vs. Great Boulder Proprietary Gold Mines Ltd. reported in 1948 All ER 21, Lalchand Mengraj & Ors. vs. Shree Ram Mills Ltd. & Ors. reported in (1968) 38 CC 606, Hungerford Investment Trust Ltd., Re: Turner Morrison & Company Ltd. reported in ILR (1972) CAL 286 at page 374-377
- (v) Writ court cannot travel beyond pleading. Ref: Bharat Singh and Others Vs. State of Haryana and Others,

22. Having regard to the rival contention of the parties the points emerge for our adjudication are to this effect:-

- i) What is the conceptual meaning and impact of the proviso of sub Section 5 of Section 45 of the Act, 2002 which is pari materia with proviso of Section 35(3) of Act, 1984?
- ii) What is the effect of deletion of provision u/s 48 of Act, 1984 which empowered Registrar to appoint an administrator on the ground of default by the Board of Directors, in the New Act of 2002?
- iii) Whether the life of the Board of Directors of the year 1998 got an extension of life for an indefinite period in terms of said proviso till the assumption of

charge of office by a new Board of Directors after election and effect of Absurdity Concept under statutory interpretation in this field?

iv) Whether the action of the said Board of Directors could be saved by applying the defacto doctrine so far as appointment issue is concerned, the effect of which was restricted by the impugned decision of the writ application?

v) Whether the impugned decision of the writ application should be interfered with having regard to the principle that "even if impugned order is illegal, it should not be quashed by writ Court, if due to quashing of impugned order, another illegality is revived?

vi) Whether the Court under the factual situation would allow revival of another illegal action by a defunct body namely the Board herein ?

vii) If the answer goes against the Board that by application of the said proviso of sub Section 5 of Section 45 of Act, 2002 or by sub Section 3 of Section 35 of Act, 1984, the tenure of the Board could not be extended and its life ended accordingly, then what appropriate order could be passed in the writ application and in this appeal, by considering all factual matrix of the case and as to whether this Court would be competent to pass any order appointing an administrator and/or Special Officer of the Court to deal with day to day administration for ends of justice.

23. Point no.1 to 3 are nucleus of the lis namely when u/s 35 of the old Act, 1984 tenure of the elected members of the Board fixed as 3 years, by proviso of sub Section 3 life of said members whether could be extended indefinitely till another new Board assumes office. The similar provision on repeal of the said Act, 1984 is existing in Section 45 sub Section 5 and the proviso thereof. Section 35(3) of the old Act, 1984 read such:-

"35(3) The term of office of the elected members of the board shall be such not exceeding three years from the date of election, as may be specified in the bye-laws of a Multi-State Co-operative Society.

Provided that the elected members shall continue to hold office till their successors are elected or nominated under the provisions of this Act or the rules or the bye laws and assume the charge of their office."

Section 45(5) of the new Act, 2002 read such:

" 45(5) The term of office of the elected members of the board shall be such, not exceeding five years from the date of elections as may be specified in the bye-laws of a multi-state co-operative society:

Provided that elected members shall continue to hold office till their successors are elected or nominated under the provisions of this Act or the rules or bye-laws and assume charge of their office."

24. It is the contention of the learned Advocates for the writ petitioners/

respondents Mr. Jayanta Mitra, learned Senior Advocate that by proviso of sub Section 5 of Section 45 which is *pari materia* with Section 35, sub Section 3 of Act, 1984, legislature intended that there should not be any vacuum in the operation and working of the Board and the said proviso practically a substantive provision by extending the life in the manner prescribed, though some time for such interpretation, life of Board becomes indefinite. Reliance has been made to the judgements *Kedarnath Jute Manufacturing Company Limited (supra)*, and *S. Sundaram Pillai Kousalaya Devi Murugesu Mudaliar vs. Dhanalakshmi Ammal Thahira Beevim (supra)*. Learned Advocate for the appellant has relied upon the judgement *S. Sundaram Pillai (Supra)* to counter the argument of the writ petitioner respondent.

25. In this present statute i.e. Co-operative Societies Act, 2002 as well as the old statute 1984 "proviso" whether could be interpreted as a substantive provision independently or it could be read as a provision explaining certain situation of main enactment, now to be answered.

26. To answer that issue the statements of objects and reasons of Multi- State Co-operative Societies Act, is very important. The statement of objects of the statute could be an aid to interpret a statutory provision.

27. Statement of objects and reasons of said Act, 2002 read such, which practically the object and reasons of the earlier Act, 1984.

"The Central Government enacted the Multi-unit Co-operative Societies Act, 1942 to facilitate the organisation, administration and functioning of co-operative societies with objects not confined to one State and serving the interests of members of such societies from more than one State. A number of national level co-operative societies and federations, promoted by co-operatives in the country had come up with the assistance of the Central and State Governments. The provisions in the co-operative laws in different states governing these Multi-State co-operative societies varied from one another. The lack of uniformity and inadequacies in the then existing arrangement rendered it necessary to replace the Multi-unit Co-operative Societies Act, 1942 by a common comprehensive Central legislation, namely, the Multi State Co-operative Societies Act, 1984 providing for a central authority to be responsible for their registration, promotion and supervision.

2. In view of the increasing demand of co-operative societies for more autonomy and democratic management with less control from the Central or State Government, a Committee under the Chairmanship of Choudhary Brahm Perkash was set up. The report of the said Committee suggested a model co-operative law. Based on the said report, it is proposed to replace the existing Multi State Co-operative law. Based on the said report, it is proposed to replace the existing Multi-State Co-operative Societies Act, 1984 by enactment of the proposed legislation, namely, the Multi State Cooperative Societies Bill, 2000.

3. The object of this Bill is to remove the restrictive provisions in the existing

Multi-State Co-operative Societies Act, 1984 in order to provide functional autonomy and democratic management of Multi-State Cooperative societies. This is being ensured by deleting the provisions of the existing Act relating to restrictions on the term of office bearers of multi- State co-operative societies, prior approval of the Central Registrar for amalgamation, and for transfer of assets and liabilities or division of multi- State co-operative societies in which not less than fifty one per cent of the paid up share capital or of total shares is held by the Central Government. This has been done in order to safeguard public interest.

4. In order to ensure financial management by the co-operative societies themselves, formation of subsidiary institutions by the cooperatives, concept of federal co-operative, raising of resources by receiving deposits, raising loans and grants from external sources in accordance with its bye-laws and to invest in the shares, securities or assets of any other institution without the previous approval of the Central Registrar, have been provided in the Bill.

5. The settlement of dispute is proposed by a quasi-judicial authority, namely, the Co-operative Disputes Settlement Authority replacing the existing system of such settlement by the Central Registrar. It is envisaged that by this system the settlement of disputes would be quicker and more judicious.

6. In order to ensure minimum control by the Central or State Governments in the management of Multi-State co-operative societies and to depoliticise their management, it has been proposed in the Bill that a Minister in the Central Government or State Government shall not be eligible to hold office of chairperson or vice chairperson in such societies. The powers of the Central Government to exempt any Multi-State Cooperative society from the provisions of the At or rules have been withdrawn.

7. In order to empower members of such societies and to ensure their active participation in management, adequate provisions have been made in the Bill for filing a complaint by a member for prosecution of offences, access to information and disqualification for membership on account of non-attendance of three consecutive general body meetings or failure to use services provided by a Multi-State co-operative society to the minimum level as provided in the bye-laws of such society.

8. The bill seeks to achieve the above objects."

28. Section 45 sub Section 5 specifies the tenure as not exceeding 5 years by using the word "shall". The two words "shall" and "not exceeding" are indicative of mandatory provision declaring the term of office of elected members as 5 years maximum, though the proviso speaks that the elected members shall continue till a new body assumes charge. From the said proviso it appears that continuation of the elected members after expiry of 5 years period has been subjected to holding of election of a new body and assumption of charge thereof. The legislature practically intended that election must be held by the Board itself

within the tenure of the Board. Considering the situation that if a Board of Directors is negligent to complete the election, sub Section 6 was enacted which provides power to the Central Registrar to hold the election within a period of 90 days from the date when such election became due.

29. There is a statutory mandate directing to conduct election by the Board in terms of Schedule of Multi-State Co-operative Societies Rule, 2002 wherein under clause-A it is provided that the Board of Directors in office shall meet atleast 60 clear days in advance of the date of expiration of its term and by resolution determine the date, time and place for convening a general body meeting for the conduct of election of its successor Board. Under Clause- b of the said Schedule such decision is required to be sent forthwith to the Central Registrar who under Clause-c of the said schedule will appoint a Returning Officer for the purpose of holding election.

30. The interpretation of proviso practically a complex problem. It depends on different determinants namely, the reflection of statutory provisions, the purpose and object of the statute, the remedial measures by proviso as intended to be achieved etc. Different judgements in this field interpreting "proviso" may be referred to.

31. In the case Abdul Jabar Butt Vs. State of Jammu and Kashmir, while considering the Section 8(1) and its proviso of the Jammu and Kashmir Preventive Detention Act, the Court held "in the first place it is a fundamental rule of construction that a proviso must be considered in relation to the principle matter to which it stand as a proviso. Therefore, the proviso in question has to be construed harmoniously with the provision of sub Section (1) to which it is a proviso and the direction not to communicate the grounds should be issued as soon as may be."

32. In the case Corporation of City of Toronto vs. A.G for Canada (1946) AC 32, however, the Court held:

"The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. The territory of a proviso, therefore, is to carve out an exception to the main enactment and exclude something which otherwise would have been within the section. It has to operate in the same field and if the language of the main enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that it has that as its necessary effect."

33. The Craies on statutory interpretation, 5th Edition page 201-202 speaks to this effect:-

"The effect of an excepting or qualifying proviso, according to ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enactment therein, which but for the proviso would be within it: and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

34. In the case Rhonda Urban Council vs. Taff Vale Railway Company reported in (1909) AC 253, the Court held as follows:

"It is true that the section is framed as a proviso upon preceding sections. But it is also true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before."

35. It has been observed thereto further:-

"The law with regard to a proviso is well settled and well understood. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But, provisos are often added not as exceptions or qualifications to the main enactment but as saving clauses in which cases they will not be construed as controlled by the section."

36. In the case T. Devadasan Vs. The Union of India (UOI) and Another, wherein it was the stand of the petitioner that the carry forward rule relating to the vacancy for Schedule Cast & Tribes not filled in one year, would swell the reservation to SC/ST to 65% causing deprivation of his right under Article 16(1) of the Constitution of India. The respondent justified the carry forward rule under Article 16(4) of the Constitution of India. Rejecting the contention of the respondent. The Court observed:

"this Court has already held that clause (4) of Article 16 is by way of a proviso or an exception to clause (1). A proviso or an exception cannot be so interpreted as to nullify or destroy the main provision. To hold that unlimited reservation of appointments could be made under clause (4) would in effect destroy the guarantee contained in clause (1) or at best make it illusory."

37. But the said view of the majority in Debdasan (Supra) was over ruled by the majority in State of Kerala and Another Vs. N.M. Thomas and Others, which subsequently got approval by a majority of nine Judges Bench in Indra Sawhney vs. Union of India reported in 1992 (Supple) 3 SCC 217 by holding that Clause 4 of Article 16 was not an exception to Clause 1 of Article 16.

38. In the case Commissioner of Income Tax Kerala and Coimbatore Vs. Krishna Warriar, proviso (b) to Section 4(3) (i) of the Income Tax Act, 1922 on point of tax exemption considered by the Apex Court. The view as follows:-

"It is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main section. Generally the

natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso: but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provision but is in itself a substantive provision. In the words of Maxwell:

"The true principle is that the sound view" of the enacting clause, the saving clause and the proviso taken and construed together is to prevail."

If business is property and is held under trust wholly or partly for religious or charitable purposes, it falls squarely under the substantive part of clause (I) and in that event clause (b) of the proviso cannot be attracted, as under that clause of the proviso, the business mentioned therein is not held under trust but one carried on behalf of a religious or charitable institution."

39. In the case *Dwarka Prasad Vs. Dwarka Das Saraf*, which was a case under UP (Temporary) Control of Rent & Eviction Act, 1947, the Court while dealing with the meaning of proviso to find out meaning of word "accommodation" in the matter of lease of a building with its equipment for a cinema business, Court held:-

"Though many functions have been assigned for provisos one has to be selective having regard to the text and context of the statute. If on a fair construction the principle provisions is clear, the proviso cannot expand or limit it. Sometimes the proviso is engrafted by an apprehensive draftsman to remove possible doubts to make matters plain to light up ambiguous edges. A proviso must be limited to the subject-matter of the enacting clause. It is a not a separate or independent enactment. Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context. A proviso ordinarily is but a proviso although the golden rule is to read the whole section inclusive of the proviso in such a manner that they mutually throw light on each other and result in a harmonious construction."

40. The said view echoed in the cases AIR 1981 1127 (SC) in the case *The State of Karnataka Vs. Krishnappa, M/s. Hyderabad Asbestos Cement Products and Another Vs. Union of India and Others*,

41. In the case *Babulal Nagar vs. Shree Synthetic Ltd.* 1984 Supple SCC 218 the Court held "a proviso does not cut down the ambit of the main provision but it cannot be interpreted to denude the main provision of any efficacy and reduce it to a paper provision." With that view to avoid miscarriage of justice both main provision and proviso interpreted accordingly.

42. Having regard to the different decisions aforesaid, meaning of proviso, may be summarised under the following categories:- (Quoted from book " Interpretation of Statutes" by Vepa P. Sarathi, 4th Edition, reprint copy of year 2006, Page 374)

"(a) When one finds a proviso to a section the natural presumption is that, but

for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held to be a repeal of the section as the proviso speaks the later intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to the interpretation; but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of the section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

43. Travelling down the lanes of different judgements as already referred to and the different propositions for interpreting the proviso as discussed, the present case could be answered.

44. It is an admitted position that the present Board of Directors were elected in the year 1998 when Act 1984 was existing. u/s 35 the tenure as well as function of different elected members have been prescribed. Section 35 read such:

"35. Election of members of board.- (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, elections of the members of the board of such Multi-State co-operative societies or class of Multi-State co-operative societies as the Central Government may, by general or special order, notify, shall be vested in such returning officers as may be appointed by the Central Registrar in this behalf.

(2) The vote at such elections shall be by secret ballot.

(3) The term of office of the elected members of the board shall be such not exceeding three years from the date of election, as may be specified in the bye-laws of a Multi-State co-operative society.

Provided that the elected members shall continue to hold office till their successors are elected or nominated under the provisions of this Act or the rules

or the bye laws and assume the charge of their office.

(4) No person shall be eligible to be elected as a member of the board of Multi-State co-operative society unless he is a member of the general body of that society.

(5) The Central Government may make rules generally to provide for or to regulate matters in respect of elections of members of the board."

45. The New Act of 2002 came into effect on 19th day of August, 2002 and before that date the tenure of the Board of Directors elected in the year 1988 ended in terms of statutory term of 3 years prescribed under sub Section 3 of Section 35 aforesaid and the election of the Board of Directors was required to be completed by fixing the election programme 60 days ahead of the date of expiration of the term of the Board in terms of Clause 2 of the Schedule of Multi State Co-operative Societies (Registration of Members, Directors and Management, Settlement of Disputes, appeal and Revision) Rules, 1985. Under said situation, Section 48 of the said Act of 1984 could have been applied by the Central Registrar to appoint an Administrator directing him to complete the election in terms of sub Section 5 of Section 48. In the old Act of 1984 there was no provision alike to the provision of Section 45 sub Section 6 whereby failing to conduct election the Central Registrar is empowered to hold the election within a period of 90 days from the date when such election became due.

46. On the other hand on comparison of New Act, 2002, it appears that the Section 48 of Act, 1984 was changed to Section 123 of the New Act, 2002 by limiting the power of supersession of specific Multi State Co-operative Society. The power of supersession of a Board in general was lifted by Act, 2002. The present Society is not a specified Multi State Co-operative Society in terms of explanation of Section 123.

47. Relevant portion of Section 48 of the Act, 1984, and Section 123 of the Act, 2002, are set out hereinbelow:

"48. Supersession of board - (1) if in the opinion of the Central Registrar the board of any Multi-State co-operative society is persistently making default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye laws or has committed any act which is prejudicial to the interests of the society or its members or has omitted or failed to comply with any directions given to it u/s 47 or that there is a stalemate in the constitution or function of the board, the Central Registrar may, after giving the board an opportunity to state its objections, if any, and considering the objections, if received, by order in writing, remove the board and appoint one or more administrators, who need not be members of the society, to manage the affairs of the society for such period not exceeding one year, as may be specified in the order, which period may, at the discretion of the Central Registrar, be extended from time to time, so, however, that the aggregate period does not exceed two years.

(2) The Central Registrar may fix such remuneration for the administrators, as he may think fit and the remuneration shall be paid out of the funds of the Multi-State co-operative society.

(3) The administrator shall, subject to the control of the Central Registrar and to such instructions as he may from time to time give, have power to exercise all or any of the functions of the board or of any officer of the Multi-State co-operative society and take all such actions as may be required in the interests of the society.

(4) Save as otherwise provided in sub-section(5), the administrator shall, before the expiry of his term of office, arrange for the constitution of a new board in accordance with the bye-laws of the Multi-State co-operative society.

(5) If at any time during the period the administrator is in office the Central Registrar considers it necessary or expedient so to do, he may, by order in writing giving reasons therefore, direct the administrator to arrange for the constitution of a new board for such Multi-State cooperative society in accordance with the bye-laws of such society and immediately on the constitution of such board, the administrator shall hand over the management of such society to such newly constituted board and cease to function.

(6) Where a Multi-State co-operative society is indebted to any financial institution the Central Registrar shall, before taking any action, under subsection (1) in respect of that society, consult the financial institution.

(7) Notwithstanding anything contained in this Act, the Central Registrar shall, in the case of a co-operative bank, if so required in writing by the Reserve Bank in the public interest or for preventing the affairs of the co-operative bank being conducted in a manner detrimental to the interests of the depositors or for securing the proper management of a cooperative bank, pass an order for the supersession of the board of that cooperative bank and for the appointment of an administrator therefor for such period or periods not exceeding five years in the aggregate as may from time to time be specified by the Reserve Bank.

123. Supersession of board of specified multi State Co-operative society.- (1) if in the opinion of the Central Government, the board of any specified Multi-State co-operative society is persistently making default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws or has committed any act which is prejudicial to the interests of the society or its members, or has omitted or failed to comply with any directions given to it u/s 122 or that there is a stalemate in the constitution or functions of the board, the Central government may, after giving the board an opportunity to state its objections, if any, and considering the objections, if received, by order in writing, remove the board and appoint one or more administrators, who need not be members of the society, to manage the affairs of the society for such period not exceeding six months, as may be specified in the order which period may, at the discretion of the Central Government, be extended from time to time, so

however, that the aggregate period does not exceed one year:

Provided that in the case of a co-operative bank, the provisions of this sub-section shall have effect as if for the words "one year", the words "two years" had been substituted.

(2) The Central Registrar may fix such remuneration for the administrators, as it may think fit and the remuneration shall be paid out of the funds of the Multi-State co-operative society.

(3) The administrator shall, subject to the control of the Central Registrar and to such instructions as he may from time to time give, have power to exercise all or any of the functions of the board or of any officer of the specified Multi-State co-operative society and take all such actions as may be required in the interests of the society.

(4) Save as otherwise provided in sub-section (5), the administrator shall, before the expiry of his term of office, arrange for the constitution of a new board in accordance with the bye-laws of the Multi-State co-operative society.

(5) If at any time during the period the administrator is in office, the Central Government considers it necessary or expedient so to do, it may, by order in writing giving reasons therefor, direct the administrator to arrange for the constitution of a new board for such Multi-State cooperative society in accordance with the bye-laws of such society and immediately on the constitution of such board, the administrator shall hand over the management of such society to such newly constituted board and cease to function.

(6) Where a Multi-State co-operative society is indebted to any financial institution, the Central Government shall, before taking any action, under sub-section (1) in respect of that society, consult the financial institution."

48. On a comparative analysis of the Old Act, 1984 and the New Act, 2002 it appears that the Board of a Co-operative Society under the provision of the law as laid down was bound to complete the election by setting up a programme well ahead of the expiry of the tenure of the members of the Board and failing to which under the New Act Central Registrar was vested with power to hold the election within 90 days from the date when such election became due in terms of sub Section 6 of Section 45, which provision was not absent in the earlier Act, 1984.

49. As already discussed that if two interpretations are possible to deal with the proviso, the interpretation as would support the purpose, object and conceptual idea of statutory provision and which will not lead absurdity, would be given effect to.

50. If the argument advanced by Mr. Mitra, Senior Advocate is accepted appearing for the writ petitioners/respondents that proviso is a substantive provision and it is not controlled by term of office u/s 45, sub Section 5 of Act,

2002 or Section 35 sub Section 3 of Act, 1984, the situation would be that elected members would continue to function indefinitely in the office despite their own fault to complete election of new board. It will practically will give a premium to a board who defaulted to complete election as per statutory mandatory provision which is discussed below applying test of mandatory provision observed in a judgement of Constitution Bench reported in The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others, under cause title Collector of Monghyer & Ors. v. Keshav Prosad Goenka & Ors.

51. On analysis of the said judgment it appears that the question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision, which, for instance sets out the consequence of omission to observe requirement but on the purpose for which the requirement has been enacted, particularly in the context of the other provision of that Act and the general scheme thereof. It further reveals from the said judgement that test depends on whether the requirement is insisted on as a protection for safeguarding right, liberty of the person or property. To consider any provision wherein a time limit is fixed for doing something, whether is a mandatory or directory, has been decided by the Apex Court in the case Balwant Singh and Others Vs. Anand Kumar Sharma and Others, which has been followed further in the case Visitor and Others Vs. K.S. Misra, . In the case Balwant Singh (supra) the court held " when a thing is required to be done by a private person within a specific time, it is mandatory ordinarily, but when a public functionary act, it is directory, unless the consequence therefor not specified, but this also a factor only not a conclusive."

52. The Division Bench of Calcutta High Court in an unreported judgement wherein one of us (Pratap Kumar Ray, J) was the presiding Judge in MAT 2631 of 2007, a case under cause title RBI vs. Mihir Chakraborty as decided on 10th December, 2008, held that time limit to do something would be construed as a mandatory provision. In the instant case applying the aforesaid test of the said judgements, if we place sub Section 5 of Section 45 and sub Section 6 thereof of Act 2002, in the acid test, the result would be that the term of the office of the elected members of the Board prescribed under the statute not exceeding 5 years from the date of election, is a mandatory provision having regard to the protection and safeguarding of right of the ordinary members to elect their representative in the Board following democratic norms of election on periodical manner after 5 years. Similar is the result on interpretation of Section 35, sub Section 3 of Act, 1984.

53. On considering the schedule of Rule, 2002, the point is further established that election programme under the schedule mandates that atleast 60 clear days in advance of the date of expiration of the term, election programme must be fixed by the Board of Director in a meeting. In terms of sub Section 6 of Section 45 which provides a default clause, it appears that Central Registrar, for default of holding election within the stipulated time by the Board of Directors, was

empowered by the statute to complete it within a period of 90 days which presupposes the anxiety of the legislatures to frame the statute in a manner so that democracy prevails and the members of the society get an elected body at every interval of five years. Considering the scheme of the Act, the purpose of the Act and the democratic fiber by which the co-operative society Act has been weaved, we hold accordingly that the time limit fixing term of the office is a mandatory provision.

54. Further more, from New Act, 2002 it appears that earlier provision to supersede the Board u/s 48 of the old Act, 1984 was lifted by identifying its area only in respect of specified Co-operative Society u/s 123 of the New Act, 2002. Naturally this Co-operative Society which is not a specified Co-operative Society would enjoy the benefit of holding office by the Board of Directors who were elected in the year 1988 for an indefinite period. To consider this argument naturally we would arrive to a situation which is not only an absurd proposition but it would breach the democratic fiber of the Multi State Co-operative Society by which act is weaved and its statement of object and reasons thereof.

55. Having regard to such the Court is not accepting such broad and wide interpretation of the proviso to inject the life of the Board of Directors elected in the year 1998 i.e. 11 years before till indefinite period so long new elected members assume office.

56. On conjoint reading of sub Section 6 and 5 of Section 45 of Act, 2002 read with statement of objects and reasons of the Act and the schedule relating to holding of election and on reading provision of Old Act, 1984, this Court is of the view that proviso has its limited application in the following situations, even on assuming that present lis to be decided on the basis of new Act, 2002.

i) Under sub Section 5 term of office of elected members starts from the very date of election for a period of 5 years under the New Act. That means as soon as election is held the term of the elected members starts to count the period of 5 years tenure under new Act or 3 years under old Act; but as the office bearer election could not be held immediately by those elected members and no charge could be handed over by the outgoing Board, the proviso could be applied to hold the office by the out going elected members till the new elected members assume charge of the office to avoid any vacuum for a limited period and not for indefinite period. This proposition pre-supposes existence of two sets of elected members, one out going elected members, another newly elected members and under that contingency only proviso could be applied to continue the function of the Society in proper way as there is no scope of appointment of Administrator by superseding the Board in the New Act of 2002 like the old provision of Section 48 under Act, 1984.

ii) Another situation could be that out going elected members did not set up the election programme 60 clear days in advance of the date of expiration of their term namely 5 years as per New Act and they failed to complete the election,

then in such situation sub Section 6 will occupy the field which provides that Central Registrar shall hold the election within a period of 90 days which means that function of the earlier Board who failed to complete the election within their tenure so far as setting up of the election programme and to complete the election vested to another office i.e. Central Registrar under the statutory provision of sub Section 6 to complete the election and to set up a new Board which presupposes the situation that Central Registrar from the date when the Board fails to conduct the election even after expiry of their tenure, assume the charge of the Board itself to complete election and old Board, who neglected and failed to hold election, may continue their office till further 90 days in addition to their tenure of 3 years or 5 years, as the case may be, as per main enactment.

57. Situation No.1 as discussed about applicability of the proviso presupposes the existence of two sets of elected members (I) out going elected members who completed their tenure and (ii) newly elected members whose tenure has started from the very date of election in terms of sub Section 5. Proviso at this juncture had applicability by not vesting any power to other body to deal with function of the Society by directing that till the newly elected body would assume charge old body would continue to hold office. In the instant case there is no such situation as after 2001 when the tenure of 3 years of elected members of Board under the old Act of 1984 was exhausted, no new elected members were existing. Situation no.2 also provided limitation to remain in office by old Board. In that view of the matter the elected members of the year 1998 amongst them many members who are not at all existing as members being disqualified in view of bylaws and membership clause of the Society due to their retirement from Railway service, cannot hold the office by taking resort to the proviso as has been argued by Mr. Mitra, Sr. Advocate.

58. So far as the second situation as discussed by conjoint reading of sub Section 5 and sub Section 6 of Section 45 it appears that when the Board fails to conduct the election during their tenure, the Central Registrar was vested with the power to hold the election and that too within a period of 90 days from the date when the election became due which means that functioning of the Society by old body extended further 90 days only and proviso would not save the situation of the Board of Directors elected in the year 1988 to hold and continue the office after that period for an indefinite period.

59. Having regard to such state of affairs, we are of the view that proviso should be interpreted to safeguard the purpose, object and conceptual idea of Multi State Co-operative Societies Act, 2002 as well as earlier Act, 1984. By giving a meaning in the manner as argued by Mr. Mitra, Senior Advocate, on proviso sub Section 5 of Section 45 of New Act, 2002 or sub Section 3 of Section 35 of the old Act, 1984, practically becomes otiose and redundant which cannot be supported by any cannon of statutory interpretation. But if the proviso is understood in this way that its applicability is limited under the temporal contingencies where there will be existence of two sets of members one out

going elected members and another incoming newly elected members whose tenure stipulated in terms of sub Section 5, the old members would be entitled to hold the office till new elected members assume charge, a proposition which supports the contextual and purposive interpretation of the Act itself on having regard to the democratic function of a Co-operative Society by its members which is the heart and soul and sole object of the act. As no steps taken under sub Section 6 of Section 45 of New Act, 2002, said situation no.2 as discussed earlier also has no applicability in the present case.

60. Before parting with the matter we hold that the judgement referred to by the Senior Advocate Mr. Mitra to contend that proviso to be considered as a new substantive provision itself will not hold good in view of statutory provisions of Multi State Co-operative Society Act, its preamble, object of the Act and democratic fiber as weaving ingredient of the said Act and more particularly in view of absurdity of a situation namely indefinite period of life of the existing Board who did not complete the election within their tenure, a defaulter.

61. It is a settled principle of statutory interpretation that regard must be taken about the consequences as would result in interpreting a statutory provision. The out come of said principle is the application of the tools of the interpretation in the angle that hardship, inconvenience, injustice, absurdity and anomaly should be avoided. It is a gallant rule of interpretation of statute that harmonious construction should be done. Absurdity according to Willes, J should be understood "in the same sense as repugnance that is to say something which would be so absurd with reference to other words of the statute as to amount to a repugnance." Reliance is placed to the judgement passed in the case Christopherson vs. Lotinga reported in (1864) 33 LJCP 121 at page 123. On a reading of sub Section 5 of Section 45 of Act, 2002 with its proviso, it appears that under the main section i.e. sub section 5, term of office of the elected members has been stipulated by using the word "shall" and "not exceeding 5 years" from the date of election but if the proviso is considered in the angle as argued by Mr. Mitra, Senior Advocate that such elected members would continue to hold office till successors are elected and assume charge of their office, it creates an anomaly in between the main section and its proviso by resulting the situation that the term of office which mandatorily contoured by the word not exceeding 5 years would be for indefinite period till the new members are elected and assume charge and by this way the provision of 5 years term under Act, 2002 or 3 years term under Act, 1984, practically is becoming repugnant. Under such a situation rule of harmonious construction will lead us to interpret the point relying the judgement passed in the case Sultana Begum Vs. Prem Chand Jain, which held as follows:-

"Rule of interpretation requires that while interpreting two inconsistent or obviously repugnant provision of a Act the Court should make an effort to interpret the provision as to harmonious them so that the purpose of the Act may be given effect to and both the provision may be allowed to operate without

rendering either of them otiose"

62. It has been held by the Apex Court in the case CWS (India) Limited (supra) "where a literal interpretation leads to absurdity or unintended result, language of the statute can be modified to accord with the intention of parliament and to avoid absurdity."

63. In the case M. Pentiah and Others Vs. Muddala Veeramallappa and Others, the Court held that "we should avoid a construction which would reduce the legislation to futility and should rather accept bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result and that manifest absurdity or futility, palpable injustice or absurd inconvenience or anomaly, is to be avoided."

64. Considering those principle of interpretation and having regard to the sub Section 6 of Section 45 when there is a default clause of holding election by the Central Registrar after election became due which means 5 years term from the date of election, the present Board cannot take advantage of his own default to retain its power. A defaulter cannot get benefit for his default.

65. The point numbers 1, 2 and 3 accordingly are answered to conclude the view that life of Board expired after 3 years from the date of assumption of office in the year 1998.

66. So far as applicability of defacto doctrine to save all actions already done by the said Board, as has been argued by Mr. Mitra Learned Sr. Advocate for which point No.(iv) we have framed, the following answer follows, by considering point (iv) and (v) analogously.

67. We hold that the Board of Directors elected in the year 1988 became a defunct body in the year 2001, prior to coming into effect of Act, 2002 and on application of sub Section 3 of Section 35 of old Act of 1984 they ceased to remain as elected members of the said Board of Co-operative Society.

68. The action as intended to be saved by applying de facto doctrine is the action of appointment decision of 110 employees in the said Society during a period when already returning officer has taken charge of the Society to hold the election being appointed by the Central Registrar. Attacking the appointment issue it has been contended by the appellant that even if it is assumed that the Board was not a defunct body after September, 2001 the Board had no authority to take a decision of appointment in terms Section 42 of the Act, 1984 and if it is considered under the new Act then u/s 49 of the Act, 2002. It is contended that the powers and function of the Board stipulated in the statute. Section 42 sub Section (d) of Act, 1984 provides power of a Board to appoint only those types of employees whose appointing authority is not the Chief Executive. Powers of Chief Executive has been stipulated u/s 45 of the said Act of 1984. It has been further contended that u/s 42 (e) of said Act, Board only had the power to regulate the appointment by identifying the scale of pay, condition of service etc. but Board

was not authorised to appoint as the power vested to the Chief Executive under Clause (f) of Section 45. Under the new Act also being the Act, 2002, it is submitted that u/s 49 sub Section 2 Clause (e) the Board got the power to regulate appointment of employees who are not covered under clause (d) of said sub Section (2) of Section 49 and the power vested to the Chief Executive u/s 52 to appoint in terms of clause (f) of Section 52 of the Act, 2002. To appreciate the issue relevant provisions of Section 42 and 45 of the old Act, 1984 and Section 49 and 52 of the New Act, 2002 are set out hereinbelow:

"42. Powers and functions of the board.- (1) The board may exercise all such powers as may be necessary or expedient for the purposes of carrying out its functions under this Act.

(2) Without prejudice to the generality of the foregoing power, such power shall include the power-

(a) to admit members;

(b) to interpret the organisational objectives and set up specific goals to be achieved towards these objectives;

(c) to make periodic appraisal of operations;

(d) to appoint a Chief Executive and such other employees of the society (out of the list of persons referred to in section 50) as are not required to be appointed by the Chief Executive;

(e) to make provisions for regulating the appointment of employees of the Multi-State co-operative society and the scales of pay, allowances and other conditions of service of, including disciplinary action against, such employees;

(f) to approve annual and supplementary budget;

(g) to acquire or dispose of immovable property;

(h) to raise funds;

(i) to sanction loans to the members; and

(j) to take such other measures or to do such other acts as may be prescribed or required under this Act.

45. Powers and functions of Chief Executive.- The Chief Executive shall exercise the powers and discharge the functions, specified below, namely:-

a) day-to-day management of the business of the Multi-State cooperative society;

b) operating the accounts of the Multi-State co-operative society and be responsible for making arrangements for safe custody of cash;

c) signing on the documents for and on behalf of the Multi-State co-operative society;

- d) making arrangements for the proper maintenance of various books and records of the Multi-State co-operative society and for the correct preparation, timely submission of periodical statements and returns in accordance with the provisions of this Act, the rules and the bye-laws;
- e) convening meetings of the general body of the Multi-State cooperative society, the board and the Executive Committee and other committees or sub-committees constituted under sub section (1) of section 46 and maintaining proper records for such meetings;
- f) making appointments to the posts in the Multi-State cooperative society in accordance with the rules made under clause (e) of sub-section (2) of section 42 except the posts in relation to which the power of appointment vests in the board under clause (d) of that sub-section;
- g) assisting the board in the formulation of policies, objectives and planning;
- h) furnishing to the board periodical information necessary for appraising the operations and functions of the Multi-State cooperative society;
- i) performing such other duties, and exercising such other powers, as may be specified in the bye-laws of the Multi-State co-operative society.

49. Powers and functions of board.- (1) The board may exercise all such powers as may be necessary or expedient for the purpose of carrying out its functions under this Act.

(3) Without prejudice to the generality of the foregoing powers, such powers shall include the power:

- n) to admit members;
- o) to interpret the organisational objectives and set up specific goals to be achieved towards these objectives;
- p) to make periodic appraisal of operations;
- q) to appoint and remove a Chief Executive and such other employees of the society as are not required to be appointed by the Chief Executive;
- r) to make provisions for regulating the appointment of employees of the Multi-State Co-operative society and the scales of pay, allowances and other conditions of service of, including disciplinary action against, such employees;
- s) to place the annual report, annual financial statements, annual plan and budget for the approval of the general body;
- t) to consider audit and compliance report and place the same before the general body;
- u) to acquire or dispose of immovable property;

- v) to review membership in other co-operatives;
- w) to approve annual and supplementary budget;
- x) to raise funds;
- y) to sanction loans to the members; and
- z) to take such other measures or to do such other acts as may be prescribed or required under this Act or the bye-laws or as may be delegated by the general body.

52. Powers and functions of Chief Executive :- The Chief Executive shall under the general superintendence, direction and control of the board, exercise the powers and discharge the functions specified below, namely:-

- (l) day-to-day management of the business of the Multi-State co-operative society;
- (m) operating the accounts of the Multi-State co-operative society and be responsible for making arrangements for safe custody of cash;
- (n) signing on the documents for and on behalf of the Multi-State co-operative society;
- (o) making arrangements for the proper maintenance of various books and records of the Multi-State cooperative society and for the correct preparation, timely submission of periodical statements and returns in accordance with the provisions of this Act, the rules and the bye-laws;
- (p) convening meetings of the general body of the Multi-State co-operative society, the board and the Executive Committee and other committees or sub-committees constituted under sub section (1) of section 53 and maintaining proper records for such meetings;
- (q) making appointments to the posts in the Multi-State cooperative society in accordance with the bye-laws;
- (r) assisting the board in the formulation of policies, objectives and planning;
- (s) furnishing to the board periodical information necessary for appraising the operations and functions of the Multi-State co-operative society;
- (t) appoint the person to sue or be sued on behalf of the Multi-State co-operative society;
- (u) present the draft annual report and financial statement for the approval of the board within thirty days of closure of the financial year;
- (v) performing such other duties, and exercising such other powers, as may be specified in the bye-laws of the Multi-State co-operative society."

69. It has been further contended by the appellant that decision as taken by the

Board to appoint 110 employees was done without any agenda of such in a meeting held by the members of the old Board and on breach of statutory provision. It has been urged that by such appointment decision of 110 employees the Society has been saddled with financial liability to pay several lakhs of rupees for salary and service benefit to them which would result financial loss of the society.

70. Countering the argument Mr. Mitra, Senior Advocate has contended that Secretary of the said Board issued the appointment letter as per decision of the Board and accordingly the appointment was lawfully made as Secretary of the Society is Chief Executive Officer u/s 51 of the said Act.

71. It has been contended further by Mr. Mitra, learned Sr. Advocate that there is no such pleading in the writ application on this aspect and as such there is no scope to decide it whether appointment of 110 employees during pendency of election process by the Board was valid or legal. Mr. Mitra, Senior Advocate has referred the judgement in support of his contention that the Court cannot travel beyond the pleading, to the case *Bharat Singh and Others Vs. State of Haryana and Others*, .

72. So far as the issue as raised about travelling beyond the pleading, this point to be considered first before deciding the issue whether applying the de facto doctrine the action could be saved and whether action itself is lawful. There is no doubt and it is settled law that Court should not travel beyond the pleading. But what is pleading in a writ application, has been decided by the Apex Court by holding that the writ application, affidavit-in-opposition, reply thereof could be considered as the pleading. It is held that even in an affidavit in reply if any point is raised that would come within the jurisdiction of the Court to consider it as pleading. Reliance is placed to the judgement passed in the case *Sri-La-Sri Subramania Desika Gnanasambanda Pandarasannadhi Vs. State of Madras and Another*, at page 1582, a Judgement of 4 judges Bench. Para 17 of said reports reads such:

"That takes us to the consideration of the question as to whether the two reasons given by the High Court in support of this decision are valid. The first reason, as we have already indicated, is that the High Court thought that the plea in question had not been raised by the appellant in his writ petition. This reason is no doubt, technically right in the sense that this plea was not mentioned in the first affidavit filed by the appellant in support of his petition; but in the affidavit-in-rejoinder filed by the appellant this plea has been expressly taken. This is not dispute by Mr. Chetty and so, when the matter was argued before the High Court, the respondents had full notice of the fact that one of the grounds on which the appellant challenged the validity of the impugned order was that he had not been given a chance to show cause why the said notification should not be issued. We are, therefore, satisfied that the High Court was in error in assuming that the ground in question had not been taken at any stage by the appellant before the matter was argued before the High Court."

73. To appreciate the applicability of ratio of the said judgement in the instant case, selected portions of the affidavit-in-opposition of writ application, affidavit-in-reply of such opposition, affidavits made in the application for appropriate orders, its opposition, are set out hereinbelow.

74. In the affidavit-in-opposition of main writ application the following averments have been made:-

"3. Before dealing with averments made in the said application, I raise the point of maintainability and state that the instant writ application is not maintainable on the following grounds:

That the writ petitioner has no locus standi or any right to file a writ petition against the order dated 31st December, 2007 passed by S. D. Indoria, Chief Director, Coop, Government of India, on the ground that it is admitted by the petitioner that there was an election for constituting of the managing committee of the Co-operative Society in question and the writ petitioner came into management for a period of three years with effect from 09.09.1998 to 09.09.2001. The said election was held in accordance with provision of Multi State Co-operative Society's Act, 1984. In Section 35 of the said Act, life of the managing committee of the Co-operative Society will be for a period of three years, therefore, the managing committee has become defunct and it has no right to remain in charge of the management of the Cooperative Society, as such the writ petitioner has no statutory right to hold office as a Chairman and a Secretary and they have no locus standi to file a writ petition before this Hon'ble High court challenging the said order. As such the writ petition should be dismissed in limine.

7. With regard to the statement made in paragraph no.3 of the writ petitioner I deny and dispute the same and I further say that the writ petitioner did not take any step to reconstitute the Board. Moreover, in the above writ petition they specifically stated that after 2001 on a number of occasion they took steps to conduct the election but as per Rule 38, Schedule 1 of the Multi State Cooperative Societies Rule, 2002 the Board of Directors have a statutory obligation to meet the 60 clear days in advance, of the date of expiration of this term and by resolution determined the date, time and place for convening a General Body Meeting for the conduct of election of its successor's Board. As such they violated the statutory provision and they are not entitled to get a relief from this Court.

9. With regard to the statement made in paragraph nos.6 & 7 of the writ petitioner are matters of record and I do not admit anything which is contrary to the record. Moreover, I state that the writ petitioner has not yet handed over the voter list in favour of the Returning Officer for conducting the election process as per Order of the Central Registrar though as per Rules, they are bound to give the voter list to the Returning Officer for conducting the election process.

10. With regard to the statement of paragraph nos.8 of the writ petition, I do not

admit anything which is contrary to the record and I state that the Secretary has no power under the Act to issue a Notification inviting the application for appointment of some temporary staff from the open market in the post of record shotter cum chaser (with semi clerical duties). I state as per provision of Section 52, Clause F of the Multi State Cooperative Societies Act, 2002 which provides that making appointment to the post in the Multi State Cooperative Society in accordance with laws. As per bye laws the Secretary is empowered to appoint officer in the society. As such the Secretary has no power to issue a notification as well as appointment letter to any person as per provision of Section 52 of the said Act.

I further say that the said notification was not hung up to any public place or any Railways Station or any newspaper, moreover after expiry of their terms they have no right to issue notification for inviting an application for appointment of some temporary staff from the open market, as such the notification itself is not a valid and legal one.

11. With regard to the statement made in paragraph no.9 of the writ petition, I do not admit anything which is contrary to the record and I state that there was no selection as well as the Society did not form any the selection committee for the said appointment and the appointment letter was issued in a pick and choose policy, as such the selection itself is bad in law and illegal.

12. With regard to the statement made in paragraph nos.10 and 11 of the writ petition, I state that the application u/s 84 of the said Act, filed by me before the Central Registrar but I came to know that the said application was not registered by the Central Registrar as Arbitration case but after going through the said application and in view of urgency the Chief Director was pleased to pass an administrative Order directing the writ petitioner to refrain from making any such appointment during election process.

14. With regard to the statement made in paragraph nos.16, 17, 18, 19, 20, 21, 22 and 23 of the writ petition are the matters of record and I do not admit anything which is contrary to record. I further say that the society itself earns profit 6-8 lacs in a year but the society will bear 70-80 lacs in a year for disbursement of salary regarding the 110 new appointees, as the financial viabilities of the society do not permit to engage a huge burden of such number of employees and in that case the society itself will go for liquidation."

75. In the affidavit-in-reply filed by the writ petitioners in response to the said opposition, the following has been averred:-

"5(b) That the appointment letter of some persons exclusively on temporarily basis issued by the Secretary of the said Society in terms of the resolution drawn in the meeting dated 01.10.2007 of the said society is legally valid and suffers from no illegality.

(c) That the existing Managing Committee of the said Society is not a defunct

Managing Committee, u/s 45(5) of the said Act, provides that the tenure of office of the elected members of the Board shall be such, not exceeding 5 years from the date of election as may be specified in the bye-laws of a Multi-State co-operative society.

Provided that elected members shall continue to hold office till their successors are elected as nominated under the provisions of this Act or the rules or Bye-laws and assure charge of their office.

Therefore, in accordance with the provisions of Section 45(5) of the said Act, and Rules and Bye laws, the existing Managing Committee/Board is very much legally holding its office, and in accordance with the provisions of section 45(6) of the said Act it is the statutory duty upon the Central Registrar of Co-operative Societies to hold election of the said Society, if the existing Board of Directors and/or Managing Committee fails to hold election of Multi-state Cooperative society.

e) It is stated that in the notice dated 21.9.2007 of the meeting of the Finance Sub-Committee to be held on 1.10.2007 there was one Agenda under the head "Financial position" and in accordance with custom prevailing during past long years that recruitment of employees/staffs is used to be discussed under the heading "financial position" in the meeting of the Finance Sub-Committee of the said society. Thereafter, in the notice dated 21.09.2007 of the meeting of the Managing Committee to be held on 1.10.2007 there was an agenda under the heading "to ratify the minutes of the last meeting of the finance sub-committee held on 1.10.2007".

Moreover, in the meeting of the Managing Committee dated 1.10.2007 the writ petitioner pointed out that a Vital Agenda i.e. acceptance of the report of Job analysis Committee was dropped through oversight and then the same was included as the Agenda No.1A under the caption "To ratify the resolution of job Analysis Committee" and the said matter was discussed in the said meeting and confirmed in the next meeting dated 12.10.2007 and in the notice of the subsequent meetings held on 12.10.2007 and 2.11.2007 the items under the heading "to ratify the minutes of the Last meeting of the Managing Committee and/or to ratify the minutes of the meeting of the finance Sub-Committee were included as agenda.

Moreover, in accordance with the Agenda and after prolong discussion in the meeting of the Managing Committee held on 12.10.2007 and 2.11.2007. Considering all aspects of the said appointment including the Financial position of the said society and/or financial burden which will be imposed upon the said society because of such appointment vis-a-vis the required strength of staffs of the said society, the petitioner no.2 was authorized to make appointment according to the panel, strength of which was approved by the resolutions drawn in the meetings of the managing committee.

f) it is stated that from the analysis of the Balance sheet of the said society and

from the reports of the Job analysis committee the said society has capacity to bear the expenses of the salary of the new appointed candidates very well and the said appointments were made in the terms of the resolution of the meeting held on 2.11.2007 and it is an executive function of the society in relation with financial matters and the same cannot come under the purview of judicial review of the Hon"ble Division Bench sitting on appeal of the instant writ application.

In this context, it is further stated that the respondent no.4 cannot challenge legality and/or validity of any financial policy decision of the said society in the present writ application. The respondent no.4 in the present application is trying to extend the scope of the writ application and seeking relief which are not subject matter of the writ petition.

In this context I categorically state that all the candidates had already joined in their job before the order dated 31.12.2007 issued by the Chief Director of the co-operative societies.

15A. With regard to the statement made in paragraph no.14 of the said affidavit, I deny and dispute the allegations made therein save and except what are matters of records. I deny that the financial inabilities of the society do not permit to engage a huge burden of such number of employment and in that case the society itself will go into liquidation.

It is stated that from the analysis of the balance sheets of the said society and from the reports of the job analysis committee the said society has capacity to bear the expenses of the salary of the new appointed candidates very well and the said appointments were made in the terms of the resolution of the meetings held on 2.12.2007 and it is an executive function of the society in relation with financial matters and the same cannot come under the purview of judicial review of the Hon"ble Division Bench on sitting on appeal of the instant writ application."

76. In the memo of appeal the following grounds were taken by the appellant:-

"2. For that there was an election for constitution of the managing committee of the co-operative society in question and the writ petitioner came into management for a period of three years with effect from 09.09.2008 to 09.09.2001. The said election was held in accordance with the provision of Multi State Co-operative Society Act, 1984. As per the said Act, life of the managing committee of the co-operative society will be for a period of three years but after 09.09.2001 the writ petitioner did not take any steps to reconstitute the managing committee as per the statute as well as they did not take any steps for reconstituting the Board as per the direction by the Hon"ble High Court dated 3rd October, 2007 in W. P. No.19370(W) of 2005. But after appointment of the Returning Officer the writ petitioner appointed 110 candidates without complying with any provision of Statute, as such the writ petitioner is not entitled to get any interim order from the Hon"ble High Court.

3. For that though the appellant preferred an application u/s 84 of the Multi State

Cooperative Societies At, 2002 but the respondent authorities passed an administrative order and directing the Chairman to refrain from making any such appointment during the election process but the learned Trial Judge stayed the order on the ground that the Chief Director has no power to issue such type of order. But as per provision of 47 of the Multi State Cooperative Societies Act, 1984 if the Central Government is satisfied that in the public interest or the purposes of securing of proper implementation of cooperative production and other development programmes approved or undertaken by the Central Government or to secure proper management of the business of the Multi State Cooperative Societies generally or for preventing the affairs of the Multi State Cooperative society being conducted in a manner detrimental to the interest of the members, any depositors or creditors thereof. It is not necessary to issue direction to any class of Multi State Cooperative Societies, as such the Chief Director has statutorily empowered to give direction to the society to refrain from making any such appointment during the election process but the learned Judge erred in law and in fact and passed an order complained of in a wrongful exercise of discretion.

4. For that the Learned Judge erred in law and in fact and passed an order complained of in spite of the fact that there does not exist such agenda as per meeting dated 1.10.2007 though it is reflected in the appointment letter (Annexure "P-3") that the said posts were created as per the Board Resolution taken in that meeting on 1.10.2007.

5. For that the Learned Judge erred in law and in fact and passed an order complaint of in spite of the fact that the appellant produced balance sheet for the last 5 years before the Learned Trial Judge and it reflects from the said balance sheets that the society is getting profit of Rs.4,58,169/- for the year 2001-2002, for the year 2002-2003 Rs.5,01,975/-, for the year 2003-2004 profit of Rs.2,32,057/-, Rs.9,28,332/- for the year 2004-2005, for the year 2005-2006 Rs.8,39,775/- and as per the pay scale written in the appointment letter it reveals that each and every employee of the total 110 number of the employees will have to get Rs.60-70 lacs per year as a salary and the society will hold the burden of Rs.70-80 lacs per year but as per balance sheet it reveals that the society earns to Rs.5-6 lacs in a year and it is not possible for the society to bear the huge amount of salary and other expenses for the new appointed candidates, as such the Learned Trial Judge did not consider this aspect and passed an interim order and allowing the writ petitioner to join those 110 candidates in the said society. If the said 110 candidates join in the said post in the said society, then the society will not even be in a position to pay them their regular salary, as such the entire decision taken by the Learned Judge is bad in law.

6. For that the learned Judge erred in law and in fact and passed an order complained of without considering that the life of the managing committee already expired since 09.09.2001, as such the managing committee of the society is a defunct committee and does not hold any power to employ the said

110 candidates.

7. For that the learned Judge erred in law and in fact and passed an order complained of in spite of the fact that the writ petitioner did not publish any voter list and forwarded the same before the Returning Officer and on the other hand they have appointed 110 candidates which is totally illegal and violation of the statutory law."

77. In the application for appropriate order filed by the appellants the following contentions have been made:-

"12. That your petitioner further states that being aggrieved by and dissatisfied with the decision taken by the managing committee being the respondent nos.1 and 2 for giving appointment to 110 candidates for the post of Record Shoter cum chaser in the said society during the election process, your petitioner prefers an application before the Central Registrar and upon considering the application the Chief Director was pleased to pass an administrative order and directed the Chairman to refrain from making any such appointment during the election process.

Xerox copy of the order dated 31st December, 2007 is annexed hereto and marked as Annexure

"P-5".

13. That your petitioner further states that it reveals from the agenda dated 1.10.2007 that there does not exist any point regarding the fresh recruitment of the 110 candidates for the post of Record Shotter cum Chaser in the said society and as such the said appointments are totally illegal and bad in law.

14. That your petitioner further states that it reflects from the said balance sheets that the society is getting profit of Rs.4,58,169/- for the year 2001-2002, for the year 2002-2003 Rs.5,01,975/-, for the year 2003-2004 profit of Rs.2,32,057/-, Rs.9,28,332/- for the year 2004-2005, for the year 2005-2006 Rs.8,39,775/- and as per the pay scale written in the appointment letter it reveals that each and every employee of the total 110 number of the employees will have to get Rs.60-70 lacs per year as a salary and the society will hold the burden of Rs.70-80 lacs per year but as per balance sheet it reveals that the society earns to Rs.5-6 lacs in a year and it is not possible for the society to bear the huge amount of salary and other expenses for the new appointed candidates, as such the Learned Trial Judge did not consider this aspect and passed an interim order and allowing the writ petitioner to join those 110 candidates in the said society. If the said 110 candidates join in the said post in the said society, then the society will not even be in a position to pay them their regular salary, as such the entire decision taken by the Learned Judge is bad in law. Your petitioner undertakes to produce the balance sheet at the time of hearing before this Hon"ble Court, if necessary.

15. That your petitioner further states that the tenure of the managing

committee already expired on 09.09.2001 and as such the present managing committee is a defunct committee and as such the writ petitioner has no right to give appointment of 110 candidates in the society in question.

16. That your petitioner further submits that at the time of hearing the learned Advocate of the petitioner produced the balance sheet as well as the agenda of the meeting dated 1.01.2007 but the learned Judge without going into the vital question came to a conclusion and stayed the order passed by the Chief Director and allowing the writ petitioner to join the said 110 candidates for the post of Record Shotter cum Chaser in the said society."

78. In the affidavit-in-opposition of this application for appropriate order writ petitioners/respondents while filing affidavit contended as follows:-

"13. With reference to the statements made in paragraph 13 of the said application I deny and dispute each and every allegations made therein. I deny that in the agenda dated 1.10.2007 there does not exist any point regarding the fresh recruitment of the 110 candidates for the post of Record Sorter cum Chaser in the said society.

15. With reference to the statements made in the paragraph 15 of the said application I deny and dispute each and every allegations made therein save and except which are matter of records. I deny that the present Managing Committee is a defunct committee and as such the writ petitioner has no right to give appointment of 110 candidates in the said society in question.

It is stated that in accordance with the provisions of section 35 of the repealed act of 1984 as well as the provisions of Section 45(5) of the said Act the present Managing Committee is lawfully holding its office and has every right to give appointment of 110 candidates in the said society."

79. In the affidavit-in-reply filed by the appellant in response to the same the following averments made:-

"11. With reference to the statements/allegations made in paragraph no.5b of the said opposition, I deny and dispute the same and I further state that the Secretary Sri Prafulla Kumar Dutta is not competent to be appointed as Secretary because he retired from his service long before seven years ago, and also he is enjoying his pension from the Railways, as such he has no right to issue any appointment letter in favour of the appointee. Moreover there is no such regulation framed by the said society for giving appointment to 110 candidates in the said society. As such, he has no right to appoint employees in the post of Record Sorter cum Chaser(Clericals). Moreover, in the meeting dated 1.10.2007 there was no agenda for appointment regarding the Sorter cum Chaser(Clericals).

12. With reference to the statements/allegations made in paragraph no.5c of the said opposition, I deny and dispute the same and I state that from the conjoint reading of Section 45(5) of the Multi State Co-operative Societies Act, as well as Rule 38 of the Multi State Co-operative Societies Rule, 2002 and Schedule 1 of

the said Act, the term of the office of the elected members of the Board shall be such, not exceeding five years from the date of election, as may be specified in the bye-laws of Multi State Co-operative Society. As per proviso that the elected members shall continue to hold the office are elected or nominated under the provision of this Act or Rules or the Bye-laws and assumed charge of their office, there cannot be a meaning that the elected body will continue beyond five years. It is a cardinal Rule of interpretation that a proviso to a particular provision of the State only embraces the field which is covered by the main provision. It craves out an exception to a main provision to which it has been enacted by the proviso to no other. The proper function of a proviso is to accept and deal with a case which would otherwise fall in the general language of the main enactment and its effect is to confine that case where the language of the main enactment is explicit and unambiguous. The Proviso can have repercussion on the interpretation of main enactment so as to the exclude from it, by implication what clearly fall within its expressed term. The scope of proviso, therefore is to crave out an exception to the main enactment and it excludes something which otherwise would have been within the Rule. It has to operate in the same filed and if the language of the main enactment is clear, the proviso can torn apart from the main enactment nor can it be used to nullify by implication what the enactments clearly says nor state at naughty the real object of main enactment, unless the word of Proviso are such that it is its necessary effect. As such the managing committee after expiry of their term has no right to remain in charge and without term has long expired and/or it died a natural death should not be allowed to continue.

13. With reference to the statements/allegations made in paragraph no.5d of the said opposition, I deny and dispute the same and I state that the applicant is the member and share holder of the said society, as such he has every right to raise objection against the illegal activities of the managing committee though the said managing committee is a defunct one and as per provision of Act, they have no right to continue, as such the said managing committee has no right or locus standi to challenge the said Order passed by the Chief Director before this Hon"ble Court. Because after completing the tenure they have no right to remain in charge of the said society.

19. With reference to the statements/allegations made in paragraph no.13 of the said opposition, I deny and dispute the same and I state that there was no agenda on the vital issue of stall recruitment of 110 candidates in the said society either in the notice dated 21.9.2007 of the Managing Committee Meeting dated 1.10.2007 and also in the notice dated 21.9.2007 for Finance Sub Committee alleged meeting dated 1.10.2007 and both the meeting were duly signed by the Secretary, Sri Prafulla Kumar Dutta.

Even the writ petitioner did not annex the Minutes of the alleged Meeting of the Managing Committee dated 1.10.2007 since no meeting was held on 1.10.2007 and therefore no minutes could be annexed. But the writ petitioner annexed the

minutes of Finance Sub Committee held on 1.10.2007 which was held under the Chairmanship of Sri Pradip Kumar Mukherjee, a Railways Officer and he was nominated director from Accounts Branch of Sealdah Railways Division. But Sri Pradip Mukherjee was transferred to Eastern Railways Head Quarter's office situated at Fairly Place Calcutta vide letter no.DAS/ADMN-Nomination/Coop. Bank dated 25.8.2006 and as such he is not competent to be a director as per bye-laws of the Society. Thus the meeting of finance sub committee held on 1.10.2007 under Chairmanship of P. K. Mukherjee is void abinitio.

Furthermore, in the meeting no.1A which has been manufactured and newly included without any agenda of the meeting Notice of Finance Sub Committee issue don 23.9.2007 only with a motive to ratify the Job Analysis Committee Report and it has been mentioned in the Resolution that the Report of Job Analysis Committee submitted by the Chairman and the same has been discussed and accepted by the House. But nowhere in the minutes drawn of the meeting of Finance Sub Committee that 110 nos. of extra staff is required in addition to present 136 staff in the society with detailed explanation of workload of the society and analysis of the same that these extra staff is very much essential to deal with the increased workload of the society which is not at all manageable by the present strength of staff and there was no resolution in that meeting that 110 fresh staff to be recruited in the society for such reasons. Thus the said Job Analysis Report is manufactured one for the purpose of legalise the said appointment of 110 candidates and thereby misleading the Hon'ble Court.

Moreover, the present number of share holders is round about 10,000 which has been seriously decreased by 8,000 within four years from 2004 to 2007. As such the present strength staff is 136 is already excess and therefore there is no reason and justification at all that more 110 staff is required to be recruited in the society which will lead the society to liquidation.

As per report made by Job Analysis Committee in the Meeting dated 1.10.2007 where in 68 numbers of the staff is required to be recruited. Suddenly on 12th October, 2007 the defunct board has decided that those members of staff are not sufficient and they have directed the Job Analysis Committee to recommend and include another person named Sri Joydev Ghosh as a new member of the job analysis committee who is also a directed of the said society. Thereafter the job analysis committee has rectified their recommendation and increased the strength of their staff from 68 to 110 candidates. This means that they have hiked 80 per cent of the staff strength which has been rectified in the board meeting.

While discussing this point of separate agenda for this vital issue which shows the discussion in agenda 1A incorporated after that. This story is incorporated after filling the writ petition and all this fact is after thought and procured for the purpose of this appeal. Moreover, as per provision of Section 43 of the bye-laws, Board of Directors of the Society shall be constituted in the following manner:

- a) One Director who shall be a senior Divisional Personal Officer, Eastern Railways, Sealdah or his nominee who shall not be below the rank of Assistant Personal Officer, Eastern Railways, Sealdah.
- b) One Director who shall be a senior Divisional Accounts Officer, Eastern Railways, Sealdah or his Nominee who shall be below the rank of Assistant Accounts Officer, Eastern Railways, Sealdah.
- c) One Director who shall be the Workshop Personal Officer, Eastern Railways, kanchpara.

And it is admitted in the Notice dated 21.9.2007 as well as 4.10.2007 as well as Corrum of the said Meeting no notice was served upon the Directors mentioned in 43 A B C as per bye-laws, as such the said meeting was held behind the back of such Directors as well as the writ petitioner did not annex the said corum while moving the learned trial Judge, as such the Corum annexed in that opposition is procured one.

20. With reference to the statements/allegations made in paragraph no.14 of the said opposition, I deny and dispute the same and I state that it reflects from the balance sheet that the Society is getting profit of Rs.4,58,169/- for the year 2001-2002, for the year 2002-2003 Rs.5,01,975/-, for the year 2003-2004 profit of Rs.2,32,057/-, Rs.9,28,332/- for the year 2004-2005, for the year 2005-2006 Rs.8,39,775/- therefore, there is no financial viability to appoint 110 candidates because the Society will have to bear the cost of Rs.60 to 70 lakhs per year as a salary and the society has to hold the burden of Rs.70-80 lakhs per year. It is not possible for the Society to bear the huge amount of salary and other expenses for new appointed candidates. Moreover, as per bank statement issued by the Indian Overseas Bank, Strand Road, Calcutta and U.C.O Bank, Kancharapara Branch, show that the society has loan of Rs.1,00,88,504/- and Rs.1,01,51,297/- respectively. As such there is no financial viability at all to appoint the huge number of employees, as such the said appointment should be quashed and also suppressed the real fact regarding the financial viability of the society and in that paragraph the Secretary specifically stated that the appointment were made in terms of the Resolution in the meeting held on 2.11.2007 but in the appointment letter annexed by the writ petitioner it reveals that the appointment was made as per meeting held on 1.10.2007 which is itself contradictory on the part of the writ petitioner, as such they are not entitled to get any relief.

I also repeat and reiterate the statements made in the earlier paragraph 19 of this opposition wherein it is clear that the notices have not been issued to every director when a resolution was taken on that meeting on that date.

I further state that in the appointment letter in column no.8 it reveals that the joining date of the candidate is 17th January, 2008, as such there can never be any joining date before 31.12.2007."

80. It is a settled legal position of law that the writ application is decided on

affidavit evidence. Reliance is placed to the case *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, a judgement of Constitution Bench. In the instant case it appears that in the opposition of writ application and in the application for appropriate order, the point that the Board had no power to appoint in terms of statute, the point that Society would be burdened with liability of several lakhs of rupees to bring the result of financial loss of the Society, that Board became defunct, that during election process a defunct body had no power to appoint, that there was no agenda for appointment issue, have been highlighted by appellant. The writ petitioners/respondents also got the chance to counter it by filing their respective affidavits, rejoinder etc. Not only that, the parties have argued at length on that point. Hence, the principle of natural justice has been duly followed by asking the parties to answer that question. It is a settled legal position that in a writ Court even if no point is initially taken, but this point could be considered by the Court upon giving an opportunity of hearing to the parties concerned. Reliance is placed to the judgement passed in the case *V.K. Majotra Vs. Union of India (UOI) and Another*, . Even for necessity to adjudicate a point, Court may do so by giving opportunity of hearing to the parties. Reliance is placed to the judgement passed in the case *Som Mittal Vs. Government of Karnataka*, .

81. Considering those finding and observation, the point as advanced by Mr. Mitra, Sr. Advocate that legality and validity of the appointment decision under the touch stone of the statutory provision was beyond adjudication as it was not pleaded, is not factually and legally sustainable.

82. Now the question whether the Board got the power to appoint. The old Act and the new Act as already quoted above stipulate the power and function of the Board. It provides that Board may appoint and remove the Chief Executive and such other employee who are not required to be appointed by the Chief Executive in terms of Clause (d) of Section 49 of the new Act and under Clause (d) of Section 42 of the old Act. Under Clause (e) of the said section of the old Act and under clause (e) of Section 49 of the New Act, the Board only got the power to regulate the appointment by identifying the pay scale, allowances, condition of service, disciplinary action etc. Hence, u/s 49 of the new Act or u/s 42 of the old Act, Board was not empowered to issue appointment letter and/or direct the Chief Executive, herein in the instant case, the Secretary of the Society, to issue appointment letter. Having regard to said statutory provision, this Court is of the view that there was a breach of statutory provision by taking resolution by the Board to appoint 110 employees exercising the power u/s 49 of the new Act or u/s 42 of the old Act as the case may be.

83. During the election process since by the order of the Court Returning Officer has already been appointed by the Central Registrar to complete the election, the Board, a defunct body though was continuing in office had no power to deal with any appointment policy, similar to the situation of any interim Government during of election process.

84. It is true that some times as a public policy defacto doctrine may save the action but if the action is not performed within the scope of official authority and in the interest of the public, the principle of defacto doctrine cannot be applied. A passage from the judgement passed in the case Pulin Behari Das & Ors. vs. King Emperor reported in 15 CLJ 517 appearing at page 574 is quoted for appreciating the said point:

"The doctrine that the acts of officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding as if they were the acts of officers de jure, dates as far back as the Yearbooks, and it stands confirmed, without any qualification or exception, by a long line of adjudications. Viner says "acts done by an officer de facto and not de jure are good, for the law favours one in a reputed authority." (Abridgment, Tit. Officers and Offices, G.4). In fact, the question for determination involved the application of the de facto doctrine, is not, as a rule, whether the challenged acts assuming the officer to be de facto as such, are valid, but whether the person whose title is questioned, is or was really a de facto Officer."

85. On reading the said report it appears that the de facto doctrine is applicable to save any action when that action is done by any person in his official authority and not beyond that and also for interest of public or third person. Even in the judgement passed in the case Pushpadevi M. Jatia Vs. M.L. Wadhavan, Addl. Secretary, Government of India and Others, it is held in paragraph 21 that to apply the defacto doctrine for the purpose of validating any act the only factor to be considered whether any officer was clothed with insignia of the office and exercised its power and function. The doctrine was engrafted as a matter of policy and necessity to protect the interest of public and not otherwise. On a reading of the statutory provisions as already discussed namely Section 49 of the new Act and Section 42 of the old Act, it appears that Board was not empowered to take a decision or appoint 110 employees under the statutory framework. It is a settled legal position that a statutory body vested with exercise of power suffers a limitation in their functioning. In other way, it could be said that a statutory body is entrusted to perform the duty as prescribed under the statute whereas a private body may act as per his choice anything except as are not prohibited under the statute. Limitation of such statutory function is now has settled its firm root in the judicial system. Reliance may be placed to the judgement Meera Sahni Vs. Lt. Governor of Delhi and Others, , Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, , the old decision Moniruddin Bapari vs. Chairman, Municipal Commission, Dhaka 1940 C W N 17 and Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udupi and Others, . This principle is applicable to the Board who is a creature by statute.

86. Having regard to those findings of observation and legal principle we are of view that by applying the defacto doctrine the appointment decision/resolution

cannot be saved.

87. The point as raised by Mr. Mitra, Senior Advocate fails accordingly. Point nos. (iv) & (v) is answered accordingly.

88. So far as point No.(vi) is concerned even if we assume that decision impugned in the writ application i.e. a direction of Central Registrar restraining the defunct Board to appoint was a decision without jurisdiction, still then as the writ jurisdiction is an exercise of discretionary power and having regard to the settled legal position as discussed while passing the interim order dated 26th February, 2008 as already quoted, that "when to quash any illegal order another illegal decision would survive, writ Court will not quash it" the Court should not interfere. Hence, we are of the view that we should not quash the impugned decision, applying said principle, as it will give a premium to the board to implement its illegal action of appointment.

89. We make it clear that though the subject matter of challenge in the writ application is the impugned decision of an officer of a co-operative department restraining appointment but as a consequential issue the legality and validity of a decision to appoint employee by the Board became also the subject matter of our adjudication on the basis of pleading advanced by the respective parties and argued on that score. Since it is held by us that present Board consisting of some of the elected members of the year 1998 became defunct long back when its tenure of 3 years completed as per Act, 1984 and in view of further finding that Board has no power to appoint 110 employees, naturally the appointment issue and its effect is required to be answered. Having regard to our findings and observation we accordingly hold that the decision to appoint 110 employees by the said Board is illegal and contrary to the statutory provision. As a consequence thereof, the said decision to appoint namely the resolution of the Board of Directors, is set aside and quashed.

90. Before parting with appeal and writ petition both, a question is required to be answered namely whether this defunct body would be allowed to continue further when on analysis of the statutory provision it appears that some members elected in the year 1998 are still in office, who even failed to hold election for electing the new body as per statutory provision. That issue is a consequential issue raised by the respective parties and argued at length by the parties. Having regard to our findings above that board became a defunct body in the year 2001, this Board cannot function further. But function of Society, a credit society if is stopped, members will suffer. For remedy, Court has power to appoint a Special Officer who will deal with day to day affairs of Society, till an elected body assume charge. Hence we appoint Sri Bani Utpal Mukhopadhyay, retired senior judicial officer of Higher Judicial Service Cadre as Special Officer of the Court to exercise the power and function of the Board of concerned Cooperative Society and he is directed to assist the returning officer to complete the election. The said Special Officer will not take any appointment decision and any decision as would incur huge expenditure. For any difficulty to follow up the administrative

work and day to day affairs, he is at liberty to mention the matter by filing proper application to the Court. The Special Officer will continue to function till the new body assume its charge. The Special Officer will be entitled to get a remuneration of Rs.15,000/- per month from the fund of co-operative society. Concerned Accountant is directed to comply it. The writ petitioners and other members of defunct Board are directed to hand over the charge forthwith to the Special Officer so appointed. The Officer-in-Charge, Narkeldanga Police Station is directed to be present at the time of handing over of charge and will assist Special Officer as and when requisition to be made by said Special Officer. On completion of election Special Officer will hand over charge to new board and an action report to be filed to the High Court Registry. Registry will place it to the Bench for discharge of Special Officer.

91. The Registrar General, High Court, Calcutta is directed to communicate the ordering portion of this judgement to said Sri Bani Utpal Mukhopadhyay, appointed as Special Officer of the E & N. F Railway Credit Co-operative Society Ltd. forthwith so that he can take charge of the Co-operative Society. Similarly copy of the said order be served to the Officer-in-Charge, Narkeldanga Police Station for his action, as directed.

92. Having regard to all these findings and observation the writ application and connected appeal stood disposed of. Interim orders passed by the Learned Trial Judge stand set aside and quashed. The appeal is allowed and disposed of accordingly.

Xerox plain copy of the ordering portion to the respective parties.

Manik Mohan Sarkar, J.

93. I agree.

Later :

Let xerox plain copy of the operative part of the judgment be given to the learned Advocates appearing for the respective parties on usual undertakings and urgent xerox certified copy of this judgement, if applied for, be given to the learned Advocates appearing for the parties expeditiously.

Stay as prayed for stands refused.

CAN 5573 of 2008 stands disposed of in terms of our findings in the appeal.