

(2000) 08 BOM CK 0092

In the Bombay High Court

Case No : Writ Petition No. 1357 of 2000

St. Anthony's Co-operative Society Ltd., Mumbai

APPELLANT

Vs

Secretary (Co-operation and Textile Department), Mumbai
and Others

RESPONDENT

Date of Decision : 18-08-2000

Acts Referred:

Constitution of India, 1950 — Article 15(1), 19(1)(c), 19(4), 21, 25

Maharashtra Co-operative Societies Act, 1960 — Section 12, 14, 14(1), 154, 2(16)

Citation : (2001) 1 BomCR 730

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : J. Reis, Y.A. Choudhari and J. Rego instructed by S.J. Chaurasia, for the Appellant; R.M. Sawant for Respondent No. 1, S.C. Dharmadhikari, M.K. Nesari and A.A. Joshi for Respondents Nos. 3 to 6, Ms. C.K. Brahmi instructed by Mahesh Menon, for the Respondent

Final Decision : Dismissed

Judgement

Dr. D.Y. Chandrachud, J.—Rule, returnable forthwith. Respondents waive service. By consent, taken up for final hearing. Leave to amend granted.

2. A Co-operative Society registered under the Maharashtra Cooperative Societies Act, 1960, seeks to exclude persons other than Roman Catholics from its membership. The State Government, in the hierarchy of Appeal and Revision provided under the Act, has come to the conclusion that to permit the Society to follow the rule of exclusion which is contained in its Bye-laws would violate the basic precept of open membership accepted by the Act. The issue before the Court, therefore, is whether in its Bye-laws, a co-operative housing society, which the petitioner is, can confine membership to a particular religion, sect or group and exclude those who do not profess the religious faith which is a qualifying condition for membership.

3. The petitioner was formed and registered in 1925. The Society owns certain

lands situated at Chembur and these lands were divided into plots in pursuance of a sub-division which was sanctioned about 75 years ago. Individual allotment of plots to members is effected on the basis of registered Agreements of lease executed between the petitioner and its members. The leases are invariably for a term of 99 years. The Society consists of 98 plots which have been allotted to its members as lessees. The 5th respondent who is a member of the Society, holds five shares bearing distinctive Nos. 233 to 237 and was allotted plot Nos. 453 (Part) and 454 (Part) admeasuring 1051 sq. meters on lease. The 5th respondent, according to the petitioner, wrongly sought to transfer his interest in the leasehold property in favour of the 6th respondent. Respondent No. 6 has, in turn, assigned his interest to respondents Nos. 3 and 4 without the consent of the petitioner. The 7th respondent claims to be an assignee of a part of the premises from the 6th respondent. After documents were executed in favour of the 3rd and 4th respondents, they filed an application claiming membership of the society. The application was filed before an Administrator who, at the material time, was placed in charge of the management of the Society. The Administrator rejected the application for membership on the ground that the transferees were not Roman Catholics by faith and that, therefore, they were not qualified to be members of the Society. After the Administrator refused the application for membership of the 3rd and 4th respondents, they moved the Deputy Registrar, Co-operative Societies under the provisions of section 23(2) of the Act. On 26th July, 1994, the Deputy Registrar allowed the Appeal and directed that the 3rd and 4th respondents be admitted as members of the Society. The Society preferred a Revision Application u/s 154 of the Act before the Divisional Joint Registrar of Co-operative Societies who, by an order dated 31st January, 1996 dismissed the Revision. The Society once again moved the State Government in Revision and the Secretary (Co-operation), by the impugned order dated 17th April, 2000, affirmed the orders passed by the Authorities below. The Society seeks to challenge in these proceedings the order dated 17th April, 2000 passed by the Secretary (Co-operation).

4. The Society like others of its ilk has framed and adopted bye laws. At the outset, reference may be made to the provisions of Bye-law 7(a) which restricts the membership of the Society to Roman Catholics. Bye-law 7(a) provides as follows:-

7(a) All persons who have signed the application for registration are original members. Other members shall be elected by the Committee, provided that all members shall be Roman Catholics. Every person shall pay Re. 1 on applying for admission, for which he shall receive a copy of the bye-laws. In cases where the application is refused, the entrance fee shall be returned.

(emphasis supplied).

The Deed of Lease which has been entered into by the Society with the 5th respondent is in the form appended to the Bye-laws and, reliance was placed on clause 16 thereof which provides that the lessee shall not assign, underlet or part

with the possession of the demised plot at any time during the term of the lease without the written consent of the Lessor. Clause 18 of the Lease Deed provides that the Lessee shall, at all times observe, abide by and be bound by the rules, regulations and bye-laws for the time being of the Lessor and carry out the instructions and directions of the Committee of the Society.

5. The transferees from the original Lessees in the present case are admittedly not Roman Catholics. In directing the co-operative housing society to admit the 3rd and 4th respondents to membership, the Authorities below, including the Secretary (Co-operation) of the State Government in the impugned order came to the conclusion that to permit the Society to confine membership to Roman Catholics would violate the principle of open membership which constitutes the foundation and basis of the provisions of the Act.

6. Since the controversy involved in the present case would, in a significant manner, turn upon the interpretation of the provisions of sections 22 and 23 of the Act, those provisions are extracted herein below:-

22. Person who may become member. - (1) Subject to the provisions of section 24, no person shall be admitted as a member of a society except the following, that is to say:

(a) an individual, who is competent to contract under the Indian Contract Act, 1872.

(b) a firm, company or any other body corporate constituted under any law for the time being in force, or a society registered under the Societies Registration Act, 1860;

(c) a society registered, or deemed to be registered under this Act;

(d) the State Government or the Central Government;

(e) a local authority;

(f) a public trust registered under any law for the time being in force for the registration of such trusts;

Provided that, the provisions of clause (a) shall not apply to an individual seeking admission to a society exclusively formed for the benefit of students of a school or college;

Provided further that, subject to such terms and conditions as may be laid down by the State Government by general or special order, a firm or company may be admitted as a member only of a society which is a federal or urban society or which conducts or intends to conduct an industrial undertaking.

Provided also that, any firm or company, which is immediately before the commencement of this Act, a member of a society deemed to be registered under this Act, shall have, subject to the other provisions of this Act, the right to continue to be such member on and after such commencement.

Section 23 dealing with "open membership", insofar as it is relevant reads as under:

23. Open membership. - (1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefore under the provisions of this Act and its bye-laws.

(1A)

(2)

(3)

(4)

7. In assailing the correctness of the view which has been taken by the Authorities below, the learned Counsel appearing on behalf of the petitioner submitted that the Bye-laws of the Society were certified by the Registrar of Societies on 24th March, 1925 and subsequently in or about 1985 after enactment of the Maharashtra Co-operative Societies Act, 1960. Counsel submitted that the Registrar has at no stage come to the conclusion that the Bye-laws of the Society were required to be amended and no direction had been given to the Society in pursuance of the provisions of section 14 of the Act. In any event, according to the learned Counsel, no such direction could have been given in view of the fact that a direction u/s 14 must necessarily be in the interests of the Society. Counsel appearing on behalf of the petitioner further urged that there is nothing in the Act which would prevent a co-operative society from confining membership to a particular class. The prescription of a qualifying condition that persons who wish to become members of the Society must belong to that class, is in the submission of Counsel a valid condition. The class which was prescribed in the present case was of persons who profess the faith of Roman Catholics. A person who is not a Roman Catholic could, therefore, in this submission, be legitimately excluded from membership of the Society. Learned Counsel appearing on behalf of the petitioners, adverted to a Judgment of a learned Single Judge of this Court delivered by A.V. Savant, J. (as the learned Judge then was), in *The Talmakiwadi Co-operative Housing Society Ltd. Vs. The Divisional Joint Registrar, Co-operative Societies and others*, in which the learned Single Judge upheld the decision of the Divisional Joint Registrar to the effect that a Bye-law of a co-operative society which confines membership to persons who belonged to the Kanara Saraswat Community was contrary to the provisions of sections 22 and 23 of the Act and, therefore, required an amendment by the Society. Learned Counsel urged that in arriving at this decision, attention of the Court was not drawn to a Judgment of a Division Bench of this Court in *Karvenagar Sahakari Griha Rachana Sanstha Maryadit, Pune and Another Vs. State of Maharashtra and Others*, . In view of the submission which has been urged at the Bar, the impact of the decision of the Division Bench of this Court in *Karvenagar Sahakari Griha Rachana Sanstha Maryadit, Pune and Another Vs. State of Maharashtra and Others*, will have to be considered so as to determine

whether the view taken by the learned Single Judge in Talmakiwadi Cooperative Housing Society Ltd's case (supra) is consistent with the view of the Division Bench of this Court. Learned Counsel appearing on behalf of the petitioner further submitted that members of a co-operative society do have a fundamental right under Article 19(1)(c) of the Constitution to form an association of their choice. Consequently, it was open to the members of the Society to legitimately decide that they will associate only with Roman Catholics in forming and conducting the co-operative housing society. The submission is that any encroachment on their rights as aforesaid will have to be regarded as unconstitutional.

8. In dealing with these submissions which have been urged by the learned Counsel appearing on behalf of the petitioner, regard must be had to some of the basic provisions of the Maharashtra Co-operative Societies Act, 1960. The preamble to the Act recites that the Act was enacted with a view to providing for the orderly development of the co-operative movement in the State in accordance with the directive principles of State Policy contained in the Constitution. The expression "Housing Society" is defined by section 2(16) to mean a Society, the object of which is to provide its members with open plots for housing, dwelling houses or flats, or if the open plots, dwelling houses or flats are already acquired, to provide its members common amenities and services. The expression "Member" is defined by section 2(19)(a) to mean a person joining in an application for the registration of a co-operative society which is subsequently registered, or a person duly admitted to the membership of the Society after registration. The expression "Bye-laws" is defined by section 2(5) to mean Bye-laws registered under the Act and for the time being in force, and to include registered amendments of such bye-laws. Section 4 of the Act provides that a Society, which has as its objects, the promotion of the economic interests or general welfare of its members or of the public, in accordance with co-operative principles, may be registered under the Act. The proviso prescribes that no Society shall be registered, the registration of which may be contrary to the policy directives which the State Government may, from time to time issue.

9. Under the provisions of section 12 read with Rule 10 of the Rules, Housing Societies are classified into three categories : (i) tenant-ownership housing societies which are housing societies where land is held either on lease-hold or on a free-hold basis by the Society and houses are owned or are to be owned by members; (ii) tenant-co-partnership housing societies which are housing societies where the land as well as buildings are held by the society on lease-hold or free-hold basis and are allotted by the society to its members and (iii) other housing societies being house mortgage societies and house construction societies. Section 9(1) empowers the Registrar to register a Society if he is satisfied that a proposed Society has complied with the provisions of the Act and the Rules. The Registrar, upon the registration of a Society, also certifies the bye-laws of the Society. Model Bye-laws have been framed which have persuasive force and it is an admitted position that the Model Bye-laws insofar as it is

material to the controversy in the present case, provide for open membership in which the membership of a cooperative society shall not be denied on the basis of caste, creed, or religious faith. u/s 14 of the Act, the Registrar can direct a Society to amend its Bye-laws if he is satisfied that such an amendment is necessary or desirable in the interest of the Society. The direction of the Registrar is to be regarded as having been duly carried out in sub-section (2) if the Society fails to implement the direction.

10. Section 23 of the Act embodies one of the basic principles underlying the co-operative movement which is the principle of open membership. The marginal note to section 23 is entitled "open membership". The section itself stipulates that the Society shall not without sufficient cause refuse admission to membership to any person duly qualified under the provisions of the Act and its bye-laws. Section 22 enunciates as to who will become a member of the Society and insofar as it is material to the present case, it provides that an individual who is competent to contract under the Indian Contract Act, 1872 shall be qualified to seek membership of a cooperative society.

11. The principle of open membership lies at the very foundation and the root of the co-operative movement. The Judgment of a Division Bench of this Court in Karvenagar Sahakari Griha Rachana Sanstha Maryadit, Pune and Another Vs. State of Maharashtra and Others, traces the history of the co-operative movement and the legislative history of the provisions of the Act. In para 6 of its Judgment the Division Bench enunciated the essence of the co-operative movement and the role and position of legislation in providing an appropriate framework for the recognition, implementation and growth of co-operation. The Division Bench has taken notice of this facet in the following terms:-

A co-operative society is a voluntary association of persons; it is an economic institution informed by social purpose and not motivated by entrepreneurial profits; it is a democratic organisation owned and controlled by those utilising its services. A combination of all these features mark out co-operatives as distinct Organisations, different from other types in the private or public sector. What objective and scope of co-operative legislation should be, have been succinctly described by Mr. Watkin in his preface to International Handbook of Co-operative Legislation:

True Co-operation draws its inspiration from realms where the State's writ does not run. Co-operative movements are not created by legislation. Nevertheless, without an appropriate legislative framework a co-operative movement in the form of a growing economic organism is not possible or even conceivable. The right of individuals to associate in co-operative societies and the right of the societies to unite in federations must be recognised.... The legal harness must allow for the free play of fundamental co-operative principles and the normal development of co-operative organisations according to the needs of their members and their own laws of growth.

12. Statutory regulation of Co-operative societies is the means by which law has recognised the constitution and functioning of co-operative societies. The manner in which co-operative societies will be formed and registered is laid down by statute. The rights and obligations of membership are provided by the statute. The manner in which co-operative societies will function is prescribed by law. A framework for the resolution of dispute by a hierarchy of tribunals is provided for. Co-operative institutions and those who participate in them as members are bound to observe the norms of the statute which recognises and regulates their activities. The benefits of the statute must equally be accompanied by a duty to observe the conditions prescribed by law in the interests of the healthy growth of the co-operative movement.

13. The Commission on Co-operative principles was presided over by Prof. D.G. Karve and this commission was appointed by the International Co-operative Alliance. The Commission enunciated what according to it, were the basic principles of a Co-operative Society. These principles are instructive for the purposes of the present discussion and are as follows :-

(i) Membership of a co-operative society should be voluntary and available without artificial restriction or any social, political, racial or religious discrimination, to all persons who can make use of its services and are willing to accept the responsibilities of membership:

(ii) Co-operative societies are democratic organisations, their affairs should be administered by persons elected or appointed in the manner agreed by the members,

(iii) the members should provide for development of the business of the co-operative, provide for common services, and distribute amongst the members the profits made.

(emphasis supplied).

There can be no gain-saying the fact that the availability of membership without social, political or religious discrimination is the essence of the formation of a co-operative institution. The genesis of co-operative institution lies in an association of persons who come together for mutual self help. Yet, the law provides the legal framework for the recognition, formation and implementation of co-operation. The legal incidents of co-operation are thus a matter of statute and exist insofar as the legislature has codified the rights and obligations of members and of the societies which they form.

14. Besides the Judgment of this Court in the Karvenagar case, reference may be made to a decision of a Full Bench of the Madhya Pradesh High Court in *The Collective Farming Society Ltd. and Others Vs. State of Madhya Pradesh and Others*, . In its Judgment, the Full Bench of the Madhya Pradesh High Court reiterated the fundamental principles underlying Co-operation and the Co-operative form of organisation. These principles are summarised in para 18 as :

(i) the principle of Voluntary Association; (ii) the principle of Democratic management; (iii) the principle of self help and mutual help; (iv) the absence of profit motive; (v) the principle of an open door policy; (vi) Publicity; (vii) Neutrality; and (viii) Equality. A detailed reference to each one of those principles may not be necessary from the present point of view but insofar as the fifth principle of open membership is concerned, it has been placed in the following words in the Judgment of the Full Bench.

(v) Open door policy : A co-operative society always welcomes new comers if they possess the requisite qualifications, reside within the area of its operation and do not carry on parallel trade. There is no bar on the ground of caste, sex, religion or political affinity.

(emphasis supplied).

Thus it is apparent on the weight of authority that one of the fundamental principles underlying the co-operative form of organisation is that membership must be open to all sections and segments of Society irrespective of caste, creed or religious faith. Section 23 of the Act embodies the principle of open membership. A Society cannot without sufficient cause refuse admission to membership to a person duly qualified under the provisions of the Act and its Bye-laws. Section 22(1) amplifies who may become a member and insofar as individuals are concerned, a person who is competent to contract under the Contract Act may become a member of the co-operative society. In this regard, the provisions of sub-section (1A) of section 22 have a bearing on the legislative intent. Sub-section (1A) begins with a non obstante provision and empowers the State Government to declare that any person or a class of persons engaged in or carrying on a particular profession, business or employment, shall be disqualified from being admitted as or continuing as a member or shall be eligible for membership only to a limited extent, so long as such person continues to be engaged in that profession, business or employment. The consideration which is required to be borne in mind by the State Government in issuing a declaration under sub-section (1A) is whether the interest of any person or class of persons conflicts with or is likely to conflict with the object of the Society or of a class of Societies. In other words, where the profession, business or employment which is carried on by a person is of a nature which could render a conflict with the objects of the Society likely, it is open to the State Government to impose a restriction on the membership of the Society either in terms of an absolute or a qualified disqualification. Where the legislature intended that a deviation from the principles of open membership should be permitted, a specific provision has been made in sub-section (1A) of section 22 of the Act. A power to impose a disqualification either in absolute or qualified terms has been vested in the State Government and a decision on whether a conflict of interest between a member and the object of the Society is likely to result is not left to the discretion of the Society itself. That power has been conferred upon the State Government and, the considerations which must weigh with the State Government, are also

elucidated in sub-section (1A) of section 22.

15. Section 4 of the Act provides for the registration of a co-operative society where a Society has its objects, the promotion of the economic interest or general welfare of its members or of the public, in accordance with the co-operative principles. The proviso to section 4 mandates that no Society shall be registered inter alia if its registration may have an adverse effect on the development of the co-operative movement or where the legislation may be contrary to the policy directives of the State Government. The formation of Co-operative Societies and conduct of business by such Societies must take place within the legal framework provided by the Maharashtra Co-operative Societies Act, 1960. The statutory enactment provides an enabling framework under which Co-operative Societies can be registered and recognised for the purposes of the Act, and the conditions subject to which they can carry on their business. An entity which seeks registration as a co-operative institution must accept the statutory conditions or regulations subject to which Cooperative Societies are required to function under the provisions of the Act. The formation and functioning of Co-operative Societies are matters which are the subject of statutory regulation and de hors the statute, a right which would be at variance with the provisions of the Act cannot be asserted. This position in law is now well settled in view of a Judgment of the Supreme Court in Daman Singh and Others Vs. State of Punjab and Others, to which a reference will presently be made in the context of the argument under Article 19(1)(c).

16. A further submission was urged on behalf of the petitioner on the basis of the provisions of Article 19(1)(c) of the Constitution. The submission has already been noted earlier and, briefly stated, what is urged is that it is open to individual to come together to form a co-operative society and to determine the persons with whom they will associate. The submission was that it is not open to the State to foist upon associating members, persons with whom they do not choose to associate for a variety of reasons. Reliance was placed on a Judgment of the Supreme Court in Smt. Damyanti Naranga Vs. The Union of India (UOI) and Others, . Before the Supreme Court the facts of the case were that there was a Society known as "the Hindi Sahitya Sammelan" which came to be formed in 1910. The Society was subsequently registered under the provisions of the Societies Registration Act, 1860. The classes of membership of the Society were stipulated by the Bye-laws of the Society. Parliament enacted the Hindi Sahitya Sammelan Act 1962 and as a result of the provisions of the Act, a statutory body which was also known as the Hindi Sahitya Sammelan came to be constituted. The parliamentary enactment provided for the membership of the statutory body as well as for the constitution of the governing body. Provision was meant for the membership of the governing body of the statutorily constituted Hindi Sahitya Sammelan.

In the facts and circumstances of the case before the Court, the Supreme Court came to the conclusion that the impact of the Act was not merely to regulate the

administration of the affairs of the Society but to statutorily alter the composition of the Society itself. This, according to the Court, would be impermissible and would constitute a violation of the fundamental right under Article 19(1)(c) of the Constitution. The Act, in the Judgment of the Supreme Court, was not capable of being saved under Article 19(4) since it was not relatable either to the sovereignty or integrity of India or to public order or morality. In para 6 of its Judgment, the Supreme Court held as follows :-

6. ...It is true that it has been held by this Court that, after an Association has been formed and the right under Article 19(1)(c) has been exercised by the members forming it, they have no right to claim that its activities must also be permitted to be carried on in the manner they desire. These cases are inapplicable to the present case. The Act does not merely regulate the administration of the affairs of the Society; What it does is to alter the composition of the Society itself as we have indicated above. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The right to form an association, in our opinion, necessarily implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the Voluntary Association without any option being given to the members to keep them out or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Article 19(1)(c) is confined to the initial stage of forming an Association and does not protect the right to continue the Association with the membership either chosen by the founders or regulated by rules made by the Association itself, the right would be meaningless because, as soon as an Association is formed, a law may be passed interfering with its composition, so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association.

The Damayanti judgment (supra) is, therefore, an illustration of a situation where the composition of a voluntarily formed association is statutorily sought to be altered by imposing membership of a body other than that which had been formed voluntarily in the first instance. The Judgment in the aforesaid case has been followed by the Supreme Court in *Asom Rastrabhasa Prachar Samiti and Another Vs. State of Assam and Others*, . In that case, the Government of Assam under an enactment of the State Legislature took over the management of the *Rashtrabhasa Prachar Samiti* for an indefinite period. The Supreme Court noted

that under the provisions of the Act it was left to the entire discretion of the Government to appoint the whole of the Board which will take the place of the Managing Committee and the elected body which was running the institution. New members were introduced; complete control was left with the Board to be nominated by the Government and there were no norms as to who could be nominated for taking over the management of the Society. Those who had initially formed the association were kept out and the Society would be run by a group of persons nominated by the Government. In this context, it was held by the Supreme Court that the right of association had been taken away and this was a deprivation for all times to come.

17. The Judgment of the Supreme Court in the Damayanti case was considered and explained by a Constitution Bench of the Supreme Court in *Daman Singh and Others Vs. State of Punjab and Others*, . The context of the Judgment, as submitted by the learned Counsel appearing on behalf of the petitioner, was the provisions of Article 31A of the Constitution but in para 9 of the Judgment referring to the earlier Judgment in *Damayanti's* case, the Supreme Court noted thus:-

In the cases before us we are concerned with co-operative societies which from the inception are governed by statute. They are created by statute, they are controlled by statute and so, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association.

In other words, a clear distinction must be made in law between bodies, such as co-operative societies which are formed since their inception subject to statutory control and regulation on one hand and on the other hand provisions of legislation such as the legislation in question in *Damayanti Naranga* and the *Asom Rastrabhasa Prachar Samiti* cases. What was considered to be fatal to the validity of the legislation involved in the latter class of cases was that as a result of the statute the very composition of a voluntarily formed association was sought to be altered by taking away the control of the association and vesting membership and the power of management in the Governing Board constituted by the Government or its nominees. These cases are clearly distinguishable from cases such as the present involving bodies such as Co-operative Societies, which owe their legal existence to the provisions of the statute and must therefore necessarily be amenable to the control of the statutory provisions. There is no compulsion to get a co-operative society registered and, therefore, once a society is registered, a grievance cannot be made of the provisions of the statute which regulate the affairs of the co-operative society. This view has been clearly laid down by the Supreme Court in *Daman Singh's* case adverted to earlier and has been followed by a Bench of two learned Judges of the Supreme Court in its judgment in *State of U.P. and another etc. Vs. C.O.D. Chheoki Employees' Co-op. Society Ltd. and others etc.*, . In para 15A of its Judgment, the Supreme Court held as follows :-

15A. Thus, it is settled law that no citizen has a fundamental right under Article 19(1)(c) to become a member of a co-operative society. His right is governed by the provisions of the statute. So, the right to become or to continue being a member of the society is a statutory right. On fulfillment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable from time to time. A member of the Society has no independent right qua the society and it is the society that is entitled to represent as the corporate aggregate. No individual member is entitled to assail the constitutionality of the provisions of the Act, rules and the bye-laws as he has his right under the Act, rules and bye-laws and is subject to its operation. The stream cannot rise higher than the source.

18. The view which has been taken by me finds support in the Judgment of a learned Single Judge of this Court; of a learned Single Judge of the Gujarat High Court which has been recently affirmed by a Division Bench of that Court and of a Division Bench of the Madhya Pradesh High Court. Insofar as the view which has been taken by this Court is concerned, Mr. Justice A.V. Savant (as he then was) held in *The Talmakiwadi Co-operative Housing Society Ltd. Vs. The Divisional Joint Registrar, Co-operative Societies and others*, that a Bye-law of a cooperative society which restricted membership only to persons belonging to the Kanara Saraswat Community clearly violated the principle of open membership adopted by sections 22 and 23 of the Act and that the Registrar was consequently within his rights in directing the Society to amend its Bye-laws in pursuance of section 14(1) of the Act. A similar view was taken by a learned Single Judge, M.S. Parikh, J. of the Gujarat High Court in *Zoroastrian Co-operative Housing Society Ltd. and Another Vs. District Registrar, Co-operative Societies (Urban) and Others*, . The Bye-laws in question in that case confined the membership of a co-operative society to members of the Parsi Community. A learned Single Judge of the Gujarat High Court relied on a Judgment of a Division Bench of this Court in the case of *Karvenagar S.G.R. Sanstha Maryadit vs. State* reported in 1989 Mh.L.J. 320 = 1989 Bom 392, which has been referred to earlier in holding that the said bye-law would run contrary to basic principles of cooperation and the principle of open membership enshrined in the relevant section of the Gujarat Co-operative Societies Act, 1962. The Judgment of the learned Single Judge was upheld by a Division Bench of the Gujarat High Court consisting of K. G. Balakrishnan, C.J. (as the learned Chief Justice then was) and S.V. Dave, J. In paras 16 and 17, the Division Bench of the Gujarat High Court has held thus:-

16. ...Therefore, it is clear that there is all pervading control by the statute over the function and composition of the cooperative societies and Courts have consistently held that such interference does not violate the freedom of association guaranteed under Article 19(1)(c) of the Constitution. As the property owned by a member of the housing society is inheritable and alienable, these rights cannot be restricted except under an express provision of law. The

bye-laws of the society expressly prohibited a non-Parsi being a member of the housing society and the same cannot be said to be reasonable as the denial is solely based on his membership of a particular community.

17. The appellant-Society must have been initially founded by persons belonging to minority community but in view of the statutory restrictions, it cannot be contended that the membership of the society would be restricted to Parsis alone. If any such restriction is imposed, it would amount to a restraint on alienation. When the property obtained as a member of the Co-operative Housing society is held to be heritable and alienable, no such restraint could be imposed on the member.

A similar view was taken, in the context of an Urban Co-operative Bank by a Division Bench of the Madhya Pradesh High Court consisting of G.P. Singh, C.J. and B.C. Varma, J. in *The Maharashtra Brahman Sahakari Bank Ltd. and Another Vs. State of Madhya Pradesh and Others*, . A Division Bench of the Madhya Pradesh High Court held that "one of the important principles of Co-operation is an open door policy." This principle, the Court held is that a co-operative society always welcomes new comers, if they possess the requisite qualifications, reside within the area of its operation and do not carry on parallel trade. Further, the Court also held that this principle means that there is no bar on the ground of caste, sex, religion or political affinity. Dealing with Article 19(1)(c), the Division Bench held as follows :-

The fundamental right to form an association does not carry with it the right to have the association recognised or registered. When a society applies for registration under the Act, it must be assumed that its members agree to be bound by the regulatory provisions of the Act for getting the privileges which the Act confers on a registered society. The privileges are purely statutory and are not in any way adjunct to the fundamental right to form an association.

19. One of the submissions which was urged on behalf of the learned Counsel for the petitioner was in regard to the fact that in delivering the Judgment in the *Talmakiwadi Co-operative Housing Society Ltd.*, case (supra) the learned Single Judge did not notice the Judgment of the Division Bench of this Court in *Karvenagar Sahakari Griha Rachana Sanstha Maryadit, Pune and Another Vs. State of Maharashtra and Others*, . The learned counsel is correct in urging the submission in the sense that the Judgment of a Division Bench was not cited before the learned Single Judge. However, the learned Single Judge did refer to the Judgment of the learned Single Judge of the Gujarat High Court reported in *Zoroastrian Co-operative Housing Society Ltd. and Another Vs. District Registrar, Co-operative Societies (Urban) and Others*, , and from the Judgment of the learned Single Judge in the Gujarat case, it is clear that the Judgment of the Division Bench of this Court in *Karvenagar Sahakari Griha Rachana Sanstha Maryadit, Pune and Another Vs. State of Maharashtra and Others*, was duly considered. In any event, the Judgment of the Division Bench of this Court in *Karvenagar* would not result in a conclusion which was different from that which

was drawn by A.V. Savant, J. in *The Talmakiwadi Co-operative Housing Society Ltd. Vs. The Divisional Joint Registrar, Co-operative Societies and others*, . Before the Division Bench in *Karvenagar S.G.R. Sanstha Maryadit's* case, the question was about legality of a direction issued by the State Government in which it was provided that existing co-operative housing societies must amend their Bye-laws so as to permit the construction of Multi storied buildings by members of the Society on plots allotted to them. The direction of the State Government provided that in such a case, the Co-operative Societies of flat holders in such multi storied buildings should be formed and registered and the new Society would also become a member of the existing housing Society. In this context, in para 9 of its judgment, the Division Bench held that as a result of the direction which was issued by the State Government, a member of an existing Society would allow the construction of a multistoried building on his plot and the Society of flat holders would ipso facto become a member of the existing housing Society. In this context, the Division Bench of this Court held that the Government was compelling the existing housing society to accept a sub-society on its land and then accept the sub-society as a member of the petitioner Society. This compulsion clearly breached the principle of law underlying Article 19(1)(c) which was laid down by the Supreme Court in *Damayanti Naranga*. The principles which have been enunciated in the Judgment of the Division of this Court in *Karvenagar S.G.R. Sanstha, Maryadit's* case have already been adverted to by me earlier.

20. Thus, having regard to the uniform position in law which has been accepted by a Judgment of this Court and by Judgments of the High Courts of Madhya Pradesh and Gujarat, it is abundantly clearly that a restriction in the Bye-laws of a co-operative society imposing a condition or qualification restricting membership, to a particular religious group would violate the principle of open membership. That principle of open membership is recognised by section 23 of the Maharashtra Co-operative Societies Act, 1960. Indeed, it must be recognised that it would not be open to the State Legislature to permit a discrimination only on the ground of religion, race, caste, sex, place of birth or any of them by virtue of the provisions of Article 15(1) of the Constitution. Regard must also be had to the position that cooperative housing societies provide an essential amenity to the citizens, namely the amenity of housing. The right to housing is now itself recognised as a fundamental right under Article 21 of the Constitution in *M/s. Shantistar Builders Vs. Narayan Khimalal Totame and others*, . Persons who come together to form a co-operative society are bound to comply with the provisions of the Maharashtra Co-operative Societies Act, 1960 which regulates their activities. Apart from this consideration, regard must also be had to the fact that in the case of a co-operative housing society membership of the Society has an incident of membership, the right to own property or the right at least to enjoy and occupy the property. Occupation or possession, as the case may be, of property whether in the capacity of an owner or as a lessee attaches to the membership of a co-operative housing society. Restricting the access to the co-

operative housing society to members of particular religious group would thus necessarily impose restrictions on the full enjoyment of property. This right may be regulated, as rights in property can generally speaking be regulated, but save and except in the face of a statutory indication, an interpretation which would interpose a bar upon the full enjoyment of the right ought not to be countenanced by the Court. A faint attempt was made to rely upon the freedom to profess, practice and propagate religion under Article 25 of the Constitution. Article 25, however, expressly makes a distinction between religion and the secular aspects. The latter can be regulated by the State. The issue was not seriously canvassed beyond a passing reference and must rest there.

21. Finally, before concluding it may be stated that though the Registrar in the present case did not issue a direction to amend the Bye-laws u/s 14 of the Act, it was clearly open to him in appeal under subsection (2) of section 23 to consider whether the bye-law of the Society on the basis of which membership was sought to be refused to the 3rd and 4th respondents on the ground of their not being Roman Catholics by faith was consistent with the provisions of the Act. The view which has been taken by the Authorities below in coming to the conclusion that Bye-law 7(a) of the Society was not consistent with the provisions of sections 22 and 23 of the Act does not suffer from any infirmity.

22. I may clarify that the only issue which has been raised in these proceedings is as regards the decision of the Society to exclude the transferees from the original lessees on the basis that they were not Roman Catholics.

23. In the result, I do not find any merit in the petition. The petition is accordingly rejected. The order of status-quo which has been passed at the stage of admission will continue to operate for a period of six weeks. There shall be no order as to costs.

Certified copy of this order expedited.

An ordinary copy of this order authenticated by the Personal Secretary may be made available to the parties.