
(2002) 09 BOM CK 0022

In the Bombay High Court

Case No : Writ Petition No. 4442 of 1987

V. Shreenivasan

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 02-09-2002

Acts Referred:

Citation : (2003) 1 ALLMR 1108 : (2003) 3 BomCR 134 : (2003) 3 MhLj 189

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Y.R. Naik, for the Appellant; Niranjana Jagtap, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This writ petition under Articles 226 and 227 of the Constitution of India, takes exception to the order passed by the Minister of State for Co-operation dated 23rd January 1987 in Revision Application No. RVA-1679/2254/CR-19/15-C. The premises in question is Flat No. 14 admeasuring 770 sq.ft. carpet area in the building known as Sundram, Goradia Nagar, Ghatkopar (East), Mumbai 400 007. Respondent No. 4 society was registered some time in the year 1970. At the relevant time, it is stated that, the petitioner was the Chief Promoter of the Society. It is further stated that the subject flat was allotted to the petitioner some time in the year 1970, but possession thereof was made over to the petitioner in March 1973 by the respondent No. 4 society. It is the case of the respondent No. 4 society that the petitioner inducted one Mr. Pai in the suit premises as a consequence of that subletting and for other reasons, the respondent No. 4 society issued notice on 4-8-1973 to the petitioner. Copy of which came to be forwarded to Mr. Pai. In this notice it is stated that, the petitioner has not occupied the suit flat since the taking over possession thereof and that has not paid the monthly dues to the Society, thus falling in arrears. The notice further alleges that the petitioner has parted with possession of the suit flat in favour of Mr. Pai without obtaining prior consent of the respondent No. 4 society. In this background the petitioner was

called upon to take remedial measures within 7 days from the date of receipt of the notice failing which to treat the said letter as a calendar month's notice to come into effect on expiry of 7 days, as required to be served on the member under Tenancy Regulation No. 20 and at the expiry of the said period the petitioner to quit, vacate and hand over quite vacant and peaceful possession of the subject flat to the respondent society. By this notice the respondent society also called upon the petitioner to discharge with immediate effect pending dues of the society as penal interest was being incurred on repayment to the financial institution. The petitioner gave reply to the said notice through his Advocate on 21-8-1974. The petitioner denied that he had let out the subject flat in breach of bye laws and Tenancy Regulations and, therefore, the question of terminating the tenancy by calendar month's notice would not arise. Insofar as the allegation of default is concerned, the petitioner has stated in his reply that he was ready and willing to pay provided the detailed statement of outstanding amount is furnished to him. According to the petitioner, in spite of this unambiguous declaration that he was ready to pay the amount of dues towards the arrears on receiving details about the same, the respondent Society did not furnish necessary information. On the other hand, according to the respondent Society, the person who was in occupation of the suit flat, said Mr. Pai, assured the respondent society by letter dated 21-10-1973 that he shall vacate the suit flat and hand over possession thereof to the Society. It is the Society's case that pursuant to the said assurance given by Mr. Pai obviously on behalf of the petitioner, he handed over possession of the suit flat to the respondent society on 21-1-1974. As a consequence of that development, the society by its letter dated 2-5-1974 addressed to the petitioner, placed on record that he has surrendered the possession of the flat to the society as occupant of the suit flat has handed over possession thereof in pursuance of his letter dated 21-10-1973. By this letter the Society, however, further informed the petitioner that the amount which was lying to the credit of his account as per books of the society was to be appropriated by the Society towards his misfeasance liability which was estimated upto Rs. 38,000/- and the excess amount to be recovered from him in accordance with law. In response to this letter, the petitioner, through his Advocate's notice dated 28-8-1974, made grievance to the Deputy Registrar of the Society Bombay, complaining that the Society was falsely claiming to have taken over possession of the suit flat and asserted that he was the member of the Society and that he was never put to notice before the act of taking over the suit flat. The petitioner by another letter sent through his Advocate dated 28-8-1974 to the respondent Society, in response to the Society's letter dated 2-5-1974, asserted that he was surprised to note the stand taken by the Society that the petitioner had surrendered the possession of the flat in question. The petitioner also denied his liability to pay any amount of Rs. 38,000/- for the alleged misfeasance. The petitioner once again expressly stated in this letter that he was willing to pay the installments of service charges and Other expenses payable as any other member, provided the society would inform him the details thereof. According to the petitioner, however, the respondent society by letter

dated 24-8-1974 addressed to the petitioner's Advocate did not inform the break up of the outstanding amount and continued to assert that possession of the flat has been handed over to the respondent society and that the petitioner was liable to pay the old dues and amount towards misfeasance liability. In response to that letter the petitioner's Advocate gave reply to the Society denying the claim made by the respondent society. In turn the respondent society sent letter to the petitioner's Advocate reiterating its stand. It is not necessary to go into that controversy for deciding the issues that would arise in the present case. What is relevant to note is that the petitioner was served with the notice dated 9-10-1974 issued by the respondent society calling upon the petitioner to show cause within one month from the date of receipt of the said notice as to why the petitioner should not be expelled from the membership of the Society and why his shares and interest should not be forfeited to the Society. The petitioner was also informed that general body was to be convened on 17-11-1974 at 10.00 a.m. at the designated place where the petitioner should remain present to show cause, if so advised. Along with the said notice the Society forwarded details about the outstanding dues -- giving break up of Rs. 5268/- which was due and payable at the relevant time. Besides the draft resolution which was to be adopted by the general body was also forwarded to the petitioner. In this notice the allegation is that the petitioner was a persistent defaulter and that because of his act of commission and omission disrupted the society and that acted in the manner prejudicial to the interest of the society. Besides, the notice clearly spelt out the ground that the petitioner had not occupied the suit premises himself after taking possession thereof from the society and in fact had parted with possession of the said flat in favour of one Mr. Pai, who in turn had surrendered the flat to the respondent society in January 1974, which fact was now disputed by the petitioner. Accordingly, the Society by its notice proposed to take action against the petitioner for expelling him in terms of bye law 12(1)(a), 12(1)(g) and 12(1)(h) read with Section 35 of the Act. In response to this notice the petitioner sent reply dated 28-10-1974. In so far the ground of default is concerned, it was stated on behalf of the petitioner that he was prepared to pay the arrears of charges if detail statement of outstanding amount payable by him was furnished to him and that his attorney shall pay Rs. 5268/- if the restraint on the flat was removed and the flat was restored to him or his attorney. Insofar as the allegation of petitioner not having occupied the suit premises himself or that he had parted with possession thereof, the same was denied. According to the petitioner he had never let or sublet the flat or had never given possession of the flat to any person and the flat was lying vacant all along. The reply, however, concedes the position that Mr. Pai was occupying the suit flat temporarily. As per the notice given by the respondent society, the general body meeting was held on 17-11-1974 at 10,00 a.m. at the designated place where the petitioner did not remain personally present nor his Advocate or any authorized person. The said meeting was attended by 54 members and after detailed deliberation, as is reflected in the resolution passed by the general body, resolved to expel the petitioner from the membership of the society under bye law No. 12(1)(a), and

(g) and (h) and also u/s 35 of the Maharashtra Co-operative Societies Act read with Rules 28 and 29 of the Maharashtra Cooperative Societies Rules and that his shares and interest be fortified to the Society. The managing committee of the Society was authorized to submit an application to the District Deputy Registrar Co-operative Societies for obtaining necessary approval for expulsion of the petitioner and incur such expenses as may be warranted therefore. The general body adopted the amended Resolution, the relevant portion whereof reads thus :--

"AMENDMENT RESOLUTION"

"Whereas Shri V. Srinivasan as Promoter and Secretary of the Society has acted in a manner prejudicial to the interest of the society and proper working of the society by introducing unwarrantedly and out of turn monies into the hands of the contractors, thereby causing wrongful loss to the society and causing wrongful gain to the Contractors, and

Whereas while acting as such, Shri Srinivasan did not disclose to the society that he is related to one of the partners of the contractors, thereby rendering the contract voidable at the instance of the society and,

Whereas series of his acts as Secretary were prejudicial to the smooth working of the Society as aforesaid and,

Whereas in the course of working as Secretary Mr. V. Srinivasan has brought disrepute to the society by the manner in which he has acted into the hands of the Contractors causing wrongful loss to the society and causing wrongful gain to the Contractors, and

Whereas Shri V. Srinivasan is due and liable to pay to the Society a sum of Rs. 5268.00 upto 31st October 1974 with interest at 9% thereon upto date of payment, which amount he failed to pay and avoided to pay by not disclosing his present address and,

Whereas in spite of surrendering his flat through the occupant Shri Pai, he has gone back on his promise and is now seeking to recover his flat illegally through his advocate, Shri K. Narayan Nair making false allegations against the office-bearers of the society and thus interfering with the smooth function of the society and,

Whereas Shri V. Srinivasan did not occupy his flat allotted to him in the building "Sundaram" belonging to the society from the date of allotment of his flat even to this date, and

Whereas he has parted with the possession of the flat to a non member thereby disclosing that he was not in pressing need of his flat, and

Whereas a Show cause notice was given to Shri V. Srinivasan at the address of his Advocate. Shri K. Narayan Nair, to his address registered with the Society, to his last known address and also pasted at the main door of Flat No. 14 Plot 162

as Shri V. Srinivasan did not leave his present address and since Mr. K. Narayan Nair in spite of requesting him to give Mr. Srinivasan's present address has not divulged his address and,

Whereas after considering all the situation and explanations from the parties concerned including the Managing Committee members,

Resolved that Shri V. Srinivasan be and is hereby expelled from the membership of the Society under Bye-law 12(1)(a)(g) and (h) and also u/s 35 of the M.C.S. Act read with Rules 28 and 29 of the M.C.S. Rules and that his shares and interests be forfeited to the Society, Resolved further that the Managing Committee be and is hereby authorized to submit an application to the District Dy. Registrar, Co-op Societies, Bombay for getting his necessary approval for his expulsion and incur such expenses as may be necessary for the same"

The amended resolution as proposed by Mr. T.S. Balakrishnan was read out to the general body three times. The first reading was done by the President, the second reading by the Hon. Secretary and the third reading by the Jt. Hon. Secretary. The amended resolution after the third reading was seconded by Mr. K.S. Sankaranarayanan and the General Body adopted the amended resolution unanimously.

There was no other item on the agenda.

Mr. S.V. Krishnan proposed a vote of thanks.

The meeting terminated at 12.15 p.m."

2. After this resolution was passed, the respondent Society moved an application before the District Deputy Registrar Co-operative Societies to accord approval to the resolution for expelling the petitioner from the Society. In that application further relief was prayed that it be declared that expulsion of the petitioner is without prejudice to the rights of the society to proceed against him in respect of charge of misfeasance proceedings. This application was resisted by the petitioner by filing detailed reply. Insofar as the ground of persistent default is concerned, it was stated that the petitioner was always ready and willing to pay the amount and there was no question of petitioner being a persistent defaulter. Insofar as the ground that the petitioner has not occupied the suit flat after taking possession thereof, the same was also denied. The petitioner also denied that the petitioner had parted with possession of the suit flat in favour of Mr. Pai as alleged. It is in this reply, for the first time, the petitioner perhaps attempted to explain the position regarding the status of Mr. Pai and contended in para 6 that bye law does not prohibit the members for allowing their friends to stay with them and hence no permission was sought. It is on the basis of this rival case made out before the Registrar, the matter was decided by the Registrar holding that expulsion resolution passed against the petitioner was appropriate and inconformity with the relevant provisions and procedure and, therefore, accorded approval to the said resolution passed in the said general body meeting held on

17-11-1974, by his order dated 6-3-1976.

3. It is relevant to note that while expulsion proceedings were pending before the Registrar, the petitioner filed a dispute before the Co-operative Court, being Dispute No. 1422 of 1975, praying for the following reliefs :

"22. The disputant, therefore pray that :

a) That to be declared that the disputant as in lawful possession of the flat No. 14 in building No. 162, Garodia Nagar in dispute and ordered that opponents to withdraw from their illegal stand of possession of the said flat and to surrender the flat and articles wrongfully seized by them to the disputant.

b) The opponents be ordered and restrained permanently from dispossessing or restraining the disputant from enjoying possession of flat No. 14 on Plot No. 162 Garodia Nagar, Ghatkopar, Bombay allotted to him without due process of law.

c) That pending hearing and final disposal of this application, the Opponents, their agents, servants and or any other person or persons claiming through them be restrained by an order and injunction of this Hon. Authority from in any manner dealing with or disposing or transferring or mortgaging or pledging or hypothecating or in any manner dealing with or disposing of or in any manner encumbering the said flat No. 14 in building on plot No. 162 of the said society and or in any manner parting with the possession of the same in favour of anyone else save and except in favour of the disputant and or any manner doing any acts which is prejudicial to the rights of the disputant herein concerning the said flat.

d) That court Receiver, High Court at Bombay be appointed as receiver for the said flat along with articles thereto pending heating and final disposal of this dispute.

e) Ad interim order in terms of para c) and d)

f) Any further orders and reliefs to be granted in favour of this disputant as may be deemed necessary in the circumstances of the case.

g) The disputant be granted the costs and expenses of this dispute."

4. In this dispute certain interim reliefs were passed directing the Society not to deal with the suit flat till the disposal of the suit. Besides, at one stage, the Society moved an application for direction against the petitioner to pay the arrears as well as the monthly outgoings in respect of the suit flat. That relief was however refused by the Maharashtra State Co-op. Court holding that the petitioner was not liable to pay the outgoings since the Society was in possession of the suit flat from January 1974. We are not really concerned with those proceedings, but reference is made as reliance has been placed on this proceeding by the petitioner.

5. As observed earlier, the Registrar approved the Resolution passed by the

general body, expelling the petitioner from the Society. Against that decision, the petitioner carried the matter in appeal before the Joint Registrar Co-operative Societies, being Appeal No. 240 of 1970. The Appellate Court was pleased to allow the appeal essentially holding that the Registrar had clearly overlooked the abovesaid dispute which was relevant for examining the matter in issue between the parties as in that dispute filed by the petitioner before the Co-operative Court he was claiming to be in lawful possession of the suit flat. According to the Appellate authority, in such a situation, it was not possible to authoritatively hold that the petitioner had let or sublet or parted with possession of the suit flat. Against this decision passed by the Appellate authority on 13-11-1978, the respondent Society filed revision u/s 154 of the Act before the Minister, Co-operation. That revision application was allowed by the concerned Minister by order dated 21-10-1986. That order was passed ex parte. Therefore, the petitioner approached the Government to rehear the revision de novo and, that request was accepted by the revisional authority. After rehearing the matter, the concerned Minister, by the impugned order dated 23-1-1986, was pleased to allow the revision application and set aside the order passed by the Appellate Authority and instead restored the order passed by the Registrar approving the resolution passed by the general body expelling the petitioner. It is this decision which is subject matter of challenge in the present writ petition.

6. According to Mr. Naik, the learned Counsel for the petitioner, the provisions contained in bye law No. 12 are inconsistent with the mandate of Section 35 of the Act and, therefore, the same will have to be declared as invalid. He submits that the validity of that bye law can be set up at any stage particularly when the petitioner was to be expelled by invoking the said bye law in the present case. He submits that Section 35 postulates expulsion of a member for his acts which are detrimental to the interest or proper working of the society. According to him, there is no third situation conceived by the act and, therefore, member cannot be expelled by invoking the situations specified in bye law No. 12 including that he was a persistent defaulter or that he had let or sublet or parted with possession of the suit flat or for that matter that he had not occupied the premises in the building within the period not exceeding six months from the date of allotment. He submits that neither non occupation of the suit flat or letting or subletting of the flat to any outsider can be said to be detrimental to the interest or proper working of the society. He further submits that even the ground of persistent default would not qualify the test of the act being detrimental to the interest or proper working of the Society. He submits that in any case ground under bye law No. 12(1)(a) that the petitioner was persistent defaulter was unavailable in the facts of the present case. Inasmuch as, the petitioner was always ready and willing to pay the outstanding amount provided that he was informed about the break up and details thereof. He submits that it is, however, only for the first time by the expulsion notice dated 9-10-1974 break up was given. Further, in response to the said notice the petitioner had clearly stated that he was willing to pay the amount provided the restraint on the flat is

removed and the flat is restored to him or his attorney. He, therefore, submits that the ground of persistent default was unavailable in the present case. He placed reliance on the certain decisions to support the above plea to which I shall make reference at the appropriate place. Insofar as ground of subletting and parting with possession in favour of Mr. Pai is concerned, according to Mr. Naik bye law No. 12(1)(g) was not attracted in the fact situation of the present case. Inasmuch as, the petitioner was always in legal possession of the suit flat though the same was physically occupied by Mr. Pai for a temporary period. He submits that in such a case there would be no question of invoking Clause (g). Insofar as the ground relating to the non occupation of the suit flat by the petitioner within the meaning of Clause (h), it is contended that the same has no application because it is not in dispute that after the allotment of the flat, the petitioner took possession of the said flat in the month of March 1973 as soon as the Society offered the possession thereof. He, therefore, submits that taking any view of the matter neither Clause 12(1)(a), (g) or (h) is attracted in the present case and, therefore, the expulsion is on the grounds extraneous to the relevant provisions of the Act.

7. On the other hand, according to Mr. Jagtap for the respondent society, validity of the bye law No. 12 cannot be questioned by the petitioner because that specific relief has not been claimed in the writ petition and more so because the petitioner was the Chief Promoter at the relevant time and he was party to the adoption of the impugned bye laws. He, therefore, submits that the question of validity of the bye laws need not be examined in this case. He further submits that in any case bye law No. 12 and the circumstances stipulated therein clearly satisfy the mandate of Section 35 of the Act which postulates that by resolution passed by a majority of not less than 3/4th of the members entitled to vote who are present at a general meeting held for the purpose, expel a member for acts which are detrimental to the interest or proper working of the society. He submits that expression "detrimental to the interest or proper working of the society" is very wide and would include the circumstances provided for in bye law No. 12, including Clauses (a), (g) and (h). He, therefore, submits that there is no substance in the grievance made about the validity of the said bye law. Insofar as the ground of persistent default is concerned, according to Mr. Jagtap, the authorities below have concurrently found that the petitioner was a persistent defaulter and that finding of fact cannot and need not be interfered with in exercise of writ jurisdiction. He further submits that in any case the record would indicate that after the notice was issued to the petitioner on 4-8-1973, demanding the arrears and outstanding amount, the petitioner did not offer the same. He further submits that the only excuse given by the petitioner was that break up of the said amount be given to him. However, according to the Society the petitioner was expected to know the outstanding amount as admittedly no payment was made by the petitioner since November 1972. It is, therefore, submitted that this was a clear case of persistent default inasmuch as when the petitioner was given the break up along with notice dated 9-10-1974 the

petitioner then contended that he was willing to pay provided the restraint on the flat is removed and the flat is restored to him or his attorney. It is, therefore, contended that the petitioner has taken all possible pleas and it is more than clear that he was in arrears continuously from November 1972 and that was a deliberate defiance by the petitioner. In such a case the Society was competent to take action against the petitioner on the ground of being a persistent defaulter. In so far as the ground of parting of possession of the flat to Mr. Pai is concerned, according to Mr. Jagtap, no interference is warranted in respect of the said ground inasmuch as the petitioner concedes the position that Mr. Pai was in occupation of the suit flat atleast for a temporary period and coupled with the fact that the petitioner had at no point of time personally occupied the suit flat. Moreover, it is contended that authorities below have recorded finding of fact that the petitioner had parted with possession of the suit flat and that finding of fact ought not to be interfered with. Mr. Jagtap submits that in that case the ground invoked by the respondent society under Clause (g) of the bye law was proper. It is further contended that it has come on record that the said Mr. Pai had surrendered the flat to the respondent society which fact presupposes that Mr. Pai was in exclusive possession of the suit flat and, therefore, parting of possession of the flat was clearly established. He further submits that in so far as Clause (h) is concerned, the petitioner has not occupied the suit flat from the date of allotment. He, therefore, submits that taking overall view of the matter, no interference was warranted in exercise of writ jurisdiction under Articles 226 and 227 of the Constitution of India.

8. Having considered the rival submissions, I shall first deal with the arguments that bye law 12 is inconsistent with the mandate of Section 35 of the Act. Section 35 of the Act reads thus :

"Section 35(1) A society may, by resolution passed by a majority of not less than three-fourths of the members entitled to vote who are present at a general meeting held for the purpose, expel a member for acts which are detrimental to the interest or proper working of the society; Provided that, no resolution shall be valid, unless the member concerned is given an opportunity of representing his case to the general body, and no resolution shall be effective unless it is approved by the Registrar. (2) No member of a society who has been expelled under the foregoing sub-section shall be eligible for re-admission as a member of that society, or for admission as a member of any other society, for a period of one year from the date of such expulsion:

Provided that, the Registrar may, on an application by the society and in special circumstances, sanction the re-admission or admission, within the said period, of any such member as a member of the said society or of any other society, as the case may be".

9. It will be necessary, now, to advert to bye law No. 12 which reads thus :

"12(1) A member may be expelled from the Society by the vote of not less than

three-fourths of the members present and voting at a General Meeting of the Society on a motion that in the opinion of the Meeting such member has

- (a) been a persistent defaulter,
 - (b) wilfully deceived the Society by false statements,
 - (c) been bankrupt or legally disabled,
 - (d) been criminally convicted of an offence involving moral turpitude,
 - (e) intentionally done any act likely to injure the credit of the Society,
 - (f) gravely misused the dwelling rented by him from the Society or habitually acted in it in a disgraceful manner or in a manner which has caused serious offence to his neighbours,
 - (g) without the previous written permission of the Managing Committee, let or sub-let or given on caretaker or leave licence basis or used for accommodating paying guests or disposed of in any other manner any portion of the dwelling accommodation/shops/godown/garages, or
 - (h) failed to occupy his premises in the building of the Society within a period not exceeding six months from the date of the allotment of a flat.
- (2) the Committee shall give a member 30 days" written notice of the proposal to expel him. The member"s explanation, if any, shall be placed before the General Meeting for consideration.
- (3) To a member so expelled shall be refunded the amount received by the Society in respect of the shares held by him at the date of the resolution for his expulsion less a deduction therefrom of 5 per cent.
- (4) Readmission of expelled members :-- No expelled member shall be readmitted except by a vote of two-thirds of the members present and voting at any General Meeting on a motion of which notice has been given.

12a. If a person already admitted as a member later on acquires a house or a housing site outside the Society in his name or his dependants or family members like wife (husband), children, etc. or if he ceases to reside permanently in Bombay City or Suburban areas the Managing Committee shall call upon such a person to resign from the membership of the Society. It shall be competent for the General Body to expel such a person from membership after giving him 3 months" notice."

10. In the present case we are concerned with Clauses (a), (g) and (h) of the said bye law. The argument is that the circumstances provided for in the said clauses are not in accord with the expression "acts which are detrimental to the interest or proper working of the society". It is, therefore, contended that the said provisions of the subject bye law are ultra vires Section 35 of the Act. In the first place, it needs to be mentioned that no specific relief is sought in the memo

of writ petition in this behalf. However, the learned Counsel for the petitioner would rely on paras 18 and 19 of the writ petition to contend that this plea has been specifically raised in the writ petition and, even if there is no relief for deciding the said Bye law as ultra vires Section 35 of the Act, that would not precluded the court from examining this question as it goes to the root of the matter. Reliance is placed on the decision of this Court reported in 1986 Mh.L.J. 314, Vijay Ramji Pawar and Ors. v. Girna Sahakari Sakhar Karkhana Ltd. and Ors. and Anr. decision of the Division Bench of this Court reported in 7956 Mh.L.J. 713, Shantilal Amolakchand Burad and ors. v. Vijay Ramji Pawar and Ors. to contend that even if no specific relief has been claimed in the writ petition the court is obliged to consider the validity of the bye law and that can be set up at any stage of the proceedings. Assuming that the petitioner is right in contending that the petitioner was entitled to set up the validity of the aforementioned bye law, the question, however, is: whether it is possible to accept the argument that the said bye law travels beyond the mandate of Section 35 of the Act? It is not in dispute that the expression "acts" detrimental to the interest or proper working of the society is not defined or explained in the Act or the Rules framed thereunder. To my mind, the subject Bye law takes the colour from the expression "acts detrimental to the interest or proper working of the Society" occurring in Section 35 of the Act. There is no reason to give restricted interpretation to the said expression. On the other hand, each of the Clauses (a), (g) and (h) thereof will be clothed with that expression. As the said expression is not defined in the Act or the Rules, the Legislature has left it open to the Society and majority of the members to decide which of the "acts" and whether the "acts" complained of would fall within the mischief of "acts detrimental to the interest or proper working of the Society". To my mind, Bye law such as Bye Law No. 12 in the present case is really an attempt to define as to which of the "acts" would fall within the mischief of expression "detrimental to the interest or proper working of the Society". Now the question is -- whether the acts specified in Clauses (a), (g) and (h) of the said Bye law can be said to be acts detrimental to the interest or proper working of the Society. If the answer is in the affirmative then it will necessarily follow that the said provisions are intra vires Section 35 of the Act. Whereas, if the answer is in the negative then the petitioner will be right in contending that the said Bye law is ultra vires Section 35 of the Act. To my mind, however, each of the said Clauses (a), (g) and (h) postulate "acts", which, unquestionably, stand the test of being detrimental to the interest or proper working of the society. Let us first advert to Clause (a). It provides the act of a persistent defaulter. It cannot be gainsaid that if a member would remain as persistent defaulter, is bound to have acted detrimental to the interest of the Society as well as affected the proper working of the Society. Similarly, when the member of a Tenant Co-partnership Housing Society as in this case, lets or sublets or gives on caretaker or leave and licence basis or allows user of premises allotted to him for accommodating paying guests or disposes of the same in any other manner "without the written permission of the Managing Committee of the Society", that act of the member will not only be detrimental to

the interest of the Society but also affect the proper working of the Society. That is the act contemplated by Clause (g) of the Bye Law. No doubt in a given case the society may permit a member to let out his premises, but that would not mean that the member can ignore the society and deal with the premises without taking written permission of the Managing Committee of the Society. Non compliance of such requirement of the bye law by any member would surely be detrimental to the interest as well as proper working of the Society. Insofar as Clause (h) is concerned, it is contended by Mr. Naik that once allotment of the flat is made by the Society then it would hardly matter to the Society whether the member occupies his premises within the stipulated period or for that matter he himself occupies the flat or allows the same to remain vacant. There is no force in this submission. Whereas, keeping in mind the entire scheme of regulations and the bye laws, to my mind, it is necessary for the member to occupy the premises within the stipulated period provided in Clause (h) from the date of allotment of that flat. Failure to do so would be surely against the requirement and stipulations provided by the regulations and bye law of the society affecting the proper working of the Society. Accordingly, it is not possible to comprehend that the subject bye law No. 12 in particular Clauses (a), (g) and (h) thereof, can be said to be ultra vires Section 35 of the Act.

11. Reverting to the grounds on which the respondent society has sought expulsion of the petitioner, the first amongst them is that the petitioner was a persistent defaulter. The Registrar has found that the petitioner admittedly did not pay any amount after 28-11-1972. Whereas, the amounts which were demanded by the respondent society, the break up of which was furnished to the petitioner, would indicate that the Society was demanding monthly dues upto 1st July 1973 being Rs. 1400 and amount which was due as at 30th June 1974 including loan installment being Rs. 2609/- and other dues from 30-6-1974 onwards till 31-10-1974 being Rs. 880/- plus interest at the rate of 9% p.a. as applicable being Rs. 379/-, totalling to Rs. 5268/-. No doubt the Society did not give this break up in the first notice which was sent to the petitioner on 4-8-1973 but, nevertheless, in that notice the petitioner was called upon to immediately pay all the outstanding dues failing which appropriate action was to be initiated against him. To that notice, however, the petitioner replied that if necessary details are provided to him he would forthwith pay that amount. Thereafter the petitioner slept over the matter and did nothing more. However, thereafter came the suit notice dated 9-10-1974 whereby the petitioner was put to notice that his case was to be considered by the general body for expulsion on the ground that he was a persistent defaulter. Along with this notice necessary details were given. However, at this stage the petitioner took the stand that he was willing to pay the said amount provided the restraint on the flat is removed and the flat is restored to him or his attorney. In this view of the matter, the conclusion reached by the lower authority that the petitioner was a persistent defaulter is inevitable. The learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court reported in Vijay Narain Singh Vs. State of Bihar and Others, . to

contend that expression "habitually" means "repeatedly" or "persistently". Further it implies a thread of continuity stringing together similar repetitive acts. And repeated persistent and similar, but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It is contended that if the petitioner was put to notice of the break up for the first time only in October 1974 and, if the petitioner did not comply with the said demand, that act would not attract the requirement of the said provision and he cannot be labeled as a persistent defaulter. It is further submitted that the petitioner had given reason for not offering the amount, though he was always ready and willing to pay the same and, in such a case, it cannot be said that the petitioner was a wilful defaulter muchless a persistent defaulter. In support of the meaning of wilful defaulter the learned Counsel has placed reliance on the decision of the Apex Court reported in 2000(2) SCALE 147, *Chordia Automobiles v. S. Moosa and Ors.* The Apex Court has held that wilful default of payment of rent means an act of consciously or deliberately done with open defiance and intent not to pay the rent. According to the petitioner, though the petitioner did not pay the outstanding amount, but since there was a very good reason for not paying the same, he cannot be branded as a wilful defaulter or as persistent defaulter. However, it is seen that the petitioner was called upon to pay not only the monthly dues but also the amount towards loan installments. The liability to pay those amounts and its quantum is not disputed. Moreover, the notice sent by the respondent society clearly asserts that the petitioner is a persistent defaulter in respect of the amounts due having failed to make any payment to the Society since November 1972 and that he was not willing to pay the same on one pretext or the other. It is in this backdrop that the allegation against the petitioner was considered by the general body of the respondent Society and a conscious decision taken by the general body that the conduct of the petitioner was of a persistent defaulter. No doubt the petitioner contends that he had sufficient cause for not making payment but, then, the petitioner could not have avoided to make the payment in spite of the impending threat of his expulsion which was to be considered by the general body coupled with the fact that he did not choose to even appear before the general body to offer his explanation. This act of commission or omission of the petitioner were obviously consciously or deliberately done with open defiance and intent not to pay the amount as demanded. Accordingly, the decision which has been relied upon will be of no avail to the petitioner. It will be now proper to advert to the observations of the Apex Court which deal with the expression "persistent default", in the case of *Myurdhwaj Cooperative Group Housing Society Ltd. Vs. The Presiding Officer, Delhi Cooperative Tribunal and Others*, . In para 10 of this decision the Apex Court has clearly observed that :

"To what extent a default is going to affect a society will depend on the facts and circumstances of each case which has to be left at the discretion of each society. It is not proper even for the courts to interfere with such a discretion, except when it is arbitrary, irrational, mala fide, against any statutory provisions or

against orders having the force of law."

In the present case, it is not the petitioner's grievance that the action is arbitrary, mala fide or against the statutory provisions or against orders having the force of law. If that be so, as observed by the Apex Court, it is the discretion of the Society and the Court would not interfere with such a discretion except the permissible area of judicial review. In para 12 of this decision the Apex Court has further observed that -- Even in a case of persistence, a society may or may not take recourse under it. The Apex Court on examining the scheme of regulation in that case found that it would indicate that defaulters can be dealt with in various ways and what is not provided, not covered by the rules, the field is open for the general body to exercise its discretion. To my mind, once the society decides to exercise its discretion to expel the member on the ground of persistent default and if that allegation is substantiated from the record as in this case, then, that decision cannot be lightly interfered with except, as observed by the Apex Court, only when it is arbitrary, irrational, mala fide, against any statutory provision or against orders having the force of law. None of these grounds are available to the petitioner, nay pressed into service before this court. The correctness of the demand made by the respondent society has not been challenged. If that be so, no fault can be found with the approval accorded by the Society for expulsion of the petitioner on the ground that he is persistent defaulter as resolved by the general body of the respondent society.

12. That takes me to the ground under Clause (h) of bye law No. 12(1) under reference. To my mind, Clause (h) will be attracted when the member fails to occupy or take possession of his premises in the building of the society within a period not exceeding six months from the date of allotment of a flat. In other words, the member is obliged to take possession of the flat allotted to him within six months from the date of allotment of the flat, provided the flat is ready for taking possession. The expression "occupy" occurring in this clause will have to be understood as "to hold" or "take possession", so as to give proper construction to this clause. The expression "occupy" as explained in Black's Law Dictionary means :-- To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to take or hold possession. Such a provision is made to dissuade the member from not taking possession of the flat even after allotment and though it is ready for occupation, with a view to avoid liability to pay the outgoing thereon. The learned Counsel for the Society, however, contends that even where the member fails to occupy or start using his premises after the allotment even then the said clause can be invoked. It is not possible to accept this contention. To my mind, however, where the member has taken possession of the flat immediately when the same is offered to him by the Society or within a period not exceeding six months from the date of offering possession, the question of invoking this provision will not arise. Inasmuch as, if the member has taken possession of the flat, in law, he will have to be held as having occupied that flat. The ground that after taking possession of his premises the member has not occupied the same himself is entirely distinct and at best

would be governed by the provision such as Clause (g) and not Clause (h). In the present case, it is not in dispute that though the allotment of the subject flat was made in 1970, however, the building became ready for possession in or around March 1973 and only thereafter possession of the suit flat was offered to the petitioner, whereupon he immediately took possession in March 1973 itself. As observed earlier for the proper construction of Clause (h) the period specified therein will have to be counted from the date of offering possession of the flat by the Society to its members. Understood thus, in the present case, since the petitioner took possession of the suit flat in March 1973, immediately when the Society offered the possession thereof, therefore, the question of invoking Clause (h) will not arise.

13. That takes me to the next ground for expulsion specified in Clause (g) of bye law No. 12(1). The authorities below have found that the petitioner has admitted that Mr. Pai was in occupation of the suit flat. It is also not in dispute that the petitioner was not occupying the flat himself. On these admitted facts, application of Clause (g) will be inevitable. To overcome this difficulty it is contended that the petitioner was in legal possession of the suit flat. However, the authorities below have found as a fact that that the suit flat was surrendered by Mr. Pai to the Society on 21-1-1974. If that be so, as rightly contended by the respondent society, it can be presumed or inferred that the petitioner had parted with the possession of the suit flat in favour of Mr. Pai. It is in this context the suit notice was issued to the petitioner. In response to the said notice the petitioner merely denied that he had let or sublet the suit premises as alleged, without specifying any further details. It is on this premise that the General Body of the society proceeded to invoke Clause (g) of the bye law to expel the petitioner. When the matter went for the approval of the said resolution, before the Registrar, the petitioner for the first time took a stand that Mr. Pai was occupying the suit flat as his friend and there was no prohibition of any manner in the bye laws requiring the member to obtain prior permission of the society to allow such occupancy. However, undisputedly, the petitioner has not adduced any positive evidence before the Registrar that Mr. Pai was occupying the flat along with the petitioner as his friend. On the other hand, the record indicates that Mr. Pai was in exclusive possession of the suit flat and, therefore, it was a case of flat being "disposed of in any other manner" as contemplated by Clause (g). The rigours of Clause (g) are very wide and would include disposition of the present kind. It is in this backdrop the Registrar has taken the view that the contention of the petitioner that Mr. Pai was admittedly staying with him in the said flat does not hold good. This is purely a finding of fact recorded by the Registrar. The Registrar has further held that the petitioner had parted possession of the flat to a non member without the written permission of the Society and this act of the petitioner was certainly detrimental to the smooth working of the Society and against the provisions of the Society's bye laws. To counter this position, the learned Counsel for the petitioner contends that if the petitioner was not in possession of the suit flat after January 1974, there is no reason why the notice

addressed by the Society dated 2-5-1974 was sent to the petitioner on the address of the suit flat. That document, however, to my mind, would be of no avail and cannot be the sole basis for reversing the finding of fact recorded by the authorities below that the petitioner had parted possession of the flat to Mr. Pai who was admittedly occupying the suit flat. Moreover, the fact that Mr. Pai has handed over possession of the suit flat to the respondent society in January 1974 would clearly suggest that he was in exclusive possession thereof. If that be so, the ground under Clause (g) was inevitable. The onus would be on the petitioner to show that he has not disposed of the flat in any manner or that he had not let or sublet the suit flat. That onus has not been discharged in the present case. Understood thus, that Clause (g) has been rightly invoked by the respondent society in expelling the petitioner from his membership. The authorities below have also recorded clear finding of fact that necessary procedure as required under the provisions of the Act and Rules and bye laws has been followed and sufficient opportunity was given to the petitioner. Having regard to this position, coupled with the fact that it is not possible to take the view that the grounds invoked by the respondent society to expel the petitioner are either arbitrary, irrational, mala fide, against any statutory provisions or against orders having the force of law, then, surely, no fault can be found with the resolution passed by the general body which is the supreme body by virtue of Section 72 of the Act; and, as approved by the Registrar, being satisfied that the statutory requirement have been fulfilled and that relevant provisions were available and have been rightly invoked by the Society.

14. One of the argument advanced on behalf of the petitioner before this court is that since the ground under bye law 12(1)(h) has been wrongly invoked by the respondent society, the entire action and decision of the general body is violated -- because it is not possible to discern that the society had taken a conscious decision of expulsion with reference to each of the ground separately. To my mind, this contention is only an argument of desperation. On the other hand, it is evident from the record that the General body of the society has examined each of these grounds separately and independently. Whereas, it is only in the operative portion of the subject resolution it has been resolved that the decision of expulsion from the membership of the society under bye laws 12(1)(a), (g) and (h) and also u/s 35 of the Act read with Rules 28 and 29 was being taken. The resolution as passed would clearly indicate that there was serious deliberation and each aspect was thoroughly examined by the General body of the Society and it had taken a decision regarding each of the grounds. It is seen that the meeting was attended by 54 members and about 15 members participated in the discussion and ultimately the general body unanimously passed the amended Resolution. If that be so, it is not possible to take the view that entire decision of the general body is vitiated as this court has found that Clause (h) was inapplicable.

15. It was also argued on behalf of the petitioner that the reasons given by the revisional authority for upholding the decision of the first authority was

unintelligible. No doubt, the revisional authority has not discussed all the matters as it should have done but, nevertheless, it has rightly observed that the pendency of the dispute would not affect the action u/s 35 of the Act. This is the correct view taken by the revisional authority, for the pending dispute will have no bearing on the questions or subject matter in issue in the present proceedings.

16. It is relevant to mention that after the hearing of this writ petition was concluded, the respondent society was called upon to examine whether the action of expulsion can be recalled if the petitioner was to make good the damages or costs suffered by the society including the payment of the outstanding amount with interest. This suggestion was put to the respondent society in the light of the observations made by the Apex Court in 1994(4) SCC 302 in *Satischandra v. Registrar Co-op. Scy. Delhi*. In para 4 of the said decision the Apex Court has referred to the directions given by the High Court to the Society to withdraw the expulsion subject to the petitioners therein paying all the arrears with interest thereon. It was contended that similar relief be extended to the petitioner. In the first place, to my mind, the observations in the said decision cannot be taken as a binding precedent of the Apex Court to the effect that in every case of expulsion the society should be called upon to withdraw the expulsion if the member was ready to pay the arrears with interest thereon. In any case, that attempt was made in the present case but the respondent society has after reconsidering the matter decided to maintain its earlier resolution and decided not to withdraw the expulsion against the petitioner. In the circumstances, this Court was required to decide the controversy on merit.

17. Accordingly, this petition fails and the same is dismissed with costs all throughout.

18. At this stage Mr. Naik prays that interim order passed by this Court in terms of prayers (b) and (c) on 2-12-1987 be continued for a period of six weeks. Mr. Jagtap for the Society has resisted this prayer. However, in the facts and circumstances of the present case, I direct the respondent society to maintain status quo with regard to the said flat for a period of six weeks from today.

Certified copy expedited.