

(2003) 03 GUJ CK 0046

In the Gujarat High Court

Case No : Civil Revision Application No. 63 of 2003

Vimal Co-op. Housing Society Ltd.

APPELLANT

Vs

Rajendrakumar Shankerbhai Bhagiya

RESPONDENT

Date of Decision : 05-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 10A, Order 7 Rule 11(d), 115, 115(1)

Gujarat Co-operative Societies Act, 1961 — Section 167, 96

Citation : (2003) 23 GLH 58 : (2003) 2 GLR 1066

Hon'ble Judges : J.R. Vora, J

Bench : Single Bench

Advocate : A.J. Patel, for the Appellant; P.M. Thakkar and Harshit and Tolia, for the Respondent

Final Decision : Dismissed

Judgement

J.R. Vora, J.—This Revision Application is preferred against an order passed by learned Civil Judge (S.D.), Baroda, on 11-2-2003 below Application Exh. 33 in Regular Civil Suit No. 74 of 2003.

2. History of litigation reveals that present opponent No. 1 Rajendrakumar Shankerbhai Bhagiya filed a Regular Civil Suit No. 74 of 2003 against (i) present petitioner - Vimal Cooperative Housing Society Ltd., (ii) Vadodara Municipal Corporation, (iii) City Survey Superintendent, (iv) Talati-cum-Mantri, (v) Mamlatdar, and (vi) Shri Ratilal C. Shah. Plaintiff Rajendrakumar Shankerbhai Bhagiya filed the above said suit stating that he became member of Vimal Cooperative Housing Society Limited in 1980 and was allotted a plot of land admeasuring 10,000 sq. feet. There was some construction in the said plot. In 1986-87, the, plaintiff intended to erect a construction in the said plot of land which was numbered as Plot Nos. 71-72 at the relevant time and he was granted permission by concerned competent authority. Necessary documents were produced along with the plaint. The plaintiff could not construct on the plot for

his own reason but thereafter plaintiff came to know that around 7th of January, 2001 Cooperating Housing Society was constructing a temple on Plot No. 71 allotted to him, Some averments are made in the plaint that he tried to contact Secretary and President of the Society in this respect who informed that the plaintiff could not have any objection in construction of building of temple. While thereafter plaintiff verified the revenue record, he found that within the plot of the plaintiff in revenue record one plot was demarcated and allotted to original defendant No. 6 Mr. Ratilal C. Shah admeasuring 3,072 sq. feet of land. The plaintiff, according to him, was never given an opportunity of being heard in making these changes in revenue record. The plaintiff also alleged that the changes made in the revenue record is against the law established and against the provisions of the Bombay Land Revenue Code. It is the allegation of the plaintiff that the suit plot which he has more particularly described in para 5 of the plaint is owned by him and the action of original defendant No. 1 present petitioner to construct temple in his property is illegal and in contravention of law. The plaintiff asked for diverse reliefs against Co-operative Society for declaration that the said Society had no authority or right to construct in his plot and other reliefs against other defendants as to the changes made in the revenue record.

3. In the above said suit, after filing, perhaps reply of an application for temporary injunction filed by the plaintiff - original defendant No. 1, present petitioner - Vimal Co-operative Housing Society filed Application Exh. 33 under Order 7 Rule 11(D) of the Civil Procedure Code. It was stated in the application that the suit is filed by the plaintiff against the registered cooperative society in the capacity of the member of the said society and the averments made in Paras, 1, 2, 5, 7, 10 and 16 to the plaint indicate that the averments pertain to the touching of the business of the Co-operative Society. It was further stated by the petitioner in the above said application at Exh.33 that the dispute raised by the plaintiff is in respect of business and management of respondent Cooperative Society because the dispute pertains to the plot of member and allotment of land made by the Co-operative Society. It was also stated that there is no conveyance deed in respect of the plot mentioned in the plaint in favour of the plaintiff nor any evidence that the plaintiff has paid amount of consideration in respect of said plot. It was further stated that the dispute which has been referred in plaint is clearly covered by Section 96 and Section 167 of the Gujarat Co-operative Societies Act, 1961 and ultimately it was prayed that since the Civil Court had no jurisdiction to hear the dispute covered u/s 96 and since the suit was barred u/s 167 of the Gujarat Co-operative Societies Act, 1961, the plaint was liable to be rejected under provisions of Order 7 Rule 11(D) of the Code of Civil Procedure.

4. The learned Judge heard parties in respect of application Exh. 33 at length and came to the conclusion that having regard to the documents produced on record and considering the nature of the dispute raised by the plaintiff in plaint, the Civil Court had jurisdiction to deal with the suit and that the suit was not barred u/s 167 of the Gujarat Co-operative Societies Act, 1961. The said order of

the learned Civil Judge (S.D.), Baroda of 11th February, 2003 rejecting the application Exh. 33 filed by opponent No. 1 is challenged by original defendant No. 1 in this Revision Application.

5. Learned Senior Counsel Mr. A.J. Patel, for the petitioner was heard at length while learned Senior Counsel Mr. P.M. Thakkar on behalf of Caveator Respondent No. 1 original plaintiff was also heard at length at this stage.

6. The main stress of the contentions raised by the learned Counsel Mr. Patel on behalf of the petitioner is in respect of the nature of the dispute and the relationship of the plaintiff with the petitioner being a member and a registered co-operative housing society. It was stated that whether the member of a registered co-operative housing society is entitled to file suit against a society and maintain the same in respect of a dispute pertaining to the business and management of the society. My attention was drawn to Sections 96 and 167 of the Gujarat Co-operative Societies Act, 1961 and it was contended that having regard to the dispute raised and statements made in the plaint, the suit is barred by the provisions of Section 96 of the Gujarat Co-operative Societies Act, 1961. It was contended that allotment of plots to the members is undoubtedly a business of the society touching to the constitution and management of the society and, therefore, clearly falls within the "touching of the business" of the society so as to oust the jurisdiction of the Civil Court. It was contended that the suit would be barred by the provisions of Section 167 of the Gujarat Co-operative Societies Act, 1961 as admittedly no notice before filing of the suit was issued by the member of the society to the society. The averments made in the plaint are as clear as clarity could be without leaving any scope whatsoever for an elaborate argument that this is a suit filed by member of a society against cooperative society. The plaint according to the learned Counsel for the petitioner ought to have been returned to the plaintiff as per the provisions of Order 7 Rule 10 in view of Section 96 of the Gujarat Co-operative Societies Act, 1961 which bars the jurisdiction of the Civil Court to take cognizance of the disputes which have arisen in this suit. It was contended that it is the duty of the society under the management and administration of the society to look after the plots of the society and common facilities. It was contended that the object of the society was to allot the plot and construct the building for the members of the society and in this view of the matter, according to learned Counsel for the petitioner, if we take any view of the matter, the dispute raised is covered by Section 96 of the Gujarat Co-operative Societies Act, 1961. The learned Judge failed to embark upon the substance of the dispute which was covered by Section 96 of the Gujarat Co-operative Societies Act, and the trial Court had no jurisdiction whatsoever. It was contended on this count that the plaint was required to be returned to the plaintiff. It was further contended that admittedly no notice as contemplated by Section 167 was issued before filing of the suit and therefore the suit was clearly barred by law as contemplated by Order 7 Rule 11(D) of the Civil Procedure Code. The learned trial Judge ought to have rejected the plaint on this count. It was contended that in this view of the matter, the learned Judge

committed jurisdictional error in rejecting the application at Exh. 33. The Civil Court assumed the jurisdiction which was not vested in it and if the Civil Court had not assumed the jurisdiction as has been done, the Suit would be liable to be dismissed on the ground of want of jurisdiction of the Civil Court. The Legislative idea and the intention behind making provisions in the shape of Sections 96 and 167 in the Gujarat Co-operative Societies Act, 1961 clearly indicates the object underlying that co-operative societies as well as the members could not be dragged in a protracted litigation and, therefore, a special machinery is provided for. It was ultimately urged that the Revision Application be allowed and after setting aside the order impugned, the plaint either be returned or rejected. Learned Counsel for the petitioner relied upon certain decisions which will be referred hereunder :

6.1 Relying on a Division Bench decision of this Court in the matter of M.G. Patel & Co., Navsari v. Shri Alka Co-operative Housing Society Ltd., Navsari, as reported in 1980 (2) GLR 498, it was argued that the suit was barred against the co-operative society as no notice was issued u/s 167 of the Gujarat Co-operative Societies Act, 1961. In the above said decision, it is observed that the business of the society, as could be gathered from the Certificate of Registration, was to construct buildings on co-operative basis, to purchase land, to sell lands, to hire lands, to develop lands and to prosecute other objects, which would ultimately ameliorate the physical, education and cultural well-being of its members. The learned Counsel for the petitioner has placed much reliance on these observations to advance a case that the matter of allotment of plots amounts to "touching the business of the Society" as contemplated by Section 167 of the Gujarat Co-operative Societies Act, 1961. It is further observed in this decision by the Division Bench of this Court that the purchase of land is one of the main objects of the society. Any cause of action that has got a direct bearing with the purchase of land has to be said as touching the business of the society. The word "touching" from its common Sense connotation is suggestive of "concerning". The plaintiff claim for the unpaid amount of consideration is directly rooted in the defendant-society's purchase of land. The question of payment of consideration arose because the society was out to purchase the land in prosecution of its objects. So the question of consideration, its payment or non-payment, is invariably associated with the purchase of land by this defendant society. Ultimately, the dispute arose in that case was held to be touching the business of society and plaint came to be rejected.

6.2 Decision in this respect was relied upon by the learned Counsel for the petitioner is in the matter of Dharoi Jalashya Matsya Udyog Sahakari Mandali Ltd. and Another Vs. Gujarat Kendriya Matsya Udyog Sanstha, . In the above said decision, the plaintiff Fisheries Co-operative Society filed a suit in Civil Court against defendant Fisheries Co-operative Society praying for injunction restraining the defendant society from collecting fish from a particular water reservoir and selling them. The defendant society was not a member of the plaintiff society. This Court held that the dispute between the societies was one

"touching the business of the society" and therefore the jurisdiction of the Civil Court to entertain the suit stood ousted in view of the provisions of Section 96(1) (e) of the Act. In para-4 of the decision, it is further observed that though the term "dispute" has not been defined in the Act, but according to ordinary dictionary meaning, there is no reason why either from the context or from the reading of the provisions of Sub-section (1) of Section 96 of the Act narrow meaning to the term "dispute" be given. It was observed that "this was much more so when the term "dispute" is prefixed by the word "any" and the word "any" which precedes the term "dispute" indicates that each and every dispute which touches the constitution, management or business of the society is covered by the provisions of Section 96(1) of the Act. This decision was relied upon to advance a contention that what type of dispute is covered by "touching of business of the society".

6.3 In this respect, learned Counsel for the petitioner further placed reliance on the decision of this Court in the matter of Anjaliben Nikhilchandra Mehta and Another Vs. Prabhakar Bapurao Fansalkar and Others, , the Court observed that having regard to the plaint filed in the dispute, respondent Nos. 3 and 4 who were the petitioners of Special Civil Application were trespassers. They were not members of the society. Besides, respondent No. 3 to the dispute was the original land owner. The Court observed that the argument on behalf of the petitioners that litigation against such persons could not be taken to the Nominee under the provisions of Section 96 because, they were neither members nor past members or persons claiming through a past member or a deceased member of a society or a society which was a member of the society. The Court ultimately held that the controversy raised by a member against the society seeking to enforce his rights arising under an agreement entered into with the society. The Court further observed that such a member could not be told that because some others were inducted into that property, the forum under the cooperative law was not available to him. The dispute was essentially concerning the business and management of the affairs of the society and it was precisely to deal with such type of situations that a specific provision was made u/s 99(3)(a) of the Co-operative Societies Act.

6.4 One more decision in support of his argument pressed into service by learned Counsel for the petitioner is the decision of the Apex Court in the matter of Navjivan Paper Mart Vs. Raikot Vibhagiva Nagrik Sahakari Bank Ltd., . As per the facts of that case, a member of a Co-operative Housing Society took loan from society for purchase of machine and the machine was hypothecated to the society. The said member sold the said machine to a non-member and in these circumstances, the Apex Court held that the purchaser of machine though not member of the Co-operative Bank but in the dispute as regards advancing loan by co-operative bank to its members and hypothecation of it, purchaser - a non-member who claimed through the member could be made a party to the dispute u/s 96(1)(b) of the Gujarat Co-operative Societies Act, 1961 and that the nominee of the Registrar in such circumstances had jurisdiction to proceed

against non-member to the extent of the hypothecated property purchased by him. It was argued that even non-member of the society can be submitted to the special jurisdiction as envisaged u/s 96 of the Gujarat Co-operative Societies Act, 1961.

6.5 In respect of Section 167 of the Gujarat Co-operative Societies Act, 1961, learned Advocate for the petitioner relied upon a decision of this Court in the matter of Thakkar Liladhar Vaghjibhai v. Jamnagar Jilla Sahakari Kharid Vechan Sangh Ltd., reported in 1983 (1) GLR 722. This Court ruled in the above said decision that the provisions of Sec 167 of the Gujarat Co-operative Societies Act are mandatory and they cannot be waived. The purpose of a notice u/s 167 is not for the individual benefit of the society, but it is for the benefit of the general public interest. It was further observed that the legislature wanted in the public interest that before any co-operative society was dragged into litigation, the Registrar of Co-operative Societies should be put in mind of the affairs of the Society so that he might look into the matter. The legislature also wanted that in order to enable the Registrar who might have many thing to manage simultaneously should have the minimum period of two months at his disposal and in order to safeguard this minimum period a statutory bar is created against the institution of the suit itself. Relying on these observations, it was argued that when dispute is touching to the business of the society, the notice is mandatory, without which the suit would be barred and hence in this case the plaint was required to be rejected as per Order 7 Rule 11 (D) of the Civil Procedure Code.

6.6 Learned Counsel for the petitioner relied upon one more decision of Punjab High Court in the case of Ajmer Kaur and others Vs. Punjab State and others, , while dealing with Section 30(g) and Section 68(6) & (7), the High Court of Punjab & Haryana came to the conclusion that the perusal of the provisions of law would show that the jurisdiction of the Civil Court was barred and hence the plaint was required to be rejected under Order 7 Rule 11(D) of C.P.C. instead of returning the same. The plaint can be returned under Order 7 Rule 10 of C.P.C. for the purpose of presentation of the same to the Court in which the suit should have been instituted but the provisions involved in the matter reveal that the suit could not have been instituted in any Civil Court, the plaint was required to be rejected. On this strength, it was contended that even considering Section 96 of the Gujarat Co-operative Societies Act, 1961, in this case the plaint ought to have been rejected.

6.7 As regards the fact of non-compliance of Section 167 of the Gujarat Cooperative Societies Act, 1961, learned Counsel for the petitioner placed reliance on the decision of this Court in the matter of Anjar Municipality Vs. Anjar Taluka Co-Opertave Sales Purchase Union and Another, and in this decision the Court observed that if no notice was served as required u/s 167 of the Gujarat Co-operative Societies Act, the paramount object underlying it would be frustrated. The paramount object underlying Section 167 was to see that the society was not unnecessarily dragged to a Court of law in a matter touching its

business. The Court thereafter referred the interpretation of "touching the business of the society" as has been laid in the case of *M. G. Patel & Co.* 1980 (2) GLR 498.

7. The point which arose during discussion whether in view of the amended provision of the Civil Procedure Code, especially Section 115(1) of the Code of Civil Procedure, by Amending Act No. 46 of 1999, an order rejecting an application for return of plaint under Order 7 Rule 10 would in the circumstances be subjected to revisional powers of this High Court by virtue of new proviso. In this respect, learned Counsel for the petitioner after relying on some decisions of different Courts and dictionary meaning of the word "Disposal" contended that the order of returning a plaint would amount to final disposal of the suit and, therefore, revision would be maintainable against rejecting an application for returning of the plaint as per Order 7 Rule 10 of the Code of Civil Procedure. Learned Counsel for the petitioner places on record a decision of the Punjab High Court in the matter of *S. Raghbir Singh Vs. Union of India (UOI) and Others*, wherein the High Court of Punjab after referring to well established rule of interpretation that the language used in a constitutional provision should receive a liberal construction so as to cover all contingencies, observed that expression "Disposal" appearing in entry 41 is wide enough to cover the extinguishment of a mortgage. With reference to the contention that disposal of the suit as envisaged by the proviso of Section 115(1) of the CPC (as amended) construing liberally covers the return of the plaint as well. Learned Advocate for the petitioner has also relied on a decision of the Calcutta High Court in the matter of *Kalyan Kumar Basak Vs. Salil Kumar Basak and Others*, wherein the word employed "disposal" in the Calcutta High Court Original Side Rules was given meaning by the High Court of Calcutta, to be not the only meaning "dismissal" but disposal includes dismissal and not confined thereto. The learned Counsel for the petitioner vehemently argued that therefore the word used disposal of suit or proceedings in Section 115(1) of the CPC is inclusive of all connotations and must include within its sweep an order returning of the plaint.

8. Learned Advocate for the petitioner also relied on two decisions - one of the Apex Court and one of the High Court of Goa to argue that the rejection of an application for returning of plaint would amount to case decided within the meaning of Section 115 of the Code of Civil Procedure. These decisions are (i) in the matter of *Shantaram Naravan Sinai Usgaoncar v. Anant Babuli Mapari*, reported in AIR 1973 Goa, Daman & Diu 43 and in the matter of *Major S.S. Khanna Vs. Brig. F.J. Dillon*, . In summing up it was contended that a statement is made in the plaint that plaintiff was the member of petitioner society. The dispute which arose was in respect of allotment of plot. The object of the society includes allotment of plots to its members and hence from the statement made in the plaint, the dispute is barred by Section 167 of the Gujarat Co-operative Societies Act because the same is touching to the business of the society. Secondly, it was also argued that having regard to the nature of the dispute raised in the plaint, the Civil Court has no jurisdiction u/s 96 of the Gujarat Co-

operative Societies Act, 1961 to entertain the suit, It was argued that the learned trial Judge ought to have rejected the plaint for the above said reasons and Revision Application deserves to be allowed.

9. On the other hand, the learned Senior Counsel for the opponent No. 1 original plaintiff as Caveator submitted that the order envisaged by Rule 10 of Order 7 and Rule 11 of Order 7 are altogether different in the nature and both are mutually exclusive. It was submitted, so far as returning of the plaint was concerned, rejection of application for returning of the plaint cannot be subjected to a revisional powers of the High Court because by no stretch of analogy the said order could be construed as final disposal of the suit.

9.1 So far as Order 7 Rule 11 of the CPC is concerned, it is submitted that plaint be rejected relying upon the statement made in the plaint. It was submitted that on perusal of the plaint, it clearly appeared that mixed question of law and facts have arisen and when the Court is required to go into the facts of the case, the plaint could not be rejected under Order 7 Rule 11 of the Civil Procedure Code. Learned Advocate for the Caveator - opponent No. 1 relied upon certain decisions, namely, Patel Meghijibhai Vithalbhair Vs. Khetivadi Utpan Bazar Samiti, wherein this Court has observed that the Order 7 Rule 11(D) of the CPC provides for rejection of a plaint on the ground where the suit appears from the statement in the plaint to be barred by any law. This Court further observed that the condition precedent for rejection of the plaint under the aforesaid statutory provision was some statement in the plaint showing that the suit was barred by some law. Since this condition was not satisfied, the plaint could not be rejected. The Court further observed that the want of statutory notice could be a ground of defence to the suit and in order to press that ground into service, the defendant was required to file its written statement taking such a defence in black and white and it could have prayed to the Court for framing of the preliminary issue in that regard under Order 14 Rule 2 of the Code instead of praying the Court for rejection of plaint under Order 7 Rule 11(D) of the CPC for want of statutory notice u/s 58 of the Gujarat Agricultural Produce Market Act, 1963.

9.2 It was contended on this strength that the Gujarat Agricultural Produce Market Act, 1963 contains the similar provision which is contained in Section 167 of the Gujarat Co-operative Societies Act and when an application under Order 7 Rule 11(D) of the CPC came to be filed, which was accepted by the trial Court and the plaint was rejected. In the above background, the order of the trial Judge was set aside by the above observations. It was contended that in the present case also there was no statement in the plaint which would cause the rejection of the plaint under Order 7 Rule 11(D) of the CPC straightaway.

9.3 On the same ground, learned Counsel for the Caveator also relied upon the decision of this Court in Civil Revision Application No. 382 of 2002 in the matter of Sunilbhai Pranbhai Khara v. Rukshmaniben Girdharlal Mehta, decided on 8-10-2002. Learned Advocate for the Caveator also relied on a decision of this Court in the matter of Choryasi Taluka Dudh Vechan Karnari Sahakari Mandali

Ltd. v. Surat Dist. Co-op. Milk Production Union and Ors., reported in 1972 GLR 797 for the contention that a particular dispute whether falls u/s 96(1) of the Gujarat, Co-operative Societies Act or not is a mixed question of law and facts because it has to be a dispute touching the constitution, management or business of the society. For the contention that an order under Order 7 Rule 10 and under Order 7 Rule 11 are different orders, the learned Counsel has placed reliance on the decision of the Calcutta High Court in the matter of Smt. Sisir Kana Guha and Ors. v. Ayakar Crithantrman Samabaya Samity Limited, reported in AIR Cal. 297 wherein it has been held that both remedies were mutually exclusive.

9.4 So far as the touching of the business of the society is concerned, learned Counsel for the Caveator relied upon a decision of this Court in the matter of Ravjibhai Desaibhai Patel v. Rajpath Co-operative Society, reported in 1976 GLR 1010, wherein this Court held that it was settled law that the expression "touching the business of the society" must be interpreted liberally and the widest connotation must be given to the said expression. This Court further observed that, however wide the interpretation might be, it would not take within its sweep a dispute arising out of a charge of false and vexatious prosecution of a member of a society. To strengthen his contention further, learned Counsel for the Caveator also relied upon a decision of this Court in the matter of Shankerbag Co-operative Housing Society Limited v. Kumari Sarojben Maganbhai, as reported in 1991 (1) GLH 279 wherein this Court observed that what was the nature of dispute and what was the scope of controversy in each case was required to be examined so as to consider whether it related to the main object of the society or touching its business. This Court further observed that the expression "touching" in Section 167 of the Act would mean, "concerning". If the question was regarding dispute between the member of the co-operative bank and the registered society with main objects of it, could not be said to be a dispute pertaining to the business of the society. The expression "business" could be interpreted to mean the "actual trading or commercial or other similar business activity" of the society which the society was authorized to enter into under the rules and its bye-laws. It was, therefore, contended that in view of what was stated in the plaint, the Court would have to go into the facts of the case and come to the conclusion whether the dispute raised by the plaintiff was touching of the business of the society as envisaged by Section 167 of the Gujarat Co-operative Societies Act, 1961 but at this stage having regard to the facts and circumstances of this case the rejection of plaint would not be a proper order.

9.5 Learned Counsel for the Caveator also relied upon an unreported decision of this Court in the matter of Shriji Nivas Co-op. Housing Society and Ors. v. Vithalbhai Narsinbhai Patel and Ors., as reported in 1983 GLH (UJ-93) 68 and contends that the facts of this case are similar to the facts of the present case. In the above said case the dispute arose between the parties regarding boundary and ownership of the land in question. It was the dispute between the third party

and Co-operative Society and Court observed that the dispute cannot be said to be touching the business of the society because the dispute was with respect to the ownership of the land. Learned Counsel also relied upon some decisions for the contention that the ouster of jurisdiction of the Civil Court cannot be easily inferred. It was, therefore, contended that unless facts of the case are taken into consideration as alleged by the plaintiff, it would be difficult for any court to come to the conclusion whether the suit was barred by Section 167 or the Court has no jurisdiction u/s 96 of the Gujarat Co-operative Societies Act, 1961. It was contended that the order impugned, therefore, cannot be interfered with in the revisional jurisdiction.

10. Having heard fully learned Counsel for the petitioner and learned Counsel for the Caveator, the issue which arises before this Court is whether the order passed by the learned trial Judge which is impugned in this Revision Application is subject to interference in revisional jurisdiction.

11. Before we enter into the controversy to decide the same, it is beneficial to have a look at the scope of the revisional power of the High Court u/s 115 of the Code of Civil Procedure. Section 115 of the CPC has undergone a drastic change by Amending Act No. 46 of 1999. The said Amendment came into force w.e.f. 1st of July, 2002. Undoubtedly, this scope of revisional powers by the said Amendment is circumscribed by legislature and not widened. But, if we consider the scope of revisional powers of the High Court before it undergone an amendment, as said above, then also it is clear that the scope was very limited even before amendment as aforesaid and which was more circumscribed by the amendment. To understand the nature of the jurisdiction which High Court exercises u/s 115 of the Civil Procedure Code, the observation of the Supreme Court in the matter of Vora Abbasbhai Alimahomed Vs. Haji Gulamnabi Haji Safibhai, will be a useful guide though the case which the Apex Court dealt with was under the Bombay Rent Act, Revision was permissible u/s 29 of the said Act. The Supreme Court in Paras 15 and 16 of the decision observed as under :

"15. The question which then arises : had the High Court jurisdiction to set aside the order of the District Court in exercise of its powers u/s 115 of the Code of Civil Procedure? The District Court on an erroneous view of Section 12(3)(b) held that the requirements of that provision were complied with by the defendant, but it also held that having regard to the circumstances, the readiness and willingness contemplated by Sub-section (1) was otherwise established. The High Court had, in exercise of its powers u/s 115 Code of Civil Procedure, no authority to set aside the order merely because it was of the opinion that the judgment of the District Court was assailable on the ground of error of fact or even of law. Jurisdiction to try the suit was conferred upon the Subordinate Judge by Section 28(1)(b) of the Act, and the decree or order passed by the Subordinate Judge was by Section 29(1)(b) subject to appeal to the District Court of the District in which he functioned, but all further appeals were by Sub-section (2) of Section 29 prohibited. The power of the High Court u/s 115 CPC was not thereby

excluded, but the exercise of that power is by the terms of the statute investing it severely restricted. The High Court may exercise its powers in revision only if it appears that in a case decided by a Subordinate Court in which no appeal lies thereto the Subordinate Court has exercised a jurisdiction not invested in it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. As observed by the Privy Council in *Balakrishna Udayar v. Vasudeva Aiyar* 44 I. A 261 : (AIR 1917 PC 71):

"x x x the Section (Section 115 of the Code of Civil Procedure) applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The Section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

Therefore, if the trial Court had jurisdiction to decide a question before it and did decide it, whether it decided it rightly or wrongly, the Court had jurisdiction to decide the case, and even if it decided the question wrongly, it did not exercise its jurisdiction illegally or with material irregularity : *Rajah Amir Hassan Khan v. Sheo Baksh Singh* 11 I A 237 (PC).

"16. Mr. Chatterjee for the plaintiff contended that the District Court in declining to pass a decree in ejectment refused to exercise a jurisdiction vested in it by law, and therefore the case fell within the terms of Clause (b) of Section 115, Counsel relied in support of his plea upon AIR 1949 239 (Privy Council) . In AIR 1949 239 (Privy Council) an application for relief under Sections 30 and 36 of the Bengal Money Lenders Act was dismissed by the Subordinate Judge on the view that the loan in question was a commercial loan which did not fall within the terms of the Act. The Judge, however, proceeded to consider whether the suit in which the application was made was a suit to which the Act applied, and held that it was such a suit. The High Court of Calcutta set aside the order. In appeal the Privy Council agreed with the High Court that the Subordinate Judge was bound, upon his finding that the loan was a commercial loan, to dismiss the application without determining whether the suit was one to which the Act applied. Sir John Beaumont in dealing with the power of the High Court observed :

"There have been a very large number of decisions of Indian High Courts on Section 115, to many of which their Lordships have referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under Sub-section (c), nevertheless, if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under Sub-section (a) or Sub-section (b), and Sub-section (c) can be ignored."

The Privy Council distinguished between cases in which on a wrong decision the

Court either assumes jurisdiction which is not vested in it or refuses to exercise jurisdiction which is vested in it by law, and those in which in exercise of its jurisdiction the Court arrives at a conclusion erroneous in law or in fact. In the former class of cases exercise of revisional jurisdiction by the High Court is permissible but not in the latter. This was pointed out by this Court in *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, wherein after referring to the passage already quoted and another passage from the judgment in AIR 1949 239 (Privy Council) , the Court observed :

"These remarks are not applicable to the facts of the present case. They apply to cases in which the law definitely ousts the jurisdiction of the Court to try a certain dispute between the parties and not to cases in which there is no such ouster of jurisdiction under the provisions of any law, but where it is left to the Court itself to determine certain matters as a result of which determination the Court has to pass a certain order and may, if necessary, proceed to decide the dispute between the parties. The distinction between the two classes of cases is this. In one, the Court decides a question of law pertaining to jurisdiction. By a wrong decision it clutches at jurisdiction or refuses to exercise jurisdiction. In the other, it decides question within its jurisdiction. In the present case, the question whether there was a sufficient cause was exclusively within the jurisdiction of the Court and the Court could decide it rightly or wrongly."

Section 12(1) does not affect the jurisdiction of the Court to entertain and decide a suit in ejectment against a tenant. It merely confers a protection upon a tenant if certain conditions are fulfilled, and Clauses (2), (3)(a), (3)(b) and the Explanation deal with certain specific cases in which readiness and willingness to pay standard rent, may either be presumed or regarded as proved. The decision of the District Court that the tenant established or failed to establish his readiness and willingness to pay the standard rent does not affect the jurisdiction of the Court conferred by law upon it, and by wrongly deciding that a tenant is or is not entitled to protection, the Court does not assume to itself jurisdiction which is not vested in it by law or refuse to exercise a jurisdiction which is vested in it by law. Nor does the Court by arriving at an erroneous conclusion on the plea of the tenant as to his readiness and willingness act illegally or with material irregularity in the exercise of its jurisdiction."

12. The powers under revision is undoubtedly discriminatory (sic. discretionary) powers but has to be exercised, as said above by the Apex Court and within the parameters as prescribed by Section 115 of the Code of Civil Procedure. A Court may pass correct order, a Court may pass a wrong order but all orders which Court has passed is not subject to revisional jurisdiction u/s 115 of the CPC by the High Court. It is only in the case of jurisdictional error or material irregularity or in the case of illegality, an interference, is called for in the revisional jurisdiction and, therefore, the opening word of Section 115 makes it amply clear that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court. The employing of the phraseology

of "may call" necessarily establishes that the High Court may refuse to exercise the jurisdiction u/s 115 of the CPC if it is found that the order is erroneous but the substantial justice is done. This view is fortified by this Court in the matter of Jamnadas Hiralal Mendha Vs. State of Gujarat and Another, wherein this Court in explicit terms observed in para-4 as under :

"4. All these matters are filed under the provisions of Section 115 of the Civil Procedure Code. Scope of exercise of jurisdiction by this High Court in revision u/s 115 of the C. P. Code is very limited. The High Court cannot go into the question as to whether the decision arrived at by the lower Courts is right or wrong. Decision of the lower Courts may be right or may not be right. It may be in accordance with the law or it may not be in accordance with law. Once it is shown that the lower Courts had jurisdiction to pass order it would be difficult for the High Court to interfere with the same unless it is shown that jurisdiction has been exercised illegally or with material irregularity, and that it has resulted into failure of justice. If this aspect is borne in mind while dealing with all these revision applications, all the revision applications are required to be rejected on this short ground alone. There is concurrent findings of fact by both the lower Courts and it is not pointed out that the lower Courts have exercised jurisdiction with material irregularity or illegally and that it has resulted into failure of justice. Even so, the arguments advanced by learned Counsels for the petitioners may be dealt with in brief."

13. Further the Apex Court in the matter of Kamaladevi Chattopadhyay Vs. State of Punjab and Another, held that the High Court shall not interfere in revisional jurisdiction only on the ground that a different view on facts elicited was possible. Thus the scope which was limited was more circumscribed by Amendments. It also be noted that proviso to old Section 115(1)(b) that "the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to party against whom it is made" is wholly deleted.

14. With the abovesaid limited jurisdiction and limited scope, as said above, the order impugned is required to be examined by this Court in this Revision. The issue has arisen two-folds. The first part is in respect of the order under Order 7 Rule 10 for return of the plaint and the second part is about rejection of the plaint under Order 7 Rule 11(D) of the CPC on account of Section 167 of the Gujarat Co-operative Societies Act, 1961. Plaint can be returned when the Civil Court has no jurisdiction to try the suit. The plaint can be rejected when the suit itself is barred by any law. So Court is empowered to return the plaint or reject the plaint as the case may be irrespective of the reliefs claimed for rejection or return of the plaint.

15. In this respect, the learned Counsel for the petitioner has vehemently argued that so far as Section 96 of the Gujarat Co-operative Societies Act, 1961 is concerned, the plaint was required to be returned. According to the learned advocate for the petitioner, order of return of the plaint would amount to final disposal of the suit, as aforesaid. This view pressed into service cannot be

countenanced. The phraseology which is used in Amending Section 115(1) of the Civil Procedure Code, which is "final disposal of the suit" leaves no scope of doubt that final disposal referred herein is final disposal of a suit as envisaged by the CPC by pronouncing judgment or otherwise. When the suit is finally disposed of by judgment and decree, the Court becomes functus officio and in these circumstances as per the provisions of Civil Procedure Code, the suit said to have been finally disposed of. In this view of the matter, merely order passed for the return of the plaint would, by no stretch of logic, amount to final disposal of the suit. This issue arises in view of the amended proviso to Section 115(1) of the Civil Procedure Code, which reads under :

"115. Revision :- (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears -

- (a) to have exercised a jurisdiction vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity

the High Court may make such order in the case as it thinks fit :

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

16. Now the application, if presuming that, came to be filed for return of plaint under Order 7 Rule 10, then the order in favour of the revisionist would be, order of return of the plaint, which would not amount to the final disposal of the suit, as envisaged by the provision of Section 115 of the Code of Civil Procedure. As aforesaid, this is more so because of return of plaint, the suit would not come to an end but Order 7 Rule 10-A of the CPC prescribes procedure how to deal with the plaint by the plaintiff when the plaint is returned to the plaintiff. Provisions has been made to direct the plaintiff to appear before the Court which might have jurisdiction for the presentation of the plaint. This provision clearly indicates that the order of return of the plaint can never be said to be a final disposal of the suit on the ground that the Court which had no jurisdiction and which returned the plaint had nothing to do with the suit further. The phraseology "the final disposal of the suit" employed in the proviso is to be understood not the Court wise but the suit wise and disposal wise and that too disposal according to law as prescribed by the Code of Civil Procedure. The proviso further suggests that it is not a disposal only but it should be final disposal of a suit. Thus, if we apply proviso, so far as the arguments about the return of the plaint is concerned, then the order in favour of revisionist in the circumstances would be

returning of the plaint and the said order would not have disposed of the suit finally. So, this Revision on that count would not be maintainable. The dictionary meaning of the word "disposal" which is pressed into service would not be useful to the petitioner.

17. The next fold is in respect of rejection of plaint. Though the Court is empowered to reject the plaint under Order 7 Rule 11(D) and an application under Order 7 Rule 11(D), the Court in proper cases is empowered to return the plaint for the reasons. Order 7 Rule 11(D) of the CPC envisages the absolute bar of any provision of law by which the suit could not have been instituted at all in any Court. In the present case, by virtue of Section 167 of the Gujarat Co-operative Societies Act, 1961, a mandatory notice is required to be issued before filing a suit by the plaintiff for the issue touching the business of the society. Section 167 of the Gujarat Co-operative Societies Act, 1961 reads as under :

"167. Notice necessary in Suits :- Save as otherwise provided in this Act, no suit shall be instituted against a society or any of its officers in respect of any act touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or before his office stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaintiff shall confirm a statement that such notice has been so delivered or left."

18. Therefore, the question arose before the trial Court was whether referring to the statement made in the plaint, the absolute bar envisaged by Section 167 operated in the present case. The learned Advocate for the petitioner, as aforesaid, has drawn attention of this Court towards the statement made in the plaint to the extent that undoubtedly the plaintiff - respondent No. 1 herein is a member of petitioner society. It is also an admitted fact that a notice as envisaged by Section 167 of the Gujarat Co-operative Societies Act was not issued by the plaintiff and therefore it was contended that it is a clear case for rejection of the plaint. My attention was also drawn to the bye-laws of the society and object of it. It was contended that allotment of plots to the members and construction of houses on behalf of the members, to provide common facilities to the members are the prime object of the society and according to the case of the petitioner since the dispute is in respect of allotment by a member of society, it is a clear case under Order 7 Rule 11(D) of the Civil Procedure Code.

19. To scrutinize the contention and the issues raised, the two very important facts are - (i) statement made in the plaint, and (ii) what is "touching to the business of the society", in the present case. For the reference, it may be said that if the plaint is read as a whole and cannot be read otherwise the statements have been made that the plaintiff became member of the society in 1980, and was allotted Plot Nos. 71 and 72 admeasuring about 10,000 sq. feet land. The plaintiff has also stated that now the said plot belongs to his ownership. For this statement, the plaintiff relied upon certain documentary evidence. A statement is also made in the plaint that he obtained permission from the competent

authorities to construct upon the plot, but he could not do that. On one fine day, he came to know that society was constructing a temple in his plot. When he met the President and Secretary of the Society, he was not satisfied. According to the further statement in the plaint he checked and verified the revenue record and found that without his knowledge and without, giving him an opportunity of being heard, his plot admeasuring 10,000 sq. feet was sliced in the revenue record and about 3,000 sq. feet of land was mutated in the name of defendant No. 6 out of the plot admeasuring 10,000 sq. feet allotted to the plaintiff. Since the plaintiff could not get the explanation to that entry, he filed the suit. Now with respect to his statement in the plaint, it is required to be borne in mind what is the touching to the business of the society. What is stated in the plaint is encroachment by the society on the plot allotted to a member. So, the plaint does not disclose a statement of mere allotment of plot but discloses encroachment by the society and allegation about the fabrication of the records for which the plaintiff has also filed a criminal complaint. Whether this statement made in the plaint amounts to the touching to the business of the society is a prime issue.

20. The expression "touching" mentioned in Section 167 of the Gujarat Cooperative Societies Act would mean "concerning". The expression "business" mentioned in the said Section could be interpreted to mean the "actual trading or commercial or other similar business activity" of the society. This is with reference to the object of the society and the society through by-laws is authorised to enter into such activity. In the matter of Co-operative Central Bank Ltd. and Others Vs. Additional Industrial Tribunal and Others, . The Apex Court had occasion to deal with the issue. It is clear from the above decision of the Apex Court that the Court is required to ascertain from the facts of each case as to whether or not the dispute raised is "touching to the business" of the society in the light of the facts of each case. The main object and authorization of society to entertain certain activity will have to be kept in mind. Therefore, whether a dispute is "touching to the business of society" is mixed question of law and fact. At times by mere statement made in the plaint, Court may come to the conclusion that dispute is covered by Section 167 of the Gujarat Co-operative Societies Act, 1961. When Court comes to this conclusion, from the statements of plaint, then the stage of rejection of plaint is provided by Order 7 Rule 11(D) of the Civil Procedure Code. But, if the Court has to ascertain the facts of the case in respect of the statement made in the plaint, then Order 7 Rule 11(D) of the CPC is not the proper stage to reject the plaint.

21. In the present case, as stated above, the statement made in the plaint discloses allegations on society to the extent of encroachment and fabrication of Public Record. Undoubtedly, any Court will have to ascertain facts of the case in this regard. Meaning thereby that by mere statements made in the plaint, a Court would not be in a position to come to the conclusion as to whether dispute raised is "touching to the business" of the society. That being the factual aspect of the case, trial Court rejected the Application at Exh. 33 for rejection of plaint

under Order 7 Rule 11(D) of the Civil Procedure Code.

22. In revisional jurisdiction with limited scope and power, this Court is not inclined to enter into the disputed facts of the case as to whether the society encroached upon the land as per the statement made in the plaint, but if this is so, the order of rejection of a plaint on statement made in the plaint would, in the facts and circumstances not be proper. This is to be looked into and be decided by the trial Court. This Court cannot go into the propriety or impropriety of the statement made in the plaint at this stage and come to the conclusion that what is stated in the plaint is wrong. True it is that this could only be done by coming to the conclusion as to the facts involved in the case. As a revisional Court what is required to be seen is whether the trial Judge committed any jurisdictional error, illegality or material irregularity. The question is whether the trial Judge had jurisdiction to deal with the application Exh. 33 as envisaged by the Supreme Court in the matter of Vora Abbasbhai Alimahomed Vs. Haji Gulamnabi Haji Safibhai, . The answer must be in the positive. This is a separate issue whether the trial Court had jurisdiction to try the suit, but undoubtedly the trial Court had jurisdiction to deal with the application Exh. 33. Therefore, the trial Court exercised the jurisdiction vested in it and there is no material irregularity or illegality committed by the trial Court in coming to the conclusion- because trial Court heard both the parties and thereafter felt that without ascertaining the facts as alleged in the plaint, it could not be said that the dispute is "touching to the business" of the society. Even if the order is erroneous but if the jurisdiction is exercised properly without any material irregularity, the order cannot be interfered with in the revisional jurisdiction of this Court. The trial Court felt that as per the statement made in the plaint the dispute was not covered either u/s 96 of the Gujarat Co-operative Societies Act, 1961 or u/s 167 of the same Act and coming to this conclusion as above by no stretch of reasoning it can be said that the Court acted without jurisdiction or committed material irregularity or illegality. The decisions of various High Courts and the Apex Court cited by the learned Counsel for the petitioner would not be helpful to the petitioner in view of what is stated above.

23. The petitioner herein may raise the dispute during the suit about the jurisdiction as well as barring of the filing of the suit which may be decided by the trial Court according to law but at this stage the order impugned for the reasons above, is beyond any interference in revisional jurisdiction of this Court.

24. In above view of the matter, this Revision.