

**HIGH COURT OF GUJARAT****LIQUIDATOR OF PIRAMAL FINANCIAL SERVICES LTD***Versus***DODSAL CORPORATION PVT LTD AND ORS****Date of Decision:** 04 November 2009**Citation:** 2009 LawSuit(Guj) 999**Hon'ble Judges:** [Jayant Patel](#)**Eq. Citations:** 2009 5 GLR 4040**Case Type:** Company Application**Case No:** 294 of 2008**Subject:** Banking, Company, Limitation**Acts Referred:**[Companies Act, 1956 Sec 457, Sec 458A](#)[Limitation Act, 1908 Art 66, Art 61](#)[Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security](#)[Interest Act, 2002 Sec 13\(2\), Sec 13\(4\).](#)**Final Decision:** Application allowed**Advocates:** [Ashok L Shah](#), [D S Vasavada](#), [Dharmesh V Shah](#), [N V Gandhi](#), [Nanavati Associates](#), [Pavan S Godiawala](#), [R M Desai](#), [V D Nanavati](#)**Jayant Patel, J.**

**[1]** The present application has been preferred by the OL of Piramal Financial Services Ltd. (hereinafter referred to as the 'Company in liquidation') seeking various reliefs which shall be dealt with appropriately hereinafter. However, the pertinent aspect is that all such reliefs are based on the premise that one Shri Anil Munshi, in capacity as proprietor of Shivani Enterprise has taken loan from the Company in liquidation of various amounts, total amounting to approximately Rs.2.20 Crores and further, allotment of various portions of the different plots of the building known as Abhijay Complex has been made in favour of the Company in liquidation against the payment of the consideration by the Company in liquidation and therefore, consequently the OL of the Company in liquidation is entitled to recover the amount of the loan as well as

the entitled to recover the possession of various spaces which has been allotted to the Company in liquidation so as to enable the OL to realise the money thereafter out of the disposal of such assets at the later stage.

**[2]** Heard Mr. R.M. Desai for the applicant OL, Mr. Devang Nanavati for Ms.Vaibhavi D. Nanavati for respondent No.1, Mr. Pavan Godiawala for respondent No.2, Mr. Ashok L. Shah for respondent No.9, Mr. Chudgar for Nanavati Associates for respondent No.10 , Mr. Dharmesh Shah for respondent Nos. 11 and 12, Mr. D.S. Vasavada for respondent No.13 and Mr.Sunit Shah with Mr.Gandhi for respondent Nos. 14 to 16.

**[3]** In order to appreciate the controversy, reference to certain relevant facts would be appropriate and the same is as under.

**[4]** One Adarsh Cooperative Housing Society Ltd. at Navrangpura, Ahmedabad has allotted various plots to its members and the Certificates have also been issued to its members out of which sub-plot No.1 of the Society was held by Vadilal Dhanjibhai Gandhi and others and sub-plot No.8 was held by Anupam Vadilal Gandhi and Ors, total area of both plots admeasures 1685 sq. yards-equivalent to 1408 sq. meters. On 24.04.1996, a Development Agreement was entered into between one Shivani Non-Trading Corporation, Sushil Association and New Shree Shakti Apartment Owners Association, all three Non Trading Corporations (hereinafter referred to as 'three NTCs') with M/s. Anil M. Munshi, a proprietary concern through its proprietor Shri Anil Manohar Munshi stating that they have acquired the possession of the aforesaid sub-plot No.1 & 8 from the owner for development and the finance is to be provided by Shri Anil Munshi and therefore, all rights for development of the property were assigned to Shri Anil Munshi as per the said agreement. The aforesaid agreement inter alia also provided for authorizing the developer to take finance from the financial institutions and to undertake the Scheme and to allot the unit to the members and to recover the price and also to handover the possession of such unit including for signing the necessary documents for such purpose.

**[5]** Thereafter, on 02.08.1996, the aforesaid three Non Trading Corporations got the Sale Deed executed in their favour of plot nos. 1 and 8 and the said Sale Deeds have been registered with Sub-Registrar's office. The Sale Deeds are not on record. However, the index of such Sale Deed produced on record goes to show that the sale has been made against the consideration. Therefore, it can be said that the aforesaid three Non Trading Corporations became owner of the aforesaid plots Adarsh Housing Cooperative Society Ltd.

**[6]** As per the respondent No.10 Ahmedabad Mercantile Cooperative Bank Ltd. (hereinafter referred to as 'AMCO Bank' for the sake of convenience) Shri Anil Munshi

approached to the Bank for availing the loan of Rs. 2 Crore, but the loan sanctioned was of Rs.1.50 Crores. As per the said Bank, an equitable mortgage was executed for deposit of the Title Deeds by Anil Munshi as well as the aforesaid three NTCs at the time when the loan was disbursed. As per the AMCO Bank, since the Sale Deed was not received back from the office of the Sub-Registrar, a letter was addressed by the NTCs to the Sub-Registrar to return the original Sale Deeds to AMCO Bank and as per the respondent Bank, the original Sale Deeds are in possession of the AMCO Bank. It is also the case of the respondent Bank that thereafter, the respondent Bank had got the charge registered with Adarsh Cooperative Housing Society for such purpose and the same was duly acknowledged by the said Society.

**[7]** On 28.11.1997, the said Anil Manohar Munshi entered into Memorandum of Undertaking (MOU) at Mumbai with M/s. INDMAG Ltd. on the basis of the Development Agreement dated 24.04.1996 to allot first floor of the building named Abhijay Complex approximately admeasuring 4000 sq. feet for a price of Rs.1.51 Crore and the payment was received in part and the remaining balance was to be paid as per the MOU at the later stage.

**[8]** It appears that prior thereto, Anil Munshi had approached to AMCO Bank for releasing the charge in favour of Dodsai Ltd. and the Bank issued No Objection to release the charge subject to the receipt of Rs.40 Lakhs from the purchaser's Advocate M/s. Nanavati & Nanavati in favour of the Bank. It appears that thereafter, the payment has been made by INDMAG Ltd. of Rs. 40 Lakhs and the charge has been released vide letter dated 01.04.1998 over the portion of the property which was the subject matter of the MOU being first floor against the payment of Rs.40 Lakhs.

**[9]** On 09.10.1998, the Suit came to be filed being No. 1243/98 by AMCO Bank against Shri Anil Munshi and other three NTCs for recovery of the amount of Rs.1,55,50,389/- with interest and in the said Suit, as certain persons had by public advertisement, made claim over the portion of the property, it was prayed that such allotment or agreement be declared as null and void and such properties be handed over to the plaintiff therein, the respondent Bank herein.

**[10]** In the said Suit, the learned Nominee ultimately passed Judgement and Award and in the said Award, it was mentioned that the area of 5000 sq. ft. was already in possession of defendant No.13 therein-respondent No.9 herein vide allotment dated 01.03.1994 and therefore, on the date when the mortgage was executed on 19.08.1996, the allotment and possession was already there, therefore, the claim over the said portion of respondent No. 9 herein deserves to be accepted. But the claim of defendant nos. 14B and 15B & 15C therein, who are respondents Nos. 14, 15 and 16 herein over the office No.201 and 202 has not been accepted since the allotment and

possession were of 29.04.1997 after the loan given on 19.08.1996, therefore, such transaction was declared as null and void as per the para 4 of the reasoning in the award of the learned Nominee. Further, the claim of defendant No.16 therein viz. one Ewaz Finance and Investment Private Ltd. is not accepted as legal and valid since it was found that the confession/admission was only on Rs.20 Stamp paper and charge was not agreed to be created over the 1000 sq. ft., therefore, the possession was not found of the rightful title. However, it was observed that if after the recovery of the Bank, if the money can be realized by such defendants, there can be no objection. Similarly, the claim of the defendant Nos. 17 and 18 therein, viz. Nilay R. Shah and Priyanka R. Shah over the office No. 202 and 203 was also not accepted as valid since the same was dated 05.10.1998 after the date of equitable mortgage deed, therefore, it is observed that defendant Nos. 17 and 18 therein would not be entitled to any relief. So far as the claim of defendant No.19 Hiraben Kiritbhai Patel over the property which is not the subject matter of the present dispute, no discussions is required.

**[11]** The aggrieved party, viz. the Bank, so far as acceptance of the claim of certain defendants in the Suit by the learned Nominee and so far as certain above referred defendants whose claim was not accepted by the learned Nominee in the Award have preferred appeals before the Gujarat State Cooperative Tribunal and the appeals are pending. However, it may be recorded that below the stay application being the property over which the claim is made by defendant No. 13, i.e. Y & H Patel and Company, the respondent No.9 herein, and defendant No.19, i.e. Hinaben Kiritbhai Patel for different property located at Manichandra, the injunction granted by the learned Nominee is confirmed. The said interim injunction has not been interfered with by this Court in the proceedings of Special Civil Application No. 5682/06 vide order dated 28.03.2006. However, the fact remains that the appeals being No. 904/03, 824/03, 943/01 and 872/01 are yet to be finalized by the Cooperative Tribunal. It has been stated on behalf of respondent Bank that AMCO Bank has filed Review Application being No. 271/02 in Appeal No. 872/01, which is pending before the Tribunal.

**[12]** It appears that pending the appeal before the Tribunal, on 29.03.2008, AMCO Bank initiated the proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as Securitisation Act) by serving the notice under Section 13(2) of the Act and thereafter, has taken steps under Section 13(4) of the Securitisation Act and it is stated that the possession is taken over on 02.05.2008. As per the AMCO Bank, when the possession is taken over, the area under the occupation of respondent No.1 has been excluded and the area of Y & H Patel and Company, respondent No.9 herein is also excluded.

**[13]** The claim of the OL which is subject matter of the present application is required to be examined keeping in view the aforesaid litigations.

**[14]** As per the OL, the loan for an amount of Rs.2.20 Crores by various agreements have been taken in November 1997 by Shivani Enterprise which is a proprietary concern of Anil Munishi and Anil Munshi has stood as a guarantor.

**[15]** The Loan Agreement which has been placed on record can be summarized with the following details :

DETAILS OF LOAN AMOUNT	DATE OF AGREEMENT
Rs.25,00,000/-	24.07.1997
Rs.27,00,000/-	26.08.1997
Rs.31,00,000/-	07.11.1997
Rs.33,00,000/-	20.11.1997

**[16]** The agreement provides for interest at the rate of 3% p.m.

**[17]** The allotment letters and the money receipts which are produced by the OL together with the affidavit in support of Judges Summons are as under:

Details of premises	Consideration	Date of allotment	Money Receipt amount and date	Share Certificate
S-4, 2nd Floor, 1000 sq. ft.	Rs.30,00,000/-	24.07.1997	Rs. 25,00,000/- dated 24.07.1997	5 shares of Rs.50/- each.
S-3, 2nd Floor, 1000 sq. ft.	Rs.30,00,000/-	26.08.1997	Rs.27,00,000/- dated 26.08.1997	5 shares of Rs.50/- each.
S-2, 2nd Floor, 1000 sq. ft.	Rs.30,00,000/-	06.11.1997	Rs.31,00,000/- dated 07.11.1997	5 shares of Rs.50/- each.
S-5, 2nd Floor, 1000 sq. ft.,	Rs.30,00,000/-	20.11.1997	Rs.33,00,000/- dated 20.11.1997	5 shares of Rs.50/- each.
S-6, 2nd Floor, 1000 sq. ft.	Rs.30,00,000/-	26.12.1997	Rs.37,00,000/- dated 26.12.1997	5 shares of Rs.50/- each.
S-7, 2nd Floor, 1000 sq. ft.	Rs.30,00,000/-	26.12.1997		5 shares of Rs.50/- each.

**[18]** The aforesaid shows that the amount of consideration was Rs.1,80,00,000/-, whereas the money receipts produced are of Rs.1,53,00,000/-, and therefore, the amount remained unpaid would be of Rs.27,00,000/-.

**[19]** The aforesaid allotment letters have been issued by Anil Munshi being proprietor of Shivani Enterprise and the pertinent aspect is that, the money receipts are also issued by Shivani Enterprises and the Share Certificates are issued by Shivalay Avenue Association, a NTC and Anil Munshi has signed as the President of the said NTC. The share certificates are issued and the share numbers are also mentioned of such share certificate.

**[20]** The perusal of the approved layout plan which has been produced on behalf of the respondent No.1 during the course of the hearing shows that at the basement, there is a cellar and hollow plinth for parking. At the ground floor, the approved construction is 375.36 sq. mtrs. At the first floor, the approved construction is 341.56 sq. mtrs. At the second floor, the approved construction is 341.56 sq. mtrs. and at the third floor, the approved construction is 341.56 sq. mtrs. The aforesaid if converted in sq. ft. would be as under :

Ground Floor - 4038.87

First Floor - 3675.18

Second Floor - 3675.18

Third Floor - 3675.18

**[21]** The aforesaid measurement is not in the super built-up, but if added with the approximately 30% of the area, as super built-up, it would come to ground floor 5250.08 sq. mtrs., first floor 4777.73 sq. mtrs., second floor 4777.73 sq. mtrs. and 4777.73 sq.mtrs.

**[22]** In order to support the claim of the OL, the learned counsel for the OL made the submission to dilute the interest of other parties to the proceedings, which can be summarized as under, so as to advance the claim of the Company in liquidation over the property.

**[23]** It was submitted on behalf of the OL that the loan agreement document of the so called deposit of Title Deed in favour of AMCO Bank is not a valid document and since it is not properly stamped and it was also submitted that on the date when the Development Agreement was entered into in favour of Shri Anil Munshi, such NTCs were not the owner of the property since the Sale Deed has been executed at the later stage.

**[24]** Whereas, the learned counsel appearing for the respondents maintained their claim by relying upon the documents produced on record as well as by relying upon the observations made by the learned Nominee.

**[25]** It appears that when the ownership is admittedly transferred at the later date in favour of the aforesaid three NTCs, and the document of deposit of title deed is duly signed by all the three NTCs, the aspect of date development agreement would not assume much importance, more particularly when such agreement has in fact been acted upon at the later stage. Hence, such contention of OL cannot be maintained to frustrate the rights of the Bank or others if have acted upon such agreement.

**[26]** The aspects on which the emphasis is made by the learned counsel for the OL is that the so called Mortgage Deed has not created any interest in favour of the respondent AMCO Bank inasmuch as it is not a Deed for deposit of Title Deeds, but is in reality, Mortgage Deed, and if treated as Mortgage Deed, the same is not properly stamped. Therefore, cannot be looked into by the Court for considering the interest of AMCO Bank. Therefore, it was submitted that since such mortgage or charge of AMCO Bank is not supported by law, this Court may ignore the same.

**[27]** It appears from the perusal of the Deed of Equitable Mortgage that in reality, it is for deposit of the Title Deeds, therefore, can be termed as equitable mortgage. It is by now well settled that the Deed is to be considered as a whole and neither by nomenclature nor by taking piecemeal use of the word in the Deed. If the document is read and considered, it appears that the parties intended to deposit the Title Deeds pursuant to the loan granted by AMCO Bank to Anil Munshi and the Title Deeds have been deposited, therefore it is the Deed for creation of equitable mortgage by deposit of Title Deeds. The learned counsel for the OL has not been able to support the contention by showing any authenticated reliable material that the requisite Stamp Duty has not been paid for creation of document for equitable mortgage. Therefore, the said contention raised on behalf of the OL deserves to be rejected.

**[28]** In view of the aforesaid finding, the contention raised on behalf of the OL that the action taken under the Securitisation Act for taking possession of the property would also fail in absence of the lawful document for mortgage in favour of the AMCO Bank, deserves to be rejected since it is found by this Court that the equitable mortgage has been created in favour of AMCO Bank as per the said Deed and consequently, the security interest could be realized as per the provisions of the Securitisation Act. It deserves to be recorded that as per the equitable mortgage dated 14.08.1996, the charge was created in the property of AMCO Bank and the said transaction of loan and equitable mortgage is in any case prior to the alleged allotment by Shivani Enterprises. Such allotment even if to be considered for the sake of examination, cannot be read to frustrate the rights of AMCO Bank for recovery of the outstanding loan amount and the said contention of the OL deserves to be rejected.

**[29]** The next aspect required to be considered is the claim of the other parties to the proceedings over the particular portion of the property, vis-?-vis the claim of the OL. The perusal of the Judgement of the learned Nominee in the Suit preferred by AMCO Bank shows that the alleged Deed of Allotment in favour of respondent No.9 herein Y & H Patel & Company is dated 01.03.1994 and the claim made is over the space of 5000 sq. ft. over the second floor of the said building.

**[30]** The pertinent aspect is that the building plans are approved only on 08.04.1996. Therefore, on the date when the so called allotment was made, there was no approved plan of the building nor it has come on record by authenticated reliable material that the construction of such building had already commenced and the construction upto 2nd floor was also made. Under these circumstances, even if it is considered that the respondent No.9 has advanced the amount of Rs.49,50,00,000/- plus Rs. 5,00,000/- total Rs.54,50,000/- to Shri Anil Munshi as proprietor of Shivani Enterprises, and it has a right to recover the amount from Shri Anil Munshi as proprietor of Shivani Enterprises, it is not possible to accept the existence of construction of the second floor admeasuring 5000 sq. ft. on the face of the commencement for construction certificate granted on 09.04.1996 only. The aforesaid is coupled with the circumstance that at the second floor, the construction to be made was 341.56 sq. mtrs., equivalent to 3675.18 sq. ft. Even if the area of super built up is added, then also, it would not be equivalent to 5000 sq. ft. If the property was not in existence at the time when the allotment was made, such allotment can no more be validly enforced by respondent No.9 nor it can be said that the allotment was of an existing property by Shivani Enterprise through its proprietor Anil Munshi in favour of respondent No.9. The aforesaid aspect is not considered by the Nominee while considering the claim of respondent No.9 herein, but as the appeal is pending before the Tribunal, no further observations deserves to be made on the aspects of the pending appeal. However, in view of the aforesaid factual position as coming on record, it is not possible to accept the contention that the area of 5000 sq. ft at the second floor could be said as validly allotted in favour of respondent No.9 herein. Even if it is considered that anticipating the construction to be made, the allotment was made by Shivani Enterprises through Anil Munshi of 5000 sq. ft. of second floor in favour of respondent No.9, it could only be said as imagination without their being any legal basis inasmuch as neither any lawful construction permission was granted on the date of allotment nor even later to the date of allotment, such construction permission has been granted for the construction of 5000 sq. ft. at the second floor. The attempt to convince that the portion of it was already found in possession of respondent No.9 at the second floor is also without any authenticated reliable material available before this Court inasmuch as when the Bank took over the possession under the Securitisation Act on 02.05.2008, it has only excluded office nos. 2 and 3 admeasuring, each of 1048 sq. feet, total area of such offices would be 2096

sq. feet. which is not tallying with the alleged possession of 5000 sq. ft. as sought to be canvassed on behalf of respondent No.9.

**[31]** Further, if the matter is considered on equitable considerations, then also, at the most, it can be said that the right for allotment would not exceed the total area available at the second floor which would be approximately 341.50 sq. mtr. (3674.54 sq. ft). Hence, the attempt to maintain the possession does not appear to be genuine nor supported by authenticated and reliable material. At the most, it can be said that the area of 341.56 sq. mtr. (3675.18 sq. ft.) was to be allotted to respondent No.9 in exchange to the loan transaction of Rs.49.50 Lakhs plus Rs.5 Lakhs, total Rs.54.50 Lakhs. The pertinent aspect is that there is no authenticated and reliable material produced for handing over of the possession by Shivani Enterprise through its proprietor Anil Munshi in favour of respondent No.9.

**[32]** Under these circumstances, the claim of the respondent No.9 for allotment and lawful possession of any area over the second floor pursuant to the alleged loan transaction of Rs.54.50 Lakhs plus interest does not deserve to be accepted as legal and valid.

**[33]** The next claim is of respondent Nos. 11 and 12 Shri Ninad Raje and Ms. Shruti Raje. The perusal of the documents produced in support of the affidavit in reply by respondents Nos. 11 and 12 shows that in none of the document, the date is mentioned of allotment of the ground floor and of the hollow plinth. Even in the affidavit-in-reply filed on behalf of such parties, there is no reference to the same. Further, perusal of such alleged allotment letter shows that for the ground floor, one allotment letter is signed by New Shiv Shakti Apartment Owners Association. Another is signed by Shiv Shakti Non Trading Corporation and third is signed by Sushil Association. All the three Non Trading Corporations have purchased the property of the land from the members of Adarsh Cooperative Housing Society. The Share Certificate are dated 24.12.1997, 26.12.1997 and 27.12.1997. It is true that they are later to the date of equitable mortgage in favour of respondent AMCO Bank as well as latter to allotment made to Company in liquidation except one dated 26.12.1997. The rights therefore, at the most, can be read for the Share Certificate of the aforesaid three Non Trading Corporations to that extent, but if the allotment is to be considered, it appears that the same are undated and there is no certainty of such transaction, if the matter is examined on the basis of the time or the day and the date. The another aspect appears to be that at the ground floor also, the construction permitted is only 375.36 sq. mtrs. (4038.87 sq. ft.) and there is no construction permission for the hollow plinth admeasuring 3660 sq. ft. Under these circumstances, it appears that the alleged allotment of the ground floor may be on the date when there was no construction at all, nor any permission for construction. Therefore, like the case of the respondent

No.9, at the most, it could be said that anticipating the construction, right for allotment was available to respondent Nos. 11 and 12 for the area of ground floor. Concerning to the area of hollow plinth, it appears that as per the construction permission, they are to be reserved for parking which would be common for each members and there cannot be any right available with the developer to allot for exclusive use of any member of NTC nor such right can be read with any allottee of any area for parking. Under these circumstances, the right of allotment for hollow plinth of respondent Nos.11 and 12 at the most could be read as common for use of the hollow plinth as parking and not in absolute as sought to be canvassed. All the aforesaid would be crystallized or can be said as valid if the so called transaction of allotment is against consideration. Neither the affidavit nor any document is produced to show that any consideration was fixed and paid by such claimant for allotment. The Share Certificate at the most may create right as shareholder but unless the transaction is with or against consideration, the same would be no valid contract in the eye of law. Hence, the claim of such claimant at the most can be considered as valid as share holder who may be entitled to get back money but after the claim of allottee against consideration are satisfied.

**[34]** The claim of respondent Nos. 14 and 15, if read with the documents produced together with Company Application Nos.14 and 15, it appears that as per the respondent No.14, the amount of Rs.4 Lakhs was paid to Shivani Enterprises on 27.10.1994 and the same is towards booking of office No.1 at the second floor. Further, the allotment letter produced shows that the same is dated 27.10.1994 and in the said letter, the area mentioned is 1048 sq. ft on the second floor and in the very allotment letter, it has been mentioned that the allotment is for the purpose of security only and the said allotment would be null and void if the finance is refunded alongwith the principal amount alongwith the interest. Another pertinent aspect is that, as observed earlier, the permission for commencing of the construction has been granted only on 09.12.1996. Therefore, the property was not in existence at the relevant point of time. Further, the intention of the parties are apparent for issuing the letter for allotment for securing finance. Therefore, such at the most can be read as right for allotment of one office at the second floor and not beyond the same. The attempt made for maintaining the claim for total area of 2096 sq. ft is not acceptable for the simple reason that the money receipt shows only one office at the second floor and the alleged allotment is for receiving finance. Therefore, the documents clearly go to show that the right for alleged allotment at the most would not exceed 1084 sq. ft at the second floor coupled with the circumstance that on the date when such right was so created, the construction could not be said to be validly in existence.

**[35]** The next claim of respondent No.1 who has been admittedly found to be in actual possession deserves consideration. It appears that the MOU was entered into on 28.11.1997 and the same is acted upon by issuance of the Share Certificates dated 10.08.1998 by all the NTCs in favour of respondent No.1. Further, the possession is stated to have been handed over on 28.11.1997 by Anil Munshi to respondent No.1, but the pertinent aspect is that the possession is stated to be for one 4000 sq. ft. at the first floor. Whereas the construction permission is only for 341.56 sq. mtr. (3675.18 sq. ft.). Therefore, such possession cannot be read for creation of valid rights exceeding the area of first floor for which the lawful construction permission has been granted. The construction, if any, made in violation of the approved construction permission, can at the most be read as unlawful and for which no rights can be said as validly created in favour of respondent No.1.

**[36]** It was contended on behalf of respondent No.1 that certain portion has been exclusively entrusted even at the ground floor and basement for parking to respondent No.1, at the later stage for effective use of the first floor for running the restaurant of pizza hut. It is hardly required to be stated that no developer or organizer or the office bearers of any NTC has any right or authority to allot any portion of any facility for the common use to be utilized by all the members and such, even if allotted, at the most can be read in common with the rights of the other members and cannot be read in absolute as sought to be canvassed. It may be that for such illegal allotment of any space, any consideration if paid by any member to the developer, such member may have right to recover the said amount, but such would not create any lawful interest in absolute in favour of such allottee as sought to be canvassed. Therefore, if the matter is examined in light of the aforesaid, the respondent No.1 at the most can be said as allottee for the first floor who has paid the amount and has received the possession in consideration thereof by the NTC through its developer Shri Anil Munshi. No right would be available exceeding the area of the first floor in absolute as sought to be canvassed. The another aspect is that at the first floor, the approved construction is only 341.56 sq. mtr. (3675.18 sq. ft.). Therefore, the actual area over which the right can be said as lawfully created in favour of respondent No.1 would be 3675.18 sq. mtrs. area at the first floor, may be the total area of first floor, not beyond the same.

**[37]** The learned counsel for the OL had attempted to submit that the MOU does not create any interest in the property and such transaction as is not registered with the Sub-Registrar, no interest can be said to have been created of respondent No.1 and therefore, the possession can be said as illegal and this Court may ignore the said aspects. Firstly the contention is on a total misconceived notion inasmuch as the right is not sought to be canvassed on behalf of the respondent No.1 only on MOU, but is coupled with the circumstance of having acted upon the MOU by paying the

consideration and the receipt of possession. Further, the Share Certificates are also issued for maintaining the lawful authority to hold the possession. The learned counsel for the OL has not been able to show any provisions of the law which required the registration at the relevant point of time, if the allotment was to be made and the possession was to be handed over by the NTC to its members. Under these circumstances, the said contention deserves to be rejected.

**[38]** Having considered the rights of the respective claimants over the particular portions of the property, the aspects of the rights of the Company in liquidation over the property deserves to be examined. The attempt was made on behalf of Shri Anil Munshi by the learned counsel Mr. Godiawala that the claim is barred by limitation as per the provisions of Section 457 and 458A of the Companies Act inasmuch the Company having been wound up with effect from 20.03.2001, the action is taken only in the year 2008 and therefore, the claim made by the OL is barred. The emphasis was made upon the provisions of Section 458A by Mr. Godiawala.

**[39]** Section 458A of the Companies Act reads as under:

Notwithstanding anything in the Indian Limitation Act, 1908 (9 of 1908) or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by the Court, the period from the date of commencement of the winding up of the company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded.]

**[40]** The aforesaid provision has not provided any limitation for initiation of the action, but it only provides for availability of the additional one year in the prescribed period of limitation as per the Limitation Act. Such period would commence from the date of winding up had the limitation period not expired prior to the date of the winding up. Therefore, in a case where the limitation period is to expire prior to the date of the winding up, within one year it shall stand extended from the date of the winding up until the expiry of one year and such period shall additionally be available for computing the limitation notwithstanding anything contained under the Indian Limitation Act. Therefore, such period is only by way of an additional availability of the period of limitation. Mr. Godiawala, learned counsel has not been able to show any provisions of law which provided that after the issuance of Share Certificate and letter of allotment, if the possession is not handed over, there is any specific period of limitation provided by any statute controlling the rights of the share holder against the NTC. Therefore, the attempt to contend that the claim is barred by the provisions of Section 458A cannot be countenanced.

**[41]** It was next contended by the learned counsel Mr. Godiawala that the normal period of limitation for recovery of the loan would apply to the claim as sought to be canvassed by the OL. It was submitted that since the decree on the face of the loan amount is prayed in the present proceedings, and such application is not having been filed within the period of 3 years from the date of loan transaction, the claim would stand as barred and therefore, no decree can be passed on the basis of the alleged loan transaction. It was also contended on behalf of Shri Anil Munshi by Mr. Godiawala that as such, the claim made on the basis of the allotment should also be supported by the statement of affairs filed by the Ex-Directors of the Company in liquidation. It was submitted that as OL has not produced any authenticated record showing the property as that of the Company in liquidation in the statement of affairs, such claim is without their being any valid support, therefore, deserves to be rejected. The learned counsel appearing for the other claimants have also supported the contention raised by Mr. Godiawala inasmuch as in absence of the authenticated material of statement of affairs, having shown the property of the Company in liquidation or the Bank account showing the bank balance on the date when the alleged payment is stated to have been made, it cannot be accepted as valid by this Court. It was also submitted by the learned counsel appearing for Mr. Anil Munshi that as such, since the Ex-Directors of the Company in liquidation were having all the papers and blank signatures of Shri Anil Munshi, they have misused the blank papers by securing the allotment in their favour including the loan transaction, money receipt, etc. Therefore, none of the documents produced on behalf of the OL may be accepted by this Court. He submitted that the loan was repaid and no amount is outstanding, therefore, this Court may reject the claim made in the application in toto as having been barred and also not supported by valid documents.

**[42]** It was also submitted on behalf of the other claimants that the receipt and the alleged allotment are by Shivani Enterprises through its proprietor Shri Anil Munshi and the Share Certificates are also issued for such purpose and it is not by any of the NTCs. Therefore, the alleged claim made by the OL deserves to be rejected on such ground.

**[43]** It is not a sine qua non that in every case, for supporting the claim to be persuaded by the OL, such must be reflected in the statement of affairs in a case where the Company is ordered to be wound up. It may be that after the properties are described in the statement of affairs, OL may be in a position to better substantiate such claim, but in absence of the details in the statement of affairs or absence of production of statement of affairs would not frustrate the claim made by the OL if otherwise can be sustained on the basis of the documents produced on record. It is hardly required to be stated that in a case when the Company is ordered to be wound up, the possibilities cannot be ruled out that the Ex-Directors of the Company, in order

to avoid their liability or for extraneous consideration for frustrating the rights of the Company in liquidation, may not file the statement of affairs and even if filed, may not disclose all correct facts and assets of the Company in liquidation. In the present case, the statement of affairs has not been filed and the claim is made on the basis of the documents found from the record of the Company in liquidation. Therefore, if the OL on the basis of the record available of the Company in liquidation has moved an application on the basis of such claim, it cannot be negated on a mere ground that the same is not supported by the statement of affairs. In such circumstances, the Court may be required to examine the claim on the basis of the documents produced on record. It is always open to the other parties to the proceedings to show any authenticated reliable documents to the Court contending that the claim is not maintainable or has been discharged or set off much earlier and the other legal defence as may be available may also be contended by the parties facing the claim, but the claim cannot be thrown away or disbelieved on mere absence of the statement of affairs or on a mere factum that the same is not supported by the statement of affairs. Therefore, the claim of the OL would be required to be examined as it is on the basis of the documents produced on record.

**[44]** The documents produced on record by the OL, if considered with the details referred to hereinabove as per the tabular statement, it appears that Anil Munshi was assigned with the right of developer and organizer by three Non Trading Corporations who are the owner of the property. It is not a case where Shivani Enterprise has come into picture for the first time, therefore, the claim may be denied on the basis of any action taken by Shivani Enterprise, but is a case where in past, Shivani Enterprise through its proprietor Shri Anil Munshi has taken money from the other persons and the allotments are also made for securing such finances. The past instances for the action taken by Shivani Enterprise are in respect to the rights and the claim of respondent No.9 as well as respondent Nos. 14 and 15. In their cases also, the consideration is received by Shri Anil Munshi and the allotment has been made by Shivani Enterprises. Therefore, Shivani Enterprises is not third party to the proceedings and it is not possible to accept the contention that any action taken by Shivani Enterprises or issuance of the allotment letter or the share certificate by Shivalay Avenue Association has nothing to do with the property in question. But the modus appears to be that whenever the finance was taken by Shri Anil Munshi, respondent No.2 herein, he was issuing the allotment letter and the share certificate of Shivalay Avenue Association in favour of the financier for securing their finance made to Shri Anil Munshi. The aforesaid modus operandi appears to be from the documents produced by the respondent Nos. 9, 14 and 15. But the fact remains that Anil Munshi is assigned with the development rights by the owners of the property of the three NTCs. If Anil Munshi in capacity as authorized person and developer of the property has

taken finance and has issued allotment letter for securing of such finance in favour of such financier, the rights would stand to that extent in the properties of NTCs. It is a different matter that if a person is allotted as a member of the NTC's itself, it may have better right in comparison to the member of Shivalay Avenue Association or Shivani Enterprise, but it is not possible to accept the contention that no right or interest whatsoever would remain in favour of such allottee when the action is taken by Shri Anil Munshi under the lawful development agreement executed by all the three NTCs.

**[45]** If the loan transaction is considered as it is, as sought to be canvassed by the learned counsel for the OL, independent of the allotment on the basis of the money receipt, such claim can be said as barred by the period of limitation inasmuch as the documents of loan transaction produced on behalf of the OL specifies the period for repayment of the loan upto 31.12.1997. Had the payment not made by 31.12.1997, the cause of action can be said as accrued in favour of the Company in liquidation and the limitation period would start running. The normal period of limitation for recovery of such loan, if considered independently, would be for a period of 3 years, which would expire on 31.12.2000. Therefore, even if the provisions of Section 458A of the Act is considered, on the date of commencement of the process of winding up, i.e. 21.03.2001, the limitation period had already expired of such loan transaction. Therefore, the exclusion of the period of one year would not be available as per the provisions of Section 458A of the Act. Therefore, the claim can be said as barred by limitation, if the matter is to be considered for an independent transaction of loan given by the Company in liquidation to Shri Anil Munshi in capacity as developer of the aforesaid three NTCs.

**[46]** However, it appears that as per the modus operandi was being adopted by Shri Anil Munshi, the transaction of loan and the allotment and creation of the security by way of allotment is a conjoint transaction. Therefore, the aforesaid appears to be in view of the peculiar past conduct of such person Shri Anil Munshi and the peculiar circumstance in the present case inasmuch as just one day prior to the loan transaction, the allotment letters are issued. Therefore, I am inclined to take the view that the transaction of loan and the allotment letter including the money receipts produced are conjoint and when the loan is taken, by way of security to such loan, the allotment letters were also issued in favour of the Company in liquidation by Shri Anil Munshi directly and also as proprietor of Shivani Enterprise. If the loan transaction is considered, coupled with the security of allotment over the area, whereby the rights on the basis of the allotment is created, the right can be read in favour of the Company in liquidation to recover the amount by realisation of the allotment made in favour of the Company over the portion of the property. Further, if the transaction is considered of loan with the creation of security by way of the allotment in favour of the Company in

liquidation, the period of limitation cannot be said as having expired on the date when the claim is lodged before this Court by the OL in the present proceedings. In a case where the right to recover the possession of immovable property exist in favour of a mortgager, the period of 3 years would commence when the right to recover the possession accrues as per Article 61 of the Limitation Act. It is an admitted position that the construction is not completed. Therefore, until the construction is completed, except at the first floor, the right to recover the possession would not accrue. Further, if the matter is examined for right of mortgagee, even if considered on the aspects of maintenance for recovery of the possession based on the rights in the immovable property, the limitation period would be 12 years as per the provisions of the Limitation Act for the suits relating to the immovable property and more particularly Article 66 and other relevant articles and such period of 12 years can at the most be said as expired on 31.12.2009. In any case, the claim is already filed by the OL prior thereto. Hence, such claim cannot be said as barred by limitation.

**[47]** The transaction of loan and the issuance of the letter of allotment and creation of the security to that extent in the property, for which the letter of allotment has been issued, having been as rather conjoint, it is not possible to accept the contention of the learned counsel for the OL that the separate decree for recovery of the loan amount with the interest be passed in favour of the Company in liquidation nor such claim independently of the loan transaction can be validly entertained after the expiry of the period of limitation.

**[48]** However, the claim at the most can be maintained of the loan with the conjoint allotment of the various portions of the property which are stated in the allotment letter which are by way of creation of the security of such loan amount. The passing of of the consideration as per the loan amount appears to be by way of receipt issued in favour of the Company in liquidation. Therefore, it is not possible to accept the contention of the learned counsel appearing for the respondents that the proof of payment made pursuant to the loan agreement is not available on record and therefore, no loan was disbursed. However, irrespective of the amount quantified in the loan agreement, the liability of Shivani Enterprises through Anil Munshi and consequently, the rights in the property by way of the allotment letter can be read to the extent of the amount already paid by the Company in liquidation to Shivani Enterprises through Anil Munshi and consequently, the rights in the properties of all the three NTCs. Such right can be to the extent that the amount already paid can be recovered even by realisation of the right of allotment in favour of the Company in liquidation and to that extent, the claim of the OL as made in the application deserves to be accepted.

**[49]** All the aforesaid goes to show that various allotments have been made by Shri Anil Munshi in capacity as the developer in the property owned by all the three NTCs. It also goes to show that after having obtained the construction permission, the construction is made in part of the first floor and slab level construction upto the third floor, but the construction is not completed as per the approved construction plan. As a result thereof, there are no walls, windows at the second and third floor, as well as at the ground floor, and the property exists of all the three NTCs as it is. It is only in the case of first floor, the construction is completed and the allotment is also made after having received the consideration. As observed earlier, except the claim of respondent No.1, who is found to be in actual physical possession and occupation of the construction at the first floor to the extent of approved plan, the actual possession and occupation is not found of any of the claimants who are parties to the present proceedings. Further, the status of the allottee who has already been put under the actual physical possession and who is actually found in occupation of the portion under the allotment would stand on different footing, but at the same time, when the rights of the allottees are to be considered in the property or the portions of the property of the NTCs, the transaction at the earlier point of time would stand in priority over the transaction at the later point of time as per the equitable considerations also. Therefore, the next aspect deserves to be considered is the admissibility of the claim of different claimants in the property vis-a-vis the claim to be considered of the OL which is the subject matter of the present application.

**[50]** This Court in the case of [Vasudha wd/o Vinayak Gokhale Vs. Prabhat Colony Co.op Housing Society Ltd.](#), 2008 2 GLH 687 had an occasion to consider more or less similar issue qua the rights of the allottees in a housing cooperative society which more or less stands at par with the Non Trading Corporation. It was observed by this Court in the said decision at para as under:

5. It does appear from the record produced on behalf of the petitioner that the payment was made by the original petitioner towards membership and towards construction in part and the share certificate also came to be transferred in favour of the petitioner. It also appears that Block No.5 was initially allotted to the petitioner and the said fact is supported by the pleadings of the society made in the proceedings of Lavad Suit No.646 of 1983, copy whereof is produced at Ex. 17 in the suit proceedings. Therefore, the aforesaid documents go to show that the original petitioner was admitted as the member and was also initially allotted Block No.5. Therefore, the interest to that extent can be said to have been created of the petitioner in the aforesaid part of the property of the Society.

6. It deserves to be recorded that in a housing cooperative society, the ownership of the property of the society vests to the society and the allotment of the plot or

block, as the case may be, is being made by the society. In the present case, as it appears, to be the scheme for not only the allotment of the plot, but also for making construction of a tenement and allotment of the tenement, after completing the construction by the society, the possession after allotment was to be entrusted to the member, who has been allotted the block. The documents produced in the proceedings of the suit go to show that the original petitioner was admitted as a member and was allotted Block No.5/A, but it also appears that the actual possession of Block No.5/A was not handed over to the petitioner on account of either non-completion of the construction or non-payment of the remaining amount by the petitioner to the society. Therefore, the right, if any, of the petitioner could be said to have been created in the property of the society to that extent only. It also appears that in the year 1982 the respondent No.2 has also paid the amount towards membership and construction to respondent No.1 Society and the actual possession is entrusted by the society to respondent No.2. Not only that, but the respondent No.2 has obtained loan and at that time, as per respondent No.2, the title clearance certificate was also obtained. It also appears that the Society did complete construction as agreed and the respondent No.2 had to complete the construction. As stated by the respondent No.2 in the affidavit-in-rejoinder, all construction after plinth level is made by him and it is further stated that the additional construction is also made by him by investing the total amount of approximately Rs.3,50,000/-.

7. It is not the case of the petitioner that the respondent No.2 had knowledge about the rights so created of the petitioner over Block No.5. On the contrary, as per the petitioner, since he was working outside Vadodara, when he inquired respondent No.2 was in possession and was making construction and at that stage, he informed respondent No.2 that the Block was already allotted to him and possibly that situation has given rise to the filing of the earlier suit in the year 1983 being Lavad Suit No.646 of 1983 preferred by respondent No.2. It is also an admitted position that the original petitioner did not take any civil action for prohibiting the construction or development by respondent No.2 and only in the year 1985 by the present suit, prayed for declaration and the entrustment of the possession.

8. In normal circumstances, if a particular plot or a block is already allotted by the society to a particular person, right of such person to that extent in the property of the society may stand created, but it is not an interest created as if the transfer of the ownership to the fullest extent by the society to the concerned person or the member. In a given case, if the society on account of the default by the member has cancelled the allotment and has not handed over the possession of the block to

such member, it may give cause to the aggrieved member to approach before appropriate forum for enforcement of such right, but thereby, it cannot be said that once the allotment is made but the same is actually not acted upon, the society will lose all interest over the property. Further, if the possession is already handed over after allotment of the same to the member concerned, it may stand on a different footing and the right of such member in such property of the Society may stand crystallized to a greater extent, but the possession not handed over would not stand on the same footing.

9. Apart from the above, as per the petitioner as well as respondent No.2, the President of the Society has cheated both of them namely; the petitioner as well as respondent No.2. It was submitted by the learned Advocate for the petitioner as well as respondent No.2 that money is collected by the President of the society from the petitioner and also from respondent No.2 and such action on the part of the President of the Society has created the present situation, whereby the petitioner as well as respondent No.2, both, are made to suffer.

10. There is no reliable, cogent evidence on record to show that respondent No.2 became member and obtained possession of Block No.5/A with the conscious knowledge that the original petitioner was already allotted the same block. The documents produced on behalf of the respondent No.2, on the contrary, go to show that respondent No.2 acted in bonafide for becoming the member of the society and also for getting the allotment of the block. As the society did not complete the construction, respondent No.2 had to make the construction at his cost. Therefore, it appears that the respondent No.2 can be said as having acted in bonafide for becoming member and for getting the allotment of Block No.5/A. The aforesaid is coupled with the circumstances that not only the construction is completed, which was agreed to be made by the Society, as on today, as per the respondent, he has incurred an expense of about Rs.3.50 lac for completing the construction and for making additional construction.

11. However, it appears that even if the respondent No.2 has acted in bonafide and has acquired the property of Block No.5/A from the Society, the rights so created of the original petitioner on account of the act and the agreement already undertaken by the society prior thereto, shall not stand vanished and it would be required for the society to compensate the loss, if any, caused on account of its action of allotment of one block to two persons, more particularly when both such persons have acted in bonafide and the action of the society, may be by itself or through its President, has put both such persons to peril.

12. In view of the aforesaid circumstances, it appears that when respondent No.2 has acted in bonafide, the Court may not grant relief for treating the allotment made to respondent No.2 as cancelled and for entrustment of the property to the original petitioner. However, it would be required for the society to honour its liability towards the action done by it and also to compensate the petitioner by paying suitable interest upon the amount paid for becoming the member and towards construction to be made by the society over Block No.5/A. In the event, the Society has no property available like common plot or liquid fund in the Bank etc., since, as observed earlier, the rights to that extent over the property of the society are read as created in favour of the petitioner over Block No.5/A, it would be required for the respondent No.2 to pay such amount to the petitioner and then to recover from the society as and when common property or the fund is available, as the case may be. Such a course appears to be in the interest of justice.

**[51]** If the matter is examined in light of the aforesaid in the present case, it appears that the conclusion can be drawn as under:

- A. The claim of respondent No.9 can be accepted for the amount of Rs.54.50 Lacs with the accrued interest thereof together with the right for allotment over the area of second floor as per the approved construction only.
- B. The claim and right of AMCO Bank as mortgagee of the property deserves to be accepted over the property.
- C. The claim of the respondent Nos. 14 and 15 deserves to be accepted of Rs.4 Lacs coupled with the right for allotment at the second floor of 1048 sq. ft.
- D. The claim of Ninad Raje and Shruti Raje, respondent Nos 11 and 12, deserves to be accepted of Rs.250/- with the Share Certificates, with no right of allotment.
- E. The claim of respondent No.1 deserves to be accepted of the actual allottee having paid the consideration and having received the actual physical possession of the approved construction at the first floor only.
- F. The claim of OL to recover the amount, total Rs.1.53 Crores with accrued interest with the right as allottee of various portions as per the allotment letter by way of security.
- G. For all such claim, the liability of the subsequent allottee would remain to pay the amount to the earlier allottee of that particular portion with the enabling right to recover such amount from NTCs who are the owners of the property. Either from the common property or from the left out portions.

H. In case of non-payment of the said amount by the subsequent allottee, the person who had the claim at the earlier point of time, can recover the amount from the properties of the NTCs which have remained unallotted or which are vacant.

I. The aforesaid shall be with the rights of the Bank to recover the amount as the mortgagee by taking care of the interest of earlier allottee prior to the allotment made at the later point of time.

**[52]** The next aspect deserves to be considered is the modalities to be adopted for enabling the OL to recover the amount. It appears to the Court that in view of the various rights of various claimants, and the property has not been fully constructed, it is neither possible for this Court to consider the distincting right by demarcating the property excluding the first floor nor it is possible for this Court to direct the sale of the property portionwise. Therefore, it appears to the Court that the only option left is to sell the property and thereafter, to consider the claim of each of the claimants and to distribute the amount as may be realised from such properties and at that stage, the payment can be made available to the OL in accordance with law keeping in view the observations made hereinabove.

**[53]** Under these circumstances, the prayer made for exclusive possession by the OL of the area which is allotted in favour of the Company in liquidation does not deserve to be granted.

**[54]** Hence, the following order :

A. The respondents Nos. 2, 4, 5, 6 and 7 shall jointly or severally pay the amount of Rs.1.53 crores to the OL within a period of three months with the running interest of 3% per month from the date of allotment as per table in para 17 until it is actually paid failing which OL shall be at the liberty to realise the amount by sale of the property on as is where is and whatever there is basis of the building Abhijay Complex, Swastik Cross Road, Navrangpura, Ahmedabad and the Sale Committee for such purpose shall comprise of the following persons -

1. OL as the Chairman.
2. Representative of the AMCO Bank.
3. Anil Munshi
4. Representative of the respondent No.9.
5. Respondent Nos.11, 12, 14, 15, and 16.

6. Representative of the workers union, if any, of the Company in liquidation.

7. Representative of the secured creditor of the Company in liquidation.

B. The money realised out of the sale of the property shall be appropriated as under -

1. For the payment of outstanding dues of respondent No.9.

2. Outstanding dues of respondent Nos.14 to 16.

3. Outstanding dues of AMCO Bank.

4. Outstanding dues of the Company in liquidation.

5. Refund of share money of Rs.250/- to respondents Nos.11 and 12.

6. Balance if any, shall be made available to respondent Nos.5 to 7.

**[55]** The present application is allowed to the aforesaid extent only. No order as to costs.

