

HIGH COURT OF GUJARAT**SADHANA COLONY COOPERATIVE HOUSING SOCIETY LTD & 1 ORS***Versus***ASHOKKUMAR BHAGUBHAI PATEL & 1 ORS****Date of Decision:** 27 November 2015**Citation:** 2015 LawSuit(Guj) 2254**Hon'ble Judges:** [C L Soni](#)**Case Type:** Special Civil Application**Case No:** 19042 of 2015**Subject:** Constitution**Acts Referred:**[Constitution Of India Art 226](#)**Final Decision:** Petition allowed**Advocates:** [Nandish Chudgar](#), [Nanavati Associates](#), [Masoom K Shah](#)**C.L. Soni, J.**

[1] Considering the controversy raised in the petition, the petition was finally heard yesterday with the consent of learned advocate for the petitioner and learned advocate for the respondent no.1. Rule. Learned advocate Mr. Shah waives service of rule on behalf of respondent no.1. Respondent no.2 being formal party, is not required to be issued Rule.

[2] By the present petition filed under Article 226 of the Constitution of India, the petitioners - Cooperative Society and its Chairman have challenged the order dated 05.11.2015 passed by the Board of Nominees below application Exh.6 in Lavad Suit No.311 of 2013. Lavad suit is filed by the petitioner no.1 - Society seeking declaration that respondent no.1 - defendant in the suit has no right or authority to put up construction of flats or for commercial purpose on plot no.20 of the society and any plan sanctioned by Municipal Corporation for such construction on plot no.20 since contrary to byelaws of the society is not binding to the society and based on such plan, defendant has no right to make construction on the said plot. Petitioner no.1 has also asked for permanent injunction restraining respondent no.1 - defendant from putting

up construction of flats or for commercial purpose on plot no.20 or creating any third party rights in respect of plot in question. In the said suit, the petitioner no.1 society filed application Exh.6 seeking injunction against respondent no.1 of similar nature as prayed for permanent injunction. The Board of Nominees has rejected the application of the petitioner by the impugned order.

[3] Learned advocate Mr. Chudgar for the petitioners submitted that presently since the Gujarat State Cooperative Tribunal is not functioning, the petitioners have approached this Court by present petition. Mr. Chudgar has also tendered additional affidavit in support of the petition. In such additional affidavit, following are the averments made in paragraph nos.2 to 5 :

"2. I state that the petitioner No.1 filed a Lavad Suit before the Court of learned Registrar's Nominee, Board of Nominees, i.e. respondent No.2 herein, being Lavad Suit No.311 of 2013. When the suit was filed, neither petitioner No.2 herein was Chairman of the Society, nor was I the Secretary of the Society. However, pursuant to the latest election of the Society, petitioner No.2 is the Chairman of the Society and I am the Secretary of the Society.

3. I state that after passing of the Resolutions by the General Body of the Society in the year, 1995 and 1996 (which have been produced on record before the Court of learned Board of Nominees), the General Body of the Society, in its meeting held on 20.12.1998, had passed a Resolution unanimously, whereby the General Body had resolved to approve the Resolution No.10 passed by the Managing Committee in its meeting held on 3.10.1998, whereby it was resolved to cancel and set aside the Resolutions of the General Body dated 12.6.1994 and it was thereby resolved not to allow/permit any commercial construction, including residential flats by any of the members of the Society on any of the plots of the Society. Annexed herewith and marked as AnnexureAI is the copy of the proceedings of the meeting of the Managing committee of the petitioner Society held on 30.10.1998 including Resolution No.10 with regard to permission of flats/scheme on the plots of the Society. Annexed herewith and marked as AnnexureAII is the proceedings of the General Body during its meeting held on 20.12.1998 including the Resolution No.2 and Resolution No.2B, whereby the Resolution passed in the Managing Committee's meeting dated 3.10.1998 is approved/resolved unanimously.

4. I state that on account of inadvertence on behalf of the then Secretary, Shri. A.K. Patel, the aforesaid Resolution were not brought to the notice of the learned Board of Nominees and were not produced on record of the proceedings before him, when the Lavad Suit was filed by him on behalf of the Society. However, the Resolutions passed by the General Body on 26.11.2005 and 28.6.2005 as well as

the Managing Committee's Resolution dated 6.9.2012 whereby specifically the permission to construct residential flats/ commercial construction on the plot No.20 of the Society possessed by Respondent No.1, were refused, have been produced before the Court of learned Board of Nominees. It is submitted that since the aforesaid Resolutions at AnnexureAI and AnnexureAI were old Resolutions and of the year 1998, the then Secretary, Shri Patel could not lay his hands on such Resolutions since it was concerning old records and therefore, on account of such inadvertence, the petitioner No.1 failed to bring the said Resolutions on record of the Court of learned Board of Nominees, when the proceedings were filed in the year, 2013. However, now during the pendency of the proceedings before this Hon'ble Court, when the present Managing committee were going through the old records and proceedings of the earlier meetings of the Managing Committee and the General Body, it found the aforesaid Resolutions in the records. It is, therefore, that the aforesaid Resolutions are now placed on record before this Hon'ble Court.

5. It is further submitted that in view of the aforesaid resolutions, it is clear that the resolutions passed in the year 1994 and 1996 (at Mark16/2, 3 and 4 in the proceedings of Ld. Board of Nominees), have been cancelled, set aside and annulled by the General Board of the petitioner no.1 Cooperative Housing Society by virtue of the resolutions passed on 3.10.1998 and 20.12.1998 at AnnexureAI and Annexure AII to the present affidavit. Therefore, the reliance placed on the said resolutions of the year 1994 and 1996 by the Ld. Board of Nominees while passing the order dated 5.11.2015 below Exh.6 in Lavad Case No.311 of 2013 is illfounded. Therefore, on this ground also (over and above the other grounds and contentions raised in the Memorandum of petition), the impugned order dated 5.11.2015 at AnnexureP/1 to the petition is required to be quashed and set aside."

[4] With the additional affidavit, copy of resolution passed in the meeting held on 03.10.1998 is also placed on record. Mr. Chudgar submitted that as stated in the additional affidavit, the resolutions subsequently passed in the year 1998 for not permitting any member to develop flats / commercial purpose could not be placed before the Board of Nominees, however, the fact remains that it is part of record of the society and as per which development of the plot in society shall be governed. Mr. Chudgar also submitted that respondent no.1 had given clear Undertaking to the society that he shall not construct flats or commercial units on the plot in question and that the plot in question shall not be used for the purpose other than for which permission has been granted by the society as well as by the Municipal Corporation. Mr. Chudgar submitted that once respondent no.1 bound himself by such Undertaking, it is not open for him to ask for permission from the Corporation and to get plan sanctioned from the Corporation for construction of flats on the plot in question. Mr. Chudgar

submitted that though before the Board of Nominees consideration of Undertaking given by respondent no.1 was pressed for, however, except taking note of Undertaking of respondent no.1, Board of Nominees has not given due consideration to the Undertaking while passing the impugned order. Mr. Chudgar submitted that in view of later resolution passed in the year 1998 by the society and in view of the Undertaking given by respondent no.1, respondent no.1 shall not be entitle to put up any construction of flats / commercial units on the plot in question and therefore, the Board of Nominees ought to have accepted the application Exh.6 and granted interim injunction prayed for by the petitioners till the Lavad Suit is decided.

[5] As against above arguments, learned advocate Mr. Shah for respondent no.1 submitted that petitioner no.1 had already permitted development of two plots for flats / commercial units and it was only when respondent no.1 started developing his plot, society has given step motherly treatment to him. Mr. Shah submitted that in terms of resolutions passed in the year 1994 and 1995, earlier two members had developed their plots and therefore, respondent no.1 would be entitle to develop his plot for putting up construction of flats especially when the Corporation has granted permission and also sanctioned plan for such construction. Mr. Shah submitted that the petitioner - society never placed on record subsequent resolutions passed by the society in the year 1998 and therefore, the petitioner - society is not justified to find fault with the impugned order made by the Board of Nominees. Mr. Shah submitted that as regards Undertaking of respondent no.1, it is not correct to say that Board of Nominees has not considered the Undertaking. Mr. Shah therefore, submitted that Board of Nominees since has exercised jurisdiction in favour of respondent no.1 in the facts of the case and in view of provisions made by the society by special resolutions permitting construction of flats and commercial units on individual plots, this Court may not interfere with the impugned order passed by the Board of Nominees in exercise of powers under Article 226 of the Constitution of India.

[6] Having heard learned advocates fro the parties, it appears that at the time of transfer of plot in question in favour of respondent no.1, respondent no.1 had submitted Undertaking to the society stating that he shall not put up any construction of flats / commercial units on the plot in question. It is further stated that in case, respondent no.1 was to carry out any type of construction other than shown in the plan, he would provide necessary details to the Chairman / Secretary of the society and thereupon he shall be liable to pay society amount which the said society demands from respondent no.1 and the society may get unauthorized construction demolished. It is further stated that construction shall not be used for the purpose other than for which permission has been granted by the society as well as by municipal corporation.

[7] It appears that Board of Nominees has referred Undertaking given by respondent no.1, however, contents of the Undertaking were required to be considered in the context of issue raised before the Board of Nominees for grant of interim relief. It does not appear from the impugned order that the contents of Undertaking were considered.

[8] It is submitted that by later resolution passed by the society in the year 1998, the society reconsidered decision earlier taken granting permission for construction of flats / commercial units, however, copy of such resolution was not placed before the Board of Nominees when the Board of Nominees considered question of grant of injunction as prayed for in application Exh.6.

[9] The Court therefore, finds that since the question is as regards entitlement of member of society to put up construction of flats / commercial units on individual plot, the matter needs to be decided in the context of Undertaking given by respondent no.1 and in the context of resolution of 1998, copy whereof could not be placed by the society before the Board of Nominees. Therefore, interest of justice will be well served if Board of Nominees reconsiders the matter and decides application Exh.6 afresh after considering later resolution passed by the society in the year 1998 and contents of Undertaking given by respondent no.1. For such purpose, the petitioner may place on record copy of resolution placed by the petitioner with the additional affidavit in support of the petition filed on record of the present petition before the Board of Nominees and give copy thereof to respondent no.1 while placing such copy before the Board of Nominees.

[10] For the reasons stated above, the petition is allowed. The impugned order dated 05.11.2015 passed by the Board of Nominees below application Exh.6 in Lavad Suit No.311 of 2013 is quashed and set aside. The matter is remitted to Board of Nominees to hear and decide application Exh.6 afresh after giving full and sufficient opportunity to both the sides including to permit the petitioners to place the above said later resolution before the Board of Nominees.

[11] In the present petition, statement of learned advocate Mr. Shah appearing for respondent no.1 was recorded on 10.11.2015 when the Court issued notice to the effect that respondent no.1 shall maintain status quo as regards construction on the plot in question till next date of hearing. Such statement was extended thereafter and it is in operation till today. Learned advocate Mr. Chudgar requested to continue such statement or direct to maintain statusquo till Board of Nominees finally decides application Exh.6. Learned advocate Mr. Shah however, requests that since there was no order of statusquo when the Board of Nominees considered the matter, this Court may not direct continuance of statusquo or continuance of statement made by him till Board of Nominees finally decides application Exh.6 afresh.

[12] The Court however, finds that protection of statusquo as per statement made by learned advocate Mr. Shah could be extended till first date when application Exh.6 is taken up by Board of Nominees and on that date, it will be open to the petitioner to make application for grant of adinterim relief. Thus till such first date, statusquo as prevailing today shall continue. If the petitioner makes application for grant of adinterim relief on the first date when the application Exh.6 is taken up by the Board of Nominees and if the Board of Nominees is to fix time schedule for hearing of application Exh.6, it shall consider application made by the petitioner for grant of adinterim relief and pass order on the same date when the application is made. Rule is made absolute accordingly.

