
AIR 1990 Bom 204 : (1989) 2 BomCR 460 : (1989) 91 BOMLR 398 : (1989) MhLj 935

Bombay High Court

Case No: Writ Petition No. 1820 of 1986

Hanuman Vitamins
Foods Pvt. Ltd. and
others

APPELLANT

Vs

State of Maharashtra
and another

RESPONDENT

Date of Decision: Feb. 16, 1989

Acts Referred:

Bombay Stamp Act, 1958 " Section 17, 2(1), 24, 31, 47(1)#Civil Procedure Code, 1908 (CPC) " Section 60#Constitution of India, 1950 " Article 226, 246, 248, 254, 268#Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 " Section 4#Registration Act, 1908 " Section 17

Citation: AIR 1990 Bom 204 : (1989) 2 BomCR 460 : (1989) 91 BOMLR 398 : (1989) MhLj 935

Hon'ble Judges: C. Mookerjee, C.J; M.P. Kenia, J

Bench: Division Bench

Advocate: Aspi Chinoy instructed by M/s. Bachubhai Munim and Co, for the Appellant; K.K. Singhvi and C.U.Bora, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Kenia, J.

This petition raises a question as to the levy of stamp duty under the Bombay Stamp Act, 1958, on a document purporting to be

an instrument of transfer of shares in a Co-operative Society and also raises the question of legislative competence in the State Legislative on the

question of levy of stamp duty as indicated in detail hereinbelow.

2. The 1st petitioner, Hanuman Vitamins Foods Pvt. Ltd. as members of the Dalamal Tower Premises Co-operative Society Ltd. and as holder of

five shares therein was in occupation of office premises No. 904 on the 9th floor of the building known as "Dalamal Tower" situate at 211,

Nariman Point, Bombay 400 021. By an instrument dated the 31st of March 1986, the 1st petitioner has purported to transfer in favour of the

petitioners Nos. 2, 3, 4, 5 and 6 the said five shares of the face value of Rs. 50/- each bearing distinctive numbers 711 to 715 in the capital of the

said Society for a consideration of Rs. 9,46,900/-. The said instrument of transfer sets out in its body that Dalamal Tower Premises Co-operative

Society Ltd. is the owner of the building known and Dalamal Tower situate at 211, Nariman point, Bombay; that the 1st petitioner who is

described as the transferor, is a member of the said society holding five shares of the face value of Rs. 50/- each, that as one of the incidents of

membership of the said Society, the 1st petitioner has a right to occupy specific office premises in the said building Dalamal Tower and the 1st

petitioner as such transferor has a right to occupy office premises No. 904 on the 9th floor of the said building Dalamal Tower which office

premises admeasures 557 sq.ft. of build up area and for a consideration of Rs. 9,46,900/- paid by the transferees (petitioners 2 to 6 herein) to the

transferor (petitioner No. 1 herein) transfer the said five shares in the capital of the said Dalamal Tower Premises Co-operative Society Ltd. "to

hold the said shares upon the same terms and conditions on which the transferor now holds". The said document goes on to state "the transferees

hereby accept the said shares subject to the said terms the conditions.

3. By a letter dated April 23, 1986, copy whereof is to be found at Ex. "C" to the petition, the Advocates for the 1st petitioner on behalf of the

Trustees of the Adarsh Trust, forwarded the aforesaid instrument of transfer of shares to the Superintendent of Stamps, Bombay for adjudication

under the provision of the Bombay Stamp Act, 1958. In the said letter, the said Advocates recorded their contention that the said instrument of

transfer of shares was wholly exempt from duty and went on to state that the said instrument was however sent for adjudication by way of

abundant caution. By a reply dated May 22, 1986, (copy whereof may be found at Ex."D" to the petition), the Superintendent of Stamps,

Bombay, informed the said Advocates for the 1st petitioner that the document sent for adjudication was a conveyance of Trust Property chargeable

with stamp duty under Article 25(b)(i) of the Bombay Stamp (Amendment) Act, 1985, on the present market value of the said property. By the

said letter, the Superintendent of Stamps requested that details regarding the premises No. 904 on the 9th floor of the said building Dalamal Tower

be furnished as also the Valuation report of the Architects and other relevant documents pertaining to the said property be forwarded to him, to

enable the Collector of the District to determine the value of the said property and on receipt of the valuation report, stamp duty will be assessed

and communicated. It is in order to quash and set aside the aforesaid letter/order dated 22nd May, 1986, that the petitioners have filed the present

petition seeking inter alia a writ of Mandamus directing the respondents who are the State of Maharashtra and the Superintendent of Stamps,

Bombay, to desist and forbear from charging, demanding or recovering stamp duty on the said ""Form of Transfer"" (Ex. "A" to the petition) under

the provisions of the Bombay Stamp Act, 1958 or from proceeding on the basis that the said Form of Transfer is not duly stamped or is liable to

be impounded under the provisions of the Bombay Stamp Act, 1958. In the petition, the petitioners have contended that the said instrument of

transfer is a document providing for the transfer of shares held in a body corporate, i.e. the Society in question and having regard to Section 2(1)

of the Bombay Stamp Act, 1958 even as amended by the Bombay Stamp (Amendment) Act, 1985. The petitioners have also gone on to contend

in the petition that the levy of stamp duty on the transfer of shares held in a Co-operative Society registered under the provisions of the

Maharashtra Co-operative Societies Act, 1960 falls exclusively within Entry 91 of List I of the Seventh Schedule and is accordingly beyond the

Legislative competence of the State Legislature under Entry 63 of List II of the Seventh Schedule. The petitioners have gone on to submit that in

the circumstances to the extent that the Bombay Stamp Act, 1958, as amended by the Bombay Stamp (Amendment) Act, 1985, purports to levy

stamp duty on a Form of Transfer of shares held as aforesaid, the said Act under the Provisions thereof are ultra vires the beyond the competence

of the State Legislature and as such null and void. The petition was argued on behalf of the petitioners by Mr. Aspi Chinoy and on behalf of the

respondents by Mr. K. K. Singhvi.

4. Mr. Singhvi on behalf of the respondents raised a preliminary objection to the maintainability of the present petition pointing out that the

petitioners had failed to avail themselves of the alternative remedy which was available to them before approaching this Court in its writ jurisdiction

Mr. Singhvi took us through the definition of "instrument" as set out in S. 2(1) of the Bombay Stamp Act, 1958 as also through the definition of

conveyance which is defined in S. 2(g) thereof. S. 2(1) and S. 2(g) are as follows:--

2 (g) "Conveyance" includes,---

(i) a conveyance on sale,

(ii) every instrument, and

(iii) every decree of final order of any Civil Court, by which property, whether moveable or immovable, or any estate or interest in any property is

transferred to, or vested in, any other person, inter vivos, and which is not otherwise specifically provided for by Schedule I;

Explanation-- An instrument whereby a co-owner of any property transfers his interest to another co-owner of the property and which is not

an instrument of partition, shall, for the purposes of this clause, be deemed to be an instrument by which property is transferred inter vivos.

2(1) "instrument" includes every document by which any right or liability is, or purports to be, created, transferred limited, extended, extinguished or

recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter to credit, policy of insurance, transfer of share,

debenture, proxy and receipt.

Section 31 of the said Act provides for adjudication as to proper stamps. Sub-sections (1) and (2) thereof are as follows:--

31(1) When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing

it applied to have the opinion of that officer as to the duty (if any) with which (or the Article or Schedule I under which) it is chargeable and pay a

fee of five rupees in case not involving stamp duty on ad valorem basis, and one rupee on every Rs. 1,000 or part thereof, subject to a minimum of

five rupees and maximum of twentyfive rupees in cases involving stamp duty in ad valorem basis, the Collector shall determine the duty (if any) with

which or the Article of Schedule I under which in his judgment, the instrument is chargeable.

(2) For this purpose the Collector may require to be furnished with a true copy or an abstract of the instrument, and also with such affidavit or

other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the

amount of the duty with which it is chargeable, are fully and truly set forth therein and may refuse to proceed up on any such application until such

true copy or abstract and evidence have been furnished accordingly:

Provided that,--

(a) no evidence furnished in pursuance of this section shall be used against any person in any civil proceeding except in an inquiry as to the duty

with which the instrument to which it relates is chargeable; and

(b) every person by whom any such evidence is furnished shall, on payment of the full duty with which the instrument to which it relates is

chargeable, be relieved from any penalty which he may have incurred under this Act by reason of the omission to state truly in such instrument any

of the facts or circumstances aforesaid.

Mr. Singhvi pointed out that under the provisions of Section 53 of the Act, the powers exercisable by a Collector under Chapter III (which

contains S. 31) shall be subject to the control of the Chief Controlling Revenue Authority.

Mr. Singhvi also pointed out that under S. 54 of the said

Act, the Chief Controlling Revenue Authority may state any case, whether on an application made to it by a party interested or otherwise coming

to its notice, and refer such case formulating the precise question with its own opinion thereon to the High Court and under sub- section (2)

thereof, every such case shall be decided by not less than three Judges of the High Court whose opinion shall prevail. Mr. Singhvi submitted that in

the light of the fact that the petitioner admittedly have not chosen of the avail themselves of the aforementioned alternative remedy, the present

petition under Article 226 ought not to be entertained by this Court. Mr. Chinoy on behalf of the petitioners pointed out that since the

constitutionality of the Bombay Stamp Act, 1958, as amended by the Bombay Stamp Act (Amendment) Act, 1985 had been challenged in the

petition, it is only appropriate that the said challenge be investigated and decided by this Court. In view of the challenge to the vires of the Act as

indicated above, we went into the details of the arguments on the petition.

5. Mr. Chinoy on the question of the legislative competence, invited our attention to the provisions of Entry 91 in List 1 of the Seventh Schedule

which is as follows:--

91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of

shares, debentures, proxies and receipts.

Mr. Chinoy also pointed out Entry 63 of the List I of the Seventh Schedule which is as follows:--

63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

Mr. Chinoy submitted that in view of the provisions of Article 246 of the Constitution of India and the position as reflected by the Entries quoted

hereinabove, it was not open to the State of Maharashtra to legislate for the levy of the duty on the matters covered in Entry 91 of List I of the

Seventh Schedule. Mr. Singhvi appearing on behalf of the respondents in the course of his address contended that levy of stamp duty does not fall

exclusively within Entry 91 of List I of the Seventh Schedule, which only speaks of rates of stamp duty. Mr. Singhvi invited attention to Entry 44 of

List III of the Seventh Schedule which is as follows:--

44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

Mr. Singhvi also pointed out that the Bombay Stamp Act, 1958 received the assent of the President on 4th of June 1958 which was published in

the Bombay Government Gazette and the Bombay Stamp (Amendment) Act, 1985 also received the assent of the President on 22nd November

1985 (in the context of the provisions of Article 254 of the Constitution of India).

6. The position is summarized in Mulla and Pratte on the Indian Stamp Act, 6th Edition at page 5 under the caption ""constitutional position"" which

is as follows:--

Constitutional position : Under the constitution, the power the legislature relating to the Stamp Duties is distributed in the following manner between

the Union and the states. While ""stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty

are in the Concurrent List, ""rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies

of insurance, transfer of shares, debentures, proxies and receipts"" are in the Union List, and rates of duties on other documents is a subject in the

State List. The Union Parliament has, therefore, the exclusive power to prescribe the rates of duty in respect of the documents enumerated in List

I. It has, in addition, the power to legislate should it desire to exercise it, in respect of the whole subject of stamp duties which is in the Concurrent

List, except that it may not prescribe the rates of duty with respect to documents other than those enumerated in List I. It follows, therefore, that

the Union Parliament is in a position to make its will prevail over the whole field of Stamp Duties. However, under Article 268 of the Constitution,

it is provided that the Stamp Duty on documents enumerated in Entry 91 of List I, though levied by the Government of India, is to be collected by

the State within which such duty is leviable, and the proceeds of any such duty are not to form part of the Consolidated Fund of India but are to be

assigned to that State.

The position arising out of the aforesaid Entries also came to be considered by the Supreme Court in the case of The Bar Council of Uttar Pradesh

Vs. The State of U.P. and Another, . Paragraph 12 of the aforesaid judgment sets out the question controversy and is as follows:--

12. The main question in which the controversy has centered is whether the levy of stamp duty on the certificate of enrolment of an advocate is a

purely taxation measure or whether it is a part of the conditions prescribed by Section 24 of the Act which an advocate must satisfy before he

becomes entitled to practise. If the requirement of the payment of such a duty is a condition precedent to the conferment on a person of the

privilege of audience and representing suitors before the Supreme Court and the High Courts any legislation relating to it would be within the

competence of the Parliament. If, however, it is purely a taxation measure then it would fall within Entry 44 of the Concurrent List in which event

both the Parliament and the State Legislature would be competent to enact legislation for the levy of the duty although it is only under Entry 63 of

List II that rates can be prescribed by the State Legislature. In other words, the charging provisions can be enacted by both the Parliament and the

State Legislatures subject to the provisions of Article 254 of the Constitution, it is well settled that the scheme of the Entries in the various lists is

that taxation is not intended to be comprised in the main subject in which "it might on an extended construction be regarded as included but is

treated as a distinct matter for the purpose of legislative competence." Even under the residuary power of legislation conferred by Article 248 the

parliament can only impose that tax which is not mentioned in either List III or List II.

Earlier, in Paragraph 11, Entries 77 and 78 in List I of the seventh Schedule relating to the qualifications and conditions on the fulfillment of which

persons would be entitled to practise before the Supreme Court or the High Court have been discussed as also Entry No. 44 of List III which

enables the Legislature of a State to legislate with regard to the levy of stamp duty, but the rates of stamp duty can be prescribed by the Parliament

only with regard to instrument falling within Entry 96 of List I (as was the case there) and by the State Legislature under Entry 63 of List II. The

Supreme Court goes on to hold "the stamp duty which is payable on the certificate of enrolment pertains to the domain of taxation and it is hardly

possible to regard it as a condition which can be prescribed for enrolment under the Entries in List I. The imposition of such a duty falls in pith and

substance under Entry 44 of List III and the prescribing of rates under Entry 63 of List II. In *M.P.V. Sundararamier and Co. Vs. The State of*

Andhra Pradesh and Another, , it was observed after a full examination of the scheme of Entries at p. 1480:--

"The above analysis -- and it is not exhaustive of the Entries in the Lists -- leads to the inference that taxation is not intended to be comprised in the

main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative

competence. And this distinction is also manifest in the language of Article 248, Clauses (1) and (2) and of Entry 97 in List I of the Constitution."

In *S. Ananthakrishnan Vs. The State of Madras*, , the levy of stamp duty on a document which gives a person the privilege or the right to plead

and act on behalf of the suitors was considered to fall within the taxing power of the State. It is difficult to escape the conclusion that the levy of

stamp duty by means of the Stamp Amendment Acts in the State of Uttar Pradesh was not covered by any of the Entries in List I and therefore it

could not be said that the State was incompetent to levy the duty and prescribe the rate under Entry 44 of List III and Entry 63 of List II in the

Seventh Schedule to the Constitution. Any argument on the basis of the legislative incompetence, has, therefore, to be repelled.

In the case under scrutiny before us too we shall have to reject the argument regarding the absence of legislative competence in the State.

7. We next come to the question of the interpretation of the instrument of the interpretation of the instrument of transfer dated 31st March, 1986

submitted by the 1st petitioners for adjudication u/s 31 as set out hereinabove. A copy of the said document is annexed as Ex. "A" to the petition

under the caption ""Form of Transfer "" . We have already set out the contents of the said document earlier. Mr. Chinoy on behalf of the petitioners

urged that the said document is only an instrument of transfer of shares belonging to the 1st petitioner in favour of the petitioners 2 to 6 held by the

1st petitioner in a Co-operative Society. Mr. Chinoy took us through the definition of the term "instrument" as set out in S. 2(1) of the Bombay

Stamp Act, 1958 and pointed out that the transfer of shares was specifically excluded from the definition of "instrument". Mr. Chinoy argued that

by no stretch of imagination would the aforesaid instrument of transfer of shares be brought within the purview of Article 25 of the Schedule I to

the Bombay Stamp Act which sets out the stamp duty on a conveyance. Article 25 provides for a duty on Conveyance and Mr. Chinoy argued

that on a fair reading of the document (Ex. "A" to the petition), it cannot be any stretch of imagination be said to be a conveyance of any right in

any Immovable property. Mr. Chinoy submitted that whereas the form of transfer only concerns itself with the transfer of shares, the right to

occupy office premises No. 904 on the 9th floor of the building Dalamal Tower was one of the incidents of membership of the said Society and it

was not permissible to the 2nd respondent to apply Article 25 to an instrument of transfer of shares merely because as a result of the transfer of

shares, the transferee will get the right to occupy the office premises which was previously occupied by the 1st petitioner. Mr. Chinoy took us

through a line of decisions including AIR 1925 Bom 527, AIR 1945 Mad 138 ;AIR 1935 Rang 243;AIR 1935 Lah 567 Superintendent of

Stamps Vs. Breul and Co., , Prem Agnani and Another Vs. The Head Quarters Sub-Registrar, Gandhinagar, Bangalore, and on the basis of the

aforesaid authorities submitted that the Court has to look at the document as it stands and not permit any extraneous matter to affect its

consideration for the purpose of determining what stamp it attracts. Mr. Chinoy stressed that it is the instrument which attracts stamp and not the

transaction, as has been pointed out in one of the decisions. It was, therefore, not permissible for the 2nd respondent to go beyond what appeared

on the fact of the Form of Transfer (Ex. "A" to the petition) and hold that it was a conveyance and not merely an application for transfer of shares.

In not a single one of these decisions have we come across any proposition which prevents the Court from looking at the document as a whole and

taking into consideration the substance of the document as contrasted from the label attached thereto. Thus, in AIR 1944 Bom 325 (SB), a

Special Bench of this Court while considering a document which purported to be a document between a principal and an agent held that there was

no magic in the word "agency" which was often used in commercial matters where the relationship was that of vendor and purchaser. The

relationship between the parties had to be decided on the facts of the case, as could be made out from the document. The proviso in the contract

completely overrode all other conflicting condition and the contract must therefore be construed as one between principal and principal. The Court

proceeded to hold that accordingly it did not attract any stamp duty since it was not chargeable with duty under Article 43 but fell within exemption

(a) to Article 5. The Court ignored the label of agency and went into the substance of the document and came to the conclusion that it represented

a contract between principal and principal and considered the document on the aforesaid basis. Similarly, in the case Prem Agnani and Another

Vs. The Head Quarters Sub-Registrar, Gandhinagar, Bangalore, of the judgment, the Court reiterated the rule of construction of instrument as

follows :

It is a cardinal rule of construction that the instrument has to be considered as a whole and the intention of the parties has to be ascertained by the

terms thereof and not by extraneous circumstances or evidence.

The Court thereafter, found it necessary to set out the relevant clauses of the Deed and proceeded to determine the question before it on the basis

of the interpretation of the document as a whole. As we shall presently point out, there is no getting away from the fact that the Form an Transfer

(Ex. "A" to the petition) being the instrument dated 31st March, 1986 submitted by the 1st petitioner to the 2nd respondent for adjudication u/s 31

of the Bombay Stamp Act, 1958, as amended, concerns itself with conveying a right to occupy the office premises No. 904 on the 9th floor of the

said building and, as such, a right to the Immovable property. The right to occupy a flat in co-operative society has been held by the Supreme

Court to be a ""species or property"". In the case of Ramesh Himmatlal Shah Vs. Harsukh Jadhavji Joshi, , the point that arose for consideration

before the Supreme Court was whether the right of the judgment debtor who claimed the right to be in occupation of the flat the subject-matter

before the Court, was liable to be attracted and sold in execution of a decree. The flat in question had been attached and offered for sale and was

purchased at an auction but before the sale was confirmed, that judgment-debtor took up the plea that the warrant of attachment and proclamation

of sale are liable to be set aside as they concern the attachment and sale of a flat in a co-operative housing society which according to the

judgment-debtor was not liable to attachment and sale. It was also urged that the judgment-debtor had no saleable interest in the said property u/s

60 of the CPC and on that ground, it was not liable to attachment. A Judge of the City Civil Court at Bombay, rejected the contention of the

judgment-debtor. On appeal, the Bombay High Court upheld the same and a Letters Patent Appeal against the decision in appeal was not

successful, and that is how the case came up for consideration before the Supreme Court. After going into the provisions of the Maharashtra Co-

operative Societies Act and the Rules made thereunder, their Lordships held ""we have also noticed that the Act does recognise interest in the

Immovable property of the Society as well (S. 47(1)(b)). We have seen all qualifications for membership. There is no reason to suppose that if the

qualification under the bye-laws are fulfilled and application for membership may be rejected. It is admitted that the flat is owned by the Society

and the judgment-debtor has a right or interest to occupy the same. This right or interest to occupy is a species of property"". In para 18 of the

judgment, after holding that the right or interest to occupy is a species of property, the Supreme Court goes on to state as follows :--

Section 29 read with S. 24 shows that there is no prohibition as such against transfer of a share to a member or even to a non-member if he

consents to be a member and makes an application for membership by purchasing five shares as provided under bye-law 9. Reading the aforesaid

provisions there is no reason to think that there is any question of refusal of membership of the Society to a non-member if he is qualified otherwise

and makes an appropriate application in which case the transfer of shares will be operative and thus the assignment of the right to occupation will

hold good..... We, therefore, unhesitatingly come to the conclusion that this species of property namely the right to occupy a flat of this type,

assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. We have seen no

fetter under any of the legal provisions against such a conclusion. The attachment and the sale of the property in this case in execution of the decree

are valid under the law.

In para 22, their Lordships go on to say as follows:--

The facts that at the time of auction-sale the purchaser was not a member of the society would not in law affect the saleability or prior attachment of the property in execution of the valid decree.

Finally in para 23, their Lordships observed as follows:--

We have seen there is no absolute prohibition against transfer of a right to occupation of the flat or even to transfer a share. The auction-purchaser

is presumed to know the limitations under which he has purchased the right to occupy the flat in Court auction. If ultimately the Society turns down

his application for membership (Which of course cannot be done except for valid reasons) it is up to him to take such course of action as available

under the law. Such a remote contingency, per se, will not make the particular right of the judgment-debtor in the flat non-attachable or non-

saleable.

8. What an instrument of transfer relating to shares in a society conveys to the transferee came up for consideration before the Full Bench of the

Gujarat High Court in a decision *Mulshanker Kunverji Gor and Others Vs. Juvansinhji Shivubha Jadeja*, . The question that was referred to the

Full Bench was as follows :--

Whether an immovable property allotted by a co-operative housing society to its member can be transferred by the member with the approval of

the Society to another person without a registered instrument of transfer?

In para 3 of the judgment, discussing how exemptions arise, the Court observed as follows (at p. 64) :

Clause (ii) of sub-section (2) of S. 17 therefore exempts from compulsory registration instruments relating to shares in a joint stock company

notwithstanding that the shares of a joint stock company consist in whole or in part of immovable property. This exemption is limited to transfer of

shares in a joint stock company and does not extend to transfer or shares in a co-operative society. It is by clause (a) of Section 42 of Gujarat

Co-operative Societies Act, 1961 that the exemption from compulsory registration has been extended to transfer of shares in a co-operative

society notwithstanding that the assets of the society consist wholly or on part of immovable property. When we read clause (ii) of the sub-section

(2) of Section 17 with clause (a) of Section 42 of Gujarat Co-operative Societies Act, 1961 we find that the language, used in both is in pari

material. It is clear therefore that the intention of the Legislature in enacting clause (a) of Section 42 of Gujarat Co-operative Societies Act, 1961,

is to extend to co-operative societies the exemption from compulsory registration extended by clause (ii) of sub-section (2) of the Section 17 of the

Registration Act, 1908 to joint stock companies.

Finally, in para 5 of the judgment, their Lordships pointed out that ""shares in a co-operative housing society have a necessary relation to the

immovable properties which the society constructs and which are allotted by the society to its members. It is necessary, therefore, to find out what

an instrument of transfer relating to "shares in a society" conveys to the transferee"". Their Lordships then observed that the type of society under

consideration was a tenant co- partnership society and went on to hold ""Therefore, when a member of such a co-operative housing society

transfers his shares to another with the approval of the society, he not only transfers the shares but also, as a necessary incident there of transfers

his interest in the immovable property which has been allotted to him. What Section 42, clause (a), therefore, exempts from the rule of compulsory

registration is an instrument relating to "shares in a society" which carry with them, as a necessary incident, members interest in the immovable

property occupied by him..... It is therefore difficult to uphold the argument raised by Miss Shah that with the transfer of "shares in such a

society", what are transferred are merely the shares in the society and not the right to occupy the house which necessarily flows from the allotment

of the houses by the society to its members. In the case of a tenant co-partnership society, "shares in a society" which a member holds appear to

us to be inseverable from his interest in the immovable property which has been allotted to him for his occupation and enjoyment..... It is

therefore clear that in case of a tenant co-partnership society, the transfer of shares necessarily carries with it the transfer of member"s interest in

the immovable property allotted to him and that such a transfer can be brought about without a registered instrument because clause (a) of Section

42 carves out an exception to the rule enunciated in sub-section (1) of Section 17 of the Registration Act, 1908"".

It may be mentioned that the scheme of the two Acts--the one applicable to Gujarat and the other applicable to Maharashtra is pari material. What

is more, in the instant case, one finds there is intrinsic material in the document itself to indicate that what has sought to be transferred is not merely

the shares but also the right to occupy office premises on the 9th floor of the building in question. However, before we come to that, it is

convenient to notice the bye-laws of Dalamal Tower Premises Co-operative Society Limited which have been produced before us by the learned

counsel appearing for the petitioners. Among the objects of the Society, one finds at B.1.1 that the purpose of the Society is primarily to constitute

an organisation of persons who have taken flats in the building known as Dalamal Tower and clause (c) thereof also includes within its objects ""to

provide social and other amenities to members who have taken flats"". Bye-law D.1.1 inter alia provides ""no person shall be admitted as member

unless he has entered into an agreement for the purchase of a flat in the building mentioned in bye-law No.2(a) as per provision of Section 4 of the

Maharashtra Ownership Flat Act, 1963 read with Rule No. 5 of Maharashtra Ownership Flat Rules, 1964."" Clause (c) of the same bye-law

includes the provision ""the General Meeting shall not admit members exceeding the number of Residential and non- Residential Flats available for

allotment."" Bye-law 2.1 provides that ""no person shall exercise the rights of a member of the society until he is admitted as such as laid down in

Bye-law No. D.1.1(a) and holds not less than five fully paid shares in the Society and his name has been entered in the Register of Members. The

Bye-laws relating to expulsion of a member (D.2.7) inter alia make it clear that on expulsion a member ""Shall also be entitled to refund of any

additional amounts paid by him towards the costs of the flat by way of loan, deposit or contribution towards construction etc. This is in addition to

being entitled to a refund of the amount received by the Society in respect of the shares held by the Society in respect of the shares held by the

member expelled at the date of expulsion."" Bye-law E. 1.5 provides for a limit to a member's share holding stating that the limit of holding of shares

by an individual member shall be according to the provisions of Section 28 of the Act and within this limit, every member shall be allotted share to

the extent of one-tenth of the total cost of the flats allotted to him. Every member shall be issued loan stock or deposit receipt or cost receipt for

the remaining cost which is not covered by the shares. With regard to transfer of shares, bye-law E.1.4 provides that the transfer of shares and

nominations of nominees, refund of shares shall be governed by provisions under Sections 29 and 30 of the Maharashtra Co-Operative Societies

Act, 1960 and Rules made thereunder. Clause (b) of the same bye-law inter alia provides ""the instrument of transfer shall be in the form set out in

schedule II appended to the bye-laws"" and clause (c) specifies that ""transfer of all shares and interest held by the Transferor shall entitle the

Transferee to the allotment and occupancy of the flats held by the transferor Bye-law F.1.8 provides in clause (i) thereof that ""no flats shall be

allotted to persons who are not members of the society, allotment of flats shall be done by the General Meeting only. No members shall be allotted

premises unless (1) he is a member holding not less than such number of fully paid up shares as would be equal to ten per cent of the estimated

total cost of the flats of be allotted to him, (2) allotment under (1) above would give only the right of occupancy to the member as a right acquired

by him by virtue of his holding shares or agreeing to hold shares to the extent of the value of flats and no other relationship like that of a landlord

and tenant would be deemed to exist between the Society and the member." The above provisions contained in the Bye-laws quoted hereinabove

speak for themselves and underline the position that transfer of shares and interest therein held by the transferor shall entitle the transferee to the

allotment and occupancy of the flats held by the transferor. With the above position as reflected by the bye-laws of the Society, we now go back

to the document in question, being the instrument of transfer which has already been noticed hereinabove. It is important to note that the said

document mentions the fact that the transferor is a member of the Society; that one of the incidents of membership of the said Society is that the

member-transferor has a right to occupy specific office premises in the case of the 1st petitioner the same being the premises No. 904 of the 9th

floor of the building known as Dalamal Tower; and that the transfer of shares is effected upon same terms and conditions on which the transferor

now holds the shares. What is more, the transferee accepts the said shares "subject to the said terms and conditions." It is difficult to visualise a

situation where a purchaser paying close to a million rupees interested merely in the transfer of five shares of the face value of Rs. 50/- each for the

said consideration and nothing more. What is more, he is not willing to leave other things to the operation of law, that is to say, it is obvious that the

he has not accepted merely the transfer of shares leaving rest of the thing, namely, the transfer of the right to occupy office premises to the

operation of law. That is why there seems to have been an insistence in mentioning that one of the incidents of the 1st petitioner's membership of

the society is that as such member, the 1st petitioner has a right to occupy the office premises No. 904 on the 9th floor of Dalamal Tower. What is

more, the transfer of shares is stated to be "upon the same terms and conditions on which the transferor now holds" and finally, the document

makes it absolutely explicit that ""the transferees hereby accept the said shares subject to the said terms and conditions.

9. In the circumstances, we feel that it would be a travesty of the truth to hold that the document being the instrument of transfer under the heading

Form of Transfer"" purports to transfer only the shares and nothing beyond the shares. We find that in substance and effect in addition to the

transfer of shares, the document also conveys the petitioners" right to occupy the office premises No. 904 on the 9th floor and it is only subject to

the said terms and conditions that the said transfer has been accepted by the transferee. In substance and effect, therefore, this document

incorporates along with the transfer of shares the conveyance of property. It may be mentioned that the Form appended to the bye-laws and found

in Appendix II of the bye-laws is not the form which has been strictly adhered to. Mr. Chinoy had argued before us that along with the transfer of

shares, the bundle of rights which the transferor has as a member is automatically transferred by operation of law irrespective of whether the bundle

of rights have been mentioned in the document or not. One wonders why out of the aforesaid bundle of rights, the particular right to occupy office

premises being 904 on the 9th floor should have been singled out for mention in the document which also makes it clear that the transferee had

accepted the transfer only subject of the said terms and conditions which included the right to occupy the premises No. 904 on the 9th floor. We,

therefore, find that although the label is one of transfer of shares only in substance and effect, the document also includes the conveyance of a right

to occupy immovable property which as the supreme Court had pointed out is a ""species of property"". We, therefore, find that the 2nd respondent

cannot be said to have been in error in stating that the document sent by the 1st petitioner for adjudication under Sec. 31 is also a conveyance of

trust property chargeable with stamp duty under Article 25(b)(i) of the Bombay Stamp (Amendment) Act, 1985. One finds that the above

conclusion can be arrived at even on consideration of the document itself as a whole without the assistance of the decision of the Full Bench of the

Gujarat High Court which in fact goes a step further.

10. We may mention that in the normal course in the light of the fact that an alternative remedy was available to the petitioners, this Court would

not have entertained this petition under Article 226 of the Constitution of India. It is only because the legislative competence to levy stamp duty

was challenged as set out in paragraph 10 of the petition, that we decided to go into the petition and the various contentions raised therein. In the

course of his submission, Mr. Chinoy addressed us in detail even on the merits of the question as to whether the 2nd respondent was justified in

adjudicating the instrument of transfer as a conveyance of trust property chargeable with stamp duty under Article 25 (b)(i) of the Act. Having

gone into the said question, we have decided the same also and we find that there is no substance in either of the two contentions raised on behalf

of the petitioners.

11. The petition therefore fails and is dismissed with costs. The Rule to stand discharged.

12. Mr. Cooper on behalf of the petitioners requests that the interim relief in terms of prayer (c) granted by an order passed on the 14th of August,

1986 be continue for a period of eight weeks from today. We order accordingly.

13. Petition dismissed.