

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.9262 OF 2015

Royal Manor Co-operative)
Housing Society Ltd., a society duly)
registered under the Maharashtra)
Co-operative Societies Act, 1960, having)
registration No.MUM/WHW/HSG./(TC)/)
13329/05-06 having address at St.Roque Rd.)
Bandra (West), Mumbai – 400 050.) .. Petitioner

Versus

1. Angana Bharali Das,)
Age about 46 years, occ. Profession)
Adult, Indian Inhabitant)

2. Shri Romit Rajan Das,)
Flat No.A/301, “A” wing, 3rd Floor, Royal)
Manor Co-operative Housing Society Ltd.,)
St. Roque Road, Bandra (West),)
Mumbai – 400 050)

3. Salim Pradhan,)
Flat No.A/601, Royal Manor Co-operative)
Housing Society Ltd.,)
St. Roque Road, Bandra (West),)
Mumbai – 400 050)

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4. Arunachamam Vijaykumar)
Flat No.A/201, "A" Wing, 3rd Floor,)
Royal Manor Co-operative Housing)
Society Ltd., St.Roque Road,)
Bandra (West), Mumbai – 400 050.) .. Respondents

Mr.Pravin Samdhani, Senior Advocate a/w Mr.Chirag Modi, Mr.Gautam Ankhad, Mr.Sunny Shah, Mr.Viral Shukla, Ms.Priti Patel, Ms.Rohina Shaikh and Mr.Darshan Ashar i/by Shukla & Associates for the petitioner.

Mr.Mayur Khandeparkar a/w Mr.Chetan Yadav a/w Mr.Ravish A. Mishra and Mr.Vijay B. Dhingreja for the respondent nos.1 & 2.

CORAM : **R.D. DHANUKA, J.**
RESERVED ON : **3rd September 2018**
PRONOUNCED ON : **12th September 2018**

Judgment :-

. By this petition filed under Article 227 of the Constitution of India, the petitioner has impugned the order dated 27th August 2015 passed by the Co-operative Appellate Court thereby dismissing the Appeal No.79 of 2014 filed by the petitioner herein arising out of the interim order passed by the Co-operative Court No.II, Mumbai on 29th October 2014 granting mandatory interim injunction in favour of the respondent nos.1 and 2 below Exhibit-5.

2. Mr.Samdhani, learned senior counsel for the petitioner states that all the respondents are served. None appeared for the respondent

nos.3 and 4. By consent of the petitioner and the respondent nos.1 and 2, the matter is heard finally at the admission stage. Some of the relevant facts for the purpose of deciding this petition are as under :-

3. During the period between 2000 and 2004, M/s.Lalani Construction Pvt. Ltd. constructed the building premises of the petitioner-Society and sold various flats to various prospective buyers. It is the case of the petitioner that the said developer had allotted the car parking in the said building i.e. stilt parking as well as open car parking. In the year 2005, the petitioner was incorporated as a society under the provisions of the Maharashtra Co-operative Societies Act, 1960 (for short “the said MCS Act”).

4. In so far as the flat No.A/301 on the first floor of 'A' wing in the building of the petitioner is concerned, the said flat was purchased by Mrs.Bernadattee Lopes and Mr.Gilbert Lopes from an original member of the petitioner. It is the case of the petitioner that the said original members did not have any parking space allotted to them. On or about 4th April 2012, the said flat bearing No.A/301 was sold by the original owners to the respondent nos.1 and 2 by a registered sale deed.

5. On 29th April 2012, the share certificate in respect of the said Flat No.A/301 was transferred in the name of the respondent nos.1 and 2. On 25th August 2012, the respondent nos.1 and 2 applied for allotment of car parking space in the compound of the petitioner society. On 10th January 2013, the respondent nos.1 and 2 through their advocate's notice called upon the petitioner to allot a permanent car parking space in the compound of the petitioner. Since there was no response to the two notices, the respondent nos.1 and 2 filed a dispute on 15th March 2013 under Section 91 of the said MCS Act and also filed an interim application (Exhibit-5) seeking interim relief before the Co-operative Court No.II.

6. In the said dispute, the respondent nos.1 and 2 had prayed for declaration that the disputants were entitled to park one car in the society building compound. In prayer clause (c) of the said dispute, the respondent nos.1 and 2 prayed that the petitioner be ordered to allot one of the parking space from the second parking in possession of the opponent nos.2 and 3 to the said dispute i.e. the respondent nos.3 and 4 in this writ petition. It was the case of the respondent nos.1 and 2 in the said dispute that the said respondent nos.3 and 4 herein were allotted two car parkings whereas the respondent nos.1 and 2 did not have any

car parking allotment in their favour. The petitioner society as well as the respondent nos.3 and 4 filed their respective written statements to the said dispute filed by the respondent nos.1 and 2. The respondent nos.1 and 2 filed a rejoinder to the said written statements.

7. It is the case of the petitioner that during the pendency of the said application (Exhibit-5) filed by the respondent nos.1 and 2, the petitioner disputed the jurisdiction of the Co-operative Court to try and entertain the said dispute. On 22nd September 2014, the Co-operative Court passed an order that the said Court had jurisdiction to try and entertain the said dispute. On 29th October 2014, the Co-operative Court partly allowed the said interim application (exhibit-5) filed by the respondent nos.1 and 2 and granted mandatory interim injunction against the petitioner directing the petitioner to permit the respondent nos.1 & 2 to allot one car parking on temporary basis. On 25th November 2014, the petitioner had challenged the order dated 22nd September 2014 passed by the Co-operative Court holding that it had jurisdiction to try and entertain the said dispute by filing a revision application bearing No.59 of 2014 and challenged the order 22nd October 2014 by filing an appeal before the Co-operative Appellate Court. Co-operative Appellate Court dismissed the said revision application by an order dated 23rd March 2014.

8. The petitioner preferred a writ petition bearing (St.) No.11423 of 2015 before this Court. By an order dated 22nd April 2015, this Court disposed of the said writ petition filed by the petitioner. This Court recorded that the petitioner had invoked Section 9A of the Code of Civil Procedure, 1908 before the Co-operative Court having regard to the prayer clause (c) of the dispute which was for an order and direction against the petitioner to allot one of a parking space from the second parking in possession of the respondent nos.3 and 4 herein. During the course of the arguments of the said writ petition, the respondent nos.1 and 2 made a statement before this Court that they would give up the prayer clause (c) of the dispute and would prosecute the dispute in respect of the other prayers. The prayer clause (c) was accordingly deleted from the dispute. This Court recorded a statement made by the learned senior counsel for the respondent nos.1 and 2 and has held that in view of the said statement, there was no warrant to consider the impugned order on merits and the said order stood modified to that extent. In the said order, it is made clear that the said dispute would proceed in respect of the other prayers.

9. By an order dated 7th May 2015, the Co-operative Appellate Court recorded that pendency of the appeal filed by the petitioner would

not in any way affect the rights of the respondent nos.1 and 2 to apply for compliance of the impugned order dated 29th October 2014. The respondent nos.1 and 2 applied for issuance of contempt against the Managing committee of the petitioner. A Show Cause Notice came to be issued to the Managing Committee of the petitioner. On 27th August 2015, the Co-operative Appellate Court ultimately dismissed the appeal bearing No.79 of 2015 and upheld the order passed by the Co-operative Court granting mandatory injunction against the petitioner and in favour of the respondent nos.1 and 2.

10. Mr.Samdhani, learned senior counsel for the petitioner society invited my attention to the order dated 22nd April 2015 passed by this Court in Writ Petition (St.) No.11423 of 2015 filed by the petitioner impugning the order passed by the Co-operative Court deciding the issue under Section 9A of the Code of Civil Procedure, 1908 raised by the petitioner and holding that the Co-operative Court had jurisdiction to try and entertain the said dispute. He also invited my attention to prayers in the said dispute filed by the respondent nos.1 and 2 under Section 91 of the said MCS Act before the Co-operative Court.

11. It is submitted by the learned senior counsel that the respondent nos.1 and 2 had impleaded the respondent nos.3 and 4 who were the other members of the petitioner and were allotted certain parking spaces in the compound of the petitioner. He submits that admittedly the respondent nos.1 and 2 have deleted the prayer clause (c) of the dispute thereby seeking an order and direction against the petitioner to allot one of a parking space from the second parking in possession of the respondent nos.3 and 4 herein and the respondent no.1 having withdrawn the said prayer from the dispute filed by the respondent no.1, no interim relief which is in aid of final relief could be prayed or pursued by the respondent nos.1 and 2 and to seek temporary car parking space against the petitioner.

12. Learned senior counsel submits that there are 19 stilt parking and 5 open parking space which were all allotted by the developer to various prospective buyers of the flats in the compound of the petitioner. It is submitted by the learned senior counsel that the respondent nos.1 and 2 had purchased the flat bearing No.A/301 from the original members of the petitioner and had purchased the said flat knowingly well that the original members did not have a car parking space in the compound of the petitioner society. He submits that all 24 car parking spaces are

already allotted by the developer to the prospective buyers and thus the Co-operative Court could not have passed mandatory interim injunction against the petitioner to allot a car parking space even on temporary basis during the pendency of the dispute and more particularly when the respondent nos.1 and 2 have withdrawn the prayer clause (c) from the arena of the dispute.

13. It is submitted by the learned senior counsel that the respondent nos.1 and 2 had not challenged the allotment of parking spaces or resolutions of the General Body passed by the petitioner. It is submitted by the learned senior counsel that the Co-operative Court has considered the judgment of the Supreme Court in the case of ***Nahalchand Laloochand Pvt. Ltd. Vs.Panchali Co-operative Housing Society Ltd., (2010) 9 SCC 536*** which was not applicable to the facts of this case.

14. It is submitted that the Co-operative Court purportedly exercised the powers under Section 151 of the Code of Civil Procedure, 1908 while granting mandatory injunction in favour of the respondent nos.1 and 2 which reliefs even could not have been granted at the final stage of disposal of the dispute.

15. Mr.Samdhani, learned senior counsel for the petitioner placed reliance on the judgment of this Court in the case of ***Samir Narain Bhojwani Vs. Aurora Properties and Investments, 2018 SCC OnLine SC 1048*** and in particular paragraph 25 thereof in support of the submission that the Hon'ble Supreme Court in the said judgment reiterated the principles of law laid down by the Supreme Court in the case of ***Dorab Cowasji Warden Vs.Coomi Sorab Warden, (1990) 2 SCC 117*** and has held that mandatory interlocutory injunction can be granted only in exceptional cases and not in a routine matter. The respondent nos.1 and 2 did not make out any case for grant of any such injunction. The impugned order passed by the Co-operative Court and confirmed by the Co-operative Appellate Court is contrary to the principles of law laid down by the Supreme Court in the case of ***Dorab Cowasji Warden (supra)***.

16. Learned senior counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Vinay Krishna Vs. Keshav Chandra & Anr., 1993 Supp (3) SCC 129*** and more particularly paragraph 16 thereof in support of the submission that the respondent nos.1 and 2 having withdrawn prayer clause (c) in the dispute, the Co-operative Court could not have granted temporary mandatory

injunction against the petitioner to allot a parking space to the respondent nos.1 and 2.

17. Learned senior counsel placed reliance on the judgment of this Court in the case of ***Alok Agarwal & Ors. Vs. Punam Co-operative Housing Society Ltd., 2013(1) All M R 33*** and in particular paragraphs 19 and 22 thereof in support of the submission that the Co-operative Court could not have granted such temporary injunction. All 24 car parking spaces are already allotted and thus there was no space available in the compound of the petitioner society for allotting any additional car parking space in favour of the respondent nos.1 and 2.

18. Mr.Khandeparkar, learned counsel for the respondent nos.1 and 2, on the other hand, strongly placed reliance on bye-law No.81 of the petitioner society and would submit that admittedly there are 24 car parking spaces whereas admittedly there are 20 flats in the said building of the petitioner society. He submits that it was the case of the petitioner that all car parking spaces were allotted by the developer to various prospective flat purchasers who became the members of the petitioner society. He submits that the petitioner did not show any record before the two Courts below that the allotments alleged to have been made by

the developer of various car parking spaces in favour of various prospective flat purchasers had been accepted by the petitioner society by passing a resolution or showing any fresh resolution allotting any such car parking space in favour of any of the flat purchaser.

19. Learned counsel strongly placed reliance on bye-law no.81 and would submit that under the said bye-law, it is clearly provided that if any stilts or parking space remain unallotted for want of applicants for allotment, a second or third stilt or parking space may be allotted to the same member who had been earlier allotted the stilt or the parking space. It is further provided that such second or third stilt/ parking space shall be made on year to year basis, provided same is not required by another member, who is not allotted even a single stilt/parking space. He submits that admittedly the respondent nos.1 and 2 did not have even a single stilt or parking space and were thus entitled to allotment of at least one stilt/parking space. The petitioner society thus could not have allotted second or third stilt parking space or open parking to the said member when one of the member is not allotted even a single stilt/parking space. Even if the petitioner could have allotted a second or third stilt/parking space that could be allotted only if the same is not required by another member, who is not allotted even a single stilt/parking space and did not

require any such parking space and that also on year to year basis and not on permanent basis.

20. Bye-law 81 of the Co-operative Housing Society which is extracted as under:-

“A member, having a motor vehicle will be eligible to have stilts or parking space. No member shall normally be eligible for being allotted more than one stilt or a parking space for parking the car owned by him allotted to him by his employer, or the firm of which he is the partner the company of which he is the director. If any stilts or parking space remain unallotted for want of applicants for allotment, a second or third stilt or parking space may be allotted to the same member who earlier been allotted the stilt or the parking space. Such allotment of 2nd or 3rd stilts/parking space shall be made on year to year basis, provided same is not required by another member, who is not allotted even a single stilt/parking space.”

21. Learned counsel for the respondent nos. 1 and 2 placed reliance on the judgment of this court in case of **R.P.R.Nair vs. Ambaji Niketan Co-operative Housing Society Ltd. and another, 2013(1) Mh.L.J. 578** in support of his submission that under section 95(4) of the Maharashtra Co-operative Societies Act, 1960, the co-operative court has been conferred with wide power to pass interim order after recording its satisfaction that an interim order of mandatory nature is required to be passed or not. He submits that though the respondent nos. 1 and 2 have withdrawn prayer clause (c) in the dispute filed by

the respondent nos. 1 and 2, the co-operative court has ample power to grant interim relief of mandatory nature by exercising such wide power under section 95(4).

22. It is submitted by the learned counsel that the respondent nos. 1 and 2 have admittedly prayed for a declaration that the respondent no.1 is entitled to park one car in the building compound of the petitioner society. He submits that if the co-operative court grants prayer clause (b) in favour of the respondent nos. 1 and 2, the petitioner society is bound to comply with the said order by applying the bye-law 81 of the petitioner society. He submits that the authorities appointed under the provisions of Maharashtra Co-operative Societies Act, also are authorized to call upon the petitioner society to comply with by the bye-laws of the petitioner society. He submits that merely because prayer clause (c) is withdrawn by the respondent nos. 1 and 2 that would not be a bar against the co-operative court or authority to seek compliance of the bye-laws of the petitioner society. It is submitted that the Supreme Court in case of **Nahalchand Laloochand Pvt.Ltd.** (supra) has clearly held that the developer cannot sell the open parking space to any of the prospective purchaser of the flat or any other tenement.

23. Learned counsel invited my attention to the written statement filed by the respondent no.3 in the dispute filed by the respondent nos. 1 and 2 before the co-operative court and would submit that the said written statement would clearly indicate that at least 4 members of the petitioner society have been allotted additional car parking in the compound of the petitioner in addition to the stilt car parking. The respondent no.3 has been allotted two open car parking spaces in the open compound of the petitioner.

24. It is submitted by the learned counsel that the respondent nos. 1 and 2 are seeking enforcement of the bye-law 81 adopted by the petitioner society and once it is declared that the respondent nos. 1 and 2 are entitled to park in the building compound of the petitioner, the petitioner society will have to comply with the said bye-law 81 and to allot one car parking space in accordance with the procedure prescribed under the said bye-law. Learned counsel placed reliance upon Rule 83 of the Maharashtra Co-operative Societies Rules, 1961 in support of his submission that under the said rules, the Registrar is empowered to forward the order or award of the co-operative court to the society or to the party concerned with instruction that the society or, as the case may be, the party concerned should initiate execution proceedings, forthwith

according to the provisions of section 98 along with the certificate issued by him under section 98 and the proclamation issued under rule 82 in the manner prescribed therein. It is submitted that thus if the respondent nos. 1 and 2 are granted prayer clause (b) of the dispute, such award can be enforced under rule 83 read with other provisions of the MCS Act. The petitioner would be liable to execute the order as may be passed by the co-operative court which are enforceable by following the procedure of execution of the award under rule 83 along with other provisions of the MCS Act and MCS Rules.

25. Learned counsel for the respondent nos. 1 and 2 invited my attention to paragraph (18) of the order passed by the co-operative appellate court and would submit that the co-operative appellate court has rightly observed that the bye-laws of the society are framed to regularize the parking spaces in area and the scheme of the bye-laws presupposes that the common facility have to be enjoyed by all the members, may be for some time if there is less parking space. It is held that only one should not only enjoy but everybody should enjoy the car parking space as it is a common facility and nobody has exclusive right over it.

26. It is submitted that the co-operative appellate court has rightly considered the provision of section 95 of the MCS Act in the impugned order conferring wide powers on the co-operative court for granting interim relief. It is submitted that concurrent findings are rendered in the dispute filed by the respondent nos.1 and 2. Thus those findings being not perverse cannot be interfered with by this court under Article 227 of the Constitution of India. Learned counsel also placed reliance on some of the photographs tendered across the bar in support of the submission that there is sufficient parking available even after allotment of the 24 car parking space to the other members of the petitioner society and thus no harm or prejudice would be caused to the petitioner society or its other members if the impugned mandatory order of injunction passed by the co-operative court and confirmed by the co-operative appellate court is enforced by the respondent nos. 1 and 2.

27. Learned counsel for the respondent nos. 1 and 2 placed reliance on the judgment of this court in case of ***Murlidhar Datoba Nimanka and others vs. Harish Balkrushna Latane and others, 2003(4) Mh.L.J.196*** and in particular paragraphs 23 and 28 thereof in support of his submission that the co-operative court has ample power to grant interim relief even of the mandatory nature.

28. Learned counsel for the respondent nos. 1 and 2 placed reliance on the judgment of this court in case of ***Balkrishna @ Balubhai Kanjibhai Mistry and others vs. Dev Chhaya Co-operative Housing Society Ltd. and others, 2000 (1) Mh.L.J.652*** and in particular paragraph (3) and would submit that if the co-operative court allows prayer clause (b) of the dispute filed by the respondent nos. 1 and 2 and declares that the respondent nos. 1 and 2 are entitled to park one car in the society building compound of the petitioner while deciding the said dispute under section 91 of the MCS Act, the co-operative court can issue incidental directions or grant ancillary reliefs to the order that may be passed under section 91. Learned counsel for the respondent nos. 1 and 2 distinguished the judgment relied upon by Mr.Samdhani, learned senior counsel for the petitioner on the ground that the facts before the courts in those judgments were different.

29. Mr.Samdhani, learned senior counsel for the petitioner in rejoinder submits that since the respondent nos. 1 and 2 have restricted their prayer only to a declaration, the registrar cannot exercise any power to direct the society to allot any car parking space to the respondent nos. 1 and 2. He submits that the declaratory decree is not executable. In support of this submission, learned senior counsel once again placed

reliance on the judgment of Supreme Court in case of **Vinay Krishna** (supra).

30. It is submitted by the learned senior counsel that the impugned order passed by the co-operative court and confirmed by the co-operative appellate court granting mandatory interim injunction to allow the respondent nos. 1 and 2 to park a car of respondent nos. 1 and 2 in the open parking space is contrary to the judgment of Supreme Court in case of **Samir Narain Bhojwani** (supra) and in case of **Dorab Cowasji Warden** (supra). Insofar as the photographs relied upon by Mr.Khandeparkar, learned counsel for the respondent nos. 1 and 2 are concerned, it is submitted that even the said photographs would indicate that the car parked by the respondent nos. 1 and 2 is just opposite the gate and thus the impugned order passed by the two courts below are enforced, it would cause inconvenience to all the members of the petitioner and would amount to excessive parking allotment. He does not dispute that there are 19 stilt parking space in the compound and 5 open car parking space in the compound of the petitioner society.

REASONS AND CONCLUSIONS

31. It is not in dispute that the respondent nos. 1 and 2 are the members of the petitioner society and have purchased flat nos. A/301

situated in the building of the petitioner society. There is also no dispute that there are 19 stilt car parking and 5 open car parking in the compound of the petitioner society. There are 20 members of the petitioner society including respondent nos. 1 and 2. There is no dispute that out of 20 members, 4 members who are occupying flat nos. A/601, A/602, B/201, B/401 and A/201 are allotted one additional parking open space. The respondent no.3 has been allotted two open car parking space i.e. open parking space no.1 and open parking space no.5. There is no dispute that the respondent nos. 1 and 2 have not been allotted any car parking space though had applied for car parking as far back as on 25th August,2012 followed by a reminder. There is no dispute between the parties that bye-law 81 relied upon by the respondent nos. 1 and 2 is applicable to the members as well as the petitioner society.

32. The respondent nos. 1 and 2 had filed a dispute under section 91 of the MCS Act before the co-operative court. A perusal of the original prayers in the said dispute filed by the respondent nos 1 and 2 clearly indicates that in prayer clause (b), the respondent nos. 1 and 2 had prayed for a declaration that they are entitled to park one car in the society building of the petitioner. Under prayer clause (c), the respondent nos. 1 and 2 had prayed for an award and decree against the petitioner to

allot one of the parking space from the second parking in possession of the respondent nos. 3 and 4 herein who are opponent nos. 2 and 3 to the dispute. In prayer clause (d) of the said dispute, the respondent nos. 1 and 2 had prayed for a temporary injunction to allot them one of the parking space from the second parking space in possession of the opponent nos. 2 and 3 during the pendency of the said dispute. Under prayer clause (e) of the said dispute, the respondent nos. 1 and 2 had prayed for an interim relief by way of temporary order and injunction against the respondent nos. 3 and 4 from parking more than one car in the building compound of the petitioner.

33. The respondent nos. 1 and 2 made a statement before this court in the Writ Petition (St.) No.11423 of 2015 filed by the petitioner against the respondent nos. 1 and 2 and others when the said writ petition appeared before this court on 22nd April,2015 thereby giving up prayer clause (c) of the dispute and that the respondent nos. 1 and 2 would prosecute the dispute in respect of the other prayers. This court permitted the respondent nos. 1 and 2 to delete the prayer clause (c) from the dispute. Pursuant to the said order passed by this court on 22nd April,2015, the respondent nos. 1 and 2 have already deleted the prayer clause (c) from the said dispute filed by them before the co-operative court.

34. A question that arises for consideration of this court is whether in view of the deletion of the prayer clause (c) from the dispute which was for seeking award and decree against the petitioner to allot one of the parking space from the second parking in possession of the respondent nos. 3 and 4, whether the co-operative court could have passed a mandatory order of injunction against the petitioner to make open car parking space to the respondent nos. 1 and 2 or not. The question also arises for consideration of this court is whether the co-operative court was right in granting an order of mandatory interim injunction against the petitioner to create any additional parking space to accommodate the vehicle of respondent nos. 1 and 2 during the pendency of the said dispute filed by the respondent nos. 1 and 2 under section 91 of the MCS Act or not.

35. A perusal of the order passed by the co-operative court and the co-operative appellate court indicates that both the courts have placed reliance on bye-law 81 of the petitioner society while granting an order of mandatory temporary injunction in favour of the respondent nos. 1 and 2 and other provisions of the MCS Act and Rules.

36. The only substantive relief now remain for consideration of the co-operative court is prayer clause (b) seeking a declaration that the disputants are entitled to park one car in the society building compound of the petitioner followed by two interim reliefs.

37. A perusal of bye-law 81 indicates that a member having a motor vehicle will be eligible to have stilt or open parking space. No member shall normally be eligible for being allotted more than one stilt or a parking space for parking the car owned by him allotted to him by his employer, or the firm of which he is the partner, the company of which he is the director as the case may be. The said bye-law further provides that if any stilts or parking space remain unallotted for want of applicants for allotment, a second or third stilt or parking space may be allotted to the same member who has been earlier allotted the stilt or the parking space. Such allotment of 2nd or 3rd stilts/parking space shall be made on year to year basis, provided same is not required by another member, who is not allotted even a single stilt/parking space.

38. It is thus clear that the 2nd or 3rd stilts/parking space can be allotted to the same member only if any stilt or car parking space remains unallotted for want of applicant for allotment. It is an admitted position

that as against 20 members of the petitioner society, there are 19 stilt parking and 5 open car parking space. Even if all 20 members of the petitioner society are allotted one car parking space, whether stilt or open car parking, all 20 members would have one car parking space under the said bye-law 81. In this case, the car parking space are admittedly more than the number of members of the petitioner society. It is not the case of the petitioner that all 20 members of the petitioner are already allotted a stilts/parking space. In my view a question of allotment of two car parking space would arise only if any member of the society who has not been allotted even a single stilt or parking space does not require such car parking. In that event, the only manner in which the additional car parking can be allotted is by allotting car parking on year to year basis.

39. I shall now consider the issue as to whether the Co-operative Court could have considered the application for interim relief in favour of the respondent nos.1 and 2 at all in view of the respondent nos.1 and 2 having withdrawn prayer clause (c) from the dispute filed by them or not.

40. A perusal of the dispute filed by the respondent nos.1 and 2 clearly indicates that the respondent nos.1 and 2 had impleaded not only the petitioner herein but also the respondent nos.3 and 4 as the tenants in

the said Dispute No.55 of 2013 filed under section 91 of the MCS Act. Prayer clause (b) was for declaration that the disputants are entitled to park one car in the petitioner society. Prayer clause (c) which is deleted by the respondent nos.1 and 2 was admittedly for grant of award and decree against the petitioner to allot one of car parking space from the second parking in possession of the opponent nos.2 and 3 to the dispute who are the respondent nos.3 and 4 herein. In addition to the respondent nos.2 and 3, other three members of the petitioner society have been allotted two car parking in the compound of the petitioner. The question that arises for consideration of this Court is that if the Co-operative Court comes to the conclusion that the respondent nos.1 and 2 are entitled to park one car in the society's building, whether such order passed by the Co-operative court can be executed or not in view of deletion of prayer clause (c) or not.

41. It is the case of the respondent nos.1 and 2 that they have filed the dispute for enforcement of bye-law 81 applicable to the petitioner as well as to the members of the society. In my view, if the Co-operative Court comes to the conclusion that the respondent nos.1 and 2 are entitled to park one car on the interpretation of bye-law 81, under section 79(2) of the MCS Act read with Rule 83, the Registrar can call

upon the petitioner society to execute the order passed by the Co-operative Court and also to comply with the obligations of the petitioner society under the provisions of bye-laws applicable to the society. The Registrar is also empowered to forward the application for execution to the proper authority for execution in the manner prescribed under Rule 82 of the MCS Rules read with section 98 of the MCS Act. In this Case, the Registrar can exercise the powers under section 79(2) and (3) and call upon the petitioner to follow the bye-laws and more particularly bye-law 81 and to allot one car parking space to the members those who are not allotted any car parking in accordance with the procedure prescribed under the said bye-law 81.

42. In my view, if such declaration as prayed in prayer clause (b) by the respondent no.1 is granted by the Co-operative Court, such order of the Co-operative Court if is confirmed by the higher Courts can be enforced by giving appropriate directions by the Registrar to the Co-operative society. The respondent nos.1 and 2 are seeking enforcement of the bye-laws of the society by the petitioner and other members of the society. It is the duty of the Registrar to enforce such bye-laws of the society by the society as well as other members of the society. In my view, there is no merit in the submission made by Mr.Samdhani, learned

senior counsel for the petitioner that since prayer clause (c) was deleted by the respondent nos.1 and 2 from the dispute, the Co-operative Court could not have even considered any interim relief by way of mandatory injunction in favour of the respondent nos.1 and 2.

43. The Supreme Court in case of *Nahalchand Laloochand Pvt. Ltd.* (supra) has held that the developer cannot sell the open parking space to any prospective purchasers of the flat or other tenements.

44. This Court in case of *Balkrishna @ Balubhai Kanjibhai Mistry & Ors.* (supra) has held that if the Co-operative Court finds that it may not be possible for the parties to use and enjoy the property jointly, it is always open to such Co-operative Court to pass incidental and ancillary order in exercise of its power under section 91 to make its order meaningful. The Co-operative Court or the Co-operative Appellate while exercising its powers can always give incidental directions or grant ancillary reliefs to the order that may be passed under section 91.

45. In my view if the Co-operative Court is satisfied that the respondent nos.1 and 2 would be entitled to declaration as prayed in prayer clause (b) of the dispute, there would be no bar against the Co-

operative Court from issuing further directions to the petitioner to comply with the bye-laws of the petitioner society which are binding not only on the members but also upon the petitioner. The respondent nos.1 and 2 are not seeking any allotment of any particular car parking space in prayer clause (b) of the dispute. If the Co-operative Court grants a declaration in terms of prayer clause (b), the petitioner in that event will have to consider the case of the respondent nos.1 and 2 for allotment of car parking space in view of the admitted fact that the respondent nos.1 and 2 have not been allotted any car parking space by following the procedure prescribed under bye-law 81. The principles laid down by this Court in case of **Balkrishna @ Balubhai Kanjibhai Mistry & Ors.** (supra) applies to the facts of this case. I am respectfully bound by the said judgment.

46. The question that now arises for consideration of this Court is whether the respondent nos.1 and 2 had made out a case for grant of mandatory interim injunction directing the petitioner society to allow the respondent nos.1 and 2 to park one car in the open space of the petitioner society or not during the pendency of the dispute.

47. The Supreme Court in case of **Dorab Cawasji Warden** (supra) has held that grant or refusal of an interlocutory mandatory

injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. It is held by the Hon'ble Supreme Court that though the guidelines are neither exhaustive nor complete or absolute, there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunction would be a sound exercise of a judicial discretion. The Hon'ble Supreme Court in the recent judgment in case of **Samir Narain Bhojwani** (supra) has reiterated the principles of law laid down by the Hon'ble Supreme Court in case of **Dorab Cawasji Warden** (supra).

48. Insofar as the respondent nos.1 and 2 are concerned, learned counsel for those respondents have placed reliance on the judgment of this Court in case of **Murlidhar Datoba Nimanka & Ors.** (supra) and in case of **R.P.R. Nair** (supra). This Court has held that the Trial Court has been conferred with powers to pass interim orders. It is held that before any interim order is passed under section 95(4) of the MCS Act, the learned Trial Court must record its satisfaction that an interim order of mandatory nature is required to be passed or not. There is no dispute that under section 95(4) of the MCS Act, the Co-operative Court, Registrar or authorized person as the case may be is empowered to make such

interlocutory orders pending decision in a dispute referred in section 95(1) as may appear to be just and convenient in order to prevent ends of justice neither defeated.

49. In the facts of this case however, it is not disputed by the respondent nos.1 and 2 that the respondent nos.1 and 2 have not been allotted any car parking space in the compound of the society since the date of making such application to the petitioner society and they have been parking their car outside the compound of the petitioner. The respondent nos.1 and 2 have also not disputed the fact that all 24 car parking spaces have been already allotted to several other members of the petitioner society and no car parking space out of those 24 car parking spaces is available as on date. Mr.Khandeparkar, learned counsel for the respondent nos.1 and 2 made an attempt to convince this Court by producing the photographs in support of the submission that even if the respondent nos.1 and 2 are permitted to park their one car in the compound of the petitioner, no inconvenience would be caused to any of the members of the petitioner society.

50. On the other hand, it is the case of the petitioner that there is no space left in the compound of the petitioner society in view of the

allotment of all the 24 car parking spaces to various members of the petitioner. Mr.Samdhani points out that the car parking of the respondent nos.1 and 2 as can be seen from the photographs produced by the respondent nos.1 and 2, would clearly indicate that the car of the respondent nos.1 and 2 has been parked just opposite the gate of the society causing inconvenience to other members of the petitioner. In my view, in these circumstances, the Co-operative Court could not have created an additional car parking space by passing a mandatory interim injunction in addition to the existing 24 car parking spaces. The other members of the petitioner society who have been allotted more than one car parking space, except the respondent nos.3 and 4 were not even impleaded in the dispute filed by the respondent nos.1 and 2.

51. The respondent nos.1 and 2 in my view, had not demonstrated any extra-ordinary circumstances for grant of such mandatory interim injunction by creating an additional car parking when all 24 car parking spaces are already allotted without rendering any finding that the double car parking spaces allotted to some of the members was in violation of bye-law 81 of the petitioner society. The principles laid down by the Hon'ble Supreme Court in cases of ***Samir Narain Bhojwani*** (supra) and ***Dorab Cawasji Warden*** (supra) clearly

applies to the facts of this case. In my view, the Co-operative Court ought to have expedited the hearing of the dispute filed by the respondent nos.1 and 2 and could not have exercised such discretionary power of granting mandatory interim injunction in the facts of this case when there is no space available for parking in the compound of the petitioner in view of the admitted fact that all 24 car parking spaces are already allotted to the existing members of the petitioner.

52. In my view, various reasons recorded by the Co-operative Court and also by the Co-operative Appellate Court while passing an order of mandatory interim injunction thereby creating an additional car parking space for the respondent nos.1 and 2 is contrary to the principles of law laid down by the Hon'ble Supreme Court in cases of **Samir Narain Bhojwani** (supra) and **Dorab Cawasji Warden** (supra). In my view, no such case was made out by the respondent nos.1 and 2 for grant of such mandatory interim injunction directing the petitioner to allow those respondent nos.1 and 2 to park their vehicle in the compound of the petitioner society during the pendency of the dispute.

53. I therefore pass the following order :-

(i) The impugned orders dated 29th October, 2014 passed by the Judge,

Co-operative Court No.2, Mumbai and the order dated 27th August, 2015 passed by the Co-operative Appellate Court are quashed and set aside. The application below Exhibit – 5 filed by the respondent nos.1 and 2 for interim relief is dismissed.

- (ii) Hearing of the dispute bearing No.CC/II/55 of 2013 is expedited. The Co-operative Court shall make an endeavor to dispose of the said dispute within one year from the date of the communication of this order. Both the parties are directed to co-operate with each other and also with the Co-operative Court in disposal of the said dispute expeditiously within the time prescribed.
- (iii) Rule is made absolute in aforesaid terms.
- (iv) There shall be no order as to costs.
- (v) All the parties as well as Co-operative Court, Mumbai to act on the authenticated copy of this order.

R.D. DHANUKA, J.