Chapter - IV

LAWS RELATING TO GROUP HOUSING IN WEST BENGAL: A CASE STUDY
4.1 INTRODUCTION:

In West Bengal, the Co-operative Housing Sector has been working not only for the rich and Middle Income Groups but also for poor persons of the Society. Though a number of Co-operative Housing Societies have been floated by affluent sections of persons, this movement has led the Lower Income Groups to gain access to housing. Previously in this State, no specific provisions were incorporated in the Co-operative Act and the Rules thereunder. The past Co-operative Acts of 1904, 1912, 1940 and 1972 had corresponding Rules and the existing Act also has its Rules framed under it. In the existing Rules, 1987 a separate chapter has been introduced.¹

In signifies that an insertion of a new and separate chapter was expedient. Previously when no such specific and particular provisions were in existent, the management and other performances like transfer, nomination etc. in Housing Co-operatives were dealt with at par with other categories of Co-operative Societies.

On the other hand, Group Housing except Co-operative Housing were being privately done by some individuals, builders and promoters. When it was felt by the Government of West Bengal that there should have provisions for the ownership of an individual apartment and making such apartment heritable and transferable, an Act was passed by the Government
of West Bengal. The law is known as the West Bengal Apartment Ownership Act.\textsuperscript{2} This law was intended to meet a new problem of Housing in the State of West Bengal especially in Cities and Towns. Group Housing was thus resorted to both in Private Sector and the Public Sector. But prior to promulgamation of this Act, there was no provisions in Group Housing regarding succession to such Apartments and transferability.\textsuperscript{3}

Therefore, there are two types of laws concerning Group Housing. In Co-operative Sector, the law is West Bengal Co-operative Societies Act and its Rules and in private sector, the law is the West Bengal Apartment Ownership Act, its Rules, West Bengal Building (Regulation of promotion of construction and transfer by promoters) Act and its Rules. In the following paragraphs, brief examination of the above laws separately is appended.

4.2 Laws regarding Group Housing in the West Bengal Co-operative Societies Act, 1983 and the West Bengal Co-operative Societies Rules, 1987:

Some special provisions for Co-operative Housing Societies have been inserted in West Bengal Co-operative Societies Act, 1983 at a separate Chapter. In this Special Chapter, there are five sections which have twenty-six corresponding Rules. The Sections are Section 85 to Section 89 and the Rules are Rule 130 to Rules 156.
4.2.1 Eligibility for Membership:

In Section 85, West Bengal Co-operative Societies Act, 1983, eligibility of a person to become a member of a Co-operative Housing Society is prescribed in its Sub-Section (1), (2) & (3). For the purpose of acquiring a membership in a Co-operative Housing Society which has been already registered or in a proposed Co-operative Housing Society which awaits registration, a person is to swear in an Affidavit that he is a permanent resident of West Bengal or he intends to reside in West Bengal permanently. The Affidavit shall also contain that he is not a member of any other Co-operative Housing Society in West Bengal and that he or any member of his family does not own any house or apartment or plot of land in the City, Town or village where the Co-operative Housing Society is located. The Co-operative Housing Society for which the membership is sought is excluded from the purview of the content of the declaration. The Affidavit is to be sworn before a Magistrate or a Notary Public.

Here “family” as to be specified in the Affidavit shall mean to consist of husband, wife, minor sons and daughters, dependant widow of a pre-deceased son, minor sons and daughters of a dependant widow of a pre-deceased son and husband’s dependant’s parents. This definition of “family” has been provided in Section 13(2).
W.B.C.S. Rules, 1987 further specifies how membership in a Co-operative Housing Society may be obtained. Every applicant who wants membership shall submit his application with following things:

i) Two recent Pass-Port size photographs.

ii) Income-Tax Clearance Certificate or Profession Tax Certificate (now abolished by Amendment of this item).

iii) Salary Certificate (in case of persons employed by others).

In the provisions of the Rule, it is not mentioned whether at the time of registration or at the time of subsequent inclusion in place of an existing member, these papers are required or not. As no specific assertion is available in the Rules, it should be taken granted that in all cases when a person wants to be a member of a Co-operative Housing Society, he should submit above papers.

In a Co-operative Housing Society, the number of members shall not exceed the total number of plots, houses or apartments proposed by a society to be allotted to members under any scheme or project of such society. A member shall be eligible for allotment of only one plot.

Hence, if in a Housing Society, no apartment is available, any application subsequently submitted by a person intending to become its member for the purpose of getting an allotment can not be entertained. If in spite of existence of any vacant apartment, the society refuses or remains
silent, the applicant has a recourse of law under Section 70 of W.B.C.S. Act, 1983. By that provision, when such an application is received by the Society, it shall be hung up on the date of its receipt on its Notice Board, inviting written objection, if any, thereto from any member of the society within a period of 7 days from that date. The application shall be granted within a period of 45 days from the date of receipt thereof if no written objection thereto is received by the society.

Any objection if received by the Society shall be disposed of under Rule 119 of the W.B.C.S. Rules, 1987 by which in the next meeting of the Board of Directors of the Society, decision on the application shall be taken. The Board shall hear the applicant before taking any decision.7

There is a provision of appeal against refusal to admit any applicant as member of any Co-operative Society. This is applicable in case of Co-operative Housing Society also, though this Section 70 and Rule 120 are not included in the Special Chapter. By Sub-Section (4) of this Section 70, the aggrieved applicant may appeal to the Registrar of Co-operative Societies. (This power is enjoyed by other Assistant Registrars or Deputy Registrars as a delegated power of the Registrar) within 60 days from the date of communication of the decision or within 90 days from the date of application, if there is no communication or any decision from the Co-operative Society.
The Registrar upon hearing the society and the applicant shall decide and make appropriate order.

There is no statutory provision to keep a panel of intending members for seeking allotment arising out of vacancies caused by resignation, expulsion or transfer.  

4.2.2 Functions of Promoters:

Now, in Sub-Section (4) and (5) of Section 85 of the Act and in Rules 130, 131 and 132 functions of the Promoters are specified. Here the word “Promoter” is not the same as the word “Promoter” as defined in West Bengal Apartment Ownership Act, 1972. Either in the West Bengal Co-operative Societies Act, 1983 or in the Rules thereunder, no definition is provided. Of Course, by the nature of function of promotors, its definition may be drawn. Here the promotors are those persons who join the application for registration of a Co-operative Housing Society. In the initial stage, the promotors are to elect four persons as their leaders such as the Chief Promoter, Chairman, Vice-Chairman and Treasurer.

But by Section 3(K) of the Apartment Ownership Act, 1972, “Promoter” means a person who constructs or causes to be constructed a building on a plot of land for the purpose of transfer of such building by sale, gift or otherwise to any person or to a Company, Co-operative Society or Association of persons and includes:
i) his assignee, if any.

ii) The person who constructs, and the person who transfers by sale, gift or otherwise, the building, if the two are different persons, or

iii) Any Board, Company, Corporation, Firm or other Association of persons, established by or under any law for the time being in force.

Hence in the West Bengal Apartment Ownership Act, 1972 construction of a building on a plot only has been taken into consideration but in case of a Co-operative Housing Society, construction of building on a plot or construction of unit houses has been considered in the West Bengal Co-operative Societies Act, 1983. The Promoter in Apartment Ownership Act, 1972 may or may not be a flat owner of the building, but in case of a Co-operative Housing Society, a promoter after registration of the society becomes a member who shall be an owner of a flat or house in a Co-operative Housing Society.

At the beginning, all promoters are to hold a meeting for adoption of name of their proposed society and its bye-laws, election of four leaders, consideration and adoption of a scheme of housing project and agreement to be entered with the vendor or lessor of the land, building, tenement, as the case may be. The Chief Promoter shall take all steps including
opening of a Bank Account for joint operation with the Chairman or the
Vice-Chairman in absence of the Chairman\textsuperscript{11} and negotiating with the
approval of the Chairman to procure land, building or tenements.\textsuperscript{12}

4.2.3 Procedure of filing application for registration of a Co-operative
Housing Society:

Before submitting an application for registration of a Co-operative
Housing Society, at least 8 eligible persons are to join themselves for the
purpose of forming a Co-operative Housing Society.\textsuperscript{13} Then they are to
procure land either from private land owner or from the Government or
from any Statutory Body like Improvement Trust, Development Authority,
Panchayat etc. Agreement with the land owner or letter of assurance of
giving land from Government or other authority may serve the purpose of
proving that land is available.

Thereafter all the eight or more persons who have joined to form a
Co-operative Housing Society for acquiring a flat or house shall submit
application to the Registrar (the Registering Officer – Assistant Registrar
or the Deputy Registrar of the Area).\textsuperscript{14} The application shall contain a
common declaration same of which is to be given in the affidavit
afterwards so as to prove eligibility of becoming a member of a Co-
operative Housing Society.
The Agreement with the landowner shall be made with all promoters but not with only the Chief Promoter or the Chairman or the Vice-Chairman or the Treasurer. The letter of assurance from the Government or the authority should also contain all names of the promoter. In case of allottees of flats constructed and given by any authority, all promoters should have allotment letters upon which application for getting a name of a Co-operative Housing Society is to be submitted to the Registrar.

A Bank Account shall be opened by the Chief Promoter, the Chairman or the Vice-Chairman. All monetary transactions are to be made through this account by Account Payee Cheque if the amount exceeds one hundred rupees and there shall be maintained a Cash Book and relevant ledgers.\(^{15}\)

After that, the promoters shall file application for registration of the proposed Co-operative Housing Society. The form with model bye-laws of a Co-operative Housing Society is available from the District Co-operative Union whose address is 23A, Netaji Subhas Road, (7\(^{th}\) Floor), Kolkata – 700 001. The application for registration is to be submitted to the Assistant Registrar of Co-operative Societies in case of a District or Co-operative Range in a District. (In Burdwan and Purba Medinipore Districts there are 3 and 2 Co-operative Ranges respectively where an office of Assistant Registrar of Co-operative Societies exists). The Rules provides general guidelines how to make by-laws of a Co-operative Society.\(^{16}\)
Applications for registration of Co-operative Housing Societies should be submitted to the Deputy Registrar of Co-operative Societies, Kolkata Metropolitan Area Housing in Kolkata when these are organised in the area of Kolkata Metropolitan Area. Further, such applications are to be submitted to the Deputy Registrar of Co-operative Societies, RTAH (Rajarhat Township Area Housing) when these are organised in Rajarhat Action Areas adjacent to the Salt Lake City.¹⁷

Another copy of the application should be sent to local District Co-operative Union for information. ¹⁸

Following documents are necessary to be submitted with the application of registration:

1) Three copies of the bye-laws of the proposed Co-operative Housing Society, duly filled in, shall be signed by all the intending members/promoters in the space provided for this.¹⁹

2) A copy of the proceedings of the meeting of the promoters, attested by the Chairman of the meeting, which should contain the resolutions on the following items shall be adjoined with the application for registration:

a) Election of a “Chief Promoter” from amongst the Promoters with his name, address, occupation and the authority vested on him.
b) That the Chief Promoter so elected has not been appointed or functioned as such in respect of any such co-operative Society.

c) Name and address of the proposed society.

d) Adoption of the bye-laws.

e) Election of the 1st Board of Directors including Chairman, Vice-Chairman and a Treasurer from amongst the Promoters and to furnish their names and addresses.

f) That this project is the sole Housing Project by the proposed society and that it after being registered shall not sponsor any other project.

f) That this project is the sole Housing Project by the proposed society and that it after being registered shall not sponsor any other project.

g) That a Bank Account has been opened in the name of the proposed society in the local Bank, preferably a Co-operative Bank to be operated jointly by the Chief Promoter with Chairman / Vice-Chairman / Treasurer.

3) a) Affidavit of each Promoter to be sworn before an Executive Magistrate or a Notary Public.

b) Two recent Pass-port size photograph affixed on application for membership of each Promoter.
4) A copy of Agreement, Bynanama regarding purchase of land, building or tenement between the proposed society and the owner of land conveying intention and promising to transfer such land etc. in favour of the Co-operative Housing Society when registered. Assurance letter for giving land by Govt. or any authority in case the land is not a private one.

5) Statement of accounts (Receipts and Payment) regarding share money, admission fee and other contribution, if collected from the promoters, counter – foils of receipt and payment vouchers to be kept ready in the records of the proposed society and arranged serially for inspections or verification.

6) Bank Balance Certificate.

7) A copy of the scheme of the Housing Project undertaken or proposed to be undertaken detailing the number of flats, garages, office accommodation and an estimate of the total cost of the project.

8) a) Land Ceiling Certificate from the Competent Authority, if the land is proposed to be purchased from a private individual.

b) Record of Revenue of the land describing the recorded owner of the land.

c) Up-to-date Tax Receipt from Land & Land Revenue Office.
d) 12 year search report regarding marketable title to the land or building by the owner.

e) Land Acquisition Collector’s Certificate declaring that the land has not been acquisitioned or vested.

9) The application shall also contain a declaration by the Chief Promoter in the following lines:

a) That he has not acted as Chief Promoter of any other Co-operative Housing Society other than this proposed one.

b) That this is the Sole Housing Project sponsored by the proposed society.

c) That he has obtained applications for membership and affidavits from all the intending members in the prescribed form.

d) That he will furnish information as may be required by the Registrar.

4.2.4 Contents of the Bye-laws:

The Bye-laws of the Co-operative Housing Society shall primarily contain following matters which shall not be inconsistent with the provisions of the Act and the Rules:

a) Name and Registered Address of the Society.
b) Objects of the Society.

c) How membership is to be obtained.

d) How nomination is to be made by the members and manner of disposal of share and flat / house in the event of the member’s death.

e) Cessation of membership – grounds thereof.

f) Expulsion from Membership – grounds and procedure.

g) Extent of liability of a member.

h) Funds and Investment.

i) Shares and transfer of share or interest.

j) General Meeting:

i) Annual General Meeting.

ii) Special General Meeting.

k) Duties and Business of Annual and Special General Meeting.

l) Chairman of General Meeting – Minutes.

m) Election and constitution of the Board of Directors – Election of Office Bearers i.e. Chairman, Vice-Chairman, Secretary and Treasurer etc.
n) Qualification of Directors – removal of a Director – Power and duties of Board of Directors – meeting of Board – Secretary and his duties – Chairman and his powers and duties.

o) Procedure of Amendment of Bye-laws.

p) Right of a member.

q) Disputes in the Society – Procedure for settlement.

r) Dissolution of the society.

4.2.5 Duties of the First Board just after registration of a Co-operative Housing Society?

After registration of a Co-operative Housing Society, first meeting of the new Board shall be held within one month from the date of the receipt of the certificate of registration for the purpose of electing an office-bearer in place of the Chief-Promoter. The function of the Chief Promoter is till the society is registered. After that, his post ceases to exist.24

Within 90 days from the date of receipt of the certificate of registration, first General Meeting is to be called on.25

i) Election of Directors of the Board.
The First Board appointed by the Registrar at the time of registration shall exist till election of a new Board within 90 days is formed).

ii) Placing a Report in the General Meeting of all members on:

a) Progress of the work,

b) Funds raised from members,

c) Expenses incurred under various heads prior to and after registration,

d) How members resigned and how many enrolled after registration of Co-operative Housing Society,

e) Latest estimate of the project cost.$^26$

iii) Decision whether the members shall themselves get the construction of building done by entrusting to the Board or to a Sub-committee.

or

Decision whether the work is to be executed by Architects and Contractors.

In case the construction work is to be done by engaging an Architect and a contractor, the Society shall publish a Notice in a Daily Newspaper having wide circulation inviting tenders for work. The Society shall
prepare a panel of Architects and Contractors exceeding three in each case.\textsuperscript{27} 

Of course, engagement of Architect and contractor is compulsory when the total cost of the project exceeds Rs.12 Lakhs.\textsuperscript{28} 

A panel of 5 valuers may also be prepared by way of inviting applications in the same manner of publication of Notice in one Daily Newspaper.\textsuperscript{29} 

No person acting as an Architect shall also act as a contractor and vice versa.\textsuperscript{30} 

After registration of a Co-operative Housing Society, all Bank Accounts opened before registration shall be closed and all amounts thereof shall be credited to the account of the Co-operative Housing Society. All expenditures made by the Chief Promoter before registration must be credited to the account of the Co-operative Housing Society to be opened now.\textsuperscript{31} 

4.2.6 Annual General Meeting and Special General Meeting : 

Annual General Meeting of the Society shall be held in terms of Section 25(1) WBCS Act, 1983 once within one year i.e. annually and in terms of Section 27, election of Directors for reconstitution of a Board is to be made within 3 years i.e. a Board of Directors shall hold office for 3 years. Agenda of an Annual General Meeting shall be the following :
i) Election, if any, of the Directors of the Board.

ii) Consideration and record of the proceedings of the last Annual
    General Meeting.

iii) Approval of the Budget.

iv) Consideration of the Audit Report.

(Audit is made by the Co-operative Audit Directorate of the
State of West Bengal – No outside auditor can be entrusted to
audit the accounts of the Society).

v) Progress in implementation of project.

vi) Particulars of funds received from individual members and
cases of default, if any.

vii) Confirmation of land, house or apartment cost as per up-to-
date estimate or estimate of escalation, as the case may be.

viii) Latest position as to drawal of loans from the West Bengal
State Co-operative Housing Federation and recovery of such
loan.

(Housing Federation is a federated Co-operative Society
whose members are Primary Co-operative Housing Societies.
For the purpose of obtaining loan for members of such Co-
operative Housing societies, they become members of this
Federation which lends money for construction of house / flat or building. This is a financial Institution in the Co-operative Housing Sector).

ix) Case of resignation, expulsion and death, if any, of members and fresh enrolment in the consequential vacancies.\textsuperscript{32}

Thus, though the provisions contained in Section 25 of the Act are not included in the Special Chapter of Co-operative Housing Societies, these are equally applicable to such Societies. Items (i) to (iv) are borrowed from Section 25 and items (v) to (ix) are specified in Rule 144 of WBCS Rules, 1987 in the Special Chapter.

Special General Meeting is mentioned in Section 26 of the Act. Such a General Meeting can be called on the following instances:

i) At the instance of majority of the Directors of the Board.

ii) On the requisition in writing of one-third of the Members of the Co-operative Society.

iii) At the direction of the Registrar.

Notice of Annual General Meeting and Special General Meeting shall be sent to every Member not less than 21 days before the date of meeting. It shall be signed by the Secretary or any other officer authorised by the Board in accordance with the direction of the Board.\textsuperscript{33}
If in a Co-operative Housing Society, the number of members is more than 1500, the Annual General Meeting shall be held with delegates, not by all members directly as per Rule 27, WBCS Rules, 1987. In a General Meeting, Annual or Special, every resolution shall be decided by a majority of votes and if the votes be equal, the matter shall be decided by the casting vote of the Chairman of the meeting. The Chairman of the Board of Directors or in his absence the Vice-Chairman or in absence of the both, one of the Directors in the panel which is to be made beforehand under Rule 32 shall preside over Annual or Special General Meeting. If there is no panel, then the members present in the General Meeting shall instantly appoint a Chairman to preside over such a general meeting either special or annual. According to the Rule, the quorum of an Annual or Special General Meeting shall be 1/5th of total members subsisting on the date of notice of the meeting. Of course, the bye-laws of a society (here Co-operative Housing Society) may specify a larger proportion i.e. greater than 1/5th e.g. 1/3rd or 1/4th etc. Quorum of such meeting must be formed within half-an-hour from the time appointed for the meeting. If not, the meeting shall be adjourned ordinarily to the same day in the next week at the same place and time. This time, no quorum is necessary for transaction of business of the meeting.

But in case of a Special General Meeting which had been called on requisition by majority of Directors of the Board or 1/3rd of the total
members or at the instance of the Registrar, if no quorum is formed at the first time, the meeting shall not be adjourned but dissolved.\textsuperscript{36}

A Minute Book is to be maintained in a Co-operative Society, it shall be drawn up and signed by the Chairman of the meeting within 72 hours from the time when the meeting terminates.\textsuperscript{37}

4.2.7 Allotment of Plots or Houses or Apartments and cost of construction:

After registration of a Housing Society the Office-Bearers shall purchase the land by way of execution of a Purchase Deed in favour of the Co-operative Housing Society. This time, Stamp Duty and Registration Fee for registration of the purchase deed are exempted. The provision has given power to the State Government to remit any tax, cess or fee payable under any law for the time being in force. The State Government may in the case of a Co-operative Society or Class of Co-operative Societies or a member of Co-operative Society remit such tax, cess or fee by general or special order. The State government by Notification grants remission of Stamp Duty and Registration Fee in respect of any instrument executed by, or on behalf of, or in favour of, any Co-operative Society or such class Co-operative Societies or an Officer / Member thereof relating to business of such Co-operative Society(s). Under the Indian Registration Act, 1908, for execution of any instrument, Stamp Duty and Registration Fee are
charged. Under this provision, a Co-operative Housing Society while registering an instrument in purchasing land on which its project shall be constructed shall get benefit of exemption of Stamp Duty and Registration Fee on the total quantum of land however big its area may be.38

After obtaining the completion certificate from the Corporation / Municipality / Panchayat the Co-operative Housing Society executes conveyance Deed of land or house or apartment in the name of individual members. This time, the Registering Officer exercising power under Registration Act, 1908, charges Stamp Duty and registration fee partly. In case of Co-operative Housing Societies, no Stamp Duty and registration fee are charged upto Rs.3,50,000/- (Rupees three lakhs fifty thousand) on the value of the land, house, apartment as the case may be.39

Now, question arises whether such remission of Stamp duty and registration fee payable by a member of a Co-operative Housing Society in whose favour a plot of land or a house or an Apartment in a building has been allotted should be extended to a member who is subsequently inducted in the society by way of transfer from an existing member. In this regard, Section 87 or W.B.C.S. Act, 1987 states that any allotment (including re-allotment) of a plot of land or a house or an apartment in a building to its member with title and interest is granted by an instrument of transfer in accordance with the provisions of Transfer of Property Act, 1882 and the Registration Act, 1908 and this instrument is the conclusive
evidence of such title or interest in favour of such member. Previously prior to December, 1995, mere allotment (including re-allotment) of a plot of land or a house or an apartment in a building to a member with title and interest was the conclusive evidence of his title and interest notwithstanding any provision contained in Transfer of Property Act, 1882 or Registration Act, 1908. At that time, no registration under the Registration Act, 1908 was necessary for such allotment or re-allotment.40

According to West Bengal Co-operative Societies Rules, 1987, allotment of plots of land, house or apartments shall be made by the Board strictly on the basis of the principles and policies adopted in its first meeting and shall be communicated to each member within seven days from such decision. Any person dissatisfied by the decision of the Board may appeal to the general body of members whose decision shall be final.41

A member may be dissatisfied with the decision of the board on allotment of land or house or apartment. So he may prefer an appeal within 15 days from the date of receipt of the communication of the decision of the Board. The Board shall within 45 days of receipt of such intimation arrange to hold a meeting of the general body.42

The above Rule does not specify the mode of allotment but gives power to the Board to fix the mode in its first meeting. In a Board, the
number of Directors is 3 to 15 as mentioned in Section 27 of the Act. Now, it is a matter of debate whether it is wise to leave this vital matter of allotment to a small body, while number of members may be hundreds, though the required minimum number of members in a Co-operative Housing Society is 8 (eight). Sometimes, very judiciously, allotment is made on the basis of lottery but by that small fraction of members who are Directors in the Board. Thus there remains scope of malpractice and arbitrariness.

Each flat in a building has its advantage and disadvantage, some flats are airy, south facing or east facing and some are not. Hence, after allotment, dissatisfaction arises in some members and differences in the housing society crop up.

The title or interest in any plot of land or house or apartment in a building shall pass on to a member only when he has made such payment as may be prescribed towards the cost of such plot of land or construction of such house or apartment or both, as the case may be to the Co-operative Housing Society. Either in the Rules or model bye-laws of Housing Society, the manner of determining the cost of plot of land or apartment has not been indicated. Of course, it is not possible to prescribe such cost of land and apartment in general terms. The most prevailing procedure of estimating such cost of land and construction of apartment or house is that the Board of Directors fixes it on the basis of assessment of architects.
Accordingly, the Board has power to issue periodical demand notice to the members for paying instalments towards cost of land, house or apartment. The cost of land may be determined on the basis of its purchase value, expenses for its development to bastu level and other prior registration expenses. But cost of construction varies as values of materials, labour charges vary. In case of unit houses, only land value is apportioned among members and then each member constructs his house according to his financial capability and requirement. In the score of construction of such unit houses, only land is allotted to a member and the Co-operative Housing Society has no role in it. The Society shall have full control only over the common areas. On the other hand, a Cooperative Housing Society comprising of ready-made flats has no responsibility of construction but only to manage the services like water, generator, security etc. In this case also, the society shall have control over the common areas and facilities. The common areas and facilities are not well defined in the West Bengal Co-operative Societies Act, 1983 and the West Bengal Co-operative Societies Rules, 1987. But most Co-operative Housing Societies follow the definition of “common areas and facilities” as contained in the West Bengal Apartment Ownership Act, 1972. According to this definition, “common areas and facilities” include:

1) The land on which the building is located and all easements, rights and appurtenances belonging to the land and the building.
2) The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stair-ways, fire-escapes and entrances and exits of the building.

3) The basements, cellars, yards, gardens, parking areas, shopping centres, schools, garages, building or apartment vacant or occupied by a tenant or any other person not being an owner and transferred or proposed to be transferred to the Association of Apartment owners and storage spaces.

4) The premises for the lodging of janitors or persons employed for the management of the property.

5) Installation of common services, such as, power, light, gas, hot and cold water, heating, refrigeration, air conditioning, sewerage etc.

6) The elevators, tanks, pumps, motors, compressors, pipes and ducts and in general all apparatus and installation existing for common use.

7) Such other common facilities as may be specially provided for the declaration.

8) All other parts of the property necessary or convenient to its existence, maintenance and safety or normally in common use.\textsuperscript{46}
Any member of a Co-operative housing society, who is an employee of the Central or the State Government or any public undertaking or Government Sponsored Institution has a facility to take loan from the Co-operative Housing Federation in the event of instant non-availability of loan from the employer. Ordinarily the rate of interest on loan at the Federation is higher than that prevailing in the offices where the member is employed. He may take loan at first from the Federation and then after getting loan from his employer repay it to the Federation at a time. Legal complication arises how a person can create a further mortgage to his employer when he has taken loan from Housing Federation creating a charge upon the land, house or apartment allotted to him.

To execute a Second Mortgage, Rule 150 has given a member of Co-operative Housing Society an advantage to create a second mortgage. By this Rule, such a member may obtain loan from his employer on such terms and conditions as may be imposed by the employer and such loan, either in lump or in a suitable instalments, as the case may be, shall be paid to him or on his authority to the Co-operative Housing Federation Ltd. as may be decided by the employer. For this purpose the loanee member upon an agreement is to assign the right with the society upon a further agreement to pledge his gratuity or deposits or interest. He shall also be required to execute a second mortgage in favour of his employer after completion of the house or apartment.47
However according to W.B.C.S. Rules, 1987 the cost of any land (including development cost) or the cost of any house or apartment on such land built by a Co-operative Housing Society shall be apportioned in such manner as may be decided by the Board, so, the Board is empowered to fix the cost according to the project cost. It often happens that the initially fixed project cost changes and the Board is compelled to change the demand notice for obtaining contribution from members.

The Board shall endeavour to avoid any escalation cost of the project. In case of any escalation, the Board shall bring the fact to the notice of the general body in an Annual General Meeting or a Special General Meeting forthwith. So, when any addition in the demand notice for raising cost of construction of flat arises, the Board is not competent to increase it. It shall obtain approval of the general body of members. That means, all members are to be appraised of the escalation of the cost and proposed additional contribution towards this escalated cost.

But, when contribution towards cost of the project is not deposited by all members timely according to demand of the Board, the construction work is chocked and it becomes impossible to complete the project in time. As duration of completion of construction becomes longer, cost of materials increases and thereby flat cost increases also. In a Group Housing for 100 or more members, if one or two members default in paying the contribution, there is a little effect of delay of completion of the project.
But in a small Group Housing of 8 members, if one fails to deposit regular contribution, the speed of construction is retarded and escalation of project cost becomes unavoidable. The additional burden of providing additional cost is shouldered by other members who have been paying it regularly.

On the above situation, when a member continues to default in payment of his dues towards cost of land or house or apartment allotted to him by the Co-operative Housing Society for more than six months without a break, the society may take recourse of the provisions specified in West Bengal Co-operative Societies Rules, 1987. According to this Rule, the Board of the Society shall have to resolve in a meeting called for the purpose of expulsion of the member of the society. But this resolution is to be supported by two-thirds of the total members of the Board present and voting. Before taking the said resolution for his expulsion for the membership of the Society, the Board shall give an opportunity to him for being heard in this respect why he shall not be so expelled. This is an extreme action against a member for such default of his dues towards cost of land or house or apartment allotted to him. But the decision of the Board to expel a member is not final. This must have approval of the Registrar of Co-operative Societies.

The Assistant Registrar of the concerned area or the Deputy Registrar in Kolkata Metropolitan Area or the Deputy Registrar in Rajarhat Township Area Project are not competent to approve it. So, the Board is to
submit the proposal or decision of expulsion to the Registrar. There is also a further provision in the Rule that the approval or disapproval of the Registrar shall be communicated to the Co-operative Housing Society within a period of six weeks and in absence of such communication, the resolution of the Board shall be effective. The power of the Registrar is exclusive as this can not be delegated to any other officer. The explanation to the Rule 137 provides this exclusive power of the Registrar of Co-operative Societies, West Bengal stationed at Kolkata. Therefore, such an expulsion matter arising in a District of Malda or Cooch Behar or Darjeeling or Purulia shall be submitted by the Co-operative Housing Society to the Registrar at Kolkata. The Registrar upon hearing the Society and the member against whom expulsion proposal has been submitted to him, shall dispose it. In previous such cases, the Registrar, disposed by either approving the decision of the Board or disapproving the decision. Otherwise, finding non-compliance of some procedural formalities by the Society he ordered for payment of defaulted dues by the member within a certain period and non-compliance of the order would confirm the approval of the expulsion. In many cases, the member complied with the order of the Registrar and the process of expulsion dropped. In some cases, the member did not comply with the terms of the order passed by the Registrar of Co-operative Societies and the decision of the Board for expulsion of the member was confirmed and approved by him finally.
A member may also be expelled in the same manner as discussed above which is embodied in Sub-Rule(1) of the Rule 137 on another ground. The ground is any act of a member which is pre-judicial to the interest of the Co-operative Housing Society or he has violated a lawful decision of the Board despite warning. But this provision does not define the act which may be considered as prejudicial to the interest of the Society. Further violation of a lawful decision of the Board is a ground for expulsion.

When the Registrar has approved expulsion of a member, the member may be aggrieved and shall have right to appeal to the Government by submission of a written representation to the State Government within a fortnight from the date of communication of the order of expulsion. So, the aggrieved member whose expulsion has been approved by the Registrar shall submit appeal to the Secretary, Cooperative Department, Government of West Bengal. In this matter, the State Government i.e. through the Secretary of that Department is the appellate authority of the Registrar. There is a limitation of period in preferring the appeal by the member so expelled. The period is a fortnight. It is not provided in this Sub-Rule that the appellate authority has power to condone the delay, if made in preferring the appeal.

From some previous records of disposal of appeal in the Co-operation Department, Government of West Bengal, it is found that the
Secretary calls the appellant member and the Board of the Co-operative Housing Society for hearing them in the matter. He also calls for record in the matter from the Registrar and a responsible officer of the Registrar appears also with the records during hearing by the Secretary. The Secretary passes reasonable order either confirming the approval of expulsion or rejecting the same. So, the extreme action against a member is expulsion. In the event of expulsion, the Society is to return the money which had already been deposited by the expelled member. The expelled member often claims the return of the deposited money along with some interest at prevailing rates of the Bank. In the matter, disputes arise and it goes for arbitration in the office of the Registrar (here Assistant Registrar or Deputy Registrar of Metropolitan Area). The endless disputes lead to an erosion of huge money from the fund of society, which is meant only for cost of land and cost of construction of house or apartment. However, re-admission of an expelled member in that very society is provided neither in the Co-operative Act nor in the Co-operative Rules. But in the registered bye-laws of a Co-operative Housing Society, there is a provision for such re-admission. In clause 15 of its model bye-laws, it is stated that no expelled member shall be re-admitted except by a vote of two-thirds of the members present and voting at any General Meeting on a motion of which, notice has been given, provided that an expelled member shall be re-admitted after one year from the date of his expulsion.
Here, it is to be noted that while a process for expulsion is taken by a Board of Directors, the member against whom such expulsion is proposed may only have an opportunity of putting forward his argument or grievance at the time of hearing the matter by the Registrar. Before that he is entitled to get a notice requiring him to show cause why he should not be expelled. At the same time, the member can raise this matter in form of dispute between the Board of the Society and himself to the Registrar. The manner of filing dispute and its disposal are set out in the Chapter-XI of the Co-operative Act styled as “Settlement of Disputes”. The corresponding Rules in the West Bengal Co-operative Societies Rules, 1987 are 171 to 182. The member desirous to file a dispute shall submit to the Registrar, a reference in writing in triplicate to be called plaint containing mainly following particular:

a) Names and address of the parties (his own and the Society, its Directors etc.)

b) A statement of the subject of the dispute, and

c) The claim of the relief prayed for.

The amount of fee in a monetary dispute is Rs.5/- for a claim upto Rs.200/- and Rs.10/- for a claim above Rs.200/-. In a non-monetary dispute the fee is Rs.50/-. The dispute is heard and disposed by way of giving an award by the Registrar or any of his sub-ordinate officers (in some cases,
retired Government Officer, Chartered Accountant etc.\) The disposal of a dispute is speedy and cheaper than that in other Civil Courts. The award is binding upon the Co-operative Society and the member. In any dispute, award of the Arbitrator or of the Registrar shall, upon application, be enforceable by any Court having local jurisdiction in the same manner as a decree of such Court as if it were a decree of a Court.\(^{56}\) Thus, the award has legal force and binding upon the parties to the dispute. The award is also appealable to the West Bengal Co-operative Tribunal within one month from the date on which the order, decision or award is communicated.\(^{57}\) The disposal of a dispute in the Court of Arbitrator or the Registrar is ordinarily to be done by six months. This period of six months is extended further upto six months totaling 12 months.\(^{58}\) Hence, once a matter of expulsion comes out, the Co-operative Housing Society falls into trap of litigation for which a huge money is expended. But initially the contribution has been raised from all members on the basis of calculation of the Cost of land and the cost of construction of house or apartment or building and other incidental expenses. The litigation cost is met out of the fund of the society. The fund falls short of by the amount equal to the litigation cost. This deficit is filled up by demanding additional contribution in the form of service charge. The service charge is ordinarily meant for management cost of the society.
It has earlier been discussed that Group Housing may be undertaken by way of:

i) Purchasing land and construction of housing project on the land for allotment of such flats / apartments to the member.

ii) Purchasing flats from some authority by individual persons who by turn form a Co-operative Housing Society for maintenance.

iii) Purchasing land from which plots are allotted or distributed to members of a Co-operative Housing Society and the individual member constructs his house according to his necessity and ability.

Hence, in the first case, when construction of Group Housing is complete, the whole project is now in the name of the Co-operative Housing Society. At this a stage, the Society shall execute a deed of conveyance to every member. In executing such a deed, exemption of Stamp Duty and Registration Fee are exempted on the value of the flat or apartment upto Rs.3.5 Lakh. This exemption is provided in Section 60(2) of West Bengal Co-operative Societies Act, 1983. But before executing such a Deed in favour of a member, the society is to confirm that the member has made payments as may be prescribed towards cost of such
plot of land or construction of such house or apartment or both, as the case
may be. The registering authority assesses a value of a flat or house on
the basis of prevailing per square feet / metres rate in the concerned area.
The audit report containing cost of construction of each flat is ordinarily
taken into consideration while assessing the value of a flat. If the value of a
flat or house is more than Rs.3.5 lakh, the Stamp Duty and Registration
Fee are calculated on the additional amount in excess of Rs.3.5 lakh.

Further, in the second case where a co-operative housing society is
formed of all purchasers of flats from an authority like West Bengal
Housing Board, Bengal Ambuja Housing Corporation, Bengal Peerless
Housing Corporation etc., the authority executes a deed of conveyance of
the whole project in favour of the society. At the time of registration of
such deed of conveyance in respect of building comprising of many flats,
fees for registration and requisite Stamp Duty are exempted under Section
60, W.B.C.S. Act, 1983. Thus the Co-operative Housing Society becomes
the sole owner of the Group Housing Project. The Society is now
competent to reconvey to an individual member the flat in respect of which
he has already paid to the Authority which constructed the project. The
reconveyed deed is for the flat alongwith the interest in common areas and
facilities. This time, Stamp Duty and Registration Fee are exempted under
the provisions of Section 60(2) supra upto Rs.3.5 lakh of the value of the
individual flat. The value of the flat is calculated on the basis of the value
already paid to the Authority for having its ownership. Thus the members of a Co-operative Housing Society formed of allottees or owners of flats constructed by an Authority, can get the flats registered in their own names through the Co-operative Housing Society and can get exemption of a considerable amount of money in the form of exemption of Stamp Duty and Registration fee. But there is a clear difference between the members who construct their own accommodation in a Co-operative Housing Project and subsequently form a Co-operative Housing Society. It seems that these persons derive benefit covertly. But apparently it seems that the constructing Authority ultimately derives such benefit. Many persons think that for exemption of such Stamp Duty and Registration Fee, the value of flats constructed by authority is cheaper than when these are sold to private owners who do not form a Co-operative Housing Society.

In the third case, where members of a Co-operative Housing Society purchase land and plots are allotted, the Co-operative Society purchases a big area of land by way of registering a sale deed. During registration of such a deed no Stamp Duty and Registration fee are required under the same Section 60 of the Co-operative Act. The Co-operative Housing Society allots plots of land to its members for construction of their houses. The Co-operative Society ultimately conveys the land with building thereon to the member by way of executing a deed for which the exemption of Stamp Duty and fee is allowed upto Rs.3.5 lakhs. Thus in
three kinds of Co-operative Housing Societies, the members get their title on the flat or house or land including the undivided interest in the common areas and facilities. In the existing West Bengal Co-operative Societies Act, 1983, the undivided interest shall constitute a heritable and transferable immovable property within the meaning of any law for the time being in force. Such heritable and transferable immovable property shall not be partitioned or sub-divided for any purpose whatsoever.  

Every member of a Co-operative Housing Society shall have the right to use the common areas and facilities for the purpose for which they are intended. But a member shall not interfere with or encroach upon the lawful right of other members in whose favour similar allotment has been made.

4.2.9 Cessation of Membership:

By the provisions of West Bengal Co-operative Societies Rules, 1987, a person shall cease to be member on three conditions. These are the instances when:

i) He incurs any of the disqualification to be a member of a Co-operative society.

ii) He fails to accept any allotment of land or house or apartment within a period of 90 days from the date of allotment.
He or any member of his family establishes any business relationship with the society or acts as an advocate or solicitor against the society unless otherwise directed by the Registrar.

Eligibility of membership in any type of Co-operative Society is applicable in case of a Co-operative Housing Society also. According to the guiding section following persons are eligible for membership of a Co-operative Society. 

a) An individual competent to contract under Section 11 of the Indian Contract Act, 1872.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Thus a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals (lucid intervals). Similarly a sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirious or drunkenness lasts.

However, some persons pretend to be minor, or unsound or drunken for fraudulently having some benefit on ulterior motive. They may some times be making some bargains, taking some loans or be supplied with
some goods by third parties, or be conferred with some benefits etc. The question which has arisen in India is, how far a minor can be asked to restore back the benefit wrongly obtained by him under a void agreement. There is a question whether a minor can be asked to pay compensation to the other party. The party to a contract who has received any benefit from another party and if the contract is itself a voidable contract shall restore such benefit to the person from whom it was received.^^

But it is applicable to a minor also according to the interpretation of the Privy Council but the Law Commission disagreed. For, Section 68 of the Indian Contract Act, 1872 is for the claim for necessaries supplied to person incapable of contracting or on his account. So, Section 68, Indian Contract Act, 1872 can be invoked against a minor.

On the other hand, a minor may be admitted as a partner in a firm with the consent of all partners to the benefits of partnership. He has a right to such share of the property and of the profits of the firm as may be agreed upon. He has right to access to and inspection of any of the accounts of the firm and have copy of those.^^

Thus, though there are so many deviation and exception to the normal rule that a minor cannot make ordinarily a contract, in the case of induction of a person as a member in a Co-operative Society including a
Co-operative Housing Society, there is no chance of a minor to become a member, even through his natural or appointed guardian.

b) any other Co-operative Society.

In case of a housing society, this clause is not applicable. Because, a Co-operative Society cannot be a member of a Co-operative Housing Society in which only an individual ordinarily becomes its member. A Co-operative Housing Society is a primary society and in the definition a "Co-operative Housing Society" means a Co-operative Society, the object of which is to provide its members with dwelling house, apartments or lands for construction of dwelling houses or apartment and maintenance of common services in connection therewith, and includes a Federation of such Societies.68

Further "Central Society" means a Co-operative Society, the primary object of which is to facilitate the working of other Co-operative Societies which are its members, and includes a Central Co-operative Bank.69 On the other hand an "Apex Society" means a Co-operative Society whose area of membership extends to the whole of West Bengal and the Primary object of which is to promote the objects, and to provide facilities for the operation of other co-operative societies which are its members and includes a State Co-operative Bank.70
Hence, this clause is not applicable to a Primary Co-operative Housing Society.

c) The State Government.

In case of a Co-operative Housing Society, the State of West Bengal has not so far become a member. In other categories of Co-operative Societies, the State Government has become member. The purpose of the induction of the State Government as a member in such societies is to strengthen the financial base of the society by contributing share or soft loan or grant for fruitful and viable functioning. Another purpose of the State participation is to monitor the functioning of the Board of Directors of a Co-operative Society.71

d) Any association or body of persons (whether incorporated or not) or any financial bank, subject to approval of the State Government by general or special order.

In the case of a Co-operative Housing Society, none other than an individual can ordinarily become its member. In West Bengal, some Associations or body of persons have been allowed to become members of Co-operative Housing Society. As for an example, the Ram Krishna Mission, Belur Math has been approved by the State Govt. to become a member of some four such housing societies. Of course, the type of such society is in respect of the housing project constructed and sold by the
W.B.Housing Board. The motto of purchasing flats by the Mission from the Housing Board was to rehabilitate the occupiers in the premises of the house-stead of the ancestors of Swami Vivekananda. The Mission wanted the house-stead renovated and to be utilized as a centre of functions and performances of the Mission. In four Co-operative Housing Societies in and around the city of Kolkata, the Mission purchased twenty flats for delivering possession to the identified occupiers. Before deciding the names of beneficiaries, the Mission was to become members of such housing societies and the State Government on applications by the Ram Krishna Mission approved the membership of the Mission by a special order in all the societies where flats were purchased by them. The Mission afterwards transferred the membership vis-à-vis flat to the identified beneficiaries. There are other instances where by this clause (d) of Sub-section (1) of Section 69, West Bengal Co-operative Societies Act, 1983, the State Government by special orders approved membership of body corporates like Indian Oil Corporation, Peerless Ltd. etc. in some housing societies.

It has been discussed previously that allotment of land or house or apartment is made by the Board of Directors of the Society and if a member is dissatisfied with this allotment, he may prefer an appeal to the general body within 15 days from the date of receipt of the communication of allotment and the Board shall take 45 days thereafter for holding a
meeting of the general body. Hence, cessation of membership for non-acceptance of allotment is subject to the decision of the appeal, if preferred by an aggrieved member. Besides, allotment of land or house or flat is subject to payment of the allotment money. Hence, if requisite amount of money is not paid within the stipulated time (i.e. 90 days), allotment shall be cancelled and consequently, his membership shall cease.\(^72\)

In a Co-operative Housing Society, there are several works like construction of the Housing Project, repairing, colouring, fenching of the boundary etc. In respect of construction, initially undertaken by a Co-operative Housing Society, there is need of appointing or engaging an Architect and a Contractor. If a member is engaged as any of those two technical men, his membership shall cease. Further, there exist several litigations and if a member functions as an Advocate or Solicitor in favour of a party to a Suit in which the Society is the other party, the member shall cease to continue as such.\(^73\)

In the model bye-laws of a Co-operative Housing Society, there is an additional clause for cessation of membership in the Clause No.11(iii) that a person shall cease to be a member “if he lets out the house or apartment or tenement allotted to him without the permission of the Board of Directors and approved by the Registrar.”
Now, in all practical purposes, execution of cessation of membership is very much complicated. Firstly, it is to be determined when cessation occurs. The decision of the Board of Directors for cessation on above stated grounds, may result to institution of a dispute by the member whose membership is proposed to be ceased. It is not mentioned in the Co-operative Law that if membership of a member ceases, what will be the consequences. Will the member leave the Co-operative Housing Society and surrender the flat to the society or transfer the flat to a new person who may be inducted as a member in his place? If he does not do any of such things, what the society will do next? After declaration of cessation, there is also a question whether the society can take service charges or other expenses from him. It is also a matter of controversy whether the society can forthwith stop service to the member including stoppage of water, electricity etc. Therefore, it is very much difficult to execute the cessation of membership of a person in a Co-operative Housing Society and for its execution there is no provision how the society shall proceed to give effect of Rule 136, W.B.C.S. Rules, 1987. Besides, if at all, execution is effected during construction period, induction of a new member in his place will take time and normal work remains suspended.
4.2.10  **Powers and Duties of the Board of Directors of a Co-operative Housing Society:**

West Bengal Co-operative Societies Rules, 1987 specifies some powers and duties of the Board of Directors of a Co-operative Housing Society. These are:

- **a)** to appoint, suspend, remove or discharge all persons engaged on payment of fees or on the basis of contract, such as Contractors, Solicitors, Supervisors, Engineers, Valuers, Architects and Surveyor;

- **b)** to invite tenders and to enter into contracts for and on behalf of the society and to settle the terms thereof. Alteration of terms of contract shall be made by a resolution of the Board by the 2/3rds of the members present and voting at its meeting.

- **c)** To authorize by name one of the members of the Board other than the person in charge of cash or account to verify the cash balance as shown in the books of the society at least once a month and other assets once in a quarter and to report to the Board the result of such verification in the next following meeting. If any shortage of cash balance of any other asset is reported, the Board shall take prompt
steps for the recovery of the shortage failing which the members of the Board shall be jointly and severally responsible for making good the shortage;

d) to issue periodical demand notice to the members for paying instalments towards cost of land, house or apartment. Number of such instalments shall be fixed in consideration of the actual progress of the work of the project;

e) to ensure that name of a nominee of a member is entered in the appropriate Register and also to inform the member of the same in an appropriate manner;

f) to arrange timely repayment of loans given by the West Bengal State Co-operative Housing Federation Ltd. and to take steps for grant of loan from that Federation and to assist members in taking such loans;

g) to place reports for consideration of members in the annual general meeting.\textsuperscript{74}

Previously, a member of a Co-operative Housing Society could take loan from the Housing Federation through the concerned society. The society remained responsible for sanction of loans to member and for repayment thereof. The accounts of loans were in the name of concerned
Co-operative Housing Society but not to names of respective loanee members. Hence, non-loanee members were also covertly responsible for repayment of loan. For default of repayment of loan by some members, inspite of timely repayment of loan to the Housing Federation by other members, the society remains still indebted to the federation whereas all members repaid the loan in full with interest. This is caused due to accounting procedure of the Federation. Now, the Federation has since introduced sanction of loan to individual members of a Co-operative Housing Society directly. Not only the members of a housing society can get loan from the Federation but also other persons who are not associated in any Co-operative Housing Society can get loan as nominal members.

In the bye-laws of a Co-operative Housing Society, there are also several powers and duties of the Board.75

4.2.11 Maintenance, repair and service charge :

After completion of the Housing Project and possession by the members of a Co-operative Housing Society, several necessaries are required and those are the following:

i) Supply of water.

ii) Lights on passages, common areas, stair cases.

iii) Security, light and fire fighting arrangements.

iv) Lift.
v) Clearance of garbage.

vi) Any other common services.

The above necessaries are perennial in nature and so long the Co-operative Housing Society will exist, without these items it is impossible to reside there.

There are some other items which requires to be undertaken after a period of few years. These items are maintenance, repair or replacement of common areas, external sides, roof of the building, stair cases, office and other common facilities of the Group Housing.

Therefore, the necessary items can be divided into two separate classes, viz. the class comprising above six items with other like items, and the class comprising items under maintenance, repair, replacement etc. as described supra. Hence, the first category or class may be defined as "service" and the other as "maintenance". But in the existing Co-operative law in west Bengal, no such classification has been provided except the provision as under – "The cost of maintenance, repair or replacement of common areas and facilities shall be apportioned according to carpet areas:

Provided that where appointment of cost according to carpet area is not considered equitable, the society may with the approval of the Registrar, realize the cost in such manner as it may consider fit". So, it is found that the law does not provide any classification and can not give rise
to any concrete procedure in fixation of charges. Besides, the society has been given power to fix the rate. But if the majority number of members are in favour of an unjust and inequitable fixation of cost and charges, the minority number of members shall have to suffer but to bear it unless the laters file dispute case and succeed.

In a Co-operative Housing Society in the Salt Lake City area, a member was employed elsewhere out of the State of West Bengal and his family members were residing in the society. Once, the Board of that society decided that all members must get connection of cable T.V. But that particulars member did not agree to get the connection on the main cause that his children were studying in lower classes. But the society continued pressing upon him and members of his family. Finally, the position became so bitter that the society directed its employees not to deliver letters, milk and essential services to the family. The member sent from his place of work an application to the Registrar of the proper jurisdiction i.e. Deputy Registrar of Co-operative Societies (Housing), Calcutta Metropolitan Area for saving his family from such oppression. The Deputy Registrar took up the matter and heard both the Society’s Board and the member and directed not to inflict the decision of the Board for Cable T.V. connection upon the unwilling members including this applicant member. The Board of the Society being aggrieved with the direction of the Deputy Registrar went to the High Court, Kolkata but the
Hon’ble High Court upheld the decision of the Deputy Registrar. Thus, it is felt that there should be specific provision in the law in respect of items of services and its charges.

The provision contained in Rule 152(2) is inadequate for the purpose of determining service charges and other repairing, maintenance or replacement. These two heads have been mingled and it is very difficult to isolate one from the other. Authorities like West Bengal Housing Board constructs building containing flats of heterogeneous areas. These flats are called flats for Low Income Group (LIG), Medium Income Group (MIG) and Higher Income Group (HIG). But in a Housing Project undertaken by the Housing Board, several types of flats are built and for the whole project comprising of such heterogeneous types of flats, only one Co-operative Society is formed. This is done for the cause that for all the buildings, a single infrastructure of common facilities is available according to the plan of the project. Service charge and maintenance, repairing, replacement and other charges are in most of the societies apportioned according to carpet area. As a result, the members who form majority in number, of a smaller size of flats become more benefited when others with flats of bigger size feel looser and they agitate against apportionment of service charges according to carpet area. As a result, the members who form majority in number of a smaller size of flats become more benefited when others with flats of bigger feel looser and they agitate against apportionment of service
charges according to carpet area. Such a matter came to the Deputy Registrar of Co-operative societies (Housing), Kolkata Metropolitan Area. From some members possessing flats of bigger size but constituting minority in the society. The Board of Directors in a General Meeting passed the decision fixing service charges on the basis of carpet area. As a majority of total members were the owners of flats of smaller size, the argument of the rest members owning flats of bigger size did not stand. Their argument was that service charge and the repair, replacement of maintenance of buildings charges should not be mingled. These two items are to be classified and the service charge should be equally divided among all members irrespective of the area of flats they hold. On the other hand, charges on repair, replacement or painting etc. may be apportioned on the basis of carpet area. Decision though made by majority members is not supported by cogent reasons. The matter was taken up by the Deputy Registrar who gave his decision. He observed that in a flat of bigger size, consumption of water, leaving wastes etc. may not be higher in all cases than those in a flat of smaller size. It may happen that more persons live in a smaller flat than in a bigger flat. It may also similarly presumed that consumption of water is higher in a smaller flat than in a bigger flat in some cases. Consumption of water does not depend upon the number of out-lets affixed in a flat. Besides, the security arrangements, lighting in common passage, electricity expenses for lift etc. are in the same manner
not depended upon the area of the flat. But, on the other hand, the Deputy Registrar observed, repairing works, replacement, painting which are classified as maintenance charge require expenses on the basis of area of the flats. It should not be equal. Hence, the decided to separate it into two categories. He ordered for classification of these two things into “service charge” and “maintenance charge” respectively. He ordered the service charge to be divided equally among all members irrespective of the area of flats they occupy and the maintenance charge to be apportioned according to carpet area of each flat. In his order dated 23.7.98 since revised on 10.9.98, the Deputy Registrar left the matter of fixing service charge and other cost in terms of Rule 152(2) read with its proviso.

The society in a Special General Meeting held on 15.3.98 resolved to fix additional service charge of Rs.45/- at flat rate but did not specify the splitting the amount into service charge and maintenance charge. Ultimately the matter went for arbitration in the form of dispute case at the office of the Registrar. The Arbitrator awarded in the line of the order of the Deputy Registrar and thereafter the matter went to the West Bengal Co-operative Tribunal.77

The West Bengal Co-operative Tribunal in this case ordered the following:
1) Maintenance charge can be levied in the mode as suggested by the Deputy Registrar of Co-operative Societies in terms of his communications/orders dated 23.7.98 and 10.9.1998.

2) Maintenance charges and service charge shall not be clubbed together.

3) Imposition of service charge shall not be in relation to the items or matters for which maintenance charge has been levied as per the order of the Deputy Registrar of Co-operative Societies.

4) Service charge is distinct from the charges of maintenance of common areas and facilities.

5) The Respondent Society shall clearly specify as to in respect of what items or matters service charge is so levied.

6) While assessing service charge the society shall clearly take a decision as to on what basis, whether uniform or according to carpet area such service charge is levied.

7) The respondent society shall issue a fresh circular in terms of the resolution to be adopted, clearly specifying in details the items or matters and the manner and the rate of
imposition of maintenance charge and service charge separately.

From the above judgement of the West Bengal Co-operative Tribunal comprised of two judges, Rule 152(2) may be interpreted as maintenance charge of the common areas and facilities but not the service charge. The service charge shall be levied as per clause 8(c) of the Bye-laws. These two things are to be segregated. Though there is a clause in the bye-laws of a Co-operative Housing Society for service charge, the Act and the Rules are silent in this respect. Comprehensive provision should be embodied in the law. In the clause of the bye-laws, the items of service charge are not also mentioned.

4.2.12 Transfer of ownership of house or flat by a member:

After getting allotment in a Co-operative Society of a plot of land or a flat or an apartment, a member may have necessity to transfer it on some contingencies. He may face difficulty in residing in his house or flat or apartment or on the plot of land allotted to him. He may find afterwards the land not suitable for construction of building thereon or face financial difficulties. He may also find necessity to dispose this property for marriage of his daughter, high education of his wards or prolonged treatment of a member of his family. Such transfer can be done with proper consent of the concerned Co-operative Housing Society and in the event of
failure of the society to give consent an appeal shall lie to the Registrar of
the proper jurisdiction. There are specific provisions in the existing co­
operative law of the State of West Bengal. A member of a Co-operative
Housing Society in whose favour a plot of land or a house or an apartment
in a building has been allotted may transfer such plot or house or
apartment, as the case may be, with the written consent of the Co-operative
Housing Society, under such terms and conditions and in such manner as
may be prescribed to any other person eligible to be a member of a Co­
operative Housing Society. 79 If the Co-operative Housing Society refuses
to give its consent to such transfer, it shall record the reasons for such
refusal in writing and communicate the same to the member within one
month from the date of receipt of his application in this regard and the
member shall have a right of appeal to the Registrar within such period as
may be prescribed. To complete this provision, the West Bengal Co­
operative Society Rules, 1987 has provided Rule 142 in this respect.

So, transfer of the property owned by a member in a Co-operative
Housing Society is to some extent restricted than that in respect of other
property which can be transferred without any interference by any
authority. In a group housing, several conditions are imposed such as in
acquiring membership there is a role of the authority of the group housing
in cases of transfer. Moreover, the proposed transfer should be qualified
under Rule 135 of the West Bengal Co-operative Societies Rules, 1987. In
the Rule, 135, qualification of being a member of a Co-operative Housing Society is prescribed apart from the relevant stipulation as specified in Section 69. According to Section 69, eligibility of an individual for being a member is to be competent to contract under Section 11 of the Indian Contract Act, 1872 (9 of 1872).

According to Rule 135(3) it is stated that for the transfer of land or house or apartment a member shall obtain a written consent of the society and before giving such consent the society shall satisfy itself that the transfer is genuine.

From the provision of Rule 135(3) it is found that the society shall satisfy itself four conditions. It is not clear whether the Board of Directors of the society or the general body of the society shall satisfy itself of those items. Other items in clauses (i), (iii) and (iv) are very specific but the clauses (ii) is very much elastic. It opens arbitrariness, caprices on the part of the society. There is no index how the society shall decide the genuineness of the proposed transferee’s need for residential accommodation.

Rule 142(2) W.B.C.S. Rules, 1987 empowers a Co-operative Housing Society, though not indicated in the Act, to raise such fee or donation as may be specified by the State Government from time to time by Notification for according consent for transfer by a member of his land,
house or apartment to another person having eligibility to become a member of the society.

From this sub-Rule (2), it is obvious that the society may raise donation or fee while according consent for any transfer of land or house or apartment. But it was stayed until and unless the State Government issued Notification specifying quantum of such fee or donation. On 23rd June 2003 the State Government in exercise of the powers conferred under Sub-Rule (2) of Rule 142 of the West Bengal Co-operative Societies Rules, 1987, allowed the Co-operative Housing Societies to raise fee or donation for according consent for transfer by a member of his land, house or apartment to another person having eligibility to become a member of the society @ 0.5% of the sale value of the concerned flat / apartment / house / plot of land etc. in the said Housing Society.80

During the period upto publication of this Notification on 23rd June 2003, Co-operative Housing Societies were raising such fee or donation at the time of transfer unofficially. Societies were raising amount as donation according to the clause no.18 of their bye-laws. In the Bye-laws, the clauses 29-32 provide the matter of transfer of share or interest.

Previous sanction of the Registrar is necessary under Rule 142(1) of West Bengal Co-operative Societies Rules, 1987. This has been discussed supra. The West Bengal Co-operative Societies Act, 1983 nowhere
necessitates approval of the Registrar save and except the provision contained in Section 85(9) of the Act. By this Sub-Section, if the Cooperative housing society refuses to give its consent to such transfer, it shall record the reasons for such refusal in writing and communicate the same to the member within one month from the date of receipt of the application in this regard and the member shall have a right to appeal to the Registrar within such period as may be prescribed. Therefore, it is seen that the Registrar is the Appellate Authority. But Rule 142(2) of the Rules empowers Registrar to approve initial proposal of transfer when the Cooperative Housing Society gives consent and sends it to the Registrar for approval. But when the society refuses or there is inaction on its part, the aggrieved member has right to appeal before the Registrar. This dual role of the Registrar in such transfer cases causes anomaly in the legal provision. So, Section 85(9) of the enabling Act and the Rules there under in Rule 142 should be in harmony with each provision to the other. The Act does not spell out the original power of the Registrar to approve the proposal consented by the co-operative housing society. Either this should be inserted in the Act or the provision of the Rule 142 should be wiped out. Recently, there was a move to withdraw the provision in the Rule 142(1), so that there remains no necessity of obtaining approval of the Registrar, but the State Government very keenly observed that if the control and power of Registrar is abolished, a Co-operative Housing Society's Board of
Directors shall get handle to exploit both the transferor and the transferee. In city or town area or in the area of Salt Lake City, around such transfer in the form of sale of flats, land etc. unholy alliances of some persons have been experienced. To arrest such illegal activities, some control of the Registrar should exist. However, the present system of disposal of appeal of an aggrieved proposed transferor should also be strengthened.

For instance, when on an appeal, though the Registrar has approved the transfer of such property, the Co-operative Housing does not implement, there is no strict provision for taking steps against the Board of the society not obeying the decision of the Registrar. There is only a provision for dissolution of the Board. The process of dissolving a Board to be taken by the Registrar is time consuming. Besides, actions of the Registrar is appealable to the West Bengal Co-operative Tribunal established under Section 135 read with Rule 227 of the Rules. Ordinarily in the Tribunal, time of disposal of appeal made by the Board of the society or made by any member of a society is required considerably. From disposal of such appeal cases, it is observed that almost two years time is required. Even, the matter can go to the High Court also. Thus, the necessity of a transfer becomes frustrated. Therefore, there should be a specific provision of a penal measure for contravention of the approval of the Registrar for transfer of the flat, land, building etc. On the other hand when the Registrar rejects the appeal of the aggrieved member, he may
prefer an appeal to the West Bengal Co-operative Tribunal.\textsuperscript{82} The applicant whose appeal has been rejected by the Registrar in respect of transfer of his property in the society may appeal to the Tribunal two months from the date of order or from the date on which the applicant gets knowledge of the order. Here, the applicant can only prefer an appeal to the Tribunal against the order of the Registrar. In some cases when the Co-operative Housing Society refused to give consent to the transfer proposal and an appeal is preferred to the Registrar who upon disposal of the appeal approves the proposed transfer, the society may be aggrieved. But the appeal to the Tribunal can only be preferred by the proposed transferor. Hence, there should remain a provision for an appeal to be made by the Co-operative Housing Society which is aggrieved by the order of the Registrar.

However, if there exists any conflict between the proposed transferor and the co-operative society, the matter remains unsolved for years together. It may go up to the highest judicial authority of the country i.e. the Supreme Court. To avoid such situation the proposed transferor and the transferee ordinarily surrender themselves to the Co-operative Housing Society's office-bearers through an underhand deal of money with the office-bearers. On the other hand, if the society has no role to say, any member can transfer his property to anyone who may have no qualification of being a member of the society and the outgoing member can go out without paying any service charge and maintenance charge payable to the
society. So, there should be a role of the society in the process of any kind of transfer. In view of such a complicated situation, suitable provision is to be embodied in the Act or in the Rules so that irregularities, undue earning of money by some persons and fraudulent practice of a few persons may be arrested to a great extent.

Any transfer of flat, apartment or land or building is now compulsorily required to be registered under Registration Act, 1908. According to the provision “Any allotment (including re-allotment) of a plot of land or a house or an apartment in a building made by a Cooperative Housing Society to its member in accordance with its by-laws shall entitle such member to hold such plot of land, house or apartment, as the case may be, with such title or interest as may be granted under the prescribed conditions, and, subject to the provision of Sub-Section (2) of Section 60 an instrument of transfer in accordance with the provision of the Transfer of Property Act, 1882 (4 of 1882) and the Registration Act, 1908 (16 of 1908) shall be conclusive evidence of such title or interest in favour of such member”.

From the above provision of Section 87(1) it is obvious that a transfer of plot of land, apartment or building is a re-allotment to another person who may be termed as a transferee in such transfer case. Hence for re-allotment, registration of an instrument of transfer in accordance with the Registration Act, 1908 is compulsory and the registered instrument
shall be the conclusive evidence of the title or interest in favour of the transferee. Previously up to December, 1995, such registration of transfer instrument was not compulsory before its amendment.\textsuperscript{84}

So, it is found that before the above stated amendment of the provision of Section 87(1) of the West Bengal Act, 1983, registration of an instrument of the transfer was not compulsory. The provision of the Registration Act, 1908 was relaxed by the special provision embodied in the Section itself. As a result, the West Bengal State Government was loosing registration fee and stamp duty out of the huge transfer of plots of land, apartments and houses in Co-operative Housing Societies. Besides, the documents which were in the hands of members before December, 1995 were insufficient for the property i.e. flat or apartment or plot of land or the house to make them marketable.

Further, a member of the co-operative housing society may not transfer his property or interest to a new person but may surrender his property to the Co-operative Housing Society. The housing society may receive the property and dispose it by re-allotment to a new person later on. In this case, the society while taking the property shall have to pay back to the outgoing member, the money which he had already deposited to the society. But question arises how a society can pay back the money when most of such societies do not possess any considerable fund. In this respect
there is a provision for disposal of share or interest of member on expulsion or resignation or on becoming insane.

When a member of a co-operative society is expelled or resigns according to the rules or the bye-laws of the co-operative society or becomes insane, his share or interest, in the capital of the co-operative society shall be transferred to a person qualified to be a transferee of such share or interest under Section 78 and the value thereof shall be paid to the member or, in the case of becoming insane, to such person as may be appointed to manage his properties under the Mental Health Act, 1987 (35 of 1987), within two years from the date on which the member is expelled or resigns or the person as aforesaid is appointed, as the case may be.\(^8\)

Therefore, the above provision is the procedure as to how share or interest of a member in three contingencies (expelled, resigned and insane) shall be disposed. In the present context when a member resigns, he is to surrender his land or flat or house to the society which afterwards can dispose it to a new person. The value by which the new person shall acquire the property shall be paid to the outgoing member. By above process, the resigned members share may be transferred. Alternatively, the resigning member may come to a contract with a new person who is eligible to become a member of a co-operative society for transfer of his share or interest to the later. But in the first process when the resigning member surrenders his property to the society, until and unless the society
is in a position to re-allot the share or interest to a new person, the value of the share or interest can not be paid to him.

4.2.13 Letting out of House or Apartment:

As has been discussed in this chapter under the heading transfer of ownership of house or flat of a member, the matter of letting out of a plot of land or a house or an apartment has also been discussed in Rule 142, West Bengal Co-operative Societies Rules 1987. In its Sub-Rule (1) it is stated that in all cases of transfer and letting out of land, house or apartment prior permission of the Registrar shall be obtained in addition to written consent of the society.

In the Act, it is provided that no member of a co-operative housing society, who has been allotted a plot of land or a house or an apartment in a building, shall let out such plot of land or house or apartment, as the case may be, and receive any compensation or income in respect to the plot of land or house or apartment without the written consent of the Co-operative Housing Society on an application made in this behalf. The Co-operative Housing Society may give its consent or refuse such consent for reason to be recorded in writing and communicate its decision to the member within one month from the date of receipt of this application.
If the Co-operative Housing Society fails to take decision on the application within one month of the date of its receipt or refuses such consent, the members shall have a right of appeal to the Registrar.\textsuperscript{86}

In the above provision, letting out of a plot of land has been included with house or apartment, but a plot of land can not be let out. It can be transferred in the form of sale, mortgage, lease, exchange, or gift.

From the provision of a tenant's definition,\textsuperscript{87} it is found that, any premises may be let out for two purposes i.e. for residential purposes and for non-residential purpose. Besides, the definition of “premises” has also been provided in the West Bengal Premises Tenancy Act, 1997. “Premises means any building or any hut or part of a hut let separately, and includes (i) The gardens, grounds and out-houses, if any appertaining thereto; and (ii) any furniture supplied by the landlord, or any fitting or fixers affixed, for the use of the tenant in such building or part of a building or hut or part of a hut but doesn’t include a room in a hostel or a lodging house.”\textsuperscript{88}

Therefore letting out may be either for residential purpose or for non-residential purpose. But, in the co-operative law, though in specific terms non-residential purpose is not prohibited, an individual who is also a permanent resident of West Bengal or who intends to reside in West Bengal permanently is eligible to be a member of a Co-operative Housing Society.\textsuperscript{89} By Rule 135(a) for the transfer of land or house or apartment a
member shall obtain a written consent of the society and before giving such consent the society shall satisfy itself that the transferee has genuine need for residential accommodation. Hence those provisions of co-operative law emphasize mainly on the residential purpose for acquiring plot of land or apartment or house in a Co-operative Housing Society. The law provides some specific grounds for transfer but does not give rise to any condition or procedure of letting out of such apartment or house to a non-member. The Registering Offices of the Co-operation Directorate of the Government of West Bengal ordinarily wants following particulars:

i) Proof of membership of the person desiring to let out his apartment or house.

ii) Reasons for which the member is compelled to leave the premises with requisite documents.

iii) Agreement between the member and the intending person who will be tenant.

iv) Credential of the proposed tenant.

v) Consent of the Co-operative Housing Society.  

In many cases, the proposed tenant is chosen from a reputed Company or Bank or Government undertaking or statutory Company. The cause is that the premium of rent or compensation is much higher than that which can be received from an individual person. In such cases, the
member enters into an agreement with the office of such company or Bank or undertaking and the office reserves its right to allow one of its employees to reside in the flat and when the first employee goes away either on transfer or on superannuation, the office again sends another employee in that flat. Sometimes, the Company or the Bank or the undertaking runs a wing of their establishment instead of sending an employee to reside thereat. Sometimes, commercial activities are performed from that apartment or house. Such performance and presence of outsiders create a problem in the society. It causes annoyance to other residents in the society and hampers peace and tranquility. It causes fear of insecurity also. If the society giving consent for letting out, finds later on an unbearable situation out of the tenancy, the society tries to withdraw its consent but the tenant does not obey. The society then pressurize on the member (landlord) to evict the tenant. Thus, in most of the cases litigation starts and continues for years. Society is made a party to the suit and it has to incur expenditure for such litigation.

In some of letting out cases, the Co-operative Housing Society charges double the amount of service charge which a member is to pay. No reasonable ground for levying such increased amount of service charge has been found. As discussed supra, approval of the Registrar of Co-operative Societies is compulsory in case of letting out under Rule 142, West Bengal Co-operative Societies Rules, 1987 also. But in many cases, a member
does not take consent of the Housing Society and approval of the Registrar. The member describes the occupier in his flat as his relative. But in course of time when the occupying person does not vacate the flat, the member confesses his irregular acts. Actually to avoid observance of legal formalities, these members induct persons in their flats or houses. Subsequently when it is found that the tenant is not vacating, the member cannot but disclose it to the Co-operative Housing Society and the Registrar. As a result violation of legal provision on letting out under Section 89 and Rule 142 of Co-operative Law does not get support from the society and the Registrar in any eviction suit.

Hence there should be a concrete and consolidated provision of law on letting out of co-operative flat or house. Otherwise, complications and litigations will increase day by day, as now.

4.2.14 Disposal of land or apartment or house of a member in the event of his death:

A member of a Co-operative Society whether it is a housing society or an agricultural society or credit society or any other type of society may make a nomination to be kept in the record of the co-operative society in favour of a person. In the event of the member’s death the society shall dispose of the share or interest of the member according to the following provision:
"Subject to the bye-laws of a Co-operative Society, any member of such Co-operative Society may in accordance with the rules nominate a person in whose favour the co-operative society shall dispose of the share or interest of such member on his death."91

Hence a member has no compulsion to nominate a person. The provision is not mandatory. Therefore, a member may or may not nominate a person in whose favour the deceased member’s share may be transferred by the society. In the co-operative societies other than Co-operative Housing Societies, share or interest is ordinarily in the form of money. But in a Co-operative Housing Society, the share or interest is in the form of a small amount of money deposited in the housing society. This share attaches the land or apartment or the house of the member. So, the share or interest in a Co-operative Housing Society is totally different to those in all other types of Co-operative Societies. In the Act or Rules, there is no specific prescription how shares along with the land or apartment or house shall be disposed of in the event of the member’s death. The guiding law is Section 79, 80 of the Act and Rules 127 and 128 of the Rules.

The West Bengal Co-operative Societies Rules, 1987 provides the manner how nomination is to be made and in what manner the same may be kept in record of the Co-operative Society. The provision is as under:
1) A member of a Co-operative Society may in accordance with provision of Section 79, nominate in writing any person belonging to his family to whom the share or interest or the value of such share or interest shall, on his death, be paid or transferred under the provision of the Act;

Provided that if a member has no family he may nominate any person to whom such share or interest or the value of such share or interest shall be paid or transferred:

Provided further that such member may, from time to time, revoke nomination and make a few nomination.

2) Every Co-operative Society shall keep a registrar of all persons so nominated.

3) In case the nominee of a member dies, the member shall report the death to the society and make a fresh nomination if he so desires. 92

So by the above rule, a member may nominate a person or may not. If the member has family and if he wishes to nominate, he shall have to nominate a person of his family only, but not anyone else outside of his family. On the other hand, if he has no family, he may nominate any person who may or may not be his relative. Definition of family is important in this place.

The definition of family is given in the following way:
A family shall be deemed to consist of husband and wife, minor sons and daughters, dependent widow of a predeceased son, minor sons and daughters of a dependent widow of predeceased son and husband’s dependent parents.

Therefore, from amongst those persons only, a member may nominate one person. Every co-operative society maintains a register of members in a prescribed form.

Here a question often arises whether a member can nominate two persons jointly or not. By Section 79 and Rule 127 supra, nomination may be made to a person. In the Act there is a provision for admission of joint members. The provision is the following:

A Co-operative society may admit pair wise any two person as joint members and may issue a single share in their joint names. Such members shall, ordinarily enjoy the rights and privileges of a member jointly.

So, by the above provision two persons may be joint members. Hence, if a member has two sons and daughters and wishes to nominate both of them as to be joint members in the event of his death, provision of Section 79 and Rule 127 restrict him to do so. On the other hand, explanation of joint members is given in the following manner:

i) Husband and wife.

ii) Father and son or unmarried daughter.
iii) Mother and son or unmarried daughter.\textsuperscript{96}

Therefore, a member is found to nominate two persons of his choice if he so desires. But many members do not nominate in his lifetime, causing uncertainty at the time of transferring share certificate and membership after his death.

One important thing is to be observed that Rule 127 of the West Bengal Co-operative Societies Rules, 1987 prohibits a member to nominate any person outside of his family in the case he has a family. But, if the member has only a daughter who has been married, he can not nominate his only daughter on the ground that she is not included in his family as defined in the Act. There are many instances when many members suffer from such paradoxical nature of the provision. Hence, the scope and periphery of nomination to be made by a member should be widened. Moreover, in the Section 79 and Rule 128, the nomination has been so provided that it may seem to be equal to gift. But, actually nomination is not gift. There are many instances of dispute between the nominee and the successors of the deceased member. When the nominee after becoming a member of the Co-operative Housing Society and occupying flat or house or land enjoys it, he doesn’t distribute the asset within legal heirs. Dispute arises and it goes upto courts of law.
However, if a member does not nominate a person or if the existence of the nominee cannot be ascertained by the Board of the Co-operative Society, then the manner how the share can be transferred is embodied in the Act. In such a case, the share or interest of a deceased member shall be transferred to the person who (subject to the production by such person of probate, letter of administration or succession certificate) appears to the Board to be established in accordance with the rules to the possession of such share or interest as part of the estate of the deceased member.\textsuperscript{97}

If the nominee does not want to be a member of the society or he has no eligibility to become its member, then any other person may be inducted as a member in place of the deceased member and the value of share and the value of the land, apartment or house shall be paid to the nominee. If there is no nominee, in such case the value shall be paid to the person who shall hold letter of administration or probate.\textsuperscript{98}

But, the law is silent if the nominee is a minor at the time of death of the member and how the deceased member’s share or interest vis-à-vis the flat (in case of co-operative housing society) can be transferred to him. Such a case came to the Deputy Registrar of Co-operative Societies (Housing), Calcutta Metropolitan Area.

The fact was this, ‘A’ was a woman serving in CMDA (Calcutta now Kolkata Metropolitan Development Authority) and her husband ‘B’
was also an employee in the same organisation. CMDA distributed plots of land to groups of its employee with view to forming co-operative housing societies for residential purpose. In such a co-operative housing society ‘A’ was a member and construction of the building of all its member was going on. ‘A’ contributed towards cost of construction of her flat and common area. Before completion of construction and before payment of all installments ‘A’ died. She had nominated her only son ‘C’ whose age was about 15 years at the time of her death and was studying in a school. The husband ‘B’ lodged an application to the Co-operative Housing Society (S) for the purpose of becoming a member in place of his deceased wife ‘A’ on the ground that his son ‘C’ was not eligible to be a member because of his minor age. On the otherhand, relatives of ‘C’ were requesting the housing society S not to permit ‘B’ to be considered as a member in place of ‘A’. In such dilemma S did not sanction membership to ‘B’. He appealed to the Deputy Registrar of the Co-operative Societies (Housing) for having his membership in place of his wife ‘A’. The matter came as an appeal under Section 70 of West Bengal Co-operative Societies Act, 1983. As discussed earlier, Section 70 entitles a person eligible for membership may, in the event of refusal by the Co-operative Society of his application for admission, appeal to the Registrar (here Deputy Registrar) lies.

One of the contentions of ‘B’ was that he was to contribute the remaining portion of the construction cost as the construction is in the
middle way; for that if he is not allowed to be a member of S, it was not possible for him to contribute towards the cost of construction. And another contention was that for continuous default in payment of the dues towards cost of land or house or apartment for more than six months without a break, expulsion of the membership may be proceeded. The Deputy Registrar of Co-operative Societies (Housing) heard the representatives of S also. The view of S also was not to take any action for expulsion in the stated circumstances. They were rather sympathetic to the minor 'C'. After hearing 'B', 'C' and 'S', the Deputy Registrar passed a reasoned decision that 'B’s membership could not be approved as 'A' had put her wish by nominating her only son for share and interest of S. the Deputy Registrar ordered S not to take any step under Rule 137 and till attainment of majority of 'C', S shall not take any decision on this matter. After attaining majority 'C' shall be included as a member in place of her mother 'A' on production of requisite documents and 'B' might contribute remaining portion of cost of construction in favour of his son 'C' as C’s natural guardian.

'B' became aggrieved with the above decision of the Deputy Registrar and filed a review petition before the Co-operation Department, Government of West Bengal. In this provision – The State Government may, of its own motion or on an application made in the prescribed manner by any person aggrieved, call for and examine the records of any inquiry
held or inspection made under this Act or the proceedings of the Registrar and make thereon such orders as it thinks fit after serving notices to persons likely to be affected by such orders.\textsuperscript{100}

The manner of making such application under Sub-Section (1) of Section 137 has been prescribed in Rule 228 of the Rules. By this rule, such an application shall be made within two months from the date of the order accompanied by an attested or certified copy of the order complained of.

The application of ‘B’ was heard by the Secretary of the Cooperation Department, Government of West Bengal but the proceeding took much time to conclude. In the meantime, ‘C’ became major. The Department ordered S, the housing society for giving membership in favour of ‘C’.

But the main point is that there is no specific provision in the Cooperative Law and even in any other law in vogue to solve this type of problem. Hence, a specific insertion in the present law is required.

In another case of a co-operative housing society, a member died nominating a person. The member had no family and he had nominated one descendant in his agnet line but the nominated person had no knowledge of such nomination nor the member informed him of such nomination in his life-time. The society was getting service charge from
the member regularly till his death. But none appeared to possess the flat and to take steps under Section 80 of the Act, which has been discussed Supra. Months passed by, none appeared with a claim to get membership and the flat or his sale proceeds. The society also was loosing service charge against the flat and other members were compelled to contribute extra service charge to make good the deficit. The Board of that society communicated the fact and this deadlock condition in respect of transfer of the deceased member’s share or interest to the Deputy Registrar. He could not find any way to solve this instant problem. Because the enabling Rule is this when upon the death of a member of a co-operative society, the question of transferring the share, or paying interest of such deceased member arises, and the Board of such society finds that the deceased member did not make any nomination in accordance with the provisions of the Section 79, or that the existence or residential address of the person nominated can not be ascertained, or that for any sufficient cause such transfer or payment can not be made without unreasonable delay, the Board may transfer the share or pay interest of such deceased member in favour of or to any person who presents in writing his or her claim for the said share or interest and produces, in support of such claims, probate, letter of administration or succession certificate issued by a Competent Court having jurisdiction and make a written declaration in an affidavit
before a Magistrate that he or she is the rightful claimant, being the legal heir or representative of the deceased.\textsuperscript{101}

The society inspite of its best efforts could not trace out the nominee or any person being the deceased member’s legal heir either agnate or cogent. The deceased was a Hindu male.

The Deputy Registrar finding no provision in such peculiar case directed the Co-operative Housing Society to advertise in daily newspaper for obtaining claim from the deceased’s relatives. The cost of advertisement was initially borne by the society itself from the additional contribution of other members for the purpose. The society advertised the matter to draw attention of claimant of the flat as well as the membership. But none turned up with the claim. The matter was brought to the notice of the Deputy Registrar by the Society’s Board of Directors. The Deputy Registrar found no provision in law to deal with such a problem. According to the Hindu Succession Act, 1956 (30 of 1956) if an intestate has left no heir qualified to succeed to his or her property in accordance with the provision of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations to which a heir would have been subjected.\textsuperscript{102}
This provision is called "Escheat". However, escheat has become rare, at present. Even a more distant relation of the intestate becomes a claimant to the property.

The property of male Hindu dying intestate shall devolve according to the provision of the Chapter II of The Hindu Succession Act, 1956 in the following manner:

"a) Firstly, upon the heirs, being the relatives specified in class I of the Schedule;

b) Secondly, if there is no heir of class I, then upon the heirs, being the relative specified in Class II of the schedule.

c) Thirdly, if there is no heir of any person of the two classes, then upon the agnates of the deceased; and

d) Lastly, if there is no agnate, then upon the cognates of the deceased."

So if any person falling in any group of (a) to (d) is not found or claims, Section 29 of the Hindu Succession Act, 1956 is applicable for escheat and to vest to the State Government.

However, in the above case the Deputy Registrar advised the Cooperative Housing Society to sell the flat upon proper publication of such sale and due receipt of quotations of value of the flat of the deceased.
member. But sale of the flat was to be made to such a person who would be eligible to become a member of that housing society. So, limited quotations were expected. Nonetheless, a good number of quotations were received by the society and to the highest quoter, the flat was sold by the society and he got the membership by re-allotment of the flat. The expenditure for the disposal of the share and interest vis-à-vis the flat was deducted from the sale proceeds of the flat. The sale proceeds were kept aside in a Bank as Fixed Deposit. This was the position for three to four years. But suddenly, a claimant appeared and wanted share and interest of the membership of the deceased person on the ground that he was a relative. The Board of the society could not be satisfied with the evidences which the claimant produced. Hence, the matter went to the Civil Court.

From the above fact, it is evident that a Co-operative Housing Society has several problems which are not only its own problem but problems of individual members.

So, law should spell out specific provisions for solving such type of problems and contingencies to avoid disputes and litigations.

4.2.15 Alteration, addition or repair:

In a Co-operative Housing Society, flats or apartments are required to be altered or added or repaired in course of time and in view of necessity. Specifically for a multi-storied building, alteration or addition or
repair must be done at the consensus of all flat owner members. According to the West Bengal Co-operative Societies Act, 1983 a member of a Co-operative Housing Society shall not make any alteration or addition or repair to any house or apartment in a building in his possession except with the previous approval of the Co-operative Housing Society. The member shall apply to the Co-operative Housing Society for the aforesaid purpose in the prescribed manner. The Co-operative Housing Society shall consider the application in a meeting of the Board and communicate to the member its decision thereon within one month from the date of receipt of the application, failing which the application shall be deemed to have been approved.

If the board decides to refuse the application, the member shall have a right to make an appeal against such decision to the Registrar within fifteen days from the date of communication of the decision and the Registrar shall decide the appeal within fifteen days from the date on which the appeal is made.104

Therefore, from the above provision, it is observed that the alteration or addition or repair is concerned with any house or apartment in a building. That means, the provision is applicable only to a building in a cluster scheme. But in case of house constructed on separate plot of land allotted by a Co-operative Housing Society to every member, there is no regulating provision if the member alters, adds or repairs to his house.
Alteration or addition must be supported by a new plan approved by the Competent Authority like Corporation, Municipality or Panchayat in addition to consent of the Co-operative Housing Society with multi-storied buildings. But in case of the second type i.e. unit house on separate land, a new plan for alteration or addition shall be obtained from the Competent Authority but the society’s consent is immaterial in such a case, if interest of another member is not hampered, and also if the common area and facilities of the housing society is not encroached or disturbed in any way. Of course, before sanction of the new plan showing alteration or addition to the deviation of the original plan, the Co-operative Housing Society should have some opinion to the Competent Authority. So, there should be also a separate type of provision in the law for controlling addition or alteration of the house on separate plot of land. For repair of such separate house, no consent of the co-operative housing society should also be necessary. For repair of the house or apartment in a building society’s consent is necessary. For according such consent, the society ordinarily invites objections from members whether there is any probability of damage of any member or not. But if any objection is not invited and the society’s consent is given to the applicant desiring to repair, subsequent objection by other members would embarrass the society afterwards.

According to Sub-Section (12) of Section 85, WBCS Act, 1983 a member shall apply to the Co-operative Housing Society for the aforesaid
purpose in the prescribed manner. But in the Rules thereunder, no prescription how an application is to be made by the member desiring for repair, or alteration or addition to his apartment or house has been provided. As a result, no uniform procedure is followed in Co-operative Housing Societies.

In a Co-operative Housing Society in South Calcutta, a member had applied to the society for remodeling the floor by mosaic and the society consented to such addition. It is to be examined now whether this work can be treated as an addition. Addition or alteration or repair should be separately defined. In that case, the member owning the flat just beneath the flat of the applicant member objected that the floor above his flat would become heavier and could not bear the load due to proposed addition. Ultimately, the society withdrew the consent temporarily and asked the applicant member to obtain certificate from a Competent Engineer. He obtained the certificate and produced it to the Board of society. The society again gave the consent. This time the aggrieved member complained of the thickness of mosaic against the applicant member and the Board of the society to the Registrar (here Deputy Registrar). The Deputy Registrar found that in respect of addition, alteration or repair, an appeal under Section 85(12) of the Act may be preferred to the Registrar by the applicant member desiring to repair or add or alter to his apartment when he is aggrieved with the refusal or inaction of the society on the
application. Nonetheless, the Deputy Registrar heard the applicant member, the board of society and the aggrieved member alleging to be affected by the proposed repair. The Deputy Registrar asked the three parties to get the subject flat, to which repair is sought for, inspected by another Engineer to be selected by the society at the cost to be borne by the applicant member and the aggrieved member. The main objection is the thickness of mosaic being added on the floor. The Engineer this time on the basis of load bearing capacity of the floor suggested to add mosaic on the floor to a maximum thickness and thereafter the Deputy Registrar after hearing all the parties directed to use mosaic on the floor at a certain thickness. It is observed that the Deputy Registrar acted on the basis of equity, good conscience and justice but not on any prescribed norm. Hence, clear guidance is necessary in case of any repair of an apartment or house of a member in a Co-operative Housing Society. And this may be done by insertion of some provision in the Rules or in its bye-laws.

In a case, a co-operative housing society resolved to add an extra room to each apartment from the ground floor to the top. But some members did not agree to add any room to their existing flats; the housing society got the extended plan sanctioned by the Competent Authority (Salt Lake Municipality). The members pressed upon the unwilling members in different ways. Because, the structure of the additional room was to be constructed covering all floors of the building. If the unwilling person
would not construct the additional room, cost of construction per member would rise considerably. On the otherhand, the plea of these unwilling people is paucity of money and non-requirement of the additional space of accommodation.

The matter ultimately came to the Deputy Registrar of Co-operative Societies (Housing), Calcutta Metropolitan Area. He found no provisions laid down in respect of such addition in the law. Some willing members proposed to help the unwilling members by way of giving loan to them on soft terms. Ultimately, after long persuasions, an amicable settlement was arrived at and the addition was effected to. But in the meantime a period of one year elapsed and cost of constructing materials became higher and the estimated cost was escalated. Therefore Rules or the Bye-laws should contain elaborated guideline in the above respect.

4.3 Laws regarding Group Housing in the West Bengal Apartment Ownership Act, 1972, Rules 1974 thereunder, Bye-laws, 1974:

The West Bengal Apartment Ownership Act, 1972 was passed with an intention to provide for the ownership of an individual apartment and to make such apartment heritable and transferable property. Housing problem in India was growing badly. To meet the problem, Group Housing Schemes with multiple of dwelling houses or units have been taken up by the State Government and by private promoters. In the past, no provision
was in any law on succession to such apartments and transferability of such units in a Group Housing. This Apartment Ownership Act, 1972 has removed the difficulties.

4.3.1 Important terms in the W.B. Apartment Ownership Act, 1972:

There are two main ingredients of the Act such as:

i) The sole owners must subject their apartments to the provision of this Act and submit jointly a Declaration which requires execution and registration under Registration Act, 1908.

ii) The apartment must be used mainly for residential purposes or to be used for the same purposes.\textsuperscript{106}

Initially at the time of first promulgation of this Act, the apartment must have been used "actually" for residential purposes. But in 1974 by an amendment the word "actually" has been substituted by "mainly". So, at earlier stage before amendment of the word "actually" the apartments were to be used actually i.e. truly i.e. as a matter of fact. But now "mainly" means principally or chiefly. Hence, this Act may apply also to those apartments which are not utilised for the purpose of residence.

Apparently, an apartment is synonymous to a flat. But in this Act "apartment" means part of a property having a direct exit to a road, street or highway or to a common area leading to such road, street, or highway
which together with its individual interest in the common areas and facilities forms an independent residential unit and includes a flat.\textsuperscript{107}

On the other hand, “flat” shall mean a separate residential unit, whether self-contained or not, used or intended to be used for any of the purposes referred to in Sub-Clauses (a) to (1) of clause (2) of Section 390 of the Calcutta Municipal Corporation Act, 1980. This definition has been provided in explanation to Section 3(a) of the West Bengal Apartment Ownership Act, 1972.

Now, owner of an apartment has been defined as follows:

“Owner” in relation to any property or part thereof or apartment includes:

i) Any person owning such property or part thereof or apartment or,

ii) Any person deemed to be owning such property or part thereof or apartment, or,

iii) Any promoter or,

iv) A lease of such property or part thereof or apartment, where the lease is for a period of thirty years or more;

Provided that any person who has executed an agreement for the purpose or for taking lease for a period of thirty years or more, of any
property or part thereof or apartment or has paid the consideration or part thereof, shall be deemed to be owning such property or part thereof or apartment even though the document for purchase or lease of such property or part thereof or apartment has not been registered.\textsuperscript{108}

Therefore, all lessees are not eligible to become owner of an apartment as defined under the interpretation clause of (ia) of Section 3 of The West Bengal Apartment Ownership Act, 1972. This definition of “owner” was not initially given in the Act. At an amendment in 1998, this definition has been included. Lessees of at least thirty years are eligible to be owners. But a tenant is not included in the definition. So, in a building, surrounding land to it and other common area like park, garden, community hall etc. may exist. An owner has distinct apartment in a building but he has also some right to those common areas and other facilities. It means, an owner has his apartment plus proportionate interest in common areas and facilities which are defined as follows: “Common areas and facilities” includes:

i) The land on which the building is located and all easements, rights and appurtenances belonging to the land and the building.
ii) The foundation, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire-escapes and entrances and exits of the building.

iii) The basements, cellars, yards, gardens, parking areas, shopping centres, schools, garages, building or apartment vacant or occupied by a tenant or any other person not being an owner, and transferred or proposed to be transferred to the Association of Apartment owners and storage spaces.

iv) The premises for the lodging of janitors or persons employed for the management of the property.

v) Installation of common services, such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning, sewerage etc.

vi) The elevators, tanks, pumps, motors, compressors, pipes and duets and in general all apparatus and installations existing for common use.

vii) Such other common facilities as may be specially provided for in the Declaration.

viii) All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.\textsuperscript{109}
Again, inspite of giving definition of “owner” in Section 3(2a), a benamdar of an apartment shall be the real owner. Where an apartment is transferred to one person for a consideration paid or provided by another person for his own benefit, the transferee shall, notwithstanding anything in the Transfer of Property Act, 1882 or in the Indian Trust Act, 1882, or in any other law for the time being in force be deemed to be the real owner of such apartment and no Court shall entertain any claim of the person, paying or providing consideration for title in such apartment on the ground that he did not intend to pay or provide such consideration for the benefit of the transferee and that the transferee in his benamder, or on any other ground.¹¹⁰

Benami or colourable transfers are those transactions which are not meant to operate between the parties. This is a collusive transaction. The property is merely put in a false name and generally for defrauding others particularly creditors. Section 53, Transfer of Property Act, 1882 is a fraudulent transfer which can be distinguished from benami transaction and the difference between those two transfers is distinct though it is often slurred. Benami transactions are not valid. They are void transactions. So the burden of proof of benami transaction is on the person claiming against the tenor of a person who is the alleged beneficiary. He is to show that the property was in fact purchased only for the benefit of the ostensible owner who was a mere name-lender.
But under West Bengal Apartment Ownership Act, 1972, benamdar shall be deemed to be the real owner of an apartment and no Court shall entertain any issue arising out of this transfer or transaction.

Here it is observed that the Transfer of Property Act, 1882 (Section 53) and the Indian Trust Act, 1882 (Section 82) or the Benami Transactions (Prohibition) Act, 1988 (Section 7) have no overriding effect on Section 4A of the Apartment Ownership Act. The question arises whether the provision is repugnant to any provision of a law made by parliaments.

Clause (2) exacts an exception to the Rule laid down in clause (1) of Article 254 in which in the event of a conflict between a union and a State law, the former prevails over the latter. It enacts that if any provision of the law made by the legislature of a state is repugnant to any provision of a law made by the Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matter emanated in concurrent list, then the law made by the Parliament, whether passed before or after the law made by such state or, as the case may be, the existing law shall prevail and the law made by the legislature of the state shall, to the extent of repugnancy, be void.\(^{111}\)

Thus from Clause (2) or Article 254, whenever there is any provision in a law made by the legislature of a state repugnant to the
provisions of a earlier Act of the Parliament or of any existing Law with respect to the matter, then in order that the law made by the State Legislature may be effective and operative, the assent of the President has to be obtained with regard to it. The language of Article 254(2) is quite simple. The result of obtaining assent of the President would be that so far as the State Act is concerned, the law will prevail in the State and over-rule the provisions of the Central Act in its applicability to that State.

The important thing is to consider whether the Legislation is in respect of the same matter. If the later legislation deals not with the matter which forms the subject of the earlier legislation but with other and distinct matters, though of a cognate and allied character then its Clause (2) of Article 254 shall have no application. A leading case in this respect is Gram Panchayat vs. Mal Winder Sing [(1985) 3 Sec 661 : AIR SC 1394].

So Section 4A of the West Bengal Apartment Ownership Act, 1972 is on concurrent subject because Transfer of property other than agricultural land is item no.6 of list III – concurrent list in Schedule VII of the Constitution of India.

As found Supra, Section 2 and Section 10 of the West Bengal Apartment Ownership Act, 1972 are the vital Sections of this Act, because this Act is applicable to every building used or to be used mainly for residential purposes. For this purpose a declaration is to be executed and
registered. Before that, a person should be under Section 3(2a) an owner of an apartment of a building. Unlike acquiring an apartment or house in a Co-operative Housing Society, a person can acquire more than one apartment. But that is not permitted in a housing society. Under this Apartment Ownership Law, a person may own more than one apartment in a building or buildings forming an association. In the explanation to Clause No.3(2) of the West Bengal Apartment Ownership Bye-law, 1974 it is stated “For the purpose of this clause, a person owning more than one apartment, shall be deemed to be one apartment owner”. Hence, unlike a member of a Co-operative Housing society, an owner of an apartment in an association may posses more than one flats.

Besides, owners of buildings are not obliged to come within the purview of the Apartment Ownership Act. Therefore, this Act is entirely optional for owners of apartments to bind themselves by the bond as provided under Section 2 and 10 of the Act. Only by forming an Association, the owners may ensure to some extent convenience and benefit of themselves.

Moreover, once entered into this Apartment Ownership Act by complying with provision of Section 2 and 10 with execution and registration of declaration, the owners may by Section 11 withdraw the declaration by registration of a further instrument. So, withdrawal from the provision of the Act may be in following cases:
i) All the Apartment Owners may with the prior permission of the State Government withdraw a property from the provisions of this Act by an instrument executed to that effect.

ii) Upon the property being withdrawn from the provisions of this Act, it shall be deemed to be owned in common by the apartment owners and the share of each such owner in the property shall be the percentage of individual interest previously owned by such owner in the common areas and facilities.

iii) Any encumbrance affecting any of the apartments shall be deemed to be transferred in accordance with the existing priority to the percentage of the individual interest of the apartment owner in the property."

“Property” has been defined to comprise the land, the building and the common areas and facilities. When the apartment owners withdraw from the provisions of this Act, the property as defined under Section 3(k) shall be deemed to be owned in common by the apartment owners. It may be then treated as a joint property and the share of each apartment owner will be his original individual share in the common areas and facilities. The provision of this Section leaves the owners in a chaotic situation. This
Section does not specify why and how withdrawal may be allowed. For this, before withdrawal some specific procedure has to be followed. Distribution of common assets, repayment to creditors, recovery of dues from owners and outsiders etc. are the main jobs before proposal of withdrawal from the provision of the Act is submitted. The Competent Authority should also be satisfied with the close of all accounts of the Association and redemption of the properties as original as at the time of execution and registration of the declaration.

In this Section, withdrawal of such declaration is upon the sweet will of the owners. There should be a provision giving power to the competent Authority to compulsorily cause the declaration withdrawn and taken away the association out of the purview of the Apartment Ownership Act. For that purpose, the Competent Authority should be given power to dissolve the Association and if there are considerable assets and liabilities, the Authority should appoint a liquidator. The liquidator may be remunerated and some specific procedure for his function with duties and powers should also be embodied in the Act. Besides, the Competent Authority while dissolving the Association should be empowered to impose any penalty for any offence like defalcation of money by any Manager out of the fund of the Association.

In this respect Section 12 of the West Bengal Apartment Ownership Act, 1972 should also be amended. This Section states:
i) All instruments relating to the declaration of any amendment thereto referred to in Section 10 or the withdrawal of a property from the provision of the Act referred to in the Section 11, or the instrument referred to in Sub-Section (3) of Section 4 shall be deemed to be instruments compulsorily registrable within the meaning of Clause (b) of Sub-Section (1) of Section 17 of the Registration Act, 1908.

(ii) The withdrawal provided for in Section 11 shall in no way bar the subsequent re-submission of the property to the provision of this Act.

So, if the provision that the Competent Authority may compulsorily dissolve the Association, amendment of Section 12 is necessary. When dissolution shall be compulsorily ordered by the Competent Authority, the cancellation of declaration by him should be conclusive evidence of its withdrawal and for that purpose, further registration or instrument should not be necessary.

In Sub-Section (2) of Section 12, there is a liberty to the owners of the Association to resubmit their property again to the provisions of this Apartment Ownership Act. There is no specific time after lapse of which the owner again may come under the preview of this Act.
In Sections 11 and 12, withdrawal of a property has been mentioned. If it is regarded that “a property” means the whole property of the Association, the provision is all right. But when, the owners want to transfer any portion of common area and facilities to an outsider individual or any organisation or Government or even to an owner of an apartment, there is no provision of the Act how the portion of the property proposed to be transferred may be withdrawn from the preview of this Act. There should be such an enabling provision either in the Act or in the Rule but not in the Bye-laws of the Association. For the purpose of transferring a portion of common areas or facilities, the owners in general meeting should resolve in affirmative. If there is any difference, there should be some forum to decide the matter.

4.3.2 Declaration:

Section 2 and Section 10 of the West Bengal Apartment Ownership Act, 1972 indicate the person or persons who shall declare some particulars by submission in prescribed form.

Section 2 states “This Act shall apply to every building which is used or proposed to be used, mainly for residential purpose and the sole owner or all the owners of every such building shall submit the same to the provision of this Act duly executing and registering a declaration setting out the particulars referred to in Section 10”.

Now Section 10 prescribes some particulars which are to be submitted in Form A given in the West Bengal Apartment Ownership Rules. 1974.\textsuperscript{114}

Either the sole owner or all owners of apartment in a property shall submit the property to the provision of the West Bengal Apartment Ownership Act, 1972 by the prescribed Form No.A.

But when the sole owner submits the declaration, he declares the whole particulars on behalf of the prospective owners who will purchase apartments of the property and the owners shall abide by all terms and conditions of the Declaration and all provisions of the Act. So, while purchasing an apartment along with the fixed percentage of common areas and facilities, a person should have been beforehand aware of the Declaration and so in the deed of transfer by the sole owner to him, assertion of the fact of declaration should be inserted.

It is also uncertain when the Bye-laws as required under Section 13(2) shall be prepared and registered again under Clause 3(2) of the West Bengal Apartment Ownership Bye-laws, 1974 in the event the sole owner of the property submitted declaration under Section 2 and 10.

Because the said Bye-laws, 1974 gives rise to provisions for formation of Association. The Clause states:

Formation of the Association:
1 a) There shall be in respect of each property an association, and each apartment owner of such property shall be a member of such association.

b) Where an apartment owner transfers his apartment by sale or leases out of the same, he shall cease to be a member of the Association concerned from the date of the sale or lease, as the case may be, and the purchaser or lessee on his notifying the purchase or lease to the Board concerned becomes immediately a member of the said Association in place of the transferor.

c) Where more persons than one jointly own and apartment, such persons shall nominate one of themselves to be a member of the Association concerned and immediately send information in respect thereof to the Board concerned.

2) Within forty five days from the appointed day or from the date of submission of the property concerned to the provisions of the Act, which ever is later or within such further period as the competent authority may, on application made to it or of its own motion, allow, the apartment owners of each property, owned by four or more apartment owners, shall in general meeting to be held on such date and such time and place as may be convenient to all such owners and to be presided over by an apartment owner chosen by the apartment owners present in such meeting form an
Association under some specific name and style, and the apartment owner presiding over such meeting shall immediately communicate the formation of such an Association along with the names of the members thereof in Form No.1 to the Competent Authority which shall register the Association under a serial number and cause the names of the members thereof to be entered into the book kept in its office for the purpose.

Explanation for the purpose of this clause, a person owning more than one apartment, shall be deemed to be one Apartment owner.

Therefore, it is to comment that by Clause 3(2) of the Bye-laws, an Association shall be formed by 4 or more apartment owners within 45 days from the appointed day or from the date of submission of the property concerned. So, by this period or any extended period, at least 4 persons must have purchased or been owner as defined in Section 2(2a) when the sole owner has already submitted the property under Section 2 and 10. The Sub-Clause (2) of Clause 3 of the Bye-laws empowers the Competent Authority to allow the apartment owners to form the Association a further time beyond 45 days but as it appears from the plain meaning of this Sub-Clause (2), the Competent Authority can not extend his period of 45 days to the sole owner for the formation of an Association. So, if the sole owner cannot transfer this apartment to at least four owners who shall form an Association under Clause 3 of the Bye-laws, the Declaration shall have no effect. When the sole owner shall alienate each apartment to individual
owners, each of them is required to furnish under Sub-Section 3(b)(ii) in Form No. C particulars and such instrument shall be executed within 30 days from the date of execution of the Deed of Purchase or the Deed of Lease under which such owner acquires his interest in such apartment. This executed instrument shall be submitted to the competent Authority for acceptance or rejection.

4.3.3 Amendment of Declaration:

Once a declaration has been submitted by the sole owner or all owners, it may afterwards be amended. Under Section 10A in Sub-Section (1), any declaration referred to in Section 2 or any amendment thereto or any instrument referred to in Sub-section (3) of Section 4 shall, in the first instance, be submitted in duplicate within 15 days from the date of its execution, to the Competent Authority along with copies of Site Plans, Building Plans and relevant title deeds.

The Apartment Ownership Rules, 1974 prescribed some circumstances in which a Declaration may be amended under Sub-Section (2) of Section 10. The Rule states the grounds as follow:

a) When there is any bonafide mistake in the Declaration.

b) When there is, subsequent to the submission of Declaration, any alteration in the description or
nature of the property or any part thereof to which such Declaration relates, or

c) When subject to the approval of Competent Authority, an amendment is necessary for carrying out the purposes of the Act.

The circumstances as specified above are not exhaustive. There are other circumstances in which amendment of originally submitted Declaration becomes expedient. These are such as:

i) The property for which a Declaration has been executed and registered under Section 2 of the Act may, at a subsequent time, divided into more than one property. That means the original property may be divided and for this purpose also. Therefore in case of such division, of course with the consent of owners, new Declaration for each of the properties after division should be executed and registered.

ii) When two properties for which two separate Declarations have been executed and registered under Section 2 read with Section 10 of the Act are adjacent and all owners of such properties want unanimously to amalgamate the two into one property, the common areas and facilities shall be merged and a new Declaration shall be executed and registered under
Section 2 again. Hence, for amalgamation of more than one property into one property, necessary steps are to be adopted under Section 10A.

For amalgamation of more than one property, there shall require some preliminary steps such as squaring up the assets and liabilities of each property or transferring or amalgamating the assets and liabilities of each property to the newly formed big property.

iii) For some complicated situation arisen in a property for which Declaration has already been submitted, the Board of Management finds it difficult to manage the affairs of the property. The split of the property by separating buildings and common areas and facilities can in many situations solve the problem. Then inspite of best effort, unanimous decision or even decision by the majority of owners can not be attained. In such case according to urgency of the situation the Competent Authority should enjoy a special power to be embodied in the Act by addition in the present Rule 4 of the said Rules so that the Competent Authority can exercise this power and amalgamate more than one property into one property or order division of a property into more than one properties. For such purpose, the Competent Authority shall
publish a draft of an order for amalgamation or division in a prescribed manner for inviting any objection or suggestion, if any, within a period specified in the draft from the owners of the property or properties, as the case may be. Besides, suggestions or objections shall be taken from other persons who may have transaction with the Board of Managers and are creditors. On getting such suggestions or objections, the Competent Authority shall give opportunity to the persons submitting such suggestions or objections of being heard. Finally, the Competent Authority shall pass reasoned order either postponing the proposed amalgamation or division or issuing order of amalgamation or the division. If the order of the Competent Authority is not obeyed, the subject property or properties should be left outside the preview of the Apartment Ownership Act, 1972 and for this, specific provision in the Act should be inserted.

4.3.4 Constitution of a Board:

Constitution of a Board and its functions are provided in West Bengal Apartment Ownership Bye-laws, 1974, and by that provision, the number of Managers of a Board shall be equal to one-third of the owner of the Apartment Owners of the property concerned. But in no case it shall be less than three or more than twenty four.
On the other hand, minimum 4 owners may join under the Apartment Ownership Act. Out of 4 owners, 3 shall form a Board, thus keeping the fourth owner outside the Board. Besides, if an owner out of 4 owners purchases another apartment then total number of owners shall stand at 3 and thereby this Act shall not apply. At this point, the law does not speak anything what the situation and the next course of action would be. Till the number of owners remains less than 4, the effect of the provision of this Act is a nullity. Hence, there should be a time limit within which the number should reach the minimum. Otherwise, the property should be left out of the preview of this Act.

Further in case of a property under the provision of the Act in which only 4 owners occupy the apartments of the property, the number of members of the Board should be kept at 4 instead of 3. Therefore, the relevant Bye-laws clause should be slightly changed to the extent of the alteration of the number of member from 3 to 4. Now, as the maximum number of Managers is 24, then the minimum total number of Apartment Owners is 72. Hence, for a total member of owners of 72 or above, the number of Managers is 24. But there should be an upper limit of the total number of members and this should be dependent upon the viable conditions of service and maintenance of the building. Further in case of total owners above a certain limit, election of Managers and transaction of other business in a general meeting may be chaotic and the meeting may go
out of control. In such cases (say above 1000 of owners) the participating persons may be delegates who may be priorly elected for five years.

According to the Bye-laws as prescribed under West Bengal Apartment Ownership Bye-laws, 1974, a Manager may be removed in following ways:

a) A Manager may be removed from office at any special General Meeting of the Association, convened on the requisition of the Board, by a vote of the majority of the apartment owners present and thereupon a successor shall be elected from among the apartment owners at that meeting. The Manager so elected shall remain in office for the residue of the term of the Manager on whose removal he has been elected.

b) Any other casual vacancy in the office or any elected Manager by resignation or death shall be filled up by the remaining Managers by co-option of a Manager within six weeks from the date of the vacancy. The Manager so co-opted shall retire at the next Annual General Meeting and the vacancy shall be filled up by election of a Manager for the remaining period of the term, if any, of the Manager in whose place the vacancy originally occurred.
Hence from Sub-Clause (a), it is found that a Manager may be removed at the instance of the Board. But when other general owners want to remove any Manager from the Board, there is no provision to cause his removal in a Special General Meeting. A provision should be inserted that if at least a percentage or fraction of total owners requisition to the Board, the Board shall convene such a Special General Meeting for the purpose of removing a Manager against whom the requisition is lodged. It shall also be included in this clause of the Bye-laws that if owners with the requisite number (may be 1/3\textsuperscript{rd}) want to remove the whole Board i.e. all Manager, then there should also be separate provision of calling a Special General Meeting. In such cases, the Board of Managers may show reluctance to call such a specific General Meeting against them. In that event also, necessary provisions of law should be formulated.

Moreover, the existing provisions of the clause does not spell out the situations or reasons for which such removal can be proposed. Some sorts of reasons in particular nature should be provided in the clause so that similar reasons can also be construed to be the grounds for such removal. Hence, like the Board of Managers, the specific fraction of total owners and the Competent Authority should be empowered in the clause for removal of a Manager or all Managers. For such conferment of powers to the owners and to the Competent Authority, necessary embodiment in this clause by way of addition or alteration should be done.
Moreover in above Clause 8(b), it is provided that for any casual vacancy in the office of any elected Manager by resignation or death, the vacancy shall be filled up by co-option. These two causes i.e. resignation and death are not exhaustive. Because, there are instances where a Manager does not attend meeting of the Board consecutively for months. In that event, the remaining Managers should co-opt in his place. Of course, the number of consecutive meetings where he remains absent may be six or seven which may be fixed while amending the provision of Clause 8(b) of the West Bengal Apartment Ownership Bye-law, 1974.

Again the number of Managers in a Board resigning may be more than the number of Managers remaining. The power of co-option of the greater number of Managers should not be left to the minority number of managers remaining. Besides, there are instances where the whole Board i.e. all Managers en-mass resign before expiry of the term. So this provision of Clause 8(b) is silent in such a situation. Hence, a provision should be added to the existing provision of the Clause 8(b) to tackle the above situation.

4.3.5 Disqualification for being Manager:

Bye-laws Clause No.9 states disqualification of a Manager. According to it, any apartment owner, who fails to pay by the 31st January in any financial year any instalment of his contribution towards the
common expenses which may have been assessed by the concerned Association in that financial year, shall not be entitled to vote at any election of the Managers of the Board concerned, and to seek election for the office of the Board concerned, till all his queries are cleared.

An apartment owner who has not attained the age of 21 years shall not be qualified for election as a Manager. An owner who has been elected as a Manager of the Board and has held office for the full term or for any part of the term as such Manager shall not be qualified for re-election as a Manager of Board for the next two terms.

Now there is a short fall in the provisions of Clause 9(2) of the Bye-laws. By this Sub-Clause (2), a Manager is to be of 21 years of age. But in property consisting of 4 owners if 2 owners are of below 21 years, 2 owners out of 4 becomes eligible to be Manager of the Board. Because any person above 18 years may be an owner of an apartment and even any person acquiring an apartment by inheritance according to Section 4(3)(a) may or may not be of 18 years. But the minimum number of the Managers of a Board must be 3 according to clause 5(2) of the Bye-laws. Hence, there should be some relaxation of exemption of this clause.

Again, a Manager in a Board for a term in full or in part shall not be qualified for re-election as a Manager of Board for the next terms.\textsuperscript{122} In a property, declaration of which has been made to come under the purview
of this Act, if there are 4 owners, at first 3 of them may constitute the Board but in the next two terms, they are not qualified for re-election. Hence, there is a gap in the provision. Even, if there are 11 owners, by clause 5(2) the number of Managers shall be 4. The Managers in the first term shall not be eligible to be Managers in second and third terms. Then for the Second terms 4 owners out of remaining 7 owners may be the managers leaving only 3 owners in the first term shall not be eligible to be Managers in second and third terms. Then for the second terms 4 owners out of remaining 7 owners may be the managers leaving only 3 owners eligible to be Managers in the third term. Thus the Board shall not be complete in the third term. It will be short by one Manager, even though we suppose that all owners are eligible by completing 21 years of age and willing to be joining the Board.

So, though the Competent Authority has been given a discretionary power to relax the sub-clause (3) of clause 9 of the Bye-laws by its proviso the general provisions is not so sound and happy. In many situations apartment owners shall have to approach the Competent Authority for relaxation of the Clause 9(3).

4.3.6 Officers of Apartment Owners’ Association :

The Bye-laws of a property provides for election of other officers except the President. This clause states as below:
In addition to the President, the principal officers of an Association shall, in addition to the Secretary, elect a Treasurer and such other officers as may be necessary all of whom including the Secretary shall be elected by and from the Board and hold office during the pleasure of the Board. The election of these officers shall be held annually at the first meeting of each Board after the annual retirement of one-third of the Managers and the election of new Managers in their places. A Manager, shall however, be eligible for being re-elected as President, Secretary or any other officer.¹²³

By this provision, one third of the Managers are to retire annually. But according to Clause No.7, “the number of Managers of the Board who shall retire annually shall be the same as the number of members constituting the Board”.

Hence, there is a controversy between Clause 7 and Clause 11. In Clause 7, all Managers of a Board shall retire annually. But in Clause 11… after annual retirement of the one-third of the Managers …..” These two provisions are paradoxical and it is very much confusing which of these two clauses shall prevail.

The word “term” used in Clause 9(3) of the Bye-laws is also undefined. From the meaning of Clause 7 and 11, it is presumed that the “term” of a Board of Managers is one year. But it is not specifically defined anywhere.
Hence, “term” should be specifically defined. Retirement of Managers should be abolished or the manner of retirement of 1/3rd of Managers should be clearly inserted. Besides, if the provision of retirement of 1/3rd of Managers is retained, then the total number of Managers in a Board should be divisible by 3. That means, total number of Managers in a Board may only be 3, 6, 8, 12, 15, 18, 21 or 24. But, if the above is considered to be inserted in the Bye-laws, then Clause No.5(2) of the Bye-laws should also be amended so that “number of Managers of a Board shall be equal to one third of the number of the apartment owners of the property concerned.

In Clause No.11(2) appointment of staff is provided. By this clause following provision has been embodied:

a) A Board may appoint other officers and employees to assist it in efficient discharge of its business under the Act and these Bye-laws. Such officers and employees may be paid such remuneration or allowances as may be determined by the Board.

b) A Board shall, subject to the approval of the Association determine the terms and conditions of service of its officers and employees referred to in Sub-Clause (a).

Thus in Clause 11(1)(a) officers have been meant as the President, Secretary, Treasurer and others. These persons are basically owners in a
property and elected by all owners. But "officers" as described in Clause 11(2) are paid staff and these persons can not be equated with "officers" as described in Clause 11(1)(a). These terminologies of "officers" in two Sub-Clauses are confusing and mingled.

So the "officers" described in Clause 11(2)(a) should be termed otherwise to distinguish two categories of persons. The "officers" described in Clause 11(1)(a) may be termed as "office bearers" and the "officer" described in Clause 11(2)(a) may be retained as is now.

The West Bengal Apartment Ownership Bye-laws, 1974 gives rise to acceptance of registration letter submitted by an officer of a Board of an Association and the procedure how resignation shall be accepted and in his place another officer of a Board shall be elected.124 The Clause of the West Bengal Apartment Ownership bye-laws, 1974 states as follows:

The President, Secretary and any other elected officer may resign his office any time by a notice to the Board. On receipt of the notice, the Board shall as early as possible at a meeting consider the matter and on the resignation being accepted shall forthwith elect another officer from amongst the Managers of the Board in place of one who has resigned.

From the above, it is observed that if all the officers including other Managers of the Board resign, there is no provision how the vacuum can be filled. In such a situation, to whom they will submit resignation letter?
So, there should be a provision for submission of resignation by all officers and Managers to the Competent Authority. The Competent Authority may, after a summary inquiry, accept the resignation and appoint an Administrator in accordance with Section 16B, the West Bengal Apartment Ownership Act, 1972.

### 4.3.7 Control and Supersession:

The West Bengal Apartment Ownership Act, 1972 provides for control and super session of a Board of Managers. According to that provision if the Association of Apartment owners having right to be exercised by the Manager or the Board of Managers fails to perform its functions under this Act or the Bye-laws made thereunder, the Competent Authority may give to it such directions as that Authority considers fit.

By above provision of Section 16B(1), the competent Authority has ample power to give directions. But if any directions are contravened, there is no provision how the direction can be executed or effected. Because the penalty Section of the Act is Section 16A in which penalty may be imposed for contravention of Section 2, Section 7 or Section 8, any provision of the Bye-laws and any covenant, condition or restriction set forth in the declaration to which he is subject or a party. Therefore, there is no way of imposing penalty or taking any civil action against contravention of the direction as may be passed by the Competent
Authority under Section 16B of the Act. Moreover, in the Bye-laws also, there is no provision for contravention of the direction of the Competent Authority. Only this is a provision to supersede the Board of Managers but this is a remote remedy and weak also.

Hence, the specific provision should be inserted in the Act or, in the Bye-laws to execute the directions of the Competent Authority effectively and for contravention of such direction, the responsible Manager should be penalised after an opportunity being given to him of hearing.

Now under Section 16B of West Bengal Apartment Ownership Act, 1972, the Competent Authority has been empowered to remove the Manager or supersede the whole Board of Managers and appoint any member of the Association or any employee of the West Bengal Government as Administrator to perform the functions of the Manager or the Board of Manager.

In Section 16B(2), the Manager or the Board of Management may be either removed or superseded. If the property is managed by a Manager, he may be removed. But if the property is managed by a Board of Manager, the Board may be superseded. In the Bye-laws of the Association of apartment owners, there is no provision in favour of a single Manager to function in place of a Board of Managers. Of course by Section 5(6), "The
Association of Apartment owners shall have right, to be exercised by the Manager or the Board of Managers on behalf of the Association...."

Thus it is permitted by Section 5(6) and Section 16B(2) of the Act, only one person called Manager can function on behalf of an Association. Otherwise a Board of Managers shall exercise rights on behalf of an Association.

But in the Bye-laws, Clause 5 gives rise to constitution of a Board and its functions. According to Clause 5(1), there shall be a Board of Managers in respect of each Association to carry on and manage the affairs and business of the Association to exercise all such powers of the Association as are not required to be exercised by the Association in a general meeting.

Therefore, there is no scope in Bye-laws to confer power of a Board to sole Manager to carry on and manage the affairs and business of the Association.

Hence, it is expedient to amend Section 5(6) and Section 16B(2) to the extent that the “Manager” shall be omitted.

The provisions of Section 16B(2) is not exhaustive. Because, the rights and duties of the Administrator must be to form another Board of Managers and if he can not constitute such a Board within 3 years on any unavoidable situation, there should be some way or provision to extend the
maximum period of three years by exemption of the general provision. Otherwise the property concerned should be left out of the purview of the Act by way of canceling the declaration originally executed and registered under Section 2 of the Act.

Moreover, when an employee of the State Government is appointed an Administrator, some remuneration should be fixed for his job, if this is additional to his normal duties. For action of the Competent Authority in superseding a Board of Managers, if the Board becomes aggrieved, there should have some provisions for appeal to the State Government in Housing Department against the supersession of the Board. Besides, the Competent Authority should be empowered to change the Administrator and in case of a property with a considerable number of apartments, a Board of Administrator consisting of more than one person may be appointed for pulling up volume of works therein.

There should also remain a provision by which the Competent Authority may be empowered to constitute a Board of Managers superseding the existing Board in lieu of appointing an Administrator. The power of the Competent Authority to exercise Section 16B(2) should be originated from his own initiation i.e. suo-moto or from any complaint lodged by some owners of the apartment against the Board. Therefore, Section 16B(1) and Section 16B(2) should be more comprehensive and workable on the part of the Competent Authority.
Moreover, during taking action under Section 16B(1) or under Section 16B(2), the Competent Authority may observe that some Manager of the Board are liable for any act detrimental or prejudicial to the interest of the Association of apartment owners. For such acts of the Manager, the Competent Authority should debar him for a certain period not eligible to become Manager of subsequent Boards and simultaneously institute a quasi criminal case against him. For the insertion of that provision Section 16B as a whole should be a subject of Section 16A for the purpose of imposing penalty upon liable persons.

4.3.8 Common Expenses:

“Common expenses” has been interpreted as “expenses of administration, maintenance, repair or replacement of the common areas and facilities and all other sums assessed against the apartment owners by the Association of Apartment owners”.

This assessment of the share of common expenses has been provided in the Bye-laws. According to the Bye-laws, every apartment owners of the property shall be assessed with such sum, being his share of the common expenses for the year as may be determined by the Association concerned to defray the common expenses which include an Insurance Premium and any repair and reconstruction work in case of hurricane, fire, earthquake or any other kind of hazard or calamity.
The assessment shall be made pro-rata according to the value of the apartment unit as specified in the Declaration in pursuance of the provision of Clause (g) of Sub-Section (1) of Section 10.\textsuperscript{127}

Hence, from the above provisions, it is observed that common expenses are assessed pro-rata according to the value of each apartment unit is specified in the Declaration. But such common expenses have been defined in Section 2(e) at various items like:

i) Administration.

ii) Maintenance.

iii) Repair of common areas and facilities.

iv) Replacement of common areas and facilities.

v) All other sums which may be assessed by the Association of Apartment owners.

But there are some ingredients of administration or maintenance which are in regular nature and perennial and expenses of which do not depend on the valuation of apartment. Those are among others:

i) Consumption of water.

ii) Garbage clearing from the premises of the property.

iii) Security arrangements.
iv) Stationary and postage.

v) Electricity in common areas like stair case, paths etc.

These expenses should be equally divided among the number of apartments.

Other items like repair or replacement of common areas and facilities would require occasional expenditure. The pro-rata distribution of such expenses on the valuation of each apartment is not justified. But, in many cases, it is found that roof of a building requires repairing. The top apartment is thereby affected by the damaged roof. The expenses of repairing are to be borne ordinarily by the top apartment owner. But, if in the Declaration, provision is given as to how expenses of such repair shall be met up, there may not arise dissatisfaction or any controversy among the owners. So, before hand at the time of execution and registration of such a Declaration, conditions and terms of repairing roof and any other common areas and facilities should be included. For the purpose of repair or replacement of common areas and facilities, the Association may utilise some portion of common areas and facilities to earn some compensation out of it and make a permanent fund.

If any apartment owner does not pay arrears common expenses, steps can be taken against him under Clause No.24 of the Bye-laws.
According to that provision for non-payment of dues of common expenses, the Board of Managers can take steps of which prosecution of the defaulting owner is one. Other steps may be taken by the Board as may be considered necessary.

Therefore, under Clause No.24 of the West Bengal Apartment Ownership Bye-laws, 1974, Board of Managers may take recourse of Section 16A of the Act for punishment. The punishment is prescribed as a fine which may extend to Rupees one thousand or to a term of imprisonment which may extend to six months or to both and in case of continuing contravention, to additional fine which may extend to rupees fifty for every day during which such contravention continues after conviction for the first such contravention.

But the above provision is for a quasi-criminal case. In this case the Magistrate will take cognizance on the prayer of the Board of Managers or an aggrieved owner or the Competent Authority. It has been laid down in Criminal Procedure Code, 1904 that all offences under any other laws shall be investigated, inquired into, tried and otherwise dealt with according to the provisions (i.e. the provisions of the criminal procedure code), but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.
In Section 16A of the West Bengal Apartment Ownership Act, 1972 there is no specific procedure detailing the manner of investigation. Therefore, the offences under this Act are to be tried according to the provisions of Criminal Procedure Code in Summons cases. Evidently so the offences are to be taken as bailable and non-cognizable.

Sub-Section (3) of the above Section 16A lays down the provisions for civil action under Section 6, 15 and 16. This shall not affect in any way the provision for Criminal action under Section 16A of the act. But this Sub-Section (3) of Section 16A does not include any clause of the Bye-laws as framed by the Competent Authority, though Section 16A (1) and Section 16A(2) are applicable.

It is very important to note that Sections 6, 15 and 16 lay down an action in a proper case and the apartment concerned to be charged for common expenses. The Section 6 of the West Bengal Apartment Ownership Act, is this in brief:

Each apartment owner shall comply strictly with the Bye-Laws and with the convents, conditions and restrictions set forth in the Declaration. Failure to comply with any of the same shall be a ground for an action to recover damages or for other relief or relieves.

Hence, there are provisions for relisation of common expenses and other charges in Section 6, 15 and 16 of the Act but there is no indication
in which forum, such cases shall be agitated and effected. For a defaulted amount of common expenses of a meager amount (say Rupees 200), the Apartment Association can not spend money of Rupees 5000, in a Court of Law. To obviate this, a speedy and cheap proceedings for recovery of such sums due from a defaulter owner should be adhered to in the law. This can only be done by empowering the Competent Authority to determine and this shall be deemed to be a public demand which may be recovered by a certificate case. Such certificate case may be filed before the Certificate Officer (ordinarily who is a Deputy Magistrate) empowered under the Bengal Public Demand Recovery Act, 1913. Otherwise the order of the Competent Authority directing for payment of defaulted common expenses under Clause 24 read with Section 15 and Section 16 may be recoverable by any Civil Court having jurisdiction, in the same manner as a degree of such Court upon application of the Association or the judgement holder.

4.4 Salient Features of W. B. Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993:

Initially the West Bengal Apartment (Regulation of Construction and Transfer) Act, 1972 West Bengal Act XVII of 1972 was promulgated on 5th June 1972 to regulate the Construction and Transfer of Apartments in group buildings which were at that time being constructed by private individuals or entrepreneurs or companies and statutory Government bodies like West Bengal Housing Board.
But, in 1994, the above Act has been replaced by the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Act, 1993. It came into effect from 9th August 1995. This Act stipulates the promoters who construct or cause to be constructed a building on a plot of land in transferring such building by sale, gift or otherwise to any other person or to any Company, a Co-operative Society or Association of persons. Promoters include any Board, Company, Corporation or Firm or other Association of persons.

In the previous law of 1972, there was no compulsion for a promoter for registration of his name and for permission for construction of any building. Now in the present law of 1993, a promoter shall get certificate of registration or the permission for construction of building to be granted under Section 3 of the new Act and such certificate shall remain valid for three years ordinarily. The period may be extended by the State Government upto a total period of five years. The Authorised Officer is the competent person to whom an application as provided in Section 3(1) read with Rule 3 of the West Bengal Building (Regulation of Promotion of Construction and Transfer by Promoters) Rules, 1995 shall be submitted by an intending promoter at least 90 days before the commencement of the construction of any building. The Authorised Officer is an officer not below the rank of Deputy Magistrate and Deputy Collector appointed by the State Government in the Housing Department. After having a
registration certificate, the promoter is to get permission under Rule 4 to construct any block or building or flat or to convert a building into flats. Fee for Registration is Rupees 500.\textsuperscript{131}

For application for getting permission of construction fees are Rupees 2000, Rupees 4000 and Rupees 5000 for buildings of estimated expenditure upto Rupees 20,000,000, exceeding 20,000,000 but below Rupees 50,000,000 and exceeding Rupees 50,000,000 respectively.

Section 10 of the above Act directs a promoter to take steps for formation of Co-operative society. According to this Section if a minimum number of persons required to form a Co-operative Society have formed an organisation and have taken flats, the promoter shall within a period of two months from the date of taking flat by the last member of such organisation, submit an application to the Registrar for registration of such organisation as a Co-operative Society (by whatever name called) and shall join, in respect of the flats which have not taken, in such application for membership of the Co-operative Society.

It is now to comment that the Section 10 is conflicting with Section 2(g). Because, a promoter constructs or causes to be constructed a building for the purpose of transfer of such building, according to Section 2(g) by sale, gift or otherwise to any other person or to a Company, Co-operative Society or Association of persons. But by Section 10, the promoter is to
take steps for registration of a Co-operative Society. As a Co-operative Housing Society may be registered with a minimum no. of 8 flat owners, then in respect of any building or buildings on a specific plot of land comprising equal to or more than 8 flats, a Co-operative society shall be registered. It is further to comment that in any building with less than 8 flats for which a Co-operative Housing Society can not be registered, the property may come under the purview of the West Bengal Apartment Ownership Act, 1972.

So, the Section 10 should be amended in following ways:

1) Section 2(g) of the Act should be amended so that there remains no conflict of this Section with Section 10.

2) The organisation comprising flat owners should either be registered under the West Bengal Co-operative Societies Act, 1983 or the property of this organisation should come under the purview of the West Bengal Apartment Ownership Act, 1972 by forming an Association of all.

3) The organisation shall take steps in forming Co-operative Society or subject the property under the Apartment Ownership Act. The promoter shall have nothing to do in such purpose. He may take leading part in it. For such proposed amendment, suitable steps should be taken.
It has been discussed supra that at least four apartment owners are required to form such an Association as per Clause 3(2) of West Bengal Apartment Ownership Bye-laws, 1974. Hence, it is not clear from the Building Act, 1993, how less than 4 owners of flats in a building shall function when they can not form a Co-operative Housing Society or come under the purview of the West Bengal Apartment Ownership Act, 1972 and even they can not form a society under the West Bengal Societies Registration Act, 1961 as at least seven persons are required to form a society under Section 4 of the later Act.

Besides, in Section 10 of this Building Act, 1993, minimum no. of persons required to form a Co-operative can get a Co-operative Housing Society registered. But if the prospective owners of the remaining flats do not, after purchasing their flats, want to become members of the Co-operative Society, there will arise conflict and complication. For an example in a specified project 500 flats are constructed. 8 persons purchased 8 flats and they got a Co-operative Housing Society registered. These 8 persons shall control rest 492 persons in induction of membership of the society. This is not at all desirable. Besides, these 492 persons may afterwards try to form another Co-operative Housing Society.

Therefore, at the time of entering into a written agreement for sale with each person under Section 7, there should remain compulsory provision that each such person shall be bound to become a member of the
Co-operative Housing Society, Rule 8 of the West Bengal Buildings (Regulation of Promotion of Construction and Transfer by Promoters) Rules, 1995 prescribes 12 particulars to be incorporated in, and the documents (or copies) to be attached to, the Deed of Agreement under Section 7 of the Act. With such particulars, another information for compulsory membership in the Co-operative Housing Society to be formed after getting possession of the flats should be included in Rule 8 above.

4.4.1 Adjudication of Disputes:

Section 6 of the West Bengal Building (Regulation of Promotion etc.) Act, 1993 provides a right to a purchaser to make an application in prescribed form to such officer as the State Government may appoint for adjudication of disputes under Rule 7. The application for adjudication of dispute under Section 6 of the Act shall be preferred in forms “G” before the Authorised Officer who shall furnish the promoter with a copy of such application fixing a date for a written reply and shall thereafter fix a date of hearing and notify the same to the applicant and the promoter who may represent himself personally or by an authorised representative. The Authorised Officer, after hearing the parties, shall come to a decision which shall be building on both parties.

The Memorandum of appeal under Section 5 of the West Bengal Building (Regulation of Promotion of Construction etc.) Act, 1993 is to be
preferred by an aggrieved person to the appellate authority in a prescribed form.

In respect of the appeal, it is to comment that for any dispute between a purchaser and a promoter, the purchaser can file a dispute before the Authorised Officer. But, there should be also provisions giving rise to right to the promoter to file a dispute under Section 6 also. Because, there are instances when for the default of the purchaser to make timely payment, the construction may get a set back. For this, other purchasers who contribute timely payment towards construction becomes affected. Besides, there should be mentioned a time limit within which a purchaser or a promoter (if he is given right to prefer a dispute) shall file a dispute under Section 6. The authority of the Authorised Officer to entertain a dispute should be fixed up to a period after delivering possession of flats or execution of conveyance by promoter under Section 11 read with Rule 12. There should be also a mention of eligible parties to a dispute. The parties may be a purchaser and a promoter. A dispute may be filled by them against each other. A purchaser should also prefer a dispute against another purchaser. Besides, there is no time limit for adjudication of a dispute under Rule 7 or under Section 6. The time limit for such adjudication may be 3 months or 6 months initially and this may be subject to extension if necessary depending upon the volume or gravity of the dispute.
Like appeal under Section 5 read with Rule 6 preferred by an aggrieved promoter by an order of the authorised officer under Section 3(5) for refusal to register the name of the applicant promoter or to grant permission to construct the building or Section 4(2) in the event of cancellation of certificate of registration by the Authorised Officer, provision for appeal against a decision of a dispute by the Authorised Officer should be embodied. Any purchaser filling or defending a dispute or any promoter filling a dispute or defending a dispute should be given a right to prefer an appeal to the Appellate Authority i.e. the State Government in the Housing Department. The Secretary or Special Secretary of the Department may hear the appeal following similar procedure as in Rule 6.

4.4.2 Restriction of a Promoter:

From the definition under Section 2(g) it is to comment that, a promoter shall construct or cause to be constructed a building on a plot and transfer the whole subsequently but by this definition he has no right to retain any flat for his own. On the other hand, from the definition under Section 2(h), a “purchaser” shall enter under Section 7 into an agreement with the promoter for the purchase of a flat. So, a promoter can not be a purchaser. If a promoter wants to possess a flat, there should be some provisions in this Act or the Rules for this purpose. “Promoter is a person who constructs under Section 2(g)(ii) in which a person who transfers by
sale, gift or otherwise the building. Hence, the true owner of the building can also not retain a flat in his name. So, there should also remain a provision in the Act or the Rules giving rise to a right of such promoter to possess a flat also.

4.5 Summing up of Co-operative Law and Apartment Ownership Law:

The Group Housing in the West Bengal Co-operative Societies Act, 1993 and its Rules thereunder is guided by a Special Chapter provided in the said Act and Rules. Co-operative Housing Societies are an extraordinary type of society unlike other types of Societies like Primary Agriculture Co-operative Society (PACS), Primary Co-operative Agricultural Marketing Society (PAMS), Co-operative Bank, Milk Producers’ Co-operative Society etc. In other States of India, all types of Co-operative Societies are governed by a single law. There is no extra chapter for Group Housing. The State of West Bengal only introduced a special chapter, though all provisions are not adequate to solve several problems arising in Co-operative Housing Societies. The areas of amendments have been identified in this chapter both in Co-operative law and Apartment Ownership law. In Co-operative Sector the area is more vast than in the Apartment Ownership Sector. Because, in Co-operative Sector, Group Housing starts from initial stage i.e. from acquiring land on which the Co-operative Society shall erect either individual building or
multi-storied building whereas in the other Sector, common function starts after acquiring ownership of apartments or flats in a building which the owners subject it under the purview of Apartment Ownership Act. That means, in Co-operative Sector, procurement of land, construction thereon, allotment to individual persons, maintenance of buildings with common areas and facilities and its services are the serial steps of a Co-operative Housing Society. But in the private sector, only maintenance and services are the main function of the apartment Owners’ Association. Therefore, the main thrust in Group Housing should be imposed on the Co-operative Housing Society.

In private sector, West Bengal Apartment Ownership Act, 1972 is applicable to a specific type of immovable property such as apartment or flats, the sole owner or owners of which shall execute and register a Declaration under Section 10. Apartments for mainly residential purposes in a Group Housing with owners who make a declaration, which must also be registered, come within the purview of this Act.

The sine quo non of application of the West Bengal Apartment Ownership Act to apartments in a Group Building is the submission of a declaration and registration thereof on approval of the Competent Authority. An apartment owner owns not only the apartment but common areas and facilities. But he is entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration.
The Act lacks in some areas which have been discussed supra. The loopholes, therefore, are to be plugged by amending the present provisions of the above Act in some places.
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Endnotes:


4. Section 85, WBCS Act, 1983 on Membership or Promotership of Co-operative Housing Society.


6. Rule 135(2), ... ibid ...

7. Section 70(2) W.B.C.S. Act, 1983.


11. Rule 131(a) ... ibid ...

12. Rule 131(a) ... ibid ...


15. Rule 141 ... ibid ...

16. Rule 11 ... ibid ...

17. Rule 9(1) ... ibid ... and Form I of First Schedule.


20. Rule 30(b), ...ibid...

21. Rule 149, ... ibid ...

22. Section 85(2) W.B.C.S. Act, 1983.


24. Rule 132, ... ibid ...


27. Rule 133(2) ... ibid ...

28. Rule 133(2) Proviso ... ibid ...

29. Rule 133(3) ... ibid ...

30. Rule 133(4) ... ibid...


33. Rule 18 ... ibid ...

34. Rule 23 ... ibid ...
35. Rule 24 ... ibid ...


37. Rule 25, ... ibid ...

38. Section 60, W.B.C.S. Act, 1983.

39. Proviso to Section 60(2)(a) and Proviso to Section 60(2)(b) ... ibid...


42. Rule 134(2), ... ibid ...

43. Section 13(2), Proviso, W.B.C.S. Act, 1983.

44. Section 87(2), ... ibid ...

45. Rule 139(f), W.B.C.S. Rules, 1987

46. Section 3(d), The W.B. Apartment Ownership Act, 1972.


48. Rule 152(1), ... ibid ...

49. Rule 140, ... ibid ...

50. Rule 137(1) ... ibid ...

51. Rule 137(2) ... ibid ...

52. Rule 137(3) ... ibid ...

53. Section 95, W.B.C.S. Act, 1983.
55. Rule 172, ... ibid ...
56. Rule 179, ... ibid ...
58. Section 96(5), (6) ... ibid ...
59. Section 87(1), ... ibid ...
60. Section 87(2) ... ibid ...
61. Section 60(2)(a), proviso and Section 60(2)(b) proviso, West Bengal Co-operative societies Act, 1983.
62. Section 87(3) ... ibid ...
63. Section 87(5) ... ibid ...
64. Section 69. W.B.C.S. Act, 1983.
65. Section 12, Indian Contract Act, 1872.
66. Section 64, ... ibid ...
67. Section 30, Indian Partnership Act, 1932.
68. Section 2(18), W.B.C.S. Act, 1983.
69. Section 2(9) ... ibid ..
70. Section 2(2) ... ibid ...
71. Section 33 ... ibid ...
73. Rule 133(4) ... ibid ...

74. Rule 139, ... ibid ...

75. Bye-law No.52(1) of the Model Bye-laws of a Co-operative Housing Society.


77. Appeal No. 25/2000

78. Clause 8(c) of Bye-laws of the Co-op. Housing Society.

79. Section 85(9), W.B.C.S. Act, 1983.

80. Notification No.2522 Co.op/A/3P-20/2001 issued by Co-operation Department, Govt. of West Bengal.


82. Serial 9 of Third Schedule, ... ibid ...

83. Section 87, ... ibid ...

84. Section 3 of the W.B.C.S. (Amendment) Act, 1995

85. Section 81 of W.B.C.S. Act, 1983.

86. Section 89 ... ibid ...

87. Section 2(g), W. B. Premises Tenancy Act, 1997.

88. Section 2(e) ... ibid ...

89. Section 85(1), W.B.C.S. Act, 1983.

90. Procedure followed by the Registrar of Co-operative Societies.


94. Form No. XII of Schedule 1 appended to the W.B.C.S. Rules, 1987 read with Rule 70(ii).

95. Section 69(4), W.B.C.S. Act, 1983.

96. Section 2(28), ... ibid ...

97. Section 80(1)(b) ... ibid ...

98. Section 80(2) ... ibid ...


100. Section 137(1), W.B.C.S. Act, 1983.


102. Section 29, The Hindu Succession Act, 1956

103. Section 8, ... ibid ...

104. Section 85(12), W.B.C.S. Act, 1983

105. Section 136, ... ibid ...


107. Section 3(a) ... ibid ...

108. Section 3(i) ... ibid ...

109. Section 3(d) ... ibid ...

110. Section 4A ... ibid ...
111. Articles 254(2) The Constitution of India.

112. Section 11, the W.B. Apartment Ownership Act, 1972.

113. Section 3(k) ... ibid ...


120. Clause 3(2) ... ibid ...

121. Clause 8 ... ibid ...

122. Clause 9(3) ... ibid ...

123. Clause 11 ... ibid ...

124. Clause 12 ... ibid ...


126. Section 2(c) ... ibid ...


130. Section 2(g), West Bengal Building (Regulation of Promotion of Construction and Transfer by promoters) Act, 1993.