

Supreme Court of India

O. N. Bhatnagar vs Smt. Rukibai Narsindas & Ors on 21 April, 1982

Equivalent citations: 1982 AIR 1097, 1982 SCR (3) 681

Author: A Sen

Bench: Sen, A.P. (J)

PETITIONER:

O. N. BHATNAGAR

Vs.

RESPONDENT:

SMT. RUKIBAI NARSINDAS & ORS.

DATE OF JUDGMENT 21/04/1982

BENCH:

SEN, A.P. (J)

BENCH:

SEN, A.P. (J)

FAZALALI, SYED MURTAZA

VENKATARAMIAH, E.S. (J)

CITATION:

1982 AIR 1097                      1982 SCR (3) 681

1982 SCC (2) 244                1982 SCALE (1) 377

CITATOR INFO :

F                1989 SC 81 (7,8)

F                1989 SC 122 (6,7,9,14)

F                1989 SC 295 (4,13)

E&R            1990 SC 1563 (15)

D                1991 SC 626 (12,13)

ACT:

Maharashtra Cooperative Societies Act, 1960 Section 91(1)-"Dispute touching the business of the Society"-Whether a claim for ejection by a Housing Cooperative Society of an occupant of a flat who had been let into possession of the premises under an agreement of leave and licence executed between him and a member of the Society is a "dispute" referable to section 91(1) of the Act read with byelaws 66 & 68(a).

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 Sections 5(4A), 13, 15A and 28, Scope of-Whether the "non-obstante" clause in Section 28 of the Rent Act has an overriding effect over the non-obstante clause in Section 91(1) of Societies Act. Applicability of Section 15A of the Rent Act Resjudicata -Section 11 of the Civil Procedure Code.

HEADNOTE:

Shyam Cooperative Housing Society Limited is constituted under the provisions of the Maharashtra Cooperative Societies Act, 1960 as a tenant copartnership type housing society. Respondent No. 1 Smt. Rukibai N. Bhavnani who is a copartner tenant member of flat No. 52 in building 5A in the housing colony known as "Shyam Niwas" situate at Warden Road, Bombay, inducted the appellant in the said flat under an Agreement of Leave and Licence dated November 28, 1961 after the appellant was accepted by the Society as a "nominal member". The agreement was renewed from time to time and the period of the last agreement expired on February 28, 1965. By her notice dated March 31, 1965, respondent No. 1 called upon the appellant to vacate the premises as his occupation of the premises had become unlawful after termination of the licence. The appellant failed to comply with the demand and therefore, respondent No. 1 preferred the claim for possession before the cooperative court which by its judgment dated April 28, 1978 made an Award against the appellant for possession of the flat in dispute and for arrears of rent and mesne profits amounting to Rs. 30,000 against the award the appellant filed an appeal before the cooperative Appellate Court but it was dismissed in January 1979. Thereafter the appellant filed a Writ Petition in the High Court in February 1979 and it was dismissed in March 1981. The Letters patent Appeal preferred by the appellant was also rejected. Hence the appeal by special leave.

Dismissing the appeal, the Court,

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HELD : (1) The claim by the society together with such member for ejection of a person who was permitted to occupy having become a nominal member

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thereof, upon revocation of licence, is a "dispute" falling within the purview of Sec. (1) of the Maharashtra Cooperative Societies Act, 1960. [696 D-E]

Deccan Merchant's Cooperative Bank Ltd. v. M/s. Dalchand Jugraj Jain & Ors. [1969] 1 SCR 887, distinguished.

2:1 The proceedings under section 91(1) of the Maharashtra Cooperative Societies Act, 1960 were not barred by the provisions of Section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The two Acts can be best harmonised by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act should apply. But, where the parties admittedly do not stand in the jural relationship of landlord and tenant, as here the dispute would be governed by Section 91(1) of the Societies Act. The appellant by virtue of his being a nominal member, acquired a right to occupy the flat as a licensee, but his rights were inchoate. [697 B-D]

Sabharwal Brothers and Another v. Smt. Guna Amrit

Thandani of Bombay, [1973] 1 SCR 53 discussed and distinguished.

2:2 The two enactments deal with two distinct and separate fields and therefore the non-obstante clause in s. 91(1) of the Act and that in s. 28 of the Rent Act operate in two different planes. The two legislations pertain to different topics of legislation. It will be noticed that s. 28 of the Rent Act proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under that Act as to parties between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of title, such as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. The appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by the respondent No. 1 under s. 91(1) of the Act and those allegations must be taken to be true. The respondent No. 1 unequivocally asserts that the parties stood in the relation of licensor and licensee and that fact is clearly borne out by the terms of the agreement of leave and licence as between the parties. The burden was on the appellant to establish that he had the status of a "tenant" within the meaning of s. 5(11) of the Rent Act, as it then stood, and that burden he has failed to discharge. If, therefore, plaintiff in the plaint does not admit a relationship which would attract any of the provisions of the Act on which the exclusive jurisdiction given in s. 28 depends, the defendant cannot by his plea force the plaintiff to go to a forum where on averments the claim does not lie. [689 A-E]

3:1 Upon the terms of Sections 5(4A) and 15A of the Rent Act, it is clear that the appellant is not entitled to the protection of Section 15A. The sine qua non for the applicability of s. 15A of the Rent Act is that a licensee must be in occupation as on Feb. 1, '73 under a subsisting licence. It is not disputed that the appellant does not answer that description since the agreement of leave and licence in his favour admittedly stood terminated by the notice of the respondent No. 1 dated March 31, 1965. That being so, the appellant is nothing but a rank trespasser and is not entitled to the protection of s. 15A of the Rent Act and cannot therefore plead the bar of s. 28(1) thereof. [690 F-H]

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3:2 As a result of the introduction of s. 15A and s. 5(4A) of the Rent Act by Maharashtra Act 17 of 1973, the licensee of any premises or any part thereof in a building vesting in or leased to a cooperating housing society registered or deemed to be registered under the Act, who was in occupation of such premises under a subsisting licence as on Feb. 1, 1973, is by a legal fiction, deemed to be a

tenant and thus has the protection of the Rent Act. In such a case, the dispute between a licensor and a licensee relating to possession of the premises of a flat would attract s. 28 read with ss. 15A and 5(4A) of the Rent Act and fall outside the purview of the Registrar's jurisdiction to adjudicate upon such dispute under s. 91(1) of the Societies Act. In the instant case the question does not arise. [691 A-C]

3:3 A bare reading of the agreement of leave and licence is clearly indicative of the fact that the appellant was a licensee. Admittedly his occupation of the flat was not as a tenant but as a licensee. The question whether or not the appellant was a licensee of the flat or a tenant thereof was directly and substantially in issue between the parties in the suit. The finding that he was not a tenant, but had only the status of a licensee operates as resjudicata between the parties. The appellant having failed in his suit for declaration of his alleged status of a tenant brought in the court of small causes cannot be permitted to reagitate the same question in these proceedings and (iii) the licence of the appellant having been terminated by respondent No. 1, by her notice dated March 31, 1965, the appellant was not in occupation of the flat on Feb. 1, 1973 under a subsisting licence and therefore did not acquire the status of a tenant under section 15A and is, not protected under section 13 of the Rent Act. [691 E-H; 692 A]

4. The respondent No. 2-Society being a copartnership type housing society, having let flat no. 52 to the respondent no. 1 as a copartner tenant-member, was vitally interested in ensuring that no stranger is in unauthorised occupation of the flat after the expiry of the term of the licence. It was therefore rightly transposed as a co-disputant in the proceedings under section 91(1) of the Societies Act, and could raise a dispute regarding the unauthorised occupation of the premises by the appellant after the revocation of the licence. [693 D-G]

#### JUDGMENT :

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1843 of 1981.

Appeal by special leave from the judgment and order dated the 21st April, 1981 of the Bombay High Court in Appeal No. 168 of 1981.

H.H. Advani, P.R. Ramasesh and Manu Iyengar for the Appellant.

S.N. Kackar, V.K. Panwani and Girish Chandra for the Respondents.

The Judgment of the Court was delivered by SEN, J. This appeal by special leave directed against the judgment of the Bombay High Court dated April 21, 1981 raises a question of some importance. The question is whether a claim for ejectment by a housing cooperative society, of an occupant of a flat who had been let into possession of the premises under an agreement of leave and licence executed between him and a member of the society, by virtue of his being a nominal member thereof, is a 'dispute touching the business of the society' within the meaning of sub-s. (1) of s. 91 of the Maharashtra Cooperative Societies Act, 1960 (for short 'the Act').

The material facts giving rise to this appeal are as follows. The respondent No. 2 herein, Shyam Cooperative Housing Society Limited is constituted under the provisions of the Maharashtra Cooperative Societies Act, 1960 as a tenant co-partnership type housing society to which Regulations in Form-A apply viz. Regulations relating to tenancies to be granted by the society to members in respect of houses held by the society. It owns and manages two housing colonies known as 'Shyam Niwas' and 'Navik Niwas' at Warden Road, Bombay. The society continues to be governed by Regulations in Form-A ever since they were adopted by it after approval by the Registrar of Cooperative Societies in 1950. It appears that in 1954 the Directors passed a resolution for the introduction of Regulations in Form-B but it was never implemented. The respondent No. 1 Rukibai N. Bhavnani is a co-partner tenant member of flat No. 52 in building No. 5-A in the housing colony known as 'Shyam Niwas' situate at Warden Road, Bombay. The respondent No. 1 inducted the appellant in flat No. 52 under an agreement of leave and licence dated November 28, 1961. The byelaws of the society provide that no member can part with his possession of the flat under an agreement of leave and licence to another except with the approval of the society and unless such licensee becomes a nominal member thereof. The respondent No. 1 and the appellant accordingly applied to the society on December 8, 1961 for accepting the appellant to be a nominal member. The respondent No. 2 society passed a resolution No. 90 on December 15, 1961 accepting the appellant as a nominal member. The leave and licence agreement executed by the respondent No. 1 was renewed from time to time and the last agreement was executed on January 10, 1965, the term of which was to expire on February 28, 1965. By her notice dated March 31, 1965 the respondent No. 1 called upon the appellant to vacate the premises as his occupation of the premises had become unlawful after termination of the licence. The appellant failed to comply with the demand and has remained in unauthorised occupation of the flat for all these years.

After termination of the agreement, in May 1965, the respondent No. 1 Smt. Rukibai N. Bhavnani claiming to be a co-partner tenant member of the society and as such holder of flat No. 52, brought proceedings against the appellant before the District Deputy Registrar Cooperative Societies Bombay under s. 91(1) of the Act for his eviction and for recovery of arrears of compensation and mesne profits, impleading the society as Opponent No. 3. On receipt of the claim under s. 91(1) the Assistant Registrar, Cooperative Societies issued notice to the appellant for the purpose of satisfying himself that a dispute under that section existed. The appellant however did not appear before the Assistant Registrar who was seized with the matter but instead filed an application before the Court of Small Causes, Bombay for fixing standard rent of the flat in dispute. These proceedings were stayed pending adjudication of the dispute by the Assistant Registrar. The Assistant Registrar in the meanwhile proceeded with the inquiry and after holding that such a dispute exist he referred the case to the Registrar's nominee for adjudication. The appellant did not challenge the decision of the

Assistant Registrar.

Before the Registrar's nominee the appellant filed his written statement and thereafter evidence of the parties was recorded. It appears that when the proceedings before the nominee were about to end he returned the papers to the Registrar as he did not want to proceed further in the matter. When the Registrar's nominee returned the papers, the Registrar assigned the case to a retired District Judge as an Officer on Special Duty to adjudicate upon the dispute under s. 91 of the Act, as by then the old system of such adjudication by the Registrar's nominees had been replaced by the appointment of Officers on Special Duty. Before the Officer on Special Duty the appellant made a demand for a de novo trial which was granted. Again, the evidence of both the parties was recorded and the matter reached the stage of argument but in the meanwhile, in April, 1970, the appellant brought a suit in the Court of Small Causes, Bombay for a declaration that he was a tenant of respondent No. 3 in respect of the flat in dispute and obtained a temporary injunction restraining respondent No. 1 from proceeding with her case before the Officer on Special Duty. Thus, the proceedings before the Officer on Special Duty remained stayed till April, 1972, when the suit filed by the appellant in the Court of Small Causes, Bombay was dismissed both on merits as well as on the ground that it was barred by limitation.

After the dismissal of the suit brought by the appellant, the proceedings before the Officer on Special Duty were revived in 1972. Meanwhile, the case had been assigned to another Officer on Special Duty, a retired Presidency Magistrate, for adjudication. Before him the appellant again demanded a de novo trial which was granted and therefore evidence had to be recorded afresh. During the stage of evidence, respondent No. 2 applied for and obtained leave to be transposed as a "disputant" as the Bombay High Court took the view that unless the society was a disputant the Registrar would have no jurisdiction to proceed under s. 91(1) of the Act. The Officer on Special Duty by his order dated August 27, 1973 rejected the application for transposition made by respondent No. 2. Thereupon, respondent No. 2 preferred a revision before the Maharashtra Cooperative Societies Tribunal which by its order dated February 8, 1974 allowed its application for transposition as a co-disputant. The appellant tried to assail the order of the Tribunal by a writ petition but a Division Bench of the High Court by its judgment dated January 9, 1976 declined to interfere. By this time the system of Officers on Special Duty was again replaced, now by the setting up of Cooperative Courts. After the dismissal of the writ petition, the proceedings initiated by respondent No. 1 were assigned to a Judge of the Cooperative Court, Maharashtra. Before him the original plaint was amended making necessary averments with respondent No. 2 as a co-disputant. Again the appellant asked for a de novo trial, but in view of the provisions of s. 91-A(4) his application was rejected. Respondent No. 1 was however resummoned for further cross examination and thereafter the appellant's evidence was recorded. In August, 1977 there was a change of the Judge of the Cooperative Court and the appellant repeated his prayer for a de novo trial but this application of his also rejected. The learned Judge of the Cooperative Court by his judgment dated April 18, 1978, made an award against the appellant for possession of the flat in dispute and for arrears of rent and mesne profits amounting to Rs. 30,000. Against the award the appellant filed an appeal before the Cooperative Appellate Court but it was dismissed in January, 1979. Thereafter the appellant filed a writ petition in the High Court in February, 1979 and it was dismissed in March, 1981 by a learned single Judge. The appellant unsuccessfully preferred a Letters Patent Appeal which was dismissed

by a Division Bench on April 21, 1981.

There are three questions to be determined in the appeal. They are : (1) Whether having regard to the fact that the parties stood in the relationship of landlord and tenant in respect of flat No. 52, the remedy of the respondent No. 1 lay by way of a suit for eviction before the Court of Small Causes, Bombay and not by a reference to the Registrar under s. 91(1) of the Act ? It is urged that the agreement of leave and licence was merely a colourable transaction for what in reality, was a lease and therefore the appellant was entitled to the protection from eviction under s. 13 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short 'the Rent Act' which is a special law dealing with the relationship of landlord and tenant and therefore the forum for trial is the Court of Small Causes which is a court of exclusive jurisdiction over such matters. It is said that the non-obstante clause in s. 28 of that Act has an overriding effect over the non- obstante clause in s. 91(1) of the Act. (2) Whether the respondent No. 2-society had any locus standi to make an application for transposition, even assuming that the appellant was not a tenant but a licensee : It is urged that the appellant was entitled to question the legality and propriety of the order of transposition made in revision by the Maharashtra State Cooperative Tribunal permitting the society to be impleaded as a co-disputant so as to bring the dispute within the purview of s. 91(1) of the Act. It is said that the respondent No. 2-society without first terminating the nominal membership of the appellant could not make a claim for his eviction from the flat in question (3) Whether a claim for ejectment of an occupant of a flat by a housing cooperative society having been let into possession of the premises under an agreement of leave and licence executed between him and a member of the society, by virtue of his being a nominal member thereof, is a 'dispute touching the business of the society' within the meaning of s. 91(1) of the Act ? We proceed to deal with these questions in turn.

The statutory provisions bearing upon these questions are set out below. The relevant provision of sub-s. (1) of s. 91 of the Act, prior to its amendment, provides :

"91(1)Notwithstanding anything contained in any other law for the time being in force, any dispute touching the.....business of a society, shall be referred by any of the parties to the dispute..... to the Registrar if both the parties thereto are one or other of the following :

(a) a society.....

(b) a member, past member or a person claiming through a member....."

Section 91(2) of the Act lays down that when any question arises whether for the purpose of sub-s. (1) any matter referred to for decision is a dispute or not, the question shall be considered by the Registrar whose decision shall be final. The Registrar is, therefore, required to decide as a preliminary issue the question whether the dispute is of the kind as between the parties in sub-s. (1). Unless he finds that the dispute falls within s. 91(1) of the Act he will have no jurisdiction to decide it. It also attaches finality to the decision of the Registrar on the preliminary issue. Section 91(3) states that save as otherwise provided under s. 91 (3) of the Act, no civil court shall have jurisdiction

to entertain any suit or other proceeding in respect of any dispute referred to in sub-s. (1).

Section 28(1), of the Rent Act insofar as material, reads :

"28(1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction

(a) in Greater Bombay, the Court of Small Causes Bombay, (aa) xx xx xx

(b) xx xx xx shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply...and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions and...no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question."

The two enactments deal with two distinct and separate fields and therefore the non-obstante clause in s. 91(1) of the Act and that in s. 28 of the Rent Act operate on two different planes. The two legislations pertain to different topics of legislation. It will be noticed that s. 28 of the Rent Act proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under that Act as to parties between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of title, such as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. The appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by the respondent No. 1 under s. 91(1) of the Act and those allegations must be taken to be true. The respondent No. 1 unequivocally asserts that the parties stood in the relation of licensor and licensee and that fact is clearly borne out by the terms of the agreement of leave and licence as between the parties. The burden was on the appellant to establish that he had the status of a "tenant" within the meaning of s. 5(11) of the Rent Act, as it then stood, and that burden he has failed to discharge. If, therefore, plaintiff in the plaint does not admit a relationship which would attract any of the provisions of the Act on which the exclusive jurisdiction given in s. 28 depends, the defendant cannot by his plea force the plaintiff to go to a forum where on averments the claim does not lie.

In our opinion, there is a felt need at the very outset to displace the appellant's apprehensions that the effect of upholding the judgment of the High Court would be to throw all licensees of residential flats in multi-storeyed buildings belonging to cooperative housing societies without any protection. The apprehensions, if we may say so, appear to be wholly unfounded. The Legislature was fully aware of the acute paucity of housing accommodation in the metropolitan city of Greater Bombay and other urban areas in the State, and also the fact that lessors of ownership flats were adopting a device of inducting tenants under the garb of an agreement of leave and licence which left the licensee with no protection. The Legislature therefore, stepped in and by Maharashtra Act 17 of 1973 the following provisions were inserted in the Rent Act. Sub-s. (1) of s. 15A of the Rent Act, as



introduced now, provides :

"15A(1) Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract, where any person is on the 1st day of February 1973 in occupation of any premises, or any part thereof which is not less than a room, as a licensee he shall on that date be deemed to have become, for the purposes of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) XX XX XX XX XX"

The term "licensee" as defined in s. 5(4A), insofar as material, reads :

"5. In this Act unless there is anything repugnant to the subject or context-

(4A) "licensee", in respect of any premises or any part thereof, means the person who is in occupation of the premises or such part, as the case may be, under a subsisting agreement for licence given for a licence fee or charge; and includes any person in such occupation of any premises or part thereof in a building vesting in or leased to a co-operative housing society registered or deemed to be registered under the Maharashtra Cooperative Societies Act, 1960; but does not include a paying guest, a member of a family residing together, a person in the service or employment of the licensor etc;.....and the expressions "licence, "licensor" and "premises given on licence" shall be construed accordingly."

It is clear upon the terms of these sections that the appellant is not entitled to the protection of s. 15A of the Rent Act. The Legislature in its wisdom has drawn a line at February 1, 1973 and laid down the condition that a licensee in occupation under a subsisting licence as on that date shall be deemed to be a tenant. The sine qua non for the applicability of s. 15A of the Rent Act is that a licensee must be in occupation as on February 1, 1973 under a subsisting licence. It is not disputed that the appellant does not answer that description since the agreement of leave and licence in his favour admittedly stood terminated by the notice of the respondent No. 1 dated March 31, 1965. That being so, the appellant is nothing but a rank trespasser and is not entitled to the protection of s. 15A of the Rent Act and cannot therefore plead the bar of s. 28(1) thereof.

As a result of the introduction of s. 15A and s. 5(4A) of the Rent Act by Maharashtra Act 17 of 1973, the licensee of any premises or any part thereof in a building vesting in or leased to a cooperative housing society registered or deemed to be registered under the Act, who was in occupation of such premises under a subsisting licence as on February 1, 1973, is by a legal fiction, deemed to be a tenant and thus has the protection of the Rent Act. In such a case, the dispute between a licensor and a licensee relating to possession of the premises of a flat would attract s. 28 read with ss. 15A and 5(4A) of the Rent Act and fall outside the purview of the Registrar's jurisdiction to adjudicate upon such dispute under s. 91(1) of the Act. Once this aspect is kept in view, there need be no apprehension as expressed by learned counsel for the appellant that the effect of upholding the

judgment of the High Court would be to throw all licensees of residential flats in multi- storeyed buildings belonging to cooperative housing societies without any protection.

It would be convenient to deal with the first two questions together. The submission that the appellant was inducted as a tenant under the agreement of leave and licence is wholly misconceived. The distinction between a lease and a licence is well-known. A bare reading of the agreement of leave and licence is clearly indicative of the fact that the appellant was a licensee. Admittedly, his occupation of the flat was not as a tenant but as a licensee. That apart, the appellant brought a suit before the Court of Small Causes seeking a declaration that it was a tenant duly protected by the Rent Act and the agreement of leave and licence was only a colourable transaction. The suit was heard on merits and was dismissed by the Court of Small Causes in July 1972. Aggrieved by that decision, the appellant preferred an appeal before the Appellate Bench of the Small Causes Court but that appeal also was dismissed. The question whether or not the appellant was a licensee of the flat or a tenant thereof was directly and substantially in issue between the parties in that suit. The finding that he was not a tenant but had only the status of a licensee operates as *res judicata* between the parties. The appellant having failed in his suit for declaration of his alleged status of a tenant brought in the Court of Small Causes cannot be permitted to re-agitate the same question in these proceedings. Further, the licence of the appellant having been terminated by the respondent No. 1 by her notice dated March 31, 1965, the appellant was not in occupation of the flat on February 1, 1973 under a subsisting tenancy and did not acquire the status of a tenant under s. 15A and is therefore not protected under s. 13 of the Rent Act.

As hereinbefore adumbrated, the respondent No. 2- society is governed by the Regulations in Form-A. It is registered as a copartnership type housing society. The bye- laws of the society provide, inter-alia, by Bye-law 2 that one of the objects of the society would be to carry on the trade of buying, selling, hiring, letting and developing land in accordance with cooperative principles. The respondent No. 1 is a co-partner tenant member and holds flat No. 52 in Form-A. The flat in question therefore belongs to the society and she is a co-partner tenant member thereof. Paragraph 5 of Form-A reads:

"5. No tenant shall assign, underlet, vacate or part with the possession of the tenement or any part thereof without the consent in writing of the society."

The two bye-laws relevant for our purposes are Bye-laws 66 and 68(a) which provide as follows:

"66. Whenever a member to whom a tenement, a shop or a godown has been allotted by the Society does not require the same for his own use temporarily or for a specific period, he may offer the same to any person, as a licensee for temporary occupation for a specified period, provided that he shall-(a) sign and undertaking as required by the Society; (b) get such temporary occupant enrolled as a nominal member of the society;

(c) shall not permit such occupation before receiving permission from the Society's Committee to do so, provided such permission shall not be considered, unless the

member has paid all his due to the Society upto date, and authorizes the Society to recover from the nominal member, out of compensation or rent receivable by him from the nominal member any amount due from the member to the Society by way of taxes, general charges or any other dues."

"68(a) No person shall be a sub-tenant or licensee or lessee etc. of the Society or of a member, unless the Committee first enrolls him as Nominal Member of the Society and he pays Rs. 500 as a security deposit to the Society. For this purpose, he has to apply in a form prescribed by the Society. The Security Deposit will bear no interest and will be issued in the joint names of the Society or the member (as the case may be) and the occupant and it will be refunded on the occupant vacating the tenement in question."

The respondent No. 1 could not have let the premises to the appellant in view of para 5 of the Form-A. All that she could do if she did not require the flat for her immediate occupation was to permit the appellant or some one to occupy the same under an agreement of leave and licence. But for that purpose both the parties had to comply with the requirements of Bye-laws 66 and 68(a). The respondent No. 1 and the appellant accordingly by their application dated December 8, 1961 applied to the society for permission to let the flat on leave and licence and for the issuance of five 'B' shares of Rs. 100 each in their joint names called "occupancy shares". The respondent No. 2-society by its resolution dated December 15, 1961 issued the shares applied for in their joint names and also admitted the appellant as a nominal member for the purpose of occupying the flat. After the termination of the agreement of leave and licence, the appellant had no right to remain in' occupation of the flat. The contention that the respondent No. 2-society cannot raise a dispute regarding his unauthorized occupation of the premises after the revocation of the licence is devoid of substance. The respondent No. 2-society being a co-partnership type housing society, having let flat No. 52 to the respondent No. 1 as a co-partner tenant member, was vitally interested in ensuring that no stranger is in unauthorized occupation of the flat after the expiry of the term of the licence as it would tend to cause annoyance and inconvenience to the other co-partner tenant members of the society.

There was a determined effort to question the legality and propriety of the order passed by the Maharashtra State Cooperative Tribunal allowing the application for transposition made by respondent No. 2-society but we did not permit the appellant to do so for obvious reasons. The appellant had challenged the impugned order of the Tribunal by a writ petition in the High Court and eventually failed. The appellant not having questioned the judgment of the High Court, the order of the Tribunal allowing transposition of the respondent No. 2-society as a co-disputant has attained a finality which cannot now be upset. The proceedings initiated by the respondent No. 1 under s. 91(1) of the Act could not go on after the High Court had taken the view in certain cases that unless the cooperative housing society is a disputant, the claim by a member thereof for possession of the premises of a flat against a licensee would not be a dispute falling within the ambit of s. 91(1) of the Act. That being so, quite apart from technicalities, we are inclined to the view that the High Court was fully justified in not interfering with the impugned order of the Tribunal allowing transposition. The Tribunal adopted a course which was both eminent and just and was necessary

for doing complete justice between the parties. The appellant who is a rank trespasser has no equity in his favour. The contention that the respondent No. 2-society could not be transposed as a co-disputant in the proceedings under s. 91(1) of the Act must therefore fail.

The third question is the much vexed question on which the decision of the appeal must turn. It is submitted that the dispute between the licensor and the licensee was not one falling within the purview of s. 91(1) of the Act. It is said that a dispute between a flat-owner and the occupant as regards tenancy cannot be taken cognizance of by the Registrar under s. 91(1) of the Act, but the remedy of the flat-owner lies by way of suit for ejectment under s. 28 of the Rent Act. The submission is that the fact that such letting was forbidden by a regulation of the society was immaterial. In reply, it is urged that the dispute undoubtedly is a dispute touching the business of the society and therefore comes within the ambit of s. 91(1) of the Act. It is further urged that the non-obstante clause in s. 91(1) of the Act had an overriding effect over s. 28 of the Rent Act, prior to the introduction of s. 15A and s. 5(4A) in that Act.

There has been a long debate as to the true meaning of the words 'touching the business of the society' occurring in s. 43(1) of the Cooperative Societies Act, 1912 and there was a divergence of opinion expressed by different High Courts but it is not necessary to burden the judgment with many citations.

In *Deccan Merchants Cooperative Bank Ltd. v. M/s. Dalichand Jugraj Jain & Ors.*,<sup>(1)</sup> the Court had occasion to construe the meaning of the expression 'touching the business of a society' occurring in s. 91(1) of the Act. It was observed that the answer depends on the words used in the Act and that the non-obstante clause clearly ousts the jurisdiction of civil courts if the dispute falls squarely within the ambit of s. 91(1) of the Act. The Court then went on to enumerate five kinds of disputes mentioned in s. 91(1): first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society and fifthly, disputes touching the business of a society. In the context, it was said:

"It is clear that the word 'business' in this context does not mean affairs of a society because election of office bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word 'business' has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws."

In regard to the question whether a dispute touching the assets of a society would be a dispute touching the business of the society, it was observed:

"Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out

property may be part of its business."

Thus, the Court adopted the narrower meaning given to the word 'business' as expressed by the Madras, Bombay and Kerala High Courts in preference to the wider meaning given by the Madhya Pradesh and Nagpur High Courts. According to the view taken in Deccan Merchant Cooperative Bank's case, *supra*, the word 'business' in the context means "any trading or commercial or other similar business activity of the society". It was held that the word 'business' in s. 91(1) of the Act has been used in a narrower sense and that it means the actual trading, commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the rules and its bye-laws.

In the present case, the society is a tenant co- partnership type housing society formed with the object of providing residential accommodation to its co-partner tenant members. Now, the nature of business which a society carries on has necessarily to be ascertained from the object for which the society is constituted, and it logically follows that whatever the society does in the normal course of its activities such as by initiating proceedings for removing an act of trespass by a stranger, from a flat allotted to one of its members, cannot but be part of its business. It is as much the concern of the society formed with the object of providing residential accommodation to its members, which normally is its business, to ensure that the flats are in occupation of its members, in accordance with the bye-laws framed by it, rather than of a person in an unauthorised occupation, as it is the concern of the member, who lets it out to another under an agreement of leave and licence and wants to secure possession of the premises for his own use after the termination of the licence. It must, therefore, follow that a claim by the society together with such member for ejectment of a person who was permitted to occupy having become a nominal member thereof, upon revocation of licence, is a dispute falling within the purview of s. 91(1) of the Act. The decision in Deccan Merchants Cooperative Bank's case, *supra*, is clearly distinguishable on facts. There, the Court was dealing with a society which was a cooperative bank and ordinarily a cooperative bank cannot be said to be engaged in business when it lets out property owned by it. In that case, the dispute was not a dispute between a society and a member or a person claiming through a member. Further when the original owner executed the lease, he was not acting as a member but as a mortgagor in possession and therefore the cooperative bank's claim for ejectment of the lessee did not fall within s. 91(1) (b) of the Act.

It is true that the Court in Deccan Merchants Cooperative Bank's case, *supra*, dealt with the question whether on the facts and circumstances of that case, the Rent Act applied and accordingly the jurisdiction of the Registrar under s. 91(1) of the Act was ousted and it was only the Court of Small Causes which had jurisdiction to evict the tenant. The Court referred to the twin social objectives with which the two enactments were designed and observed that while s. 91(1) of the Act was intended and meant, in the main, to shorten litigation, lessen its costs and to provide a summary procedure for the determination of the disputes relating to the internal management of the societies, the Rent Act was intended to achieve a different social objective i.e. to prevent the eviction of tenants and enhancements of rent, and then went on to say that it was necessary that a dispute between the landlord and tenant should be dealt with by the Courts set up under the Rent Act and in accordance with the special provisions of that Act. It then dealt with the inter-relation between the

non-obstante clause in s. 91(1) of the Act and s. 28 of the Rent Act and observed that this special objective under the Act does not impinge on the objective underlying the Rent Act. It seems to us that the two Acts can be best harmonised by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act, should apply. But where the parties admittedly do not stand in the jural relationship of landlord and tenant, as here, the dispute would be governed by s. 91(1) of the Act. No doubt, the appellant acquired a right to occupy the flat as a licensee, by virtue of his being a nominal member, but in the very nature of things, his rights were inchoate. In view of these considerations, we are of the opinion that the proceedings under s. 91(1) of the Act were not barred by the provisions of s. 28 of the Rent Act.

A great deal of reliance has been placed by the appellant's counsel on the decision in *Sabharwal Brothers & Anr. v. Smt. Guna Amrit Thandani of Bombay*.<sup>(1)</sup> The importance of that case lies in the fact that it relates to the respondent No. 2 society, and the disputant there was the owner of a flat on the second floor of Block No. 8 "Shyam Niwas". She was a member of the society and had acquired the flat in question, which was let out to the appellant Sabharwal Brothers under an agreement of leave and licence, which was renewed from time to time and when she asked the appellant to vacate as she required the flat for her personal occupation, they did not comply with the demand as a result of which the owner of the flat filed a statement of claim before the Registrar under s. 91(1) of the Act which required adjudication. There was a challenge to the jurisdiction of the nominee of the Registrar to whom it was referred, and ultimately he made an award that the appellant Sabharwal Brothers had occupied the flat on leave and licence basis and was therefore liable to be evicted. In revision, the Bench of the Small Causes Court held that the Registrar's nominee did have jurisdiction and the High Court upheld the order of the Bench. Allowing the appeal, this Court observed:

"With all respect to the High Court, it seems to us that there was a fundamental error in the above approach. No doubt it was the business of the society to let out premises and a member had no unqualified right to let out his flat or tenement to another by virtue of the bye-laws and a breach of the bye-laws could affect the defaulting member's right to membership. But we are not able to see how letting by a member to another member would touch the business of the society which included inter alia the trade of buying, selling, hiring and letting land in accordance with cooperative principles. The letting of flat by respondent No. 1 was a transaction of the same nature as the society itself was empowered to enter into but letting by itself did not concern the business of the society in the matter of its letting out flats. Nothing was brought to our notice to show that such a letting would affect the business of the society once it had sold the flat to the respondent No. 1. The position might have been different if the latter had himself been a tenant of the flat under the society. "To touch" means "to come in contact with" and it does not appear that there is a point of contact between a letting by the respondent No. and the business of the society when the society was not itself the landlord of the flat."

It is we think, important to remember that this authority decided only one point albeit a point of great importance namely, that the society having sold the flat, like any other vendor of immovable

property, the letting out of the flat by the flat-owner was no concern of the society. There was nothing to show that such letting would affect the business of the society once it has sold the flat. With respect, we entirely agree with all that was said. But then the Court went on to say:

"The position might have been different if the latter had himself been a tenant of the flat under the society."

It logically follows, as a necessary corollary, that if the transaction between the society and the holder of the flat were governed by Regulations in Form-A, as here, that is to say, if the society had let out the flat to her, the decision of the Court would have been otherwise.

The decision in Sabharwal Brothers' case, supra, is distinguishable for two reasons. First, there was an outright sale of the flat by the society and not that it had been let out to her under Regulations in Form-A; and secondly, the society having sold the flat, the letting of the flat by the flat-owner did not in any way affect the business of the society in the matter of its letting out the flat. The observation made by this Court that the fact that such letting was forbidden by a regulation of the society was immaterial did not fall for decision in that case and was a mere obiter.

In the result, the appeal must fail and is dismissed with costs.

S.R.

Appeal dismissed.