

PETITIONER:
SANWARMAL KEJRIWAL

Vs.

RESPONDENT:
VISHWA COOPERATIVE HOUSING SOCIETY LTD. & ORS.

DATE OF JUDGMENT 08/03/1990

BENCH:
AHMADI, A.M. (J)
BENCH:
AHMADI, A.M. (J)
SHETTY, K.J. (J)

CITATION:
1990 AIR 1563 1990 SCR (1) 862
1990 SCC (2) 288 JT 1990 (2) 200
1990 SCALE (1) 398
CITATOR INFO :
D 1991 SC 626 (12,13)

ACT:
Bombay Rents, Hotels & Lodging House Rates Control Act,
1947: Section 15A--Licensee occupying flat in cooperative
Housing Society--Whether entitled to statutory protection of
Rent Act?

Maharashtra Cooperative Societies Act 1960: Section
91(1)--Can licensee occupying flat in a tenant co-partner-
ship society be evicted?

HEADNOTE:

The question for determination is, can a licensee occupying a flat in a tenant co-partnership society be evicted therefrom under subsection (1) of section 91 of the Maharashtra Cooperative Societies Act, 1960 notwithstanding the protection extended by Section 15A of the Bombay Rents, Hotels & Lodging House Rates Control Act, 1947 as amended by Act XVII of 1973 or whether such proceedings would be governed by Section 28 of the Rent Act?

The appellant licensee was in actual possession of the flat on 1st February 1973 under a license without the express permission of the Society. He was let in, in 1957 by one D.P. Kejriwal who was looking after the flat originally allotted to one Laxmi Devi Kejriwal in 1949. She gifted her interest as allottee member to her brother who in turn transferred his interest therein to his brother Hari Kumar Sharma, respondent No. 2, in July 1967. Even after this transfer D.P. Kejriwal continued in management of the flat till 1979 when he received a letter from Respondent No. 2 claiming ownership of the flat. The appellant thereafter filed an interpleader suit. On disposal of the said suit Respondent No. 2 deposited a sum of Rs.5,500 with Respondent No. 1, the Society, towards the cost of the Society to initiate proceedings for eviction of the appellant from the flat in question under Section 91(1) of the Societies Act. The appellant contended that the proceeding under section 91(1) was not competent as the document of leave and licence in fact created a lease. Alternatively, as he was in actual possession under a subsisting license right from 1957 to 1st February 1973, he was a statutory tenant under section 15A

of Bombay Rent Act and the Cooperative Court had no jurisdiction under section 91(1) of the Societies Act and the proper court was one under section 28 of the Rent Act which the Respondent No. 2 had in fact approached.

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The Co-operative Court passed an ejectment order against the appellant. The appellant filed an appeal under section 97 of the Societies Act to the State Co-operative Appellate Court, Bombay. The appellate court dismissed the appeal and confirmed the order of the Co-operative Court. Feeling aggrieved by the concurrent findings of the two courts the appellant preferred a Writ Petition in the High Court of Bombay. The Writ Petition was also dismissed.

While allowing the appeal and setting aside the judgments of all the Courts below and directing that the claim application filed under section 91(1) of the Societies Act shall stand dismissed, this Court,

HELD: The appellant was and is a protected tenant under section 15A of the Rent Act. The proceedings initiated under section 91(1) of the Societies Act cannot in the circumstances succeed as the Society has failed to prove the fact of trespass which constituted the foundation for jurisdiction. if the society fails to prove that the appellant has no right to the occupation of the flat since he is a mere trespasser, the suit must obviously fall. [883B-C]

The Societies Act, section 91(1), confers jurisdiction on the Cooperative Court while section 28 of the Rent Act confers jurisdiction on the Court of Small Causes, Bombay. [881B]

The Status of a tenant is conferred on him by law as the legislature desired to extend the protection of the Rent Act to such licensees. Rights which do not flow from contracts but are conferred by law such as the Rent Act must be determined by the machinery, if any, provided by the law conferring the right. [881G-H]

Notwithstanding the absence of privity of contract between the owner-landlord and the licensee-protected tenant the latter cannot be evicted except in accordance with the provisions of the Rent Act. [882B]

Chandavarkar Sita Ratna Rao v. Ashalata S. Gum am, [1986] 4 SCC 447 at 478; Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi, [1975] 2 SCC 105; Hindustan Petroleum Corporation Ltd. v. Shyam Cooperative Housing Society, [1988] 4 SCC 747=AIR 1989 SC 295; O.N. Bhatnagar v. Rukibai Narsimdas, AIR 1982 SC 1097; M/s. AVR & Co. & Ors. v. Fairfield Cooperative Housing Society & Ors., [1988] 4 SCC 408; Sardar Mohan Singh Ahluwalia v. Maitrai Park Cooperative Housing Society & Anr., [1988] 4 SCC 416; Hindustan Thompson Associates Ltd. v. Mrs. Maya Inderson Israni & Ors..

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1988] 4 SCC 745; Smt. Krishna Rajpal Bhatia v. Miss Leela H. Advani & Ors., [1989] 1 SCC 52; Deccan Merchant Cooperative Bank Ltd. v. Pali Chand Jugraj Jain, [1969] 1 SCR 887 and Co-operative Central Bank Ltd. v. Additional Industrial Tribunal, Andhra Pradesh, [1970] SCR 205, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1369 of 1990.

From the Judgment and Order dated 16.6.1989 of the Bombay High Court in W.P. No. 2513 of 1989.

Anil B. Diwan, Y.R. Naik, S. Thananjayan and K.R. Choud-

hary for the Appellant.

Dr. Y.S. Chitale, Y.T. John, C.V. Francies, C.V. Rappai, 3. Prakash and V.K. Purwani for the respondents.

The Judgment of the Court was delivered by AHMADI, J. Special leave granted.

Can a licensee occupying a flat in a tenant-co-partnership society be evicted therefrom under Sub-Section (1) of Section 91 of the Maharashtra Co-operative Societies Act, 1960 (Act No. XXIV of 1961), hereinafter called 'the Societies Act', notwithstanding the protection extended by Section 15A of the Bombay Rents, Hotels & Lodging House Rates Control Act, 1947 ('Act No. LVII of 1947'), hereinafter called 'the Rent Act', as amended by Act XVII of 1973 or whether such proceedings would be governed by Section 28 of the Rent Act? That is the question which arises for our determination in the context of the fact that the appellant licensee claimed to be in actual possession of the flat on 1st February, 1973, under a subsisting licence, albeit without the express permission of the society. The actual matrix in which this question needs to be answered may be briefly stated as under:

The Vishwa Co-operative Housing Society Ltd., respondent No. 1, hereinafter called 'the Society', was registered sometime in 1948 under the provisions of the Bombay Co-operative Societies Act, 1925 and is deemed to be registered by virtue of Section 166(2) under the present Societies Act. On 2nd March, 1949 one Laxmi Devi Kejriwal was admitted to the membership of the society and was allotted Flat 865

No. 25 of the multi-storeyed building known as 'Vishwa Mahal' situate on "C" Road, Churchgate, Bombay-20. The said Laxmi Devi gifted her interest as the allottee-member of the society to her brother Ambica Prasad Sharma of Udaipur. One D.P. Kejriwal who was looking after this flat inducted the appellant therein w.e.f. 1st June, 1957 under a leave and licence agreement on a licence fee of Rs.400 per month. While the appellant was in actual occupation of the flat, the allottee-member Ambica Prasad Sharma transferred his interest therein to his brother Hari Kumar Sharma, respondent No. 2, sometime in July 1967. The said respondent was admitted to the membership of the society on 15th July, 1967. It appears that even after this transfer D.P. Kejriwal continued in management of the flat and collected and received the licence fee from the appellant till the middle of 1979 when he received a letter from respondent No. 2 claiming ownership of the flat. The appellant then filed an interpleader suit in the Court of Small Causes, Bombay, seeking a direction to whom he should pay the rent for the flat occupied by him. This interpleader suit was disposed of on 21st June, 1983. Immediately thereafter respondent No. 2 deposited Rs.5,500 on 28th June, 1983 with respondent No. 1 society towards the society's cost to initiate proceedings for eviction of the appellant from the flat in question under Section 91(1) of the Societies Act. Two days later the respondent No. 2 filed a suit for the eviction of the appellant from the flat in the Court of Small Causes, Bombay. After respondent No. 2 deposited Rs.5,500, the society passed a resolution on 5th July, 1983 to initiate proceedings under Section 91(1) of the Societies Act for the eviction of the appellant from the flat in question. Thereupon the society served the appellant with a notice to quit dated 11th July, 1983 and thereafter instituted the action under Section 91(1) of the Societies Act.

The appellant raised several defences, two of which may be noticed. He firstly contended that the so-called document

of leave and licence in fact created a lease and, therefore, the proceeding under Section 91(1) of the Societies Act was not competent. Secondly he contended that even if it is assumed that the relationship was of a licensor and a licensee under the deed, since he was in actual occupation and possession of the flat in question under a subsisting licence right from 1957 to 1st February, 1973 he was a statutory tenant under Section 15A of the Rent Act and was, therefore, entitled to protection from eviction till a competent court granted eviction on any of the grounds set out in Sections 12 or 13 of the Rent Act. He, therefore, contended that the Cooperative Court had no jurisdiction under Section 91(1) of the Societies Act and the proper court to approach was

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the one under Section 28 of the Rent Act, which the respondent No. 2 had in fact approached.

The Cooperative Court came to the conclusion that the relationship created under the document of leave and licence was that of a licensor and a licensee. On the question of tenancy under Section 15A the Court concluded as under:

"So far as second part of the issue regarding opponent No. 2 contending to be tenant of opponent No. 1 is concerned, the opponent No. 1 in his evidence has mentioned to the effect that after his becoming a member of the society he initially accepted the opponent No. 2 as his licensee and allowed him to occupy the suit flat temporarily on his promise to vacate when required by opponent No. 1. He has further stated that he filed the case in the Small Causes Court for ejectment of opponent No. 2 in his own right as advised by his Advocate in that case. He has also stated that he accepted Opponent No. 2 as his tenant because after 1.2.1973 there is change in law and so he had to accept opponent No. 2 as his tenant. In view of this evidence I have to give a finding in the affirmative in respect of part of the issue whether opponent No. 2 proves that he is a tenant of opponent No. 1".

In other words the Cooperative Court came to the conclusion that the appellant was a tenant of respondent No. 2 under Section 15A of the Rent Act since he was in occupation of the flat on 1st February, 1973. After finding the appellant to be a tenant of respondent No. 2 under section 15A, the Cooperative Court proceeded to observe as under:

"Now regarding the effect of findings on the parts of issue No. 2 as mentioned hereinabove, the position in law is quite clear that even though the non-member occupant could at best be regarded as tenant of member, he cannot be deemed as tenant of the society because the society does not fall within the definition of the term landlord under the Rent Act".

The Cooperative Court, therefore, came to the conclusion that the society could maintain an action under Section 91(1) of the Societies Act notwithstanding the fact that the occupant was a tenant under Section 15A of the Rent Act qua the member-allottee. In this view, the

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Cooperative Court passed an ejectment order against the appellant and ordered that the member shall personally occupy the flat in question within 15 days from the receipt of possession thereof.

The appellant feeling aggrieved by this order filed an appeal under Section 97 of the Societies Act to the Maharashtra State Cooperative Appellate Court, Bombay, being Appeal No. 206 of 1988. The said appeal was dismissed with costs on 22nd December, 1988. The appellate court also took the view that regardless of the relations between the occu-

pant of the flat and the member-allottee, the society was entitled to maintain an action under Section 91(1) of the Societies Act since there was not and there could not be any relationship of landlord and tenant between the society and the occupant. It accordingly confirmed the order passed by the Cooperative Court.

Feeling aggrieved by the concurrent findings recorded by the said two courts, the appellant preferred writ petition No. 25 13 of 1989 in the High Court of Judicature at Bombay. The said writ petition was summarily dismissed on 16th June, 1989 but by a speaking order. The learned Single Judge while dismissing the writ petition observed as under:

"It has now been repeatedly held by the Supreme Court that the protection even though available to the occupier against member of the cooperative society, such protection cannot be claimed against a housing society. A reference to the decision in O.N. Bhatnagar v. Rukibai Narsindas, reported in AIR 1982 SC 1097, is sufficient".

The decision of this Court in Hindustan Petroleum Corporation Limited v. Shyam Cooperative Housing Society, [1988] 4 SCC 747= AIR 1989 SC 295 was distinguished as not laying down any proposition that a licensee is entitled to take advantage of Section 15A of the Rent Act even against the society. So stating the learned Judge dismissed the writ petition. That is how the appellant is before us by special leave.

Section 91(1) of the Societies Act insofar as relevant for our purposes reads as under:

"Notwithstanding anything contained in any other law for the time being in force any dispute touching the constitu-

tion, management or business of a Society shall be referred by any of the parties to the dispute to the Cooperative Court 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, past member or a deceased member of the society
- Sub-section (3) reads as under:

"Save as otherwise provided under sub-section (2) to Section 93, no court shall have jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub-section (1)"

Sub-section (2) of Section 93 lays down that:

"Notwithstanding contained in this Act the Cooperative Court may, if it thinks fit suspend any proceedings in respect of any dispute, if the question at issue is one involving complicated questions of law and fact, until the question has been tried by a regular suit instituted by one of the parties or by the society".

Sub-section (1) of Section 99 which begins with a non-obstante clause gets attracted if there arises any dispute touching the business of a society. Such a dispute can be referred to a Cooperative Court if both parties to the dispute are one or other of those enumerated in clauses (a) to (e) thereof. These include a society, a member or a person claiming through a member or a past member or a deceased member. The dispute in the present case is between the society, its member and appellant, a person stated to be one claiming through the present member or the past member. The crucial question which arises is whether the dispute or controversy between the parties can be said to be one touching the business of the society. If yes, the Cooperative Court alone will have jurisdiction since the jurisdiction of every other court is ousted by virtue of Sub-section (3) of

Section 91 except for the limited purpose stated in sub-section (2) of Section 93 of the Societies Act.

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Under bye-law No. 2 the objects of the society are inter alia to carry on trade of building, buying, selling, hiring, letting and developing land on cooperative principles. Regulation 4 in Form A provides that no tenant-member shall assign, under-let, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the society. Bye-law 7A lays down that an outsider-non-member can be allowed to take advantage of the member's flat only on production of a written confirmation of the member before the society and on the society thereupon admitting such member as a 'nominal' member of the society. Admittedly in the present case no written permission of the society was obtained either by the member or by the appellant before the latter was put in possession of the flat in question nor was any request made to the society to admit the appellant as a nominal-member. It was, therefore, contended on behalf of the society that the entry of the appellant in the flat in question was clearly in violation of Regulation 4 and bye-law 7A adverted to above and, therefore, the dispute was clearly one touching the business of the society attracting Section 91(1) of the Societies Act. The appellant's challenge as pointed out earlier can be said to be two fold, namely, (1) the dispute between the appellant and the society cannot be said to be in any manner related to the business of the society and (2) since the jural relationship between the member and the appellant was admittedly of landlord and tenant, the jurisdiction of the Cooperative Court under the Societies Act was clearly barred by virtue of Section 28 of the Rent Act which is a special statute dealing with landlord-tenant relationship.

The Rent Act was enacted to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and of evictions and also to control the charges for licence of premises, etc. Section 15A which was inserted by amending Act 17 of 1973 provides as under:

"15A(1) Notwithstanding anything contained 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 any part thereof, in his occupation". The expression 'licensee' is defined in sub-section (4A) of Section 5 as under:

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'5(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 Co-operative 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, or a person conducting a running business belonging to the licensor, for a person having any accommodation for rendering or carrying on medical or para-medical services or activities in or near a nursing home, hospital or sanatorium, for a person having any accommoda-

tion in a hotel, lodging house, hostel, guest house, club, nursing home, hospital, sanatorium, dharmashala, home for widows, orphans or like premises, marriage or public hall or like premises, or in a place of amusement or entertainment or like institution, or in any premises belonging to or held by an employee or his spouse who on account of the exigencies of service or provision of a residence attached to his or her post or office is temporarily not occupying the premises, provided that he or she charges licence fee or charge for such premises of the employee or spouse not exceeding the standard rent and permitted increases for such premises, and any additional sum for services supplied with such premises, or a person having accommodation in any premises or part thereof for conducting a canteen, creche, dispensary or other services as amenities by any undertaking or institution; and the expressions 'licence', 'licensor' and 'premises given on licence' shall be construed accordingly".

The definition of a 'landlord' in Section 5(3) includes in respect of a licensee deemed to be a tenant by Section 15A, the licensor who has given such licence. Similarly the expression 'tenant' as defined by Section 5(11) includes such licensees as are deemed to be tenants by Section 15A.

Section 14(2) may also be noticed which reads as under:

"Where the interest of a licensor who is a tenant of any

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premises is determined for any reason, the licensee, who by .. Section 15A is deemed to be a tenant, shall, subject to the provision of this Act, be deemed to become the tenant of the landlord, on the terms and conditions of the agreement consistent with the provisions of this Act".

The Courts below have come to the conclusion that the appellant was a tenant of respondent No. 2 by virtue of Section 15A of the Rent Act since he was in actual occupation of the flat on 1st February, 1973. Having recorded the relationship of landlord and tenant between the member, respondent No. 2, and the occupant-appellant, the courts below took the view that as there was no such jural relationship between the society and the occupant, the society was entitled to evict the occupant from the flat in question by taking recourse to Section 91(1) of the Societies Act as the dispute between the society, its member and the occupant claiming through the member was essentially one touching the business of the society. In other words according to the courts below while the member could not evict the occupant except through proceedings initiated under the Rent Act, the society was free to evict the occupant, without dis-continuing the membership of the licensor, by virtue of Section 91(1) of the Societies Act. There is, according to the courts below, no conflict between Section 91(1) of the Societies Act and Section 28 of the Rent Act because in order to attract the latter provision it must be shown that the relationship between the society and the occupant is that of a landlord and a tenant or a licensor and a licensee who is entitled to the benefit of Section 15A of the Rent Act. Unless such a relationship is established, the society cannot be precluded from initiating eviction action under Section 91(1) of the Societies Act against an occupant with whom it has no privity of contract, notwithstanding the fact that he was inducted in the flat by the member-allottee, albeit contrary to the regulations and bye-laws of the society, and by passage of time a relationship of landlord and tenant has developed between the two by virtue of Section 15A of the Rent Act.

What impelled the legislature to introduce Section 15A and the related provisions on the statute book by Act XVII of 1973? The acute paucity of accommodation, particularly in

urban and metropolitan centres, is of common knowledge. Section 15 of the Rent Act initially prohibited sub-letting. Despite this prohibition sub-letting took place on a large scale because of non-availability of rented premises. The legislature had to face this hard reality and was required to extend protection to such sub-tenants when they were threatened with eviction.

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tion by enacting the Bombay Rents, Hotels & Lodging Houses Rates Control Act (Amendment) Ordinance, 1959. Thereafter also the acute shortage of accommodation continued and to circumvent the prohibition of sub-letting in Section 15 increasing use of inducing third parties in rented premises through the expedient of leave and licence agreements was made. This becomes evident from the Objects and Reasons for Act No. XVII of 1973, which read as under:

"It is now notorious that the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, is being avoided by the expedient of giving premises on leave and licence for some months at a time; often renewing from time to time at a higher licence fee. Licensees are thus charged excessive licence fees; in fact, several times more than the standard rent, and have no security of tenure, since the licensee has no interest in the property like a lessee. It is necessary to make provision to bring licensees within the purview of the aforesaid Act. It is therefore provided by Clause 14 in the Bill that persons in occupation on the 1st day of February, 1973 (being a suitable anterior date) under subsisting licences, shall for the purposes of the Act, be treated as statutory tenants, and will have all the protection that a statutory tenant has, under the Act. It is further provided in Clause 8 that in the case of other licences, the charge shall not be more than a sum equivalent to standard rent and permitted increases, and a reasonable amount for amenities and services. It is also provided that no person shall claim or receive anything more as licence fee or charge, than the standard rent and permitted increases, and if he does receive any such amounts, they should be recoverable from the licensor".

The legislative policy is evident from the opening words of Section 15A--Notwithstanding anything contained elsewhere in this Act or anything contrary in any other law for the time being in force, or in any contract--which convey in no uncertain terms that the legislature desired to protect licensees who were in actual occupation of any premises on 1st February, 1973 from eviction by conferring on them the status of a tenant and thereby bringing them within the purview of the Rent Act regardless of the other provisions of the said enactment or any other enactment or contract to the contrary. A sweeping overriding effect is given over all laws and other provisions of the Rent Act as well as contract providing to the contrary thereby placing the

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question of status of licensees in occupation of any premises on 1st February, 1973 beyond the pale of doubt. To make matters clear corresponding changes were simultaneously made, in the preamble of the Rent Act and the definitions of 'landlord' and 'tenant' and a new definition of 'licensee' was inserted on the statute book. Not only did the legislature desire to confer the status of a tenant on such licensees but it went a step further by providing in Section 14(2) that on the determination of the licensor's interest in the premises such a statutory tenant under Section 15A will become the tenant of the landlord, thereby establishing a jural relationship of landlord and tenant through statute

as distinguished from contract. It, therefore, seems crystal clear to us that the legislative policy was to extend the protective umbrella of the Rent Act to licensees who were in occupation of any premises on 1st February, 1973 by fictionally conferring on them the status of a tenant, overriding all other provisions of the statute itself, all other statutes and contracts providing to the contrary. Therefore, every other provision of the Rent Act, every provision of any other law and every covenant of a contract which runs counter to the legislative policy engrafted in Section 15A, meaning thereby which provides to the contrary, must yield to Section 15A read with Section 14(2) of the Rent Act. That is why this Court while overruling the decision of the Full Bench of the Bombay High Court in *Ratanlal Chandiprasad v. Raniram Darkhand*, writ petition No. 76 of 1980 decided on 18th October, 1985 observed in paragraph 69 of its judgment in *Chandavarkar Sita Ratna Rao v. Ashalata S. Gurnatn*, [1986] 4 SCC 447 at 478 as under:

"..... it must be held that all licensees created by landlords or by the tenant before February 1, 1973 and who were in actual occupation of a premises which was not less than a room as licensee on February 1, 1973 would be the licensees of the landlord or tenant and whether there by any term in the original agreement for tenancy permitting creation of such tenancy or licences or not they would become tenant and enjoy the rights granted under the Act specially those mentioned in Section 14(2) of the Act".

Therefore, this Court held that a licensee under a licence created by a tenant, be he a statutory tenant or a contractual tenant, whether or not his tenancy agreement permitted the creation of such licence, was entitled to the protection of Section 15A of the Rent Act. In other words no statutory bar or contractual bar operated against the conferment of the statutory tenancy on the licensee in occupation of any

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premises on 1st February, 1973 under Section 15A of the Rent Act.

That takes us to the next question whether or not a member of a co-partnership type of a co-operative society has such interest in the premises allotted to him as would entitle him to give the same on leave and licensee basis to a non-member. In a tenant co-partnership type of society the members are shareholders; but the title to the property vests in the society which in turn rents the tenements or flats to its members. The cost of construction of dwellings is met from deposits and loans besides the share money. The rental is usually determined on long term basis so calculated as to meet the cost of construction and upkeep of the building and to guarantee perpetuity of occupation on repayment of the whole value of the tenement or flat. At the end of the period the member is credited with additional shares equal to the amount paid by him; the interest on these shares generally matches the rental payable by him to the society. Thus on full payment the member becomes entitled to occupy the tenement or flat free of charge as the rental he has to pay to the society is almost met from the interest received from shares held by him. Thus a member has more than a mere right to occupy the flat.

A similar question came up for consideration before this Court in *Ramesh Himmatlal Shah v. Harsukh. Jadhavji Joshi*, [1975] 2 SCC 105 in the context of whether or not the member's right in the flat was liable to attachment and sale under Section 60 of the Code of Civil Procedure. This Court after analysing the various provisions of the Societies Act, the bye-laws and the regulations framed thereunder, came to

the conclusion that the member's right or interest to occupy is a species of property. Proceeding further this Court made the following observations in paragraph 18 to 20 of the Judgment:

"There is no absolute prohibition in the Act or in the Rules or in the bye-laws against transfer of interest of a member in the property belonging to the Society. The only transfer which is void under the Act is one made in contravention of sub-section (2) of Section 47 [See Section 47(3)]. We have not been able to find any other provision anywhere to the same effect. In the Scheme of the provisions a dichotomy is seen between share or interest in the capital and interest in property of the Society. While Section 29(2) refers to transfer of a member's share or his interest in the capital or property of any Society, Section 31 in contrast speaks of 'the share or interest of a member in the capital of a So-

ciety'. The Act, therefore, makes a clear distinction between the share or interest in the capital and share or interest in property of the Society. We have also noticed that the Act does not recognise interest in the immovable property of the society as well [See section 41(1)(b)]. We have seen the qualifications for membership. There is no reason to suppose that if the qualification under the bye-laws are fulfilled an application for membership may be rejected".

After pointing out that the right or interest to occupy is a species of property this Court went on to add as under:

"We, therefore, unhesitatingly come to the conclusion that this species of property, namely, the right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. We have seen no fetter under any of the legal provisions against such a conclusion. The attachment and sale of the property in this case in execution of the decree are valid under the law.

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In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest or in the interest of commerce to impose a bar on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the Legislature must be in express terms. We have failed to find one".

It becomes clear from this decision that the member's right to occupy the flat is a species of property liable to attachment and sale. It is more than a mere right to occupy. It is transferable and if the transferee answers the qualifications under the bye-laws for being admitted to the membership of the Society, the Society would be precluded from unreasonably withholding such admittance. There can, therefore, be no doubt that a member-allottee has a right to transfer his interest in the flat to a third party and, therefore, the right to induct a third party on leave and licence basis.

It was contended by the learned counsel for the appellant that Section 15A was inserted in the Rent Act to serve a dual purpose namely (1) to curb exploitation of licensee and (2) to provide security

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of tenure. If the view taken by the Courts below in the name of maintenance of the 'distinctive mutuality' principle is endorsed, the very purpose of the amendment, argued counsel, would be defeated. He pointed out that in the State of Maharashtra the cooperative movement had taken rapid strides and the legislature was aware that a large number of licen-

sees were in occupation of flats situate in Cooperative Societies. It must, therefore, be assumed that the legislature desired to extend the protection of the Rent Act to such licensees also by bringing them within the scope of Section 15A of the Act. In support of this contention he placed strong reliance on the decision of this Court in Hindustan Petroleum Corporation Limited (supra). This submission was countered by the learned counsel for the society and the member on the plea that the Courts below had rightly concluded that the jurisdiction of the Cooperative Court under Section 91(1) of the Societies Act was not ousted because there was no jural relationship of landlord and tenant between the society and the appellant. According to them if non-members could be inducted in tenements or flats belonging to a Cooperative Housing Society of the present type, the entire housing movement would become redundant and the object of forming such cooperative housing societies would be totally defeated. Therefore, submitted the learned counsel, even if it is assumed that the appellant had acquired the status of a tenant by virtue of Section 15A of the Rent Act, the protection extended by the said provision would extend to the licensor-member only and not to the society. In this connection strong reliance was placed on the decision of this Court in O.N. Bhatnagar's case (supra) which has been referred to and relied on in four subsequent decisions namely, M/s A.V.R. And Co. & Others v. Fairfield Cooperative Housing Society & Others, [1988] 4 SCC 408; Sardar Mohan Singh Ahluwalia v. Maïtraï Park Co-operative Housing Society and Another, [1988] 4 SCC 416; Hindustan Thompson Associates Ltd. v. Mrs. Maya Inderson Israni & Others, [1988] 4 SCC 745 and Smt. Krishna Rajpal Bhatia v. Miss Leela H. Advani and Others, [1989] 1 SCC 52.

Five decisions were rendered by a Division Bench of this Court (A.P. Sen & B.C. Ray, JJ.) on a single day i.e. 19th September, 1988 on the question of applicability of Section 91(1) of the Societies Act. In four of those cases, namely, A.V.R. & Co. & Others; Sardar Mohan Singh Ahluwalia; Hindustan Thompson Associates Ltd. and Smt. Krishna Rajpal Bhatia, this Court on facts took the view that the applicability of Section 91(1) of the Societies Act could not be assailed. In all those four cases the Court came to the conclusion that the licence was terminated before 1st February, 1973 and, therefore,

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the occupant could not be said to be in occupation of the flat under a subsisting licence on 1st February, 1973 and hence Section 15A of the Rent Act had no application. In such a fact-situation this Court rightly took the view that Section 28 of the Rent Act was not attracted and hence the society was entitled to seek eviction under Section 91(1) of the Societies Act. In Bhatnagar's case the occupant was inducted in the flat on leave and licence basis after the Society had accepted him as a nominal member. But his licence was terminated by a notice dated 31st March, 1965 and thereafter his occupation was no more under a subsisting licence to entitle him to the protection of Section 15A of the Act. In the case of A.V.R. & Co. also the licensee's claim for deemed tenancy was rejected on the ground that the licence had expired long before 1st February, 1973 and had not been renewed since then. The Court, therefore, came to the conclusion that the licence was not in occupation of the flat under a subsisting licence on 1st February, 1973 and, therefore, the benefit of Section 15A could not be extended to him. In the case of Sardar Mohan Singh Ahluwalia also the Court found that as a matter of fact there was no subsisting

licence on 1st February, 1973 to attract the application of Section 15A of the Rent Act. In Hindustan Thompson Associates Ltd. the facts disclosed that the licence was terminated by the member on 1st October, 1972 and the occupant was called upon to vacate the premises. It was, therefore, held that since the subsequent occupation of the flat by the occupant was not under a subsisting licence his occupation was in the nature of a trespasser and hence Section 15A had no application. The Court, therefore, concluded that eviction proceedings could be commenced against him under Section 91(1) of the Societies Act. In the last mentioned case of Smt. Krishna Rajpal Bhatia the court found that the agreement in question created the relationship of a licensor and a licensee and the licence had in fact been terminated by a notice dated 21st May, 1969 and, therefore, the occupant was a mere trespasser when the action was commenced under Section 91(1) of the Societies Act and was not entitled to the benefit of Section 15A of the Rent Act. It can, therefore, be seen that the aforesaid 5 decisions on which considerable reliance was placed by the learned counsel for the Society and its member can be distinguished on facts inasmuch as in all those cases the finding of fact recorded throughout was that the licensee was not in occupation of the premises in question under a subsisting licence on 1st February, 1973 to invoke the protection of Section 15A of the Rent Act.

However, in the case of Hindustan Petroleum Corporation Limited (supra) the Esso Eastern Inc., a company, had taken flat No. 35

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in Block No. 8 in Sham Niwas on leave and licence basis for a period of one year in terms of a written agreement dated November 26, 1968 from Smt. Nanki M. Malkani. On December 4, 1968 the Society passed a resolution admitting one T.J. Mansukani, an employee of the company, as a nominal member of the society since he was to occupy the flat. The licence agreement was extended from time to time under the renewal clause incorporated in the agreement. After the company was taken over under the Esso (Acquisition of Undertakings in India) Act, 1974 Smt. Nanki M. Malkani sent a communication affirming the terms and conditions of the licence and again confirmed the same on 24th March, 1976. It will be seen from these facts that the licence was subsisting on 1st February, 1973. On 11th September, 1980 the Society passed a resolution calling upon the appellant-corporation to vacate the said premises and directed its member Smt. Nanki M. Malkani to occupy the same herself. Upon the appellant-corporation failing to vacate the premises the Society commenced proceedings under Section 91(1) of the Societies Act on 15th September, 1980 for eviction of the appellant-corporation and its employee from the flat. The Cooperative Bank Bombay, after considering the evidence adduced by the parties, dismissed the claim of the Society holding that the appellant-corporation was entitled to the benefit of Section 15A of the Rent Act and the said protection could not be taken away by the Society seeking eviction under Section 91(1) of the Societies Act. The Society preferred an appeal which came to be allowed on 17th March, 1984 whereupon the appellant-corporation approached the High Court under Article 226 of the Constitution, but in vain. The appellant-corporation obtained special leave to appeal to this Court.

This court raised three questions for decision, two of which are relevant for our purpose. The first question was whether the appellant corporation as successor-in-interest of Esso Eastern Inc., the licensee, was entitled to the

protection of Section 15A of the Rent Act having regard to the fact that Esso Eastern Inc. was in occupation of the flat in dispute under a subsisting licence on 1st February, 1973 and whether the society's action for ejection of the occupant of the flat could be said to be a dispute touching the business of the society within the meaning of Section 91(1) of the Societies Act. After referring to the relevant statutory provisions of both the Societies Act and the Rent Act, this Court observed that the finding of the appellate court that the appellant-corporation was not entitled to the protection of Section 15A of the Rent Act could not be sustained. This Court concluded in paragraph 14 at page 758 as under:

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"In the premises, petitioner 1 Hindustan Petroleum Corporation Ltd., is clearly protected under Section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In that view of the matter, we do not think it necessary to deal with the contention as regard the applicability of Section 91 of the Maharashtra Co-operative Societies Act, 1960. All aspects arising out of the submissions as to the jurisdiction of the Registrar under Section 91(1) of the Act have already been considered by this Court in O.N. Bhatnagar case and we reiterate the principles laid down therein". This Court did not consider it necessary to deal with the third contention whether a claim for ejection of an occupant of a flat in a cooperative housing society who has been put in possession thereof by the member under a leave and licence agreement, is a 'dispute touching the business of the society' within the meaning of Section 91(1) of the Societies Act, because in its view it was already covered by Bhatnagar's case. To put it differently the Division Bench accepted the ratio of Bhatnagar's case as laying down the correct law and did not see the need to restate the same.

While in Bhatnagar's case this Court on facts came to the conclusion that the requirements of Section 15A were not satisfied and, therefore, action under Section 91(1) of the Societies Act was maintainable, it repelled the apprehension that such a view would throw out all licensees of residential flats in multi-storeyed buildings belonging to Cooperative Housing Societies in the following words:

"The apprehension, 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 cities 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".

After referring Section 15A(1) and Section 5(4A) of the Rent Act this Court proceeded to observe as under:

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"As a result of the introduction of Section 15A and Section 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 1.2. 1973, is by a legal fiction, deemed to be a tenant and thus has the protection of Rent Act. In such a case the dispute between a licensor and licensee relating to possession of the premises of a flat would attract Section 28 read with Section 15A and 5(4A) of the Rent Act and would fail

outside the purview of the Registrar's jurisdiction to adjudicate upon such dispute under Section 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

Indubitably the flat in question fails within the definition of 'premises' in Section 5(8) of the Rent Act. The appellant, a licensee under Section 5(4A), is a deemed tenant under Section 15A and, therefore, falls within the definition of 'tenant' under Clause (bb) of Section 5(11) of the Rent Act. Such a tenant is entitled to the protection of the Rent Act and cannot be evicted from the premises in his occupation except as provided by the said Act. To hold otherwise would be to render the status conferred on licensees in actual occupation on 1st February, 1973, under a subsisting licence, nugatory. The appellant was put in possession of the flat in question by the tenant-co-partner-member of the Society and was accepted as such by the successormembers also. As pointed out earlier a member of a tenant-copartnership type of Society is under an obligation to pay a fixed rental every month to the Society. This rental is, no doubt, determined on the basis of the member's financial obligations incurred on account of the cost of construction, price of land or lease rent, as the case may be, interest on borrowings, etc. The primary object of such a society is to provide residential accommodation to its members on easy payment basis. That is why in Bhatnagar's case this Court stated that '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 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

881 of the licence'. Therefore, this Court held that ejectment of an occupant, whose licence is terminated and who does not have the protection of law, such as the Rent Act, can be secured under Section 91(1) of the Societies Act.

But what happens when competing provisions vesting jurisdiction under different laws open with a non-obstante clause and invest jurisdiction in different Courts? The Societies Act under Section 91(1) confers jurisdiction on the Cooperative Court while Section 28 of the Rent Act confers jurisdiction on the Court of Small Causes, Bombay. This Court observed in Deccan Merchants Cooperative Bank, Limited v. Dali Chand Jugraj Jain, [1969] 1 SCR 887 that 'the two Acts can be harmonised best by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act, should apply'. This view was approved in Bhatnagar's case also. In Co-operative Central Bank, Ltd. v. Additional Industrial Tribunal, Andhra Pradesh, [1970] 1 SCR 205 also this Court was required to harmonise the competing provisions in Section 61 of the A.P. Co-operative Societies Act, which is substantially the same as Section 91(1) of the Societies Act, and Section 10(1)(d) of the Industrial Disputes Act. This Court applying the test laid down on Deccan Merchants Co-operative Bank's case held that a dispute relating to the service condition of an employee of the society would properly be governed by the Industrial Disputes Act.

It was, however, submitted by the learned counsel for the society that the earlier enactment i.e. the Rent Act

must yield to the later Act, i.e. the Societies Act, if the competing provisions of the two cannot be reconciled--lex posterior derogate priori. But the Rent Act is special law extending protection to tenants, just as the Industrial Disputes Act which makes provision for the benefit of the workmen. Ordinarily, therefore, a general provision, a dispute touching the business of the society, would have to give way to the special provision in the Rent Act on the maxim generalia specialibus non derogant. That is why this Court harmonised the said provisions by holding that in matter covered by the Rent Act, its provisions, rather than the provisions of the Societies Act, should apply. In the present case the appellant seeks protection of the Rent Act since he is a deemed tenant under Section 15A read with Section 5(4A) and 5(11)(bb) of the Rent Act. The status of a tenant is conferred on him by law as the legislature desired to extend the protection of the Rent Act to such licensees. Rights which do not flow from contracts but are conferred by law such as the Rent Act, must, we think, be determined by the machinery, if any, provided by the law conferring the right.

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The submission that the appellant cannot seek protection against the Society as his entry into the flat was in violation of the Bye-laws would have been valid had the statute not intervened. To take such a view would tantamount to carving out an exception in Section 15A of the Rent Act that the said provision would not apply to licensees in occupation of flats owned by tenant-co-partnership societies. The language of Section 15A read with Section 5(4A) of the Rent Act does not warrant such a construction. The mere fact that there was a violation of the Bye-laws would not make any difference for it is not unknown that even in cases of breach of statute, the legislature has conferred protection on those guilty of breach if the prevailing circumstances so warrant e.g., sub-letting was prohibited by Section 15 but when the legislature realised the need to protect the sub-tenants it did so by an ordinance promulgated in 1959. Similarly when the legislature felt the need to protect licensees in occupation on 1st February, 1973, it intervened by enacting Section 15A. The legislative policy is quite evident from Section 15A and the protection given to licensees cannot be taken away on the plea that the initial entry of the licensee in the flat was in breach of the Bye-laws. If the occupant-licensee who is a protected tenant under Section 15A can be evicted by the society on the plea of absence of privity between the society and the protected tenant, it would render the protection of Section 15A redundant. The situation is more or less similar to the case of an owner-landlord whose tenant had contrary to the terms of the contract introduced a licensee who is now protected by Section 15A of the Rent Act. In such a case notwithstanding the absence of privity of contract between the owner landlord and the licensee-protected tenant, the latter cannot be evicted except in accordance with the provisions of the Rent Act. We, therefore, do not see any merit in the contention that notwithstanding the protection given by Section 15A, the society can proceed to evict him under Section 91(1) of the Societies Act on the plea that such protection is not available against the society. Such a view would defeat the legislative object of Section 15A of the Rent Act.

But the jurisdiction of the Court in which the action is originated must be determined on the averments in the plaint or claim application and not on the defence taken by the

adversary party. For example, if the plaintiff goes to court alleging that the defendant is a trespasser, the ordinary court will have jurisdiction and its jurisdiction will not be taken away merely because the defendant pleads tenancy. If, however, the defendant succeeds in proving that he is a tenant in respect of premises, possession whereof is sought, the court trying the case would dismiss the suit on the ground that the plaintiff had failed to prove the

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jurisdictional fact that the defendant was a trespasser. Here also the claim was lodged by the society in the Cooperative Court on the ground that the appellant was in wrongful occupation of the flat in question and was a mere trespasser. On facts it is now found that the appellant was and is a protected tenant under Section 15A of the Rent Act. The proceedings initiated under Section 91(1) of the Societies Act cannot, in the circumstances, succeed for the simple reason that the society has failed to prove the fact which constitutes the foundation for jurisdiction. If the society fails to prove that the appellant has no right to the occupation of the flat since he is a mere trespasser, the suit must obviously fail. That is why even in the case of Hindustan Petroleum Corporation Limited this Court did not consider it necessary to deal with the contention based on Section 91(1) of the Societies Act in detail and felt content by observing that the point stood covered by the decision in Bhatnagar's case.

For the reasons afore-stated, we are of the view that the impugned Judgment of the Bombay High Court cannot be allowed to stand. We allow this appeal, set aside the Judgments of all the Courts below and direct that the claim application filed under Section 91(1) of the Societies Act shall stand dismissed. However, in the facts and circumstances of the case we make no order as to costs.

R.N.J.

Appeal

allowed.

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