

CASE NO.:
Appeal (civil) 2990-2991 of 2005

PETITIONER:
M/s. Anita Enterprises & Anr

RESPONDENT:
Belfer Coop. Housing Society Ltd. & Ors

DATE OF JUDGMENT: 14/11/2007

BENCH:
B.N. AGRAWAL & P.P. NAOLEKAR

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NOS. 2990-2991 OF 2005
WITH
CIVIL APPEAL NOS. 2992-2993 OF 2005
AND
CIVIL APPEAL NOS. 2994-2995 OF 2005

B.N. AGRAWAL, J.

1. These appeals by special leave have been filed against separate orders rendered by a Division Bench of the Bombay High Court in Letters Patent Appeals whereby the same have been dismissed as not maintainable, thereby confirming the common judgment rendered by a learned Single Judge of the High Court in three writ petitions filed under Article 227 of the Constitution of India [hereinafter referred to as 'the Constitution'].

2. The facts, in brief, are that the Belfer Cooperative Housing Society Limited, Bandra [West], Mumbai, respondent No. 1 in Civil Appeal Nos. 2990-2991 of 2005, [hereinafter referred to as 'the Society'], which was a tenant co-partnership housing society, held both lands and flats constructed thereon and Dr. Gopal Mahadeo Dhadphale, respondent No. 2 in the said appeals [hereinafter referred to as 'the member'] was admitted as member of the Society in the year 1962 and flat No. 4 on the ground floor was allotted to him. On 3.6.1982, the member inducted M/s. Anita Enterprises, appellant No. 1 in the said appeals, in room No. 2 of the said flat on a monthly rental of Rs. 1000/- and on 3.10.1983 the appellant aforementioned was inducted in room No. 3 as well on a monthly rental of Rs. 750/-. The member thereafter inducted M/s. Anita Medical Systems Pvt. Ltd., appellant No. 2 in the said appeals, in room no. 1 of the flat in question on a monthly rental of Rs. 1000/- which was subsequently enhanced to Rs. 1500/- per month and both the appellants were put in possession of the aforesaid premises. The appellants paid rent upto the month of December, 1986 and as the member refused to accept the rental from January, 1987, the rental was sent to him by cheques under registered post, but the same was not accepted.

3. Thereupon, the appellants were asked to vacate the premises in question which necessitated filing of two separate suits by them in the year 1987 before the Small Causes Court for a declaration that they were tenants with regard to the aforesaid premises of which they were in occupation and for perpetual injunction restraining the member from interfering in any manner with their possession over the premises in question in which suits only the member was made party and not the Society. The member in the

said suits contested the claim of the appellants and both the suits filed by the appellants were dismissed by the trial court upon a finding that the appellants were not inducted as tenants in the suit premises. But on appeal being preferred to the appellate bench of the Small Causes Court, the same were decreed and it was held that the appellants were inducted as tenants in the premises in their occupation.

4. In the meantime, the Society raised a dispute in the year 1989 before the Cooperative Court under Section 91 of the Maharashtra Cooperative Societies Act, 1960 [hereinafter referred to as 'the Societies Act'] praying therein that the appellants be evicted from the premises in their occupation and the member be directed to occupy the same as, according to the Society, the member had parted with possession of the premises in question in favour of the appellants which was not permissible in law. The said case was contested by the appellants in which the member and the appellants entered appearance and all contested the claim of the Society. The Cooperative Court by its award decided the dispute in favour of the Society, passed an order of eviction against the appellants and directed the member to occupy the premises. The said order was upheld in appeal.

5. Thereafter, before the High Court three writ petitions were filed \026 one by the appellants against the aforesaid order passed by the appellate court upholding order passed by the Cooperative Court and the other two writ petitions by the member against the order passed by the appellate bench of the Small Causes Court whereby aforesaid declaratory suits filed by the appellants were decreed. A learned Single Judge of the High Court, by a common judgment, dismissed the writ petition filed by the appellants whereby order passed by the Cooperative Court against the member and the appellants, which was upheld in appeal, has been confirmed and allowed the writ petitions filed by the member, set aside judgment and order passed by the appellate bench of Small Causes Court and restored that of the trial court whereby declaratory suits filed by the appellants were dismissed. The said judgment has been upheld by Division Bench of the High Court by dismissing the Letters Patent Appeals on the ground that the same were not maintainable in view of the fact that the writ petitions were filed under Article 227 of the Constitution. Hence these appeals by special leave.

6. Undisputed facts are stated hereinafter. The Society was a tenant co-partnership housing Society, the land and the structures standing thereon, which include the premises in question, were held by it, respondent no. 2 was admitted as its member, allotted flat No. 4 and put in possession thereof. The appellants are in occupation of the premises in question since the date of their induction aforementioned and the member remained in possession of the premises for a period of more than one year before induction of the appellants therein. Induction of appellants as tenants by the member amounted to transfer of interest by the member in the premises in question, which was property of the Society, and the appellants were neither members of the Society nor can be said to be persons whose application for membership had been accepted by the Society or persons whose appeal under Section 23 of the Societies Act had been allowed by the Registrar or persons who were deemed to be members under Section (1A) of Section 23 of the Societies Act. The appellants were inducted without the consent of either the Society or its Managing Committee and never admitted as nominal members of the Society.

7. Shri Shekhar Naphade, learned senior counsel appearing on behalf of the appellants in support of the appeals, submitted that respondent no. 2 - in his capacity as member of the tenant co-partnership housing society - has a possessory right in the premises in question and the Society was only, by way of legal fiction, owner of the said premises. It was further submitted that

there was no relationship of landlord and tenant between the Society and the member and there was such a relationship between the member and the appellants, as such, the appellants were entitled to claim protection under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 [hereinafter referred to as 'the Rent Act'] and the proceeding under Section 91 of the Societies Act was not maintainable in view of the bar incorporated under Section 28 of the Rent Act. According to him, the Society was not justified in contending that there was relationship of landlord and tenant between the Society and the member and consequently the appellants cannot be said to be sub-tenants of the member as creation of sub-tenancy was forbidden under Section 15 of the Rent Act unless there was contract to the contrary, which was not so in the case on hand and, consequently such a sub-tenant cannot be treated to be a tenant within the meaning of Section 5(11) of the Rent Act. It was also submitted that the tenancy right could be created by the member as the transfer by him of his right in the premises was not forbidden in law, therefore, the Society was not justified in contending that relationship of landlord and tenant was not duly created inasmuch as even if there was restrictive right of transfer and not absolute one if the tenancy was created in infraction of the same, the transaction creating tenancy right in the appellants by the member cannot be said to be void as such and if a party wanted to avoid the same, it was required to move a competent civil court for a declaration that the same was invalid in law as the said transaction can, at the highest, be said to be voidable and the said question cannot be examined by a Cooperative Court purporting to act under Section 91 of the Societies Act.

8. On the other hand, Shri U.U. Lalit, learned senior counsel appearing on behalf of the Society, submitted that the relationship between the Society and the member, as would appear from the Bye-Laws of the Society as well as Regulations, was that of landlord and tenant in respect of the premises held by the Society and the member purported to create right of a sub-tenant in the appellants which was, in the absence of any contract to the contrary, forbidden by Section 15 of the Rent Act, as such the appellants having not acquired the status of a tenant within the meaning of the Rent Act, cannot claim protection thereunder from eviction. Alternatively, it was submitted that even if it was treated that there existed no relationship of landlord and tenant between the Society and the member and relationship of landlord and tenant was created between the member and the appellants, the same was not valid in law as it was not duly created in view of the fact that such a transaction being in violation of the provisions of Section 29 of the Societies Act, was invalid as the transfer made was, though entered into after completion of period of one year of occupation of the member, to a non-member which was forbidden by law, as would appear from the said provisions and the Bye-Laws of the Society and its legality or otherwise could have been examined in a dispute raised under Section 91 of the Societies Act. It was then submitted that asking the Society to first seek such a declaration from a competent civil court and thereafter raise a dispute under Section 91 of the Societies Act would frustrate the very object of the Societies Act. It was further submitted that in any view of the matter, in the present case as the appellants had already filed suits before the Small Causes Court for a declaration that their status was that of tenants under the Rent Act, in which it was open to the Society to raise the question that the relationship of landlord and tenant was not duly created, meaning thereby not in accordance with law but contrary to law and for granting relief to the appellants therein the Court was called upon to go into this question and decide the same. Learned counsel also submitted that as the relationship of landlord and tenant was not duly created, the appellants could not claim protection of the

Rent Act and the petition under Section 91 of the Societies Act was maintainable as the dispute raised was touching upon business of the Society.

9. In view of the rival submissions, the following questions fall for our consideration in these appeals:-

1. Whether status of a member in a tenant co-partnership housing society is that of a tenant or landlord within the meaning of the Rent Act and consequently there was any relationship of landlord and tenant between the society and its member?

2. Whether purported status of the appellants, who were inducted by the member in the premises in question was that of a tenant or sub-tenant within the meaning of Section 5(11) of the Rent Act and if it is held to be a tenant whether the relationship of landlord and tenant between them was duly created so as to claim protection from eviction under the Rent Act?

3. Whether the question regarding legality or otherwise of creation of tenancy right between the appellants and the member of the Society could be adjudicated by the Small Causes Court in suits filed by the appellants against member of the Society for declaration that there was relationship of landlord and tenant between them and the High Court was justified in restoring decree passed by the trial court to the effect that there was no relationship of landlord and tenant between the appellants and member of the Society?

4. Whether the matter regarding legality or otherwise of creation of tenancy right between the appellants and the member could be adjudicated by the Cooperative Court in dispute raised under Section 91 of the Societies Act before the Cooperative Court or the Society before raising any such dispute was required to obtain a declaratory decree from competent civil court by filing a properly constituted suit before it?

10. In order to appreciate the points involved in these appeals, it would be useful to refer to the relevant provisions of the Societies Act, Maharashtra Co-operative Societies Rules, 1961 [hereinafter referred to as 'the Rules'], Bye-Laws of the Society which were registered with the Registrar, Cooperative Society, at the time of grant of registration to it [hereinafter referred to as 'the Bye-Laws'], Regulations relating to tenancies to be granted by the Society to members in respect of premises held by the Society contained in Form A which are part of registered Bye-Laws of the Society [hereinafter referred to as 'the Regulations'] and the Rent Act which run thus:-

THE SOCIETIES ACT:

"Section 2 - Definitions.- In this Act, unless the context otherwise requires,--

[(16) "housing society "means a society, the object of which is to provide its members with open plots for housing, dwelling houses or flats; or if open plots, the dwelling houses or flats are already acquired, to provide its members common amenities and services];

(19)

(a.) "member" means a person joining in an application for the registration of a Cooperative society which is subsequently registered, or a person duly admitted to membership of a society

after registration, and includes a nominal, associate or sympathizer member;

* * * * *

(c.) "nominal member" means a person admitted to membership as such after registration in accordance with the by-laws;

* * * * *

"Section 23 - Open membership.- (1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act and its by-laws.

[(1A) Where a society refuse to accept the application from an eligible person for admission as a member, or the payment made by him in respect of membership, such person may tender an application in such form as may be prescribed together with payment in respect of membership, if any, to the Registrar, who shall forward the application and the amount, if any so paid, to the society concerned within thirty days from the date of receipt of such application and the amount; and thereupon if the society fails to communicate any decision to the applicant within sixty days from the date of receipt of such application and the amount by the society, the applicant shall be deemed to have become a member of such society.] [If any question arises whether a person has become a deemed member or otherwise, the same shall be decided by the Registrar after giving a reasonable opportunity of being heard to all the concerned parties.]

(2) Any person aggrieved by the decision of a society, refusing him admission to its membership, may appeal to the Registrar. [Every such appeal, as far as possible, be disposed of by the Registrar within a period of three months from the date of its receipt:

Provided that, where such appeal is not so disposed of within the said period of three months, the Registrar shall record the reasons for the delay.]

(3) The decision of the Registrar in appeal, shall be final and the Registrar shall communicate his decision to the parties within fifteen days from the date thereof.

[(4) Without prejudice to the foregoing provisions of this section, in the case of agro-processing societies or any other society for which a definite zone or an area of operation is allotted by the State Government or the Registrar, it shall be obligatory on the part of such society to admit, on an application made to it, every eligible person from that zone or the area of operation, as the case may be, as a member of such society, unless such person is already registered as a member of any other such society, in the same zone or the area of operation.]"

"Section 29 - Restrictions on transfer or charge

of share or interest .- (1) Subject to the provisions of the last preceding section as to the maximum holding of shares and to any rules made in this behalf, a transfer of, or charge on, the share or interest of a member in the share capital of a society shall be subject to such conditions as may be prescribed.

(2) A member shall not transfer any share held by him or his interest in the capital or property of any society, or any part thereof, unless\027

(a)he has held such share or interest for not less than one year;

(b)the transfer is made to a member of the society or to a person whose application for membership has been accepted [by the society, or to a person whose appeal under Section 23 of the Act has been allowed by the Registrar; or to a person who is deemed to be a member under sub-section (1A) of-section 23.].

(3) Notwithstanding anything contained in sub-sections (1) and (2), where a member is allowed to resign, or is expelled, or ceases to be a member on account of his being disqualified by this Act or by the rules made thereunder or by the by-laws of the society, the society may acquire the share or interest of such member in the share capital by paying for it at the value determined in the manner prescribed provided that the total payment of share capital of a society in any financial year for such purposes does not exceed ten per cent of the paid-up share capital of the society on the last day of the financial year immediately preceding.

Explanation --.[I]--The right to forfeit the share or interest of any expelled member in the share capital by virtue of any by-laws of the society, shall not be affected by the aforesaid provision.

[Explanation II,--In this section, the expression "financial year" means the year ending on the [31st day, of March] or, in the case of any society or class of societies the accounts of which are with the previous sanction of the Registrar balanced on any other day, the year ending on such day.]

(4) Where the State Government is a member of a society, the restrictions contained in this section shall not apply to any transfer made by it of its share or interest in the capital of the society; and that Government may, notwithstanding anything in this Act, withdraw from the society its share capital at any time, after giving to the society notice thereof of not less than three months".

"Section 31 - Share or interest not liable to attachment.- The share or interest of a member in the capital of a society, or in the loan-stock issued by a housing society, or in the funds raised by a society from its members by way of savings deposit, shall not be liable to attachment or sale under any decree or order of a Court for or in respect of any debt or liability incurred by the member; and

accordingly, neither the Official Assignee under the presidency-towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1920, nor any such person or authority under any corresponding law for the time being in force, shall be entitled to, or have any claim on, such share or interest."

"Section 47 - Prior claim of society.- (1)

Notwithstanding anything in any other law for the time being in force, but subject to any prior claim of Government in respect of land revenue or any money recoverable as land revenue and to the provisions of sections 60 and 61 of the Code of Civil Procedure, 1908.

(a) any debt or outstanding demand, owing to a society by any member or past member or deceased member, shall be a first charge,--

(i) upon the crops or other agricultural produce raised in whole or in part whether with or without a loan taken from the society by such member or past member or deceased member,--

(ii) upon any cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or workshop, godown or place of business supplied, to or purchased by such member or past member or deceased member, in whole or in part, from any loan whether in money or goods made to him by the society, and

(iii) upon any movable property which may have been hypothecated, pledged or otherwise mortgaged by a member with the society, and remaining in his custody;

(b) any outstanding demands or dues payable to a society by any member or past member or deceased member, in respect of rent, shares, loans or purchase money or any other rights or amounts payable to such society, shall be a first charge upon his interest in the immovable property of the society,

Explanation.--The prior claim of Government in respect of dues other than land revenue, shall be restricted for the purpose of sub-section (1) to the assets created by a member out of the funds in respect of which the Government has a claim.

(2) No property or interest in property, which is subject to a charge under the foregoing sub-section, shall be transferred in any manner without the previous permission of the society; and such transfer shall be subject to such conditions, if any, as the society may impose.

(3) Any transfer made in contravention of sub-section (2) shall be void.

(4) Notwithstanding anything contained in sub-sections (2) and (3), a society, which has as one of its objects the disposal of the produce of its members, may provide in its by-laws, or may otherwise contract with its members,--

(a) that every such member shall dispose of his produce through the society, and

(b) that any member, who is found guilty of a breach of the by-laws or of any such contract, shall reimburse the society for any loss, determined in such manner as may be specified in the by-laws."

"Section 91 - Disputes .- (1) Notwithstanding [anything contained] in any other law for the time being in force, any dispute touching the constitution, [elections of the committee or its officers other than elections of committees of the specified societies including its officer], conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated or by a creditor of the society, to the co-operative Court if both the parties thereto are one or other of the following:--

(a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the society, or the Liquidator of the society [or the official Assignee of a de-registered society]

(b) a member, past member of a person claiming through a member, past member of a deceased member of society, or a society which is a member of the society [or a person who claims to be a member of the society;]

[(c) a person other than a member of the society, with whom the society, has any transactions in respect of which any restrictions or regulations have been imposed, made or prescribed under sections 43, 44 or 45, and any person claiming through such person;

(d) a surety of a member, past member or deceased member, or surety of a person other than a member with whom the society has any transactions in respect of which restrictions have been prescribed under section 45, whether such surety or person is or is not a member of the society;)

(e) any other society, or the Liquidator of such a society [or-de-registered society or the official Assignee of such a de-registered society].

[Provided that, an industrial dispute as defined in clause (k) of section 2 of the Industrial Disputes Act, 1947 , or rejection of nomination paper at the election to a committee of any society other than a notified society under section 73 - 1 C or a society specified by or under section 73 -G, or refusal of admission to membership by a society to any person qualified therefor [or any proceeding for the recovery of the amount as arrear of land revenue on a certificate granted by the Registrar under sub-section (1) or (2) of section 101 or sub -section (1) of

section 137 or the recovery proceeding of the Registrar or any officer subordinate to him or an officer of society notified by the State Government, who is empowered by the Registrar under sub - section (1) of section 156,] [or any orders, decisions, awards and actions of the Registrar against which an appeal under section 152 or 152 A and revision under section 154 of the Act have been provided] shall not be deemed to be a dispute for the purposes of this section.]

(3) 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).

Explanation 1.--A dispute between the Liquidator of a society [or an official Assignee of a de-registered society] and [the members (including past members, or nominees, heirs or legal representative or deceased members)] of the same society shall not be referred [to the co-operative Court] under the provisions of sub-section (1).

Explanation 2.--For the purposes of this sub-section, a dispute shall include\027

(i) a claim by or against a society for any debt or demand due to it from a member or due from it to a member, past member or the nominee, heir or legal representative of a deceased member, or servant for employee whether such a debt or demand be admitted or not;

(ii) a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower, whether such a sum or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, by any officer, past officer or deceased officer, by any agent, past agent or deceased agent, or by any servant, past servant, past servant or deceased servant, or by its committee, past or present, whether such loss be admitted or not;

(iv) a refusal or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land or any other asset resumed by it for breach of condition as the assignment."

"93. Transfer of disputes from one Co-operative Court to another and suspension of proceedings in certain cases.-

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(2) Notwithstanding anything contained in this Act, the Co-operative Court, on an application made to it by any of the parties to the dispute, may, if it thinks fit suspend any proceedings in respect of any dispute, if the question at issue between a society

and a claimant or between different claimants, 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. If any such suit is not instituted in a Civil Court within two months from the date of the order of the Co-operative Court, shall continue the proceedings and decide the dispute]"

[Emphasis Added]

THE RULES

"Rule 8 \026 Matters in respect of which Registrar may direct society to make by-laws or society may make by-laws.-

(1) The Registrar may require a society to make bye-laws in respect of all or any of the following matters, that is to say.-

* * * * *

(c) the object of the society;

* * * * *

(f) the privileges, rights, duties and liabilities of members including nominal, associate and sympathizer members;

* * * * *

(m) the procedure for expulsion of members;

(2) A society may make by-laws for all or any of the following matters, that is to say \026

* * * * *

(c) the conditions, if any, under which the transfer of share or interest of a member may be permitted;"

"Rule 10 \026 Classification and sub-classification of societies.- (1) After registration of a society, the Registrar shall classify the society into one or other of the following classes and sub-classes of societies prescribed below according to the principal object provided in its by-laws:

Class

1 Sub-Class

2
Examples of societies
falling in the class or sub-
class, as the case may be

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Society

(a)Tenant

Ownership

Housing Society

Housing Societies where
land is held either on lease-
hold or free-hold basis by
Societies and houses are
owned or are to be owned
by members.

(b)Tenant Co-
partnership

Housing Society

Housing Societies which
hold both land and
buildings either on lese-
hold or free-hold basis and
allot them to their
members.

(c) Other Housing
Societies

House Mortgage Societies
and House Construction
Societies.

"Rule 28 \026 Expulsion of members.- Any member
who has been persistently defaulting payment of
his dues or has been failing to comply with the
provisions of the by-laws regarding sales of his
produce through the society or other matters in
connection with his dealings with the society or
who, in the opinion of the committee, has brought
disrepute to the society or has done other acts
detrimental to the interest or proper working of the
society may, in accordance with the provisions of
sub-section (1) of Section 35, be expelled from the
society. Expulsion from membership may involve
forfeiture of shares held by the member."

[Emphasis Added]

THE BYE-LAWS

"Bye-law. 2.- The objects of the Society shall be: -

(a) To purchase plot No\005\005\005\005\005\005\005\005. or to
purchase building \005\005\005\005\005\005\005\005.. constructed on
Plot No\005\005\005\005\005\005\005\005\005\005\005\005 (referred to in the
application for registration), or any other plot or plots
with the prior approval of the general meeting and of
the Registrar and to construct tenements on such
plot or plots for the use of members;

* * * * *

(f) To do all things necessary or expedient for the attainment of the objects specified in these by-laws;"

"Bye-Law 7.- All persons permanently residing in Bombay City and Suburban area or who intend to settle down in Bombay City and Suburban area permanently and who have signed the application for registration are original members. Other members shall be admitted by the Committee. Every person on applying for membership shall deposit Re.1/- as entrance fee and the value of at least five shares for which he shall receive a copy of the by-laws. Two adverse votes are sufficient to exclude an applicant. In case where an application is refused, the deposit shall ordinarily be returned.

Note:- Resident is a person who resides in the house or tenement permanently and which he does not leave for more than 4 months at a time."

"Bye-Law 12.- (1) A member shall be expelled from the Society by the vote of not less than two-thirds of the members present and voting at a General Meeting of the Society on a motion (which shall be final and conclusive) that in the opinion of the Meeting such member has:

- (a) been a persistent defaulter
- ,'
- (b) willfully deceived the Society by false statements,
- (c) been bankrupt or legally disabled,
- (d) been criminally convicted of an offence involving moral turpitude
- ,'
- (e) intentionally done any act likely to injure the credit of the Society,
- (f) gravely misused the dwelling rented by him from the Society or habitually acted in it in a disgraceful manner or in a manner which has caused serious offence to his neighbours
- or
- (g) without the previous written permission of the Managing Committee has let or sub-let or given on caretaker or leave licence basis or used for accommodating paying guests or disposed off in any other manner any portion of the dwelling accommodation/shops/godowns/garages.
- (h) failed to occupy his premises in the building of the society within a period not exceeding six months from the date of the allotment of a flat."

"Bye-Law 64.- No member shall be tenant of the Society unless he subscribes to such number of shares as the Managing Committee prescribes."

"Bye-Law 64(a).- A member to whom a tenement is allotted shall occupy it himself and shall not assign,

underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Managing Committee. Such permission shall not be granted unless the member authorizes the society to recover rent or compensation and taxes and other common charges from the sub-lettee, licensee or caretaker. The society shall admit every such sub-lettee, licensee, or caretaker as a nominal member of the Society".

[Emphasis Added]

THE REGULATIONS

"Regulation 4.- No tenant shall assign underlet, vacate or part with the possession of the tenement or any part thereof without the previous consent in writing of the Society"

"Regulation 24.- The rent shall be calculated as follows and shall be paid on the first day of each calendar month: -

(a) A rent of 61/4 per cent per annum (which shall not be increased during the tenancy) on the cost including the building, land, roads and other items, such cost to be certified by the Committee whose decision shall be final and conclusive and to be paid by 12 equal calendar monthly payments.

(b) A further rent during the term of 25 years of \005\005\005\005. Per cent per annum (which shall not be increased during the said term of 25 years except for a new tenant) on the said cost such rent to be applied to the share account of the tenants and to be paid by 12 equal calendar monthly payments and it is anticipated that when all these payments are made the dividend on the shares will be equal to the rent paid under clause 24(a) hereof.

(c) A further rent equal to the proportion (applicable to the tenement) of the expense incurred from time to time in insurance against fire, tempest or flood or violence by an army or mob or other irresistible force and in the management of the Society and the maintenance and repair of the Society's Estate such expense and proportion thereof payable by the tenant to be determined by the Certificate of the Committee whose decision shall be final and conclusive such further rent to be paid on the 1st day of the calendar month next following the date of the said certificate.

(d) A further rent equal to the proportion applicable to the tenement of the sum or sums from time to time paid by the Society in respect of assessment and rates such proportion to be determined by the Certificate of the Committee whose decision shall be final and conclusive such further rent to be paid on the 1st day of the calendar month next following the date of the said certificate.

I agree to take the tenement known as\005\005subject to the above regulations which I agree to observe and

perform and by which I agree to be bound".

[Emphasis Added]

THE RENT ACT

"Section 5 \026 Definitions.- In this Act unless there is anything repugnant to the subject or context,-

* * * * *

(3) "landlord" means any person who is for the time being, receiving, or entitled to receive, rent in respect of any premises whether on his own account or on account, or on behalf, or for the benefit of any other person or as a trustee, guardian, or receiver for any other person or who would so receive the rent or be entitled to receive the rent if the premises were let to a tenant; and includes any person not being a tenant who from time to time derives title under a landlord; and further includes in respect of his sub-tenant, a tenant who has sublet any premises; [and also includes in respect of a licensee deemed to be a tenant by section 15A, licensor who has given such license, [and in respect of the State Government, or as the case may be, the Government allottee referred to in sub-clause (b) of clause (1A), deemed to be a tenant by section 15B, the person who was entitled to receive the rent if the premises were let to a tenant immediately before the coming into force of the Bombay Rents, Hotel and Lodging House Rates Control, Bombay Land Requisition and Bombay Government Premises (Eviction) (Amendment) Act, 1996]]"

* * * * *

"(11).- "tenant" means any person by whom or on whose account rent is payable for any premises and includes, -

(a) such sub-tenants and other persons as have derived title under a tenant [before the 1st day of February 1973;]

[(aa) any person to whom interest in premises, has been assigned or transferred as permitted or deemed to be permitted, under section 15;]

(b) any person remaining after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title [before the first day of February 1973;]

(bb) such licensees as share deemed to be tenants for the purposes of this Act by section 15A]

[(bba) the State Government, or as the case may be, the "Government allottee, referred to in sub-clause (b) of clause (1A), deemed to be a tenant, for the purposes of this Act by section 15B;].

[[(c) (i) in relation to any premises let for residence,

when the tenant dies, whether the death has occurred before or after the commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1978, any member of the tenant's family residing with the tenant at the time of his death or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court;

(ii) in relation to any permission let for the purposes of education, business, trade or storage, when the tenant dies, whether the death has occurred before or after the commencement of the said Act, any member of the tenant's family using the premises for the purposes of education of carrying on business, trade or storage in the premises, with the tenant at the time of his death, or, in the absence of such member, any heir of the deceased tenant, as may be decided in default of agreement by the Court.

Explanation.- The provisions of this clause for transmission of tenancy, shall not be restricted to the death of the original tenant, but shall apply, and shall be deemed always to have applied, even on the death of any subsequent tenant, who becomes tenant under these provisions on the death of the last preceding tenant.".]

"Section 15. [In absence of contract to the contrary, tenant not to sub-let or transfer] [or to give on licence].-

[(1)] Notwithstanding anything contained in any law [but subject to any contract to the contrary,] it shall not be lawful after the coming into operation of this Act for any tenant to sub-let the whole or any part of the premises let to him or to assign or transfer in any other manner his interest therein [and after the date of commencement of the Bombay Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1973, for any tenant to give on licence the whole or part of such premises]:

[Provided that the [State] Government may by notification in the Official Gazette, permit in any area the transfer of interest in premises held under such [leases or class of leases [or the giving on licence any premises or class of premises] and no such extent as may be specified in the notification.]

[(2) The prohibition against the sub-letting of the whole or any part of the premises which have been let to any tenant, and against the assignment or transfer in any other manner of the interest of the tenant therein, contained in sub-section (1), shall, subject to the provisions of this sub-section be deemed to have had no effect [before the 1st day of February, 1973], in any area in which this Act was in operation before such commencement; and accordingly, notwithstanding anything contained in any contract or in the judgment, decree or order of a Court, any such sub-lease, assignment or transfer of any such purported sub-lease, assignment or transfer in favour of any person who has entered into possession, despite the prohibition in sub-

section (1) as purported sub-lessee, assignee or transferee and has continued in a possession [on the date aforesaid] shall be deemed to be valid and effectual for all purposes, and any tenant who has sub-let any premises or part thereof, assigned or transferred any interest therein, shall not be liable to eviction under clause (e) of sub-section (1) of section 13.

The provisions aforesaid of this sub-section shall not affect in any manner the operation of sub-section (1) after the [date aforesaid]".

"Section 15A. Certain licensees in occupation on 1st February 1973 to become tenants.-

(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 purpose of this Act, the tenant of the landlord, in respect of the premises or part thereof, in his occupation.

(2) The provisions of sub-section (1) shall not affect in any manner the operation of sub-section (1) of section 15 after the date aforesaid]".

"Section 28 - Jurisdiction of Courts.-

[(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) in any area for which, a Court of Small Causes is established under the Provincial Small Cause Courts Act, 1887, such Court and]

(b), elsewhere, the Court of the Civil Judge (Junior Division) having jurisdiction in the area in which the premises are situate or, if there is no such Civil Judge the Court of the Civil Judge (Senior Division) having ordinary jurisdiction,

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 Act apply [or between a licensor and a licensee relating to the recovery of the licence fee or charge] 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 subject to the provisions of sub-section (2)] no other court shall have jurisdiction to entertain any such suit, proceeding, or application or to deal with such claim or question.

[(2) (a) Notwithstanding anything contained in clause (aa) of sub-section (1), the District Court may at any stage withdraw any such suit, proceeding or application pending in a Court of Small Causes established for any area under the Provincial Small Causes Courts Act, 1887, and transfer the same for trial or disposal to the Court of the Civil Judge (Senior Division) having ordinary Jurisdiction in such area.]

(b) Where any suit, proceeding or application has been withdrawn under clause (a), the Court of the Civil Judge (Senior Division) which thereafter tries such suit, proceedings or application, as the case may be, may either re-try it or proceed from the stage at which it was withdrawn.

(c) The Court of the Civil Judge trying any suit, proceeding or application withdrawn under clause (a) from the Court of Small Causes, shall, for purposes of such suit, proceeding or application, as the case may be, be deemed to be the Court of Small Causes.]

Explanation.- In this section "proceeding" does not include an execution proceeding arising out of a decree passed before the coming into operation of this Act."

[Emphasis Added]

11. In our country, for the first time, Co-operative Credit Societies Act, 1904 was passed, to encourage thrift, self-help and co-operation among agriculturists, artisans and persons of limited means, and for that purpose to provide for the constitution and control of co-operative credit societies, which laid down the foundation of co-operative law. Under that Act ten members could form a society and the object of the society was to raise funds either from members or outsiders and give loans to the needy members out of the funds so collected. The principle of limited liability was also recognized and the concept of profit motive was given a go-by. The tendency towards concentration of wealth in a few hands was discouraged by providing that no member could hold shares beyond a certain limit. The said Act was replaced by the Cooperative Societies Act, 1912, which was repealed by the Bombay Cooperative Societies Act, 1925. The aforementioned Act was repealed by the Maharashtra Cooperative Societies Act, 1960 to consolidate and amend the law relating to cooperative societies in the State of Maharashtra the objective of which was to provide for the orderly development of the cooperative movement in the State in accordance with the Directive Principles of State Policy enshrined in Part Four of the Constitution of India.

12. 'Society' has been defined under Section 2(27) of the Societies Act to mean a cooperative society registered or deemed to be registered under the Societies Act. Under Section 2(5) 'by-laws' means by-laws registered under the Societies Act and for the time being in force and includes registered amendments of such by-laws. Under Section 2(16) 'housing society' has been defined to mean a society, the object of which is to provide its members with open plots for housing, dwelling houses or flats; or if open plots, the dwelling houses or flats are already acquired, to provide its members common amenities and services. Section 2(19) defines 'member' to be a person joining in an application for the

registration of a cooperative society which is subsequently registered, or a person duly admitted to membership of a society after registration and includes an associate, nominal or sympathiser member. Under Section 2(19)(c) 'nominal member' is a person admitted to membership as such after registration in accordance with by-laws. Section 2(21) defines the expression 'prescribed' to mean prescribed by rules. Under Section 2(24) 'Registrar' has been defined to mean a person appointed as Registrar of Co-operative Societies under the Societies Act. 'Rules' under Section 2(26) means rules made under the Societies Act.

13. Section 4 of the Societies Act lays down that a Society which has as its objects the promotion of economic interests or general welfare of its members or of the public in accordance with cooperative principles or a society established with the object of facilitating the operations of any such society, may be registered under the Societies Act. Under Section 9, upon the satisfaction of the Registrar, cooperative society and its bye-laws are registered on an application made to that effect under Rule 8. Section 12 lays down that the Registrar shall classify all societies into one or other of the classes of societies defined in Section 2 and also into such sub-classes thereof, as may be prescribed. Rule 10 prescribes such classification of the societies and under Rule 10(1)(5) three types of housing societies have been enumerated. First is under Rule 10(1)(5)(a) which is a 'tenant ownership housing society' where land is held either on leasehold or freehold basis by the society and houses are owned or are to be owned by members. The second type of housing society under Rule 10(1)(5)(b) is 'tenant co-partnership housing society' which holds both land and buildings either on leasehold or freehold basis and allots them to its members. The third type under Rule 10(1)(5)(c) is 'other housing societies' which are called house mortgage and house construction societies and the same do not come in any of the categories of housing societies referred to above.

14. Section 22 of the Societies Act enumerates the persons who are eligible to be admitted as members of a society. Section 23 lays down that no society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of the Societies Act and its by-laws. Section 24 lays down that even if any person does not fulfill the eligibility requirement enumerated in Section 22 of the Societies Act, he can be admitted by the Society as a nominal, associate or sympathizer member. According to Section 25 a person shall cease to be a member of the society on his resignation from the membership thereof being accepted or on the transfer of the whole of his share or interest in the society to another member or on his death or removal or expulsion from the society or where a firm, company, any other corporate body, society or trust is its member, on its dissolution or ceasing to exist. Under Section 35 a society is empowered by resolution passed by a majority of not less than three-fourths of the members entitled to vote, who are present at its general meeting held for the purpose, to expel a member for acts which are detrimental to the interest or proper working of the society. Under Rule 28 of the Rules any member who has been persistently defaulting payment of dues or has failed to comply with the provisions of the bye-laws regarding sales of his produce through the society or other matters connected therewith in connection with his dealings with the society or who, in the opinion of the committee, has brought disrepute to the society or has done other acts detrimental to the interest or proper working of the society may, in accordance with the provisions of sub-section (1) of Section 35, be expelled from the society. Under bye-law 12 a member is required not to let or sub-let or give on caretaker or leave licence basis or use for accommodating paying guests or dispose of in any manner any portion of the tenement without the previous written permission of the Managing

Committee of the Society and failure thereof tantamounts to violation of the bye-laws within the meaning of Rule 28 and such a member would be liable to be expelled thereunder.

15. Section 29(2) of the Societies Act provides that a member shall not transfer, inter alia, any interest in the property of any society or any part thereof unless two conditions are fulfilled, namely, the member has held such interest for not less than one year and the transfer is made either to an existing member of the society or to a person whose application for membership has been accepted by the society or to a person whose appeal under Section 23 of the Societies Act has been allowed by the Registrar or to a person who is deemed to be a member under sub-section (1A) of Section 23 of the Societies Act.

16. Under Rule 8(2) of the Rules, a society may make bye-laws prescribing thereunder, inter alia, conditions, if any, under which the transfer of share held by a member or interest of a member in the tenement allotted to him may be permitted. Under bye-law 64(a) a member to whom a tenement is allotted shall be entitled to occupy the same himself and is not permitted to assign, underlet, vacate or part with the possession of the same or any part thereof without the previous consent in writing of the Managing Committee of the Society, which permission shall not be granted unless the member authorises the society to recover rent or compensation and taxes and other common charges from the sub-lettee, licensee or caretaker who must agree to become its nominal member. Regulation 4 of the Regulations, which every member at the time of his admission to the membership of the Society is required to observe by giving an undertaking in writing, provides that no tenant shall assign, underlet, vacate or part with possession of the premises or any part thereof without the previous consent in writing of the society.

17. Bye-law 2(a) enumerates objects of the society one of which would be to purchase plot and to make constructions thereon for use of its members. The further objects of the society are to advance loans to its members, guarantee loans to its members for acquiring building sites, constructing houses, to receive or guarantee repayments in lump sum or in instalments and to do all things necessary or expedient for the attainment of the objects specified in the bye-laws, meaning thereby that every member to whom a plot or flat is allotted for his self occupation and use shall not part with possession thereof unless permitted by the society, which, at the time of grant of permission, shall admit such persons in whose favour the member intends to part with possession by admitting him as a nominal member. Bye-law 7 lays down that all persons permanently residing in Bombay City and Suburban areas or those who intend to settle down in Bombay City and Suburban areas shall be eligible to be admitted as members by the Committee of the Society. Bye-law 64 requires that no member shall be a tenant of the society in respect of the tenement unless he subscribes to such number of shares as the Managing Committee prescribes, which is five paid-up shares in the society as per regulation 1 of the Regulations and upon subscribing to such shares under bye-law 64 such a member shall be allotted a tenement for his self occupation who shall not part with possession thereof in any manner without the previous consent in writing of the Managing Committee and while granting such permission the person in whose favour the member intends to part with possession shall be admitted as nominal member.

18. Under regulation 2, the committee of the society is required to maintain a register of applicants for the tenements and the tenements would be offered to the members in the order in which they appear in the register and in the event of two or more members having made application on the same day, the one to whom the offer is to be made shall be determined by lot. Regulation 3 permits the tenancy to continue as long as the tenant

or his successor in all respects observes and performs the obligations imposed upon him under the Regulations as a tenant. Regulation 4 forbids a tenant to part with the possession of the tenement without the previous consent in writing of the society. Regulation 24 enumerates the manner in which rent would be calculated. The cost of the land, building, road and other items to be determined by the committee of the society and 6-1/4% thereof shall be paid every year in 12 equal monthly instalments. In addition to the aforesaid rent, the tenant is required to make certain other payments by way of rent as required under sub-clauses (b) to (d) of regulation 24. In the present case, the member in whose favour tenement, i.e., the flat, has been allotted had undertaken in writing that he agreed to take the tenement subject to the Regulations and agreed to observe the same.

19. Section 31 gives immunity to the share or interest of a member in the capital of a society or in the loan stock issued by society or in the funds raised by a society from its members by way of savings deposit, from attachment or sale under any decree or order of a court for or in respect of any debt or liability incurred by the member. According to the provisions of Section 36 of the Societies Act, a society, upon its registration, shall be treated to be a body corporate, as such a juristic person. Section 47(2) of the Societies Act lays down that interest of a member in those properties of the society whereupon a charge has been created under sub-section (1) of Section 47 shall not be transferred in any manner without the previous permission of the society and for according permission the society may impose such conditions as it may deem fit and proper. According to Section 47(3) any transfer made in contravention of sub-section (2) of Section 47 shall be void. Under Section 79AA Regulations can be framed by the society for carrying on its trade or business on the direction of the Registrar and the same are required to be approved by him.

20. Section 91, which begins with a non-obstante clause, lays down that if there is any dispute, inter alia, touching the business of a society, the same shall be referred to Cooperative Court by, inter alia, any of the parties to the dispute. Section 91(3) lays down that, except as provided under sub-section (2) of Section 93 of the Societies Act, no court shall have jurisdiction to entertain any suit or proceeding in respect of any dispute referred to in sub-section (1) of Section 91 of the Societies Act. Section 93(2), which also begins with a non-obstante clause, provides that the Cooperative Court may, on an application made to it by any of the parties to dispute, if it thinks fit, suspend any proceedings in respect of any dispute, if the question at issue between a society and a claimant or between different claimants 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, but if any such suit is not instituted in a Civil Court within two months from the date of the order passed by the Cooperative Court, the proceedings under Section 91(1) shall continue and dispute raised by the parties shall be decided by the Cooperative Court. Section 94 (1) lays down that the procedure for adjudication of the aforesaid disputes raised by the parties shall, as far as possible, be the same as provided in the case of Civil Court by the Code of Civil Procedure, 1908. Section 97 prescribes appeal before the Cooperative Appellate Court against award of the Cooperative Court adjudicating the dispute raised under Section 91 of the Societies Act.

21. According to Section 146(1)(a) if any member of a society makes any transfer of any property or interest in property in contravention of sub-section (2) of Section 47 or any persons knowingly acquires or abets in the acquisition of such property, the same, inter alia, would be an offence under the Societies Act, punishment for which has been provided under Section 147 of the Societies Act. Section 165 empowers the State Government to

make rules for, inter alia, the conduct and regulation of business of society and carrying out the purposes of the Societies Act.

22. The Rent Act was enacted to amend and consolidate the law relating to the control of rents and repair of certain premises, of rates of hotels and lodging house and of evictions and also to control the charges for licence of premises etc. Section 5(3) of the Rent Act defines a 'landlord' to be a person who, for the time being, is receiving or entitled to receive rent of any premises from a tenant, which includes a licensee who is deemed to be a tenant within the meaning of Section 15A of the Rent Act. Section 5(11) defines 'tenant' to mean a person by whom or on whose account rent is payable for any premises which, inter alia, includes a licensee, who is a deemed tenant under Section 15A of the Rent Act but shall not include such a sub-tenant to whom interest in the premises has been purported to have been assigned or transferred in the absence of any contract to the contrary as required under Section 15 of the Rent Act. Section 13 of the Rent Act enumerates the grounds for eviction of a tenant which includes bona fide need of the landlord. Section 15 of the Rent Act lays down that in the absence of any contract to the contrary, it shall not be lawful for any tenant to sublet the whole or any part of the premises in which he was inducted as a tenant. Section 15A lays down that if any licensee who was in occupation of the premises, in which he was inducted as a licensee, before the 1st day of February, 1973 and the licence was subsisting on that date, he shall be deemed to have become a tenant of the landlord in respect of the premises on that date i.e., 1.2.1973 when Maharashtra Act 17 of 1973 came into force whereby Section 15A was inserted in the Rent Act.

23. Section 28, which starts with a non-obstante clause, lays down that suit or proceeding between a landlord and a tenant relating to recovery of rent or possession of any premises to which provisions of Rent Act apply shall be entertained by a court enumerated thereunder and no other court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question.

24. We now proceed to deal with the first question, i.e., whether, in the present case, status of the member was that of a tenant or landlord within the meaning of the Rent Act and consequently there was any relationship of landlord and tenant between them? Under Rule 10(1)(5)(a) 'tenant ownership housing society' has been defined to mean housing society where land is held either on leasehold or freehold basis by the societies and houses are owned by its members, whereas under Rule 10(1)(5)(b) in case of 'tenant co-partnership housing society', the society holds both land and buildings either on leasehold or freehold basis and allots them to its members. In the case of tenant co-partnership housing society, it is clear from the Rules that the ownership of the land and building both remains with the society and member cannot be said to be co-owner, but in the case of tenant ownership housing society, the ownership of the land remains with the society, but ownership of the building/flat vests in the member. So far as tenant within the meaning of Section 5(11) of the Rent Act is concerned, he has a mere right to occupy. He is entitled to the protection of the Statute so long as grounds for eviction are not made out and can be evicted only by instituting a suit in a court enumerated under Section 28 of the Rent Act.

25. The concept of tenant co-partnership housing society was considered by this Court in the case of Sanwermal Kejriwal vs. Vishwa Cooperative Housing Society Ltd., (1990) 2 SCC 288, wherein it was noticed that the title to the property, i.e., the land and building/flat both, vests in the society. It has been further noted that cost of construction of the dwelling is met from deposits and rent 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. This Court has concluded that 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 and, consequently, a member has more than a mere right to occupy the same. In this regard, we may usefully refer to paragraph 13 of the case of Sanwarmal [supra] which reads thus:-

"13. That takes us to the next question whether or not a member of a copartnership type of a cooperative society has such interest in the premises allotted to him as would entitle him to give the same on leave and licence basis to a non-member. In a tenant copartnership 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."

[Emphasis Added]

26. From a bare perusal of the aforesaid passage, it would be clear that after full payment a member is entitled to continue to occupy the tenement free of charge and neither he is liable to pay any rent to the society nor the society is entitled to receive any rent from the member. According to the definition of 'landlord' under Section 5(3) of the Rent Act, landlord is a person who is for the time being receiving or entitled to receive rent and under Section 5(11) a tenant is liable to pay rent, but in view of the observations of this Court in Sanwarmal (supra), neither the society is entitled to receive rent from the member nor member is liable to pay any rent to the society after the entire value of the land and cost of construction of the building together with interest on its value has been paid.

27. The matter may be examined from another angle. If it is held that the society is a landlord and the member is a tenant within the meaning of the Rent Act, in that event the society can evict the member by filing a suit for eviction if it requires the premises for its bona fide need, but under the Societies Act, it can evict the member only as a consequence of his expulsion from the membership and neither under the Societies Act nor Rules framed thereunder nor Bye-Laws nor Regulations there is any provision that a Society can evict a member in case it has got bona fide need of the same. The said interpretation would be contrary to the object

of the Societies Act.

28. It appears to us that the status of a member in a tenant co-partnership housing society is very peculiar. The ownership of the land and building both vests in the society and the member has, for all practical purposes, right of occupation in perpetuity after the full value of the land and building and interest accrued thereon have been paid by him. Although de jure he is not owner of the flat allotted to him, but, in fact, he enjoys almost all the rights which an owner enjoys, which includes right to transfer in case he fulfills the two pre-conditions, namely, he occupies the property for a period of one year and the transfer is made in favour of a person who is already a member or a person whose application for membership has been accepted by the society or whose appeal under Section 23 of the Societies Act has been allowed by the Registrar or to a person who is deemed to be a member under sub-section (1A) of Section 23 of the Societies Act. In case any of these two conditions is not fulfilled, a member cannot be said to have any right of transfer. Thus, we reiterate the law laid down by this Court in the case of Sanwarmal (Supra) that a member has more than a mere right to occupy the flat, meaning thereby higher than tenant, which is not so in the case of a tenant within the meaning of Section 5(11) of the Rent Act. This being the position, we have no difficulty in coming to the conclusion that the status of a member in the case of tenant co-partnership housing society cannot be said to be that of a tenant within the meaning of Section 5(11) of the Rent Act, as such there was no relationship of landlord and tenant between the Society and the member.

29. We now turn to the second question, i.e., as to whether the status of the appellants was that of tenant or sub-tenant. In view of our answer to question no. 1 that the status of the member was higher than a tenant and although de jure he was not an owner but, for all practical purposes, he was exercising almost all the rights of an owner, excepting absolute right of transfer, he not being the tenant, there is no question of his creating sub-tenancy in favour of the appellants. A member may not be an owner of the flat in the eye of law but he may still be a landlord within the meaning of the Rent Act which does not necessarily postulate a landlord to be an owner of the property, but if a person is entitled to receive rent or receiving rent he may be treated to be a landlord within the meaning of the Rent Act. The question arises as to whether such a member could create a tenancy right under law, meaning thereby whether the relationship of landlord and tenant between the member and the appellants was duly created so as to claim protection from eviction under the Rent Act. The factum of letting out by the member to the appellants is not in dispute. Purported creation of tenancy right in favour of the appellants was in infraction of the provisions of Section 29(2) of the Societies Act whereunder there is a legislative command to the member not to transfer his interest in the property of the Society unless two conditions are fulfilled, firstly, the member has held the interest for a period of not less than one year, meaning thereby that he has remained in occupation of the flat, which was allotted to him by the Society, for a period of one year and, secondly, transfer was made to a member of the Society or to a person whose application for membership has been accepted by the Society or to a person whose appeal under Section 23 of the Societies Act has been allowed by the Registrar and his application for membership has been accepted by him or to a person who is deemed to be a member under sub-section (1A) of Section 23. In the present case, the first pre-requisite is fulfilled, but so far as the second one is concerned, the appellants who claim to be tenants were not existing members of the Society nor they ever filed any application for membership of the Society, much less its acceptance nor it has been claimed that they shall be deemed to have become members of the Society under sub-section (1A) of Section 23 of the Societies

Act.

30. Undisputedly, in the present case, there is infraction of the provisions of Section 29(2) of the Societies Act. Now it has to be seen whether sub-section (2) of Section 29 is mandatory or directory. From the scheme of the Societies Act, the Rules, Bye-Laws and Regulations it would be clear that in a case of tenant co-partnership society the ownership of the land and the building both vest in the society and the premises is allotted to the member for his occupation only and not for the purpose of occupation of anybody else. That is the object of the Societies Act as would appear from bye-law 2, i.e., 'for use of the member', meaning thereby his own use. According to bye-law 64, the flat is allotted to a member for occupying it himself. Regulation 4 is also in line with bye-law 64 which says that no tenant shall part with possession of the premises without the previous consent in writing of the society. Under bye-law 64(a) also a member is restrained from parting with possession of the flat without permission of the society which shall be granted upon filing application, by an intending transferee, for grant of membership by admitting him as a nominal member. Keeping in mind the language of Section 29(2), which is in the nature of injunction upon the right of a member to transfer unless the twin conditions are fulfilled, and the purpose for which the house is allotted to a member, i.e., for his self occupation, it cannot be said in any manner that the said provision is directory as giving such an interpretation would frustrate object of the Societies Act whereunder a flat is allotted to a member for his self-occupation as would appear from the Societies Act, Rules, Bye-Laws and Regulations. As such, we have no option but to hold that the provisions of Section 29(2) are mandatory.

31. The question that arises now is that if there is any infraction of the said provision, whether the same would invalidate the creation of relationship of landlord and tenant between the member and the appellants. It has been submitted on behalf of the appellants that the member had absolute right of transfer, as such relationship of landlord and tenant was duly created. In support of the submission, reliance was placed upon two decisions of this Court in the cases of Ramesh Himmatlal Shah vs. Harsukh Jadhavji Joshi, (1975) 2 SCC 105 and Sanwarmal [supra]. In Ramesh [supra], the question in issue was as to whether interest of a member in a flat allotted to him by co-partnership housing society could be attached and sold in execution of a decree passed against a member. This Court referred to the provisions of Sections 29(2), 31 and 47 of the Societies Act. The Court was considering matter in the light of the provisions of Section 31 of the Societies Act which lays down that share or interest of a member in the capital of a society or in the loan stock issued by a society or in the funds raised by a society from its members shall not be liable to attachment or sale under any decree or order of a court in respect of any debt or liability incurred by a member. Under this provision, there was immunity from attachment/sale in execution of a decree to certain types of interests of a member of the society, but the interests of a member in the flat was not enumerated thereunder, as such there was no provision exempting interest of a member in the flat allotted to him from being attached and sold in execution of a decree against a member. Therefore, there was no legal bar in attachment and sale of interest of a member in the flat allotted to him by the society. Before this Court the question was raised that the restriction under Section 29(2) put on the right of a member to transfer should be equally applied in the case of auction sale in execution of decree against a member. Court observed that "the only restrictions under Section 29(2) are that the member may not transfer his interest in the property prior to one year and the transfer is made to an existing member of the Society or to a person whose application for membership has been accepted by the Society". Though the Court has considered the provisions of

Section 47 which lay down that interest of a member in such a property which was allotted to him and upon which there is a charge, cannot be sold by a member without permission of the society and if there is infraction thereof, such a transaction has been declared by Section 47(3) of the Societies Act to be void, obviously the restrictions under Section 29(2) providing thereunder restricted right of voluntary transfer cannot apply to auction sale in execution of a decree against a member which is distress sale as the same has not been specifically exempted under Section 31 of the Societies Act. Of course, while dealing with the provisions of Section 29(2), the Court was also having in mind that under Section 47(3) if the transfer is in infraction of the provisions of Section 47(2) the same has been declared, to be void, by the Statute itself whereas in a case of infraction of Section 29(2) of the Societies Act, the Statute is silent. As a matter of fact, the question as to what would be the effect of infraction of the provisions of Section 29(2) was not subject matter of consideration before this Court in the case of Ramesh (supra), as such the law laid down therein that there was no prohibition against transfer of right to occupy a flat was in the light of the fact whether interest of the member in the flat could be auctioned/sold in execution of a decree passed against the member, meaning thereby distress sale. In the present case we are concerned with voluntary transfer which is in contra distinction to distress sale, as such the said case is clearly distinguishable.

32. Another decision upon which reliance was placed on behalf of the appellants is the case of Sanwarmal [supra]. In that case, a petition was filed under Section 91 of the Societies Act for passing an order of eviction of a licensee who was inducted as a licensee by a member of the Society, though contrary to the provisions of Section 29(2) of the Societies Act, but he became deemed tenant under Section 15A of the Rent Act on 1.2.1973, i.e., the date on which the amending Act came into force, as the licensee was in occupation of the premises and licence was subsisting on that date, as such this Court held that the petition under Section 91 of the Societies Act was not maintainable as the licensee acquired the status of tenant even though there was no privity of contract between the parties, but as the status of tenant was acquired, by legislative intervention, under Section 15A of the Rent Act, as such he was entitled to claim protection under the said Act. Though in that case the question whether right to occupy a flat in a case of tenant co-partnership society is transferable or not was not in issue before the Court, but following the judgment in the case of Ramesh [supra], this Court observed that the right of a member in the flat is transferable. In our view, the aforesaid observation in the case of Sanwarmal [supra] cannot be said to be ratio of the case but a mere obiter, as such the same can be of no avail to the appellants.

33. It has been submitted that in case transfer has been made by a member in infraction of the provisions of Section 47(2) of the Societies Act, according to the provisions of Section 47(3) the same shall be void, but there is no such provision in case there is infraction of the provisions of Section 29(2) which, we have already found, are mandatory. In case there is infraction of a mandatory provision, in that event the transaction cannot be said to be void but would obviously be voidable and once avoided, the relationship of landlord and tenant, i.e., between the member and the appellants cannot be said to have been duly created, meaning thereby in accordance with law. Thus, we have no difficulty in holding that the relationship of landlord and tenant between the appellants and the member was not duly created, as such the appellants would not be entitled to claim protection under the Rent Act and the bar created under Section 28 of the Rent Act would not operate.

34. This takes us to the next question whether legality or

otherwise of the creation of relationship of landlord and tenant between the member and the appellants could be adjudicated in the suits filed by the appellants before the Court of Small Causes for declaration that they were tenants in the premises in their respective occupation and there was relationship of landlord and tenant between the member and the appellants. The said suits were dismissed by the trial court after recording a finding that no relationship of landlord and tenant existed between the member and the appellants, but on appeal being taken the appellate bench of the Court of Small Causes decreed the suits holding that relationship of landlord and tenant did exist between the member and the appellants after reversing decree passed by trial court. When the matter was taken to the High Court in writ applications, the same have been allowed, decrees passed by the appellate bench of the Small Causes Court set aside and those of the trial court restored whereby it was held that there was no relationship of landlord and tenant between the member and the appellants. When suits were filed before the Small Causes Court by the appellants for a declaration that there was relationship of landlord and tenant between them and the member, it was open to the defendants to take a defence that no such relationship was created either in fact or in law as creation of such a right was barred under Section 29(2) of the Societies Act. In the present case the factum of creation of tenancy has not been disputed, but what has been disputed is its legality. As the creation of tenancy was in infraction of mandatory provisions of Section 29(2), it was voidable and invalid in law although not void and the Small Causes Court was not only competent to decide the same but obliged under law to go into the same before granting or refusing relief to the plaintiff as the same was a point in issue in those suits. This being the position, we are of the view that the High Court was justified in setting aside the decrees passed by the appellate bench of the Small Causes Court and restoring those of the Small Causes Court whereby suits for declaration were dismissed after recording a finding that there was no relationship of landlord and tenant between the member and the appellants who were consequently not entitled to claim protection under the Rent Act and no interference by this Court is called for.

35. The last question that falls for decision is as to whether the Society was required to first obtain adjudication from a competent civil court by filing a properly constituted suit for a declaration that relationship of landlord and tenant was not duly created and, therefore, the induction of a person by the member as tenant was invalid, the same being in infraction of mandatory provisions of Section 29(2) of the Societies Act before raising a dispute under Section 91 of the Societies Act or the said question could be gone into in a proceeding under Section 91 of the Societies Act before the Cooperative Court where a dispute touching upon the business of the society can be raised by the parties and in deciding the said dispute was it permissible for the Court to go into the said question. It is true that ordinarily in case of a transaction like the present one which is voidable and not void, if an aggrieved party intends to avoid the same it is required to obtain a decree from a competent civil court by filing a properly constituted suit. But in a case like the present one, if a party is first asked to obtain a decree from a competent civil court and only thereafter raise a dispute which is undisputedly touching upon the business of the society under Section 91 of the Societies Act, the same would frustrate the provisions of Section 91 and the intention of the Legislature in incorporating a cheap and expeditious remedy by referring the same to a court constituted under the Societies Act instead of throwing a party to cumbersome procedure of moving a civil court.

36. The dispute raised in the present case, undoubtedly, touches upon business of the Society which is a condition precedent for the applicability of Section 91 of the Societies Act. The business of

tenant co-partnership housing society is, after purchasing plots and constructing houses/flats thereon, to allot the same to its members for their self occupation and for a period of one year they can not part with possession of the same in favour of anybody and on expiry of the said period can transfer the same in favour of member of the society or to a person whose application for membership has been accepted by the society or to a person whose appeal under Section 23 of the Societies Act has been allowed by the Registrar or to a person who is deemed to be a member under sub-Section (1A) of Section 23 of the Societies Act. It is part of business of the Society to see that the house/flat allotted to a member remains in his occupation or in occupation of any other member and if any non-member intends a transfer in his favour, like the present one, he is required to obtain previous consent in writing either of the Society or its Managing Committee and in the event of consent being accorded, the Society shall admit him as a nominal member in which eventuality only the transfer can be made in his favour. In the present case, under Section 91 of the Societies Act, the Society was well within its right to get a dispute adjudicated as to whether the member had, by inducting the tenants in the flat, who were non-members, made a transfer in contravention of the provisions of Section 29(2) of the Societies Act. Thus the question regarding legality or otherwise of the creation of tenancy right by the member in favour of the appellants, which amounts to transfer of interest of a member in the property of the Society, can be decided by raising a dispute before the Cooperative Court.

37. In the present case, the only dispute raised before the Cooperative Court was as to whether transfer made by a member in favour of a so-called transferee/tenant thereby purporting to create a tenancy right in his favour was in infraction of the mandatory provisions of Section 29(2) of the Societies Act, as such the same was touching upon business of the Society. In case Cooperative Court decides such a dispute in favour of the Society in that eventuality the so-called transferee/tenant would not be entitled to claim any protection under the Rent Act, the bar provided under Section 28 of the Rent Act would not operate and consequently the petition under Section 91 of the Societies Act would be maintainable.

38. Learned counsel appearing on behalf of the appellants submitted that even if the tenancy is created in breach of law having statutory force, the same would not be void. Reliance in this connection has been placed upon a decision of this Court in the case of Nanakram vs. Kundalrai, (1986) 3 SCC 83, in which it was held that tenancy created in breach of Rent Control Order, which was having a statutory force, was not void. In that case under Clause 22 of the Central Provinces and Berar Letting of houses and Rent Control Order, 1949 a landlord was required to report the matter to the Deputy Commissioner, upon vacation of the premises, who alone was empowered to permit induction of any tenant, but instead of adopting the said procedure, landlord himself inducted tenant which was challenged by filing a suit before civil court for a declaration that creation of tenancy right was invalid. The trial court decreed the suit and the said decree was confirmed in appeal by the High Court. When the matter was brought to this Court, it was held that the transaction was not void and the infraction alleged was not of mandatory provisions of law which would obviously mean that the transaction was not even voidable, as such the suit was liable to be dismissed. In our view, the case of Nanakram [supra] is quite distinguishable and shall have no application to the present case as here there was infraction of mandatory provisions of Section 29(2) of the Societies Act. Thus we hold that the question regarding legality or otherwise of creation of relationship of landlord and tenant between the member and the appellants could have been gone into by the

Cooperative Court under Section 91 of the Societies Act as it touches upon business of the Society and the High Court has not

committed any error in not interfering with the order passed by appellate court confirming that rendered by the Cooperative Court.
39. For the foregoing reasons, we do not find any merit in these appeals which are accordingly dismissed, but there shall be no order as to costs.

JUDIS