

(1998) 08 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition No. 2134 of 1989

Southern Automatic Industries Pvt. Ltd. and another

APPELLANT

Vs

Mrs. N.S. Talpade and another

RESPONDENT

Date of Decision : 29-08-1998

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Maharashtra Co-operative Societies Act, 1960 — Section 91

Citation : (1999) 1 BomCR 32 : (1999) 1 BOMLR 399 : (1998) 3 MhLj 545

Hon'ble Judges : A.V. Savant, J

Bench : Single Bench

Advocate : Dilip Jhangiani, for the Appellant; Chabria, for the Respondent

Final Decision : Allowed

Judgement

A.V. Savant, J.—Heard both the learned Counsel; Shri Jhangiani for the petitioners (original opponent in the Trial Court) and Shri Chabria for respondent No. 1 Smt. Talpade (original disputant No. 2). None appears for respondent No. 2 Co-operative Housing Society (Original disputant No. 1) though served.

2. This petition of 1989 seeks to challenge the order dated 28th February, 1989 passed by the Co-operative Appellate Court by which appeal No. 13 of 1989 filed by respondent No. 1 Smt. Talpade was allowed. In the result the order dated 31st October, 1988 passed by the Co-operative Court, Mumbai holding that the dispute lodged by opponents on 11th September, 1978 in the Co-operative Court was not maintainable in the Co-operative Court for want of jurisdiction was set aside. A few relevant facts may be stated for appreciating the short controversy as to whether the Co-operative Court will have jurisdiction to entertain the dispute in view of the provisions of section 91 of the Maharashtra Co-operative Societies Act, 1960 (for short "Societies Act") and section 28 of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 (for short "Rent Act").

3. The first respondent Smt. Talpade is a member of the second respondent

Beach House Co-operative Housing Society. It is a tenant co-partnership society in which the first respondent owns a flat No. D-1. The first petitioner is a private limited company and the second petitioner is a partnership firm. The names of the two petitioners are more or less identical viz. (1) M/s Southern Automatic Industries Pvt. Ltd. and (ii) Southern Automatic Industries. A leave and licence agreement was entered into on- 1st April, 1972 between Smt. Talpade and the second petitioner firm for letting out the suit flat for an initial period of 11 months with an option to the licensee's petitioner No. 2 - to extend it for a further period of 11 months. It is the petitioners' case that although the agreement was termed as a leave and licence, the true intention between the parties was to create a lease. At any rate, the leave and licence agreement dated 1st April, 1972 was subsisting on 1st February, 1973 and by virtue of the amendment of the provisions of the Rent Act, namely, sections 5(4A), 5(11)(bb) and section 15 A of the Rent Act, the second petitioner acquired the status of a "deemed tenant" under the Rent Act.

4. On 11th September, 1978 the respondents lodged dispute No. ABN-II-580/2295 of 1978 in the Co-operative Court, Mumbai. The relief prayed for was that the petitioners be ordered to quit, vacate and hand over vacant and peaceful possession of the suit flat and, secondly, the petitioners may be directed to pay to the first respondent a sum of Rs. 3,318/- being compensation and/or mesne profit for certain period. Since I am concerned with the question of jurisdiction, I will refer to the averments in the original dispute-plaint at a later stage. Suffice it to say that the respondents categorically averred in the plaint that under a leave and licence agreement dated 1st April, 1972 the petitioners were in possession of the premises on leave and licence basis on a monthly compensation of Rs. 400/- p.m. for the use and occupation of the flat and Rs. 500/- p.m. towards the compensation for the use of furniture, fixtures and fittings and Rs. 100/- p.m. for the use of car parking space in the society premises. There are further averments that both the petitioners were in possession on 1st February, 1973 under a subsisting leave and licence agreement dated 1st April, 1972 and despite the request made by the first respondent the petitioners did not quit, vacate and hand over peaceful possession. The first respondent has further alleged that both the petitioners were persistent defaulters in respect of payment of monthly compensation. It has further been alleged that for the education of her children the first respondent was in reasonable and bona fide need of the flat.

5. Though the original dispute was filed only against the first petitioner company, later on second petitioner firm was added in the dispute.

6. On 6th December, 1978 written statement was filed wherein it was contended that the premises were given on leave and licence basis and in view of the amendment to the provisions of the Rent Act, occupants of the said flat - the petitioners were entitled to be treated as "deemed tenants". It was contended that initially the dispute was filed only against the first petitioner company and it

was later on that the second petitioner firm was added as opponent No. 2. It was further contended that even prior to the leave and licence agreement dated 1st April, 1972 the premises were occupied by M/s Bombay Spring Works (a predecessor company of the first petitioner company) under the leave and licence agreement dated 1st December, 1968. In para 9.4 of the written statement it was specifically contended that under the leave and licence agreement dated 1st April, 1972 the petitioners were in lawful possession of the suit premises and, therefore, were protected as "deemed tenant" and there was no question of renewal of the said agreement on the ground that it had expired on 28th February, 1973. It was, therefore, contended that dispute would not lie u/s 91(1) of the Societies Act and could be agitated only the Rent Act.

7. On 11th September, 1998 following issues were framed :

1. Whether the disputant No. 2 is staying in Pune or having place of residence in Bombay? Whether such a residence is owned by the disputant No. 2?
2. Whether there was an agreement for leave and licence dated 1st April, 1972 between the disputant No. 2 and the opponent No. 1 as alleged in para 3 of the dispute application? If so, whether the disputants are entitled to change their cause of action from opponent No. 1 to opponent No. 2 as amended. Whether such an amendment is permissible under law.
3. Whether there was a subsisting agreement between the disputant No. 2 and the opponent No. 2? If so what is the effect thereof? Whether the present dispute can be agitated in the form it has been agitated u/s 91 of the M.C.S. Act or provisions u/s 28 of the Bombay Rent Control Act is operative?
4. Whether the Disputant Society has been charging non-occupation charges to the Disputant No. 2 and hence whether the Disputant No. 1 is contend with collection of monies from members who have let out the premises without their permission. In such a situation whether there is a waiver and/or acquiescence. Hence whether the present dispute can be agitated u/s 91 of the M.C.S. Act?
5. Whether the disputant No. 2 has given the premises in dispute to the opponent No. 2 with a dominant consideration for money?
6. Do the opponent prove that the agreement dated 1st April, 1972 is a sham agreement?
7. Whether any furniture or fixtures have been given by the disp. No. 2 to the opponent No. 2? If not what is the effect?
8. Whether the disp. No. 2 is charged car parking charges by the disp. No. 1 ? If so, how much? Whether the disp. No. 2 is entitled to recover Rs. 100/- from the opponent No. 1 or opponent No. 2 allegedly excessively? What is the effect thereof.
9. Do the opponents prove that they are protected tenants in the premises in dispute?

10. What amount of deposit has been collected by disp. No. 2? What has happened to the deposits?
11. Do the disputants No. 1 prove that the disp. No. 2 violated the byelaws, tenancy regulations of the society by allowing opponent No. 1 and/or opponent No. 2 to use and occupy the suit flat?
12. Does disp. No. 2 prove that the opponent No. 1 and/or opponent No. 2 failed and neglected to vacate, quit and hand over the quiet possession of the suit flat on expiry of efflux of leave and licence agreement and/or after Advocate's notice dated 21-6-1978 of disp. No. 2?
13. Do the disp. No. 1 prove that disp. No. 2 sought help of disp. No. 2 for the recovery of the flat from the opponents Nos. 1 and 2 for self occupation?
14. Do the disp. No. 1 society prove that disputants Society interested to enforce its byelaws and recover the possession of the suit flat from opponents Nos. 1 and 2?
15. Whether the opponent No. 1 are the successors of opponent No. 2 by its conversion into private company Ltd.? If the answer is "Yes", whether the opponent No. 2 are entitled to defend the suit?
16. Do the opponents prove that whether there is a discriminatory treatment meted out by the disp. No. 1 and that there is sinister motive in the present dispute?
17. Do the opponents prove in the eyes of the law Southern Automatic Industries are different from Southern Automatic Industries Pvt. Ltd.?
18. Whether the opponent No. 1 and/or opponent No. 2 are entitled to defend the suit in view of the pleadings in the written statement?
19. Whether there is any policy of the disputant society enunciated in any of their records as alleged in the dispute application?
20. Whether the disputant No. 2 requires premises in dispute for her own occupation as alleged?
21. Whether the disputants are entitled to the relief's sought?
22. What order?

It is relevant to note that issue No. 3 specifically relates to the plea of jurisdiction.

8. On 28th September, 1988 the petitioners filed an application in the Trial Court contending that in view of the fact that there was a subsisting agreement between the second petitioner and respondent No. 1, the dispute could not be agitated in its present form u/s 91 of the Societies Act. Reliance was placed on a decision of the Apex Court pronounced on 19th September, 1988 in Hindustan Petroleum Corporation Ltd. vs. Shyam Co-operative Housing Society, Judgments

Today 1988 (3) SCC 716. It was, therefore, contended that the dispute u/s 91 of the Societies Act was not maintainable and only the Court u/s 28 of the Rent Act will have jurisdiction. It may be convenient to reproduce para 4 of the petitioner's application dated 28th September, 1988 which reads as under.

I say that in view of the judgment of the Supreme Court declared on 19-9-1988 in the matter of Hindustan Petroleum Corporation Ltd. vs. Shyam Co-operative Housing Society. It is now settled that dispute u/s 91 is not maintainable where the occupants are under subsisting Licence and only court under the Rent Act u/s 28 has jurisdiction. I say that the position has now been settled in law. I therefore, pray that the above dispute be ordered to be dismissed with costs as being without jurisdiction.

9. On 5th October, 1988, the first respondent filed a reply to the petitioners' application dated 28th September, 1988. She contended that she had a contract only with the second petitioner firm and not with the first petitioner and, therefore, the first petitioner cannot claim the protection u/s 15A of the Rent Act. The first respondent tried to rely on some evidence in the form of leave and licence agreement and subsequent developments to contend that the first petitioner company would not be entitled to claim protection of the amended provisions of the Rent Act.

10. The learned Trial Judge by his order dated 31st October, 1988 upheld the petitioners' objection on the question of jurisdiction. It was held that in view of the ratio of the Apex Court judgment in the case of Hindustan Petroleum Corporation, (supra) the "Co-operative Court will have no jurisdiction to entertain the dispute since the second petitioner firm was protected in view of the amendment to the provisions of the Rent Act. In the result, the petitioners' application dated 28th September, 1988 was allowed and it was held that the dispute filed by the respondents was not maintainable in the Co-operative Court for want of jurisdiction.

11. Against the said order dated 31st October, 1988, the second respondent Society did not file any appeal. It was only the first respondent who filed Appeal No. 13 of 1989 in the Co-operative Appellate Court. By its judgment and order dated 28th February, 1989, the Appeal Court allowed the appeal and while setting aside the order dated 31st October, 1988 directed the Trial Court to proceed further with the dispute in accordance with law. The Appeal Court did not specifically decide the issue of jurisdiction though the appeal was specifically on the point of jurisdiction alone. The Appeal Court expressed the view that "there were compelling reasons for the lower Court to record further evidence in order to come to the conclusion that either Respondent No. 1 or respondent No. 2 (present petitioners) are successors in interest of the licensees who were the parties as such to the leave and licence agreement dated 1st April, 1972". The Appeal Court, therefore, came to the conclusion that it was necessary to remand the matter to the Trial Court to record further evidence. It was, in these circumstances, that the Appeal Court set aside the order passed by the Trial

Court and remanded the matter back. It is this order dated 28th February, 1989 that is challenged in the present petition before me.

12. Having heard both the learned Counsel at length, in my view, in the light of the ratio of the three decisions of the Apex Court, the order passed by the Appeal Court is clearly unsustainable in law and the order passed by the Trial Court will have to be restored. The three decisions are : (i) Mahabir Prasad Verma Vs. Dr. Surinder Kaur, ; (ii) Hindustan Petroleum Corporation Ltd. vs. Shyam Co-operative Housing Society, Judgments Today 1988 (3) SC 716 and (iii) Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others, . My reasons for this conclusion are as under:

13. It is well settled by a catena of decisions that for deciding the question of jurisdiction one must look to the averments in the plaint as a whole and it is not permissible to look to the written statement. In this behalf I may refer to the Full Bench decision in Dattatraya Krishna Jangam Vs. Jairam Ganesh Gore, where it has been categorically held that in order to determine which court has jurisdiction to try a suit, the court should read the plaint as a whole and ascertain the real nature of the suit and what in substance the plaintiff has asked for. Whatever may be the relief claimed, if on a fair reading of the plaint it becomes apparent that the plaintiff has alleged the relationship of landlord and tenant between him and the defendant and the relief claimed in substance relates to recovery of rent or possession or raises a claim or question arising out of the Rent Act or any of its provisions, then it is the Small Causes Court alone that will have jurisdiction to decide the suit. In Tejoomal Lakhmichand Vs. M.J. Talegaonkar and Others, , Bharucha, J. (as His Lordship then was) has categorically held that jurisdiction of the Court has to be decided upon the averments in the plaint. In Laxmibai Narayan Satesa Vs. Dattatraya Tukaram Jarande, again, this Court reiterated that jurisdiction of a Court must be determined only from the averments in the plaint and not on the basis of defences in the written statement or on the basis of issues raised and it is only the Court in which the suit has been filed which has jurisdiction to determine the same.

14. It is not necessary to burden the judgment with any more authorities since the position is now crystallised in Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others, . While considering the conflict between the provisions of section 91 of the Societies Act and section 28 of the Rent Act, the Apex Court has clearly laid down that jurisdiction of the Court in which action is originated must be determined on the averments made in the plaint or the claim application and not on the defence taken by the adversary party. For example, if the plaintiff goes to the 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 the premises, the possession whereof is sought, Court trying the case would dismiss the suit on the ground

that the plaintiff had failed to prove the jurisdictional fact that the defendant was a trespasser. The Apex Court was dealing with a case where the claim was lodged by the society in the Co-operative Court on the ground that the appellant was in wrongful occupation of the flat in question and was a mere trespasser. On facts, it was found that the appellant was a protected tenant u/s 15A of the Rent Act. In the circumstances, the Apex Court held that proceedings initiated u/s 91(1) of the Societies Act could not succeed for the simple reason that the society had failed to prove the fact which constituted a foundation for jurisdiction. Observations to this effect are to be found in para 23 of the judgment at pages 1575-1576.

15. Bearing in mind the principle that the jurisdiction of Court in which the action is originated must be determined on the averments in the plaint or the claim application and not on the defence taken by adversary party, let me examine the averments made by the respondents in the plaint. I have briefly referred to them in para 4 earlier, but it is necessary to reproduce some of the averments at this juncture in the light of the law laid down by Apex Court. In para 3 of the plaint, the respondents categorically averred as under :

3. The Disputants say that by an agreement of leave and licence dated 1st April, 1972 made and entered into between the disputant No. 2 and the opponents hereinabove, the disputant No. 2 at the request of the opponents granted permission to allow the opponents to use and occupy the suit premises on leave and licence basis on a monthly compensation of Rs. 400/- per month for use and occupation of the suit premises and Rs. 500/- towards the compensation for use of furniture's, fixtures, fittings and other amenities and a further sum of Rs. 100/- for the use of the car parking space in the Society premises. The said licence agreement commenced from 1st April, 1972. Under the said agreement an option was given to the opponents to extend the licence agreement by a further period of 11 months. The disputants say that the opponents expressed to the disputant No. 2 that the opponents had no desire to continue to use and occupy the said flat more than the period agreed upon. The opponents in the said agreement had agreed to return the furniture's, fixtures and fittings in the same good condition as they were then but with the reasonable wear and tear.

16. Thereafter in para 4 it was further categorically averred as under:

4. The disputants say that the said licence agreement expired on 20th February, 1973, however, with the option of one more term 20-2-1973 to 19-1-1974 of 11 months the said licence agreement came to an end on 31st January, 1974. Hence the said licence agreement came to an end by efflux of time on 31st January, 1974. The disputant No. 2 says that though the said licence agreement came to an end on 31st January, 1974 the opponent No. 1 and/or 2 did not quit, vacate or hand over the possession of the suit premises nor did they show any inclination to vacate the suit premises. The disputant No. 2 says that she called upon the opponents No. 1 and/or 2 on many occasions to quit, vacate and hand over quiet and peaceful possession of the suit premises along with the

furniture's, fixtures and fittings as stated in the licence agreement but the opponents did not respond. The disputant No. 2 says that she informed the Opponents Nos. 1 and 2 that the said flat was required for her personal use and occupation as her children are educating in Bombay, but the opponents did not vacate the said flat. The Disputant No. 2 says that the opponent Nos. 1 and/or 2 are the persistent defaulters of payment of monthly compensation. The disputant No. 2 says that the opponent Nos. 1 and/or 2 are in the arrears of a sum of Rs. 3,318/- upto June, 1978 and the opponents have failed and neglected to pay.

(Emphasis supplied)

17. The portions underlined (Italicised here) by me will show that the respondents themselves approached the Co-operative Court with a clear case and categoric averment that the petitioners were in possession under a leave and licence agreement which was subsisting on 1st February, 1973. The initial agreement dated 1st April, 1972 itself was till 28th February, 1973. There is a further averment that the first respondent had called upon the petitioners to quit, vacate and hand over quiet and vacant possession on two grounds; (i) the petitioners were in arrears of payment of monthly compensation and (ii) the first respondent needed the premises bona fide for the purpose of education of her children. Para 4 seeks to make out two grounds of eviction under the Rent Act - one of default in payment of rent u/s 13(1)(a) and the other of reasonable and bona fide requirement u/s 13(l)(g). That is not the end of the averments.

18. In para 5 of the plaint further categoric averments referring to the possession of the petitioners under the leave and licence agreement are as under:

5. The disputant No. 2 says that in spite of repeated demands made by her the opponent No. 1 and/or 2, failed and neglected to hand over, vacant and peaceful possession of the suit premises to her. The disputants say that the licence granted to the opponents No. 1 and/or 2 had expired on 31st January, 1974 by efflux of lime. The disputants say that on the expiry of the said agreement, the opponents No. 1 and/or 2 were hound and liable to quit, vacate and hand over the vacant and peaceful possession of the suit premises but the opponents refused to hand over the same and continue to remain in occupation unlawfully and illegally. The disputant No. 2 therefore, finally through her Advocate's letter dated 24th June, 1978 called upon the opponents to quit, vacate and hand over quiet and peaceful possession of the suit premises. The said notice was received by the opponents Nos. 1 and/or 2 but failed and neglected to comply with the requirements of the said notice. In the said notice the disputant No. 2 expressed that the suit premises are required for her personal use and occupation and that her children are doing higher studies in Bombay. The Disputant No. 2 therefore, addressed a letter dated 16th June, 1978 to the disputant No. 1 Society, expressing her genuine need, intention, desire and wish to occupy the flat by herself and sought the help of the disputants No. 1 society to secure the vacant and peaceful possession of the suit premises.

(Emphasis supplied)

Here again the respondents have unequivocally admitted that both the petitioners were liable to vacate the premises on expiry of the leave and licence agreement and that they had continued to remain in possession unlawfully and illegally. It is reiterated that the notice to quit was issued demanding possession of the premises on the ground of bona fide personal requirement of the first respondent namely education of her children. It is true that consequent upon the amendment of the plaint, there is a reference to the difference in the legal statute of the two petitioners namely the first petitioner company and the second petitioner firm. There is also a reference in the amended para 1(a) to the Small Causes Court suit No. 2070 of 1978 filed by the Directors of the first petitioner company for declaration that they were the tenants in respect of the suit premises. In amended para 7(a) of the plaint, there is a reference to the second petitioner firm having illegally permitted the first petitioner company to occupy the premises without consent or knowledge of the respondent. I need not examine the merits of the said contentions at this stage.

19. As mentioned in para 12 above, in view of the three decisions of the Apex Court the controversy is no longer *res integra*. In *Mahabir Prasad Verma Vs. Dr. Surinder Kaur*, , the Apex Court has considered the apparent conflict between the provisions of section 91(1) of the Societies Act and section 28 of the Rent Act and it has been observed in para 8 of the judgment at page 1100-1101 as under:

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

Thereafter in para 20 of the judgment the Apex Court has observed thus at page 1105 :

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

20. In *Hindustan Petroleum Corporation Ltd. and another vs. Shyam Co-operative Housing Society and ors.*, Judgments Today 1988(3) SC 716, the Apex Court reiterated the above position and held that if petitioner No. 1 Hindustan Petroleum Corporation Ltd. was clearly protected u/s 15A of the Rent Act, it was not necessary to deal with the contention as regards applicability of the provisions of section 91 of the Societies Act. The Apex Court clarified in para 14 of its judgment at page 724 that all aspects arising out of the submissions as to the jurisdiction of the Registrar u/s 91(1) of the Act had already been considered by the Apex Court in *D. N. Bhatnagar's* case (*supra*) and the Court reiterated the principles laid down therein. In the result, the order passed by the Co-operative Court for eviction of the petitioner No. 1 Hindustan Petroleum Corporation Ltd. in proceedings initiated u/s 91 of the Societies Act as also the said proceedings were quashed.

21. The matter is now set at rest beyond the pale of any controversy. In the last decision in *Sanwarmal Kejriwal Vs. Vishwa Co-operative Housing Society Ltd. and others*, the Apex Court has considered its earlier decisions commencing with *Deccan Merchants Co-operative Bank's* case, AIR 1989 SC 1320 and ending with the decision in *Krishna Rajpal Bhatia and Others Vs. Miss Leela H. Advani and Others*, and reiterated that the Court had harmonised the said provisions and held that in matters covered by Rent Act, its provisions, rather than the provisions of the Societies Act, should apply. In *Sanwarmal Kejriwal's* case the appellant sought protection of the Rent Act since he was a deemed tenant u/s 15A read with section 5(4A) and section 5(1 I)(bb) of the Rent Act. Status of a tenant was conferred upon him by Legislature in view of the amendment of the Rent Act. 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 law conferring the right. These observations are to be found in para 21 of the judgment at page 1575.

22. In para 22 of the Judgment in *Sanwarmal Kejriwal's* case the Apex Court considered the submissions on behalf of the Society that the appellant before it cannot seek protection against the society as his entry into the flat was in violation of the byelaw. The Court rejected the contention in view of the

amendment to the Rent Act and said that to hold otherwise would be to carve out an exception to section 15A of the Rent Act to the effect that the said provisions would not apply to licensees in occupation of a flat owned by the tenant Copartnership society. These observations are to be found in para 22 of the judgment at page 1575.

23. Then in para 23 (at pages 1575-76 of AIR), the Apex Court concluded the discussion regarding the test for determining the jurisdiction of the Court in which the action was originated namely on the basis of the averments in the plaint or the claim application and not on the defence taken by the adversary party. Para 23 reads as under :

23. 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 jurisdictional fact that the defendant was a trespasser. Here also the claim was lodged by the society in the Co-operative 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 protected tenant u/s 15A of the Rent Act. The proceedings initiated u/s 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 Corpn. Ltd., 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 points stood covered by the decision in Bhatnagar's case.

In the result the Apex Court set aside the judgment of this Court and directed that the claim of the society u/s 91 of the Co-operative Societies Act stood dismissed.

24. Relying upon the aforesaid judgments Shri Jhangiani the learned Counsel for the petitioners contended that the Appeal Court was in error in not deciding the issue and holding that the Trial Court ought to have recorded further evidence. The Trial Court on the basis of the judgment of Apex Court in Hindustan Petroleum Corporation's case had clearly recorded a finding that the Co-operative Court had no jurisdiction to entertain the suit. There was a subsisting agreement in favour of the second petitioner firm which was in possession of the flat on 1st February, 1973. I have already reproduced in paras 15 to 18 above the categoric averments in paras 3, 4 and 5 of the plaint. They leave no doubt

whatsoever that the respondents approached the Co-operative Court with a clear case that the petitioners had continued in possession under a subsisting leave and licence agreement. The possession was demanded from both the petitioners on two grounds namely (i) arrears of payment of compensation and (ii) reasonable and bona fide requirement. Reading the plaint as a whole, it leaves no doubt whatsoever that the claim is under the provisions of the Rent Act by v. landlord against a deemed tenant seeking eviction on the ground of arrears of payment of rent and reasonable and bona fide requirement. I am making these observations for the limited purpose of holding that the Co-operative Court has no jurisdiction as held by the Trial Court.

25. As against this Shri Chabria the learned counsel appearing on behalf of respondent No. 1 contended that, in the first place, issues having been framed, in view of provisions of Order XIV, Rule 2(1) of the Code of Civil Procedure, notwithstanding that the case may be disposed of on a preliminary issue, the Court should, subject to the provisions of sub-rule (2) pronounce a judgment on all issues. Counsel contended that since the issues were settled as far back as on 11th September, 1981, the application dated 28th September, 1988 filed by the petitioners ought not to have been entertained. This submission overlooks sub-rule (2) of Rule 2 of Order XIV. Indeed, Order XIV, Rule 2, sub-rule (1) is itself subject to the provisions of sub-rule (2). It would be convenient to reproduce Order XIV, Rule 2 as under :

O. XIV, R. 2. Court to pronounce judgment on all issues. - (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of facts arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to :

(a) the jurisdiction of the Court; or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit. postpone the settlement of the other issue until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

A perusal of sub-rule (2) makes it clear that when issues of law and of fact arise in the same suit and the Court is of the opinion that the case or any part thereof may be disposed of an issue of law only, it may try that issue first when that issue relates to (a) jurisdiction of the Court or (b) a bar to the suit created by any law for the time being in force. In such a case, the Court may postpone settlement of the other issues until after that issue has been determined. In my view, when a clear issue of jurisdiction arose on a bare reading of plaint, the learned Trial Judge had no alternative but to consider the petitioners' application dated 28th September, 1988. On a plain reading of the provisions of Order XIV, Rule 2, the contention of Shri Chabria must be rejected.

26. It was then contended by Shri Chabria that for deciding the question of jurisdiction one must not only look at the plaint and averments made therein but, in the facts of the present case, one must also consider the documents annexed to the plaint such as the leave and licence agreement and the picas in the written statement which reflect the true character of the two petitioners namely petitioner No. 1 company and petitioner No. 2 firm. In view of the law laid down by the Apex Court it is not possible for me to look either to the pleadings in the written statement or to the evidence on record merely because some evidence had been led. Such a course is clearly impermissible in law in view of the judgments which I have referred to above.

27. It was contended by Shri Chabria that no prejudice would be caused to the petitioners if the entire trial is allowed to proceed in accordance with law viz. the matter to be decided by the Trial Court; the appeal to be decided by the Appeal Court and then the issue permitted to be raised in a writ petition. At any rate, counsel contended that I should adopt the same course which the Appeal Court adopted namely, decide nothing and remit the matter to the Trial Court? This petition is pending in this Court since 1989. Plaint was lodged on 11th September, 1978. It is nearly 20 years later that I am hearing this petition. It would be most unfair to the litigants to dispose of this petition without deciding anything and directing the parties to undergo the ritual of a trial keeping all contentions on merits open at such a belated stage. As I said earlier, the law laid down by the Apex Court in the 3 decisions referred to above leaves no choice but to decide the question of jurisdiction on the basis of the averments made in the plaint read as a whole and in particular in paras 3, 4 and 5 thereof. In that view of the matter, the only conclusion to which one can reach is that the Co-operative Court will have no jurisdiction to entertain the dispute u/s 91 of the Societies Act. In the circumstances, I accept the contentions raised by Shri Jhangiani. The contentions raised by Shri Chabria are, therefore, rejected.

28. In the view that I have taken, the petition succeeds. The impugned order passed by the Appellate Court on 28th February, 1989 is hereby quashed and set aside and the order passed by the Co-operative Court on 31st October, 1988 is hereby restored. The proceedings initiated by the respondents in the Co-operative Court u/s 91 of the Societies Act are hereby quashed on the ground that the Co-operative Court has no jurisdiction to entertain the said proceedings. Rule is accordingly made absolute in terms of prayer (a). There will, however, be no order as to costs.

29. Issuance of certified copy expedited.