

BOMBAY HIGH COURT

Bandra Green Park

Vs.

Dayadasi

Appeal No.334 of 1980

(Deshpande, C.J. and Smt. Sujata Manohar, J.)

25.03.1982

JUDGEMENT

Ueshpande. C.J.

1. Respondent No.1 (hereinafter referred to as "the licensee") filed a Miscellaneous Petition in this Court under Article 226 of the Constitution of India challenging the validity of "reference" of the dispute made by respondent No.2. Deputy District Registrar, under section 91 of the Maharashtra Co-

operative Societies Act, 1960 (hereinafter referred to as "the Act") to respondent No.3, the Co-operative Court, raised jointly by appellant No.1, a Co-operative Housing Society and appellant No.2 its member.

2. The disputant raised this dispute on 15th Sept., 1975, for possession of Flat No.6, held by the member in the building owned by this Society, and compensation for its use against the licensee. The flat was purchased by the member from the builders in or about the year 1964 before the Society was incorporated in 1965 and conveyance of the building was executed in its favor. The member was required to leave Bombay due to the exigencies of her husband's employment and the flat came to be occupied by the licensee on leave and license basis under an agreement dated 1st Sept., 1972. It was initially for 11 months with option to the licensee to renew it for further periods of eleven months twice. The husband retired from the service and the member required the flat in dispute for her and her family's occupation. The application raising the dispute did aver how the flats in building were intended for the occupation of members and how the restoration of possession was necessary for this purpose. This dispute was referred, as indicated above, on 17th Sept., 1975.

3. The licensee submitted her written statement before the Co-

operative Court Amongst other defenses, she challenged its jurisdiction on two points. She firstly claim-
ed to be the tenant of the member (1) on the true interpretation of the agreement and also (2) because of the licensee having become tenant with effect from 1st Feb., 1973 on the amendment of the Rent Act under Act No.17 of 1973. The dispute thus was alleged to be triable by the Court under the Rent Act. She secondly alleged that the dispute, essentially being between the member and her licensee, did not touch the business of the Society to attract Section 91 of the Act. It was also alleged that the Society was an idle party, it having no interest in the possession of the flat and it having lent its name to the dispute merely to attract the jurisdiction of the Co-operative Court under Section 91 of the Act. It was also indicated that the standard rent fixation application was already filed by the licensee in the Court of Small Causes under the Bombay Rent Act

4. At the instance of the licensee the question of jurisdiction was tried by the Co-operative Court as a preliminary issue with-out recording any evidence. The Co-operative Court held that on averments, the Society cannot be held to be an idle party, and as such the dispute did touch its business to attract Section 91 of the Act and it had jurisdiction to try the dispute.

5. The validity of this order was challenged in the Miscellaneous Petition in this Court. By an order dated 23rd April, 1980, Mody J. upheld the contention of the licensee and quashed the reference. The learned Judge held that the business of the Society to construct building and allot the flats therein to its members came to an end with the members being put into the possession thereof. The subsequent act of restoration of possession from the licensee to the member could not touch its business. Merely lending the name by the Society without indicating any breach of the bye-laws cannot touch its business to attract Section 91 of the Act.

6. Mr. Dhanuka, the learned advocate appearing for the appellants, contends that under the bye-laws, the Society is as much interested in the restoration of possession to its member, as the member himself or herself can be. It is a part of the business of the Society to ensure that flats in its building are occupied by the members, excepting when due to certain exigencies, the same are permitted to be occupied by strangers for some limited period. He drew our attention to para 12 of the plaint raising the dispute and expressly pleading that the building of the Society "is meant to house the members of the disputant No.1 Society and no others". Mr. Dhanuka therefore, contends that mere omission to plead breach of bye-laws expressly should not be so fatal.

7. In our opinion, Mr. Dhanuka's contention is well founded. A dispute between a member of a Society and his licensee does not touch the business of the Society and does not, therefore, attract Section 91. A Division Bench of this Court in *Kalavat Ramchand v. Shankerrao Patil* holding s

o and the Full Bench judgment in *Long v. Smt. Jinabai G. Gulrajani*² affirming the same deal with several points involved in such a case including when the Society can or cannot be held to be an idle party. Dispute filed after Kalawati's case are invariably raised by the Society and the member jointly against the licensee excepting cases where the Society feels that even the member is liable to be evicted. The disputants have not made any secret of the fact that the Society has become a co-

disputant on the member agreeing to bear all the expenses of the litigation. This, to our mind, cannot make any difference whatsoever to the Society's interest in the dispute, if, in fact, it has such an interest. It is not disputed that the bye-

laws of the Society do contemplate possession of the flats by members except for temporary period due to some exigencies. In all such cases, where the Society constructs a building for housing its members, and the flats therein are intended for their occupation only, the Society is recipient of several concessions in the matter of allotment of plots, securing of the controlled building materials, stamp duty etc. The builders constructing buildings and

1(1974-76 Bom LR 718)

2(1981-83 Bom LR 299): (AIR 1981 Bom 244)

selling flats as part of their business may not be recipient of all such benefits even though they are under a statutory obligation to form a co-

operative society of such purchasers of the flats, to ensure achievement of the same object. The ownership-

ship of the flats in such cases vests partly in the Society and partly in the members, who are entitled to the possession of the flats as an incidence of their membership and shareholding in accordance with the scheme of the bye-

laws of such Society. The business of the Society in all such cases does not come to an end merely on construction of the building and putting the members in possession of the flats therein. The common problems created by co-

existence of several members in a Society's building makes the continuance of the supervision and intervention by the Society indispensable as also the assertion of its ownership whenever it becomes necessary in terms of the bye-laws. The provisions of the bye-laws requiring the members to remain in possession of the flats and permitting possession thereof by non-

members only with the permission of the Society for a limited period, require constant supervision and interference by the Society to prevent their evasion.

8. In a Division Bench judgment (decided by myself and Mody J.) dated 5th Feb., 1980 in *Contessa Knit Wear v. Udyog Mandir Co-operative Housing Society*³ this Court had an occasion to refer to this dual ownership of the society and the members, in such flats of the building owned by the Society, and its incidence. This is what is observed in para-graph 10:

"The occupation of flats (or blocks as the case may be) by several holders in one building held by such Societies raises some problems of such 'co-

existence' inevitably giving rise to certain mutual rights and obligations requiring a machinery to regulate and enforce the same. Bye-laws to the above effect, involving some mechanism for enforcement are framed as a part of the process of the registration of such Societies. This necessarily involves an abridgement of their property rights in such flats. One such incidence of such 'co-existence' is the indispensable dual ownership; management and authority to enforce the obligation being vested in the Society, while right of occupation subject to the Bye-laws being vested in the member. Another incidence is the indispensability of restricting the right of occupation to the member himself, for whose occupation it is intended from its very inception and who alone is liable to comply with such obligations and as a corollary thereto, his disability to induct any third person therein, excepting with the permission of the society, in case of any temporary urgency. Yet another incidence is the restriction on his right of transfer of his interest in the society including the incidental right of occupation."

Para 10A of the judgment indicates how even the builders are under an obligation to form a society of the purchasers of the flats and execute a conveyance in respect of the building in favour of such society.

9. Earlier, another Division Bench of this Court had also on an occasion to highlight the role of such a society in the affairs of the occupants of the Society building even affect the flats are allotted to such members. In *I.R. Hingoram v. Pravinchandra*⁴ this is what the
3(AIR 1980 Bom 374)
4(1965-67 Bom L.R 306)
Division Bench (Chainani. C.J. and Gokhale, J.) observed at
page 311 :

"The Regulations of both the societies, to which the buildings in question belong, contain a similar Regulation. Consequently the flats now in occupation of the petitioners could not have been given to them for occupation without the permission of the societies. The object of a co-operative housing society being to provide housing accommodation to its members, it is the business of the society to see that such accommodation is occupied by its members or by persons approved by it and not by unauthorized persons. Every member is bound by the rules, bye-laws and regulations of the society. In respect of the common amenities provided by the society he has to pay certain charges and expenses to the society. A housing society is, therefore, vitally concerned with the question as to who occupies the accommodation provided by it. A dispute in regard to the occupation of such accommodation is, therefore, a dispute connected with the business of such a society. In any case there can be no doubt that such a dispute will touch

h the business of the society." It is true that the ratio of this case has been partially overruled by the Supreme Court in the case of *Deccan Merchants Co-operative Bank v. Dalichand*⁵ The claim of the society to evict the non-members inducted in the building before its purchase by the society is held not to be touching the business of the society within its conception under section 91 of the Act. The ratio of Hingorani's case about the Society's claim to evict non-members inducted in the flats after its becoming owner, such as in the present case, remains unimpaired by the above Supreme Court judgment."

10. It is true that the plaint does not contain any express averment about the occupation of the licensee being in breach of any bye-laws. It is, however, expressly pleaded that the flats in the Society are intended (1) for the occupation of the members and (2) that the flat was given by the member to the licensee for occupation due to exigencies of employment of her husband. These averments, if found true, at the trial, cannot but make the Society an interested disputant in the same manner in which the member seeking possession for her own occupation can be said to be. Ensuring possession of the flat by the member and eviction of the non-member cannot but be held to be touching the business of the Society in terms of the ratio of the two judgments and several other cases decided by the Court.

11. Mr. Punwani, the learned advocate appearing for respondent No.1, did try to distinguish the ratio of the judgment in Contessa's case (AIR 1980 Bombay 374) on the ground that the disputant

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Society therein was claiming possession both from the member and, the licensee, because of the breach committed after the cancellation of the member's membership on account of such a breach. The member and the licensee were both non-disputants. This, to our mind, cannot make any difference of substance to the ratio. The question whether the dispute touches the business of the Society or not, cannot depend, on whether the membership it cancelled or whether the member is a disputant or non disputant. It will depend on whether the occupation of the stranger happens to be in breach of the bye-laws or not. Nothing prevents the Society and the member joining their hands as long as the object is to ensure compliance with the bye-laws. (see 1982-84 Bom 5(AIR 1969 SC 1320)

LR 1, in this context). It is this breach and obligation to prevent it that touches the business of the Society and enables the Society to claim possession by invoking Section 91 of the Act. If para 10 in Contessa's case reflects the correct legal position, the Society, can be held to have real interest in the dispute even to ensure restoration of possession to the member and her continued possession of the flat. The Society joining the dispute on the member's undertaking to bear the expenses by itself cannot run counter to the existing interest of the Society in the flat and its obligation to ensure compliance and observation of the bye-laws and regulations in this behalf. The fact thus that a member happens to be a co-

disputant or non-disputant turns out to be a beneficiary thereof even when he happens to be himself guilty of the breach of the bye-laws, cannot make any difference whatsoever. We must hasten to add that the averments in the present case show that occupation by the licensee was necessitated due to the exigencies of the employment of the member's husband and that such occupation was with the permission of the Society. This implies, that the member herself is not guilty of any breach of the bye-laws. Breach by the member also cannot be said to be an ingredient of the cause of action in every such case.

12. Mr. Punwani then contends that the licensee had become the tenant, and the Court under the Rent Act, and not the Co-operative Court, can have jurisdiction to entertain the dispute. In this case, the Society and the member both are the disputants-claimants. The licensee does not claim to have become a tenant of the Society. The Society, no doubt, is claimed to have permitted occupation by the licensee. It is not known whether the terms of the agreement were also approved by the Society. Mere granting of permission to a licensee by itself cannot make the Society a party to the transaction. This apart, the averments in the plaint indicate grant of such permission by the Society only for the limited purpose and for limited period to suit the service exigencies of the member's husband. The Society itself not being a party to the transaction, the licensee cannot claim to be a tenant of the Society, even if the agreement of leave and licence is interpreted to be an agreement of tenancy or even if the licensee is held to have become a sub-tenant because of the amending provisions of the Rent Act enforced with effect from 1st Feb., 1973. At best, the licensee can claim to be a tenant of the member. The question whether a licensee of the flat held by a member in a Co-operative Society can or cannot be a tenant of the Society itself, did come up for consideration in the Contessa's case (supra). The point is discussed at great length. The Division Bench has held that in view of the housing schemes contemplated under Section 2(16) of the Act, the Society can never be the landlord of the licensee inducted by the member. Nor permission of permanent tenancy is compatible with the basic structure of such housing societies.

13. It is true that under the ratio of this very judgment, a licensee can claim to have become a tenant of the member provided, the licensee is not of the exempted category contemplated under Section 5(4-A) of the Rent Act. The definition of the word "licensee" in the said section excludes the licensee inducted in the premises to meet the service exigencies of the licensor. In the present social life, ordinarily, the wife is required to live with her husband and exigencies of the husband's employment become part of her life also. The plain averment that the licensee was inducted in the flat in disp

ute due to such service exigencies excludes her from the purview of the word "licensee" as contemplated under the Rent Act as also from the benefits of tenancy contemplated to be conferred on such licensees. It is not possible to accept the contention of the licensee to have become a tenant at this stage when the facts have yet to be investigated. The defence that here the licence agreement is, in fact, intended to be tenancy agreement also cannot be accepted without trial and proof.

14. Mr. Punwani then contends that in either case, the plaint suffers from misjoinder of parties and the Co-operative Court can claim to have no jurisdiction to try the dispute as long as the claim of the member to get possession from the licensee-tenant is excluded from its jurisdiction. As discussed earlier, firstly, this point can arise only after the trial, if it is found that the licensee is a tenant. Secondly, this question can be considered in its true perspective only at the trial and cannot be raised at this stage, when such points are not tried at all. Nothing also prevents the disputants or either of them from exercising their choice and getting one of them transposed from the array of disputants to the array of non-disputants to prevent the ouster of jurisdiction of the Co-operative Court.

15. Mr. Punwani then challenged the jurisdiction of the Co-operative Court on account of the reference itself being void. His argument is twofold: Firstly, that the reference order passed without any notice and any opportunity to the non-disputant to have her say is void. Secondly, that the order is made mechanically without any application of mind. No such point is raised in the written statement before the Co-operative Court though raised before the learned single Judge in a writ petition. Mr. Punwani contends that it was unnecessary to raise it before the Co-operative Court, the order of reference being final and the Co-operative Court being incompetent to go behind the reference order. He relied on the judgment of Jahagirdar J. delivered on 21st December, 1981 in the case of *Mario Miranda v. Pilot Bunder Co-operative Society*⁶, The ratio of the judgment, no doubt, supports Mr. Punwani on all these points. The learned Judge has analysed the requirements of such reference in para 5 of his judgment by reference to Sections 93 and 152(4) of the Act and Rule 76 of the Rules thereunder and upheld the contention to the above effect in an exhaustive judgment.

16. With respect, however, the view of the learned Judge does not appear to us to be correct Section 93(1) of the Act, so interpreted by the learned Judge, reads as follows:

"93(1) If the Registrar is satisfied that any matter referred to him or brought to his notice is a dispute within the meaning of Section 91, the Registrar shall, subject to the rules, decide the dispute himself, or refer it for disposal to a Co-operative Court."

This section consists of two parts. The first part requires the Registrar's "satisfaction" as to the dispute being covered by Section 91, by reference to the subject-matter and, the parties involved. The second part requires him to decide if he would dispose of the dispute himself or refer it for disposal to the Co-operative Court. The decision on this point is always in favour of reference as he and his assistants can hardly get time even to read the plaint raising dispute for the first part of satisfaction. The section itself does not contemplate any notice to the non-disputants at this stage. The required "satisfaction" thus does not contemplate any trial of any issue as such, the disposal of the entire dispute with all its requirements and trap-pings being reserved for the subsequent stage. The stage of "satisfaction", on the face of it, is preliminary and contemplated "satisfaction" is of a

6(Writ Petn. No.2541 of 1981)

prima facie nature. Several enactments contemplate such stages of *prima facie* "satisfaction" before the adjudicative machinery is set into motion. The next stage being of the decision either to try the dispute himself or refer the same for trial to the Co-operative Court, every aspect of the dispute remains untried at the stage of satisfaction including the truth of the averments made, which ultimately go to determine the jurisdiction. Requirement under Rule 76 of recording decision and reasons for satisfaction is aimed merely at ensuring the application of mind by the Registrar and elimination of casual approach. Ordinarily, trial of the "dispute" should include trial of every aspect thereof including the issue of jurisdiction. This indeed is the rule, splitting of one case into two stages and trial thereof by two different persons being an exception. The section does not contain clearer words to that effect and it cannot be a matter of ready inference.

17. Such a satisfaction and following the decision to refer the dispute for disposal, themselves not affecting anybody's rights in the same way in which affecting of rights is understood in the legal sense, any question of implying obligation to hear the "affected" parties cannot arise. The absence of provision of notice also is reflective of the same legislative intent. We are, therefore, unable to see why any obligation to issue notice at this stage should be implied, when such satisfaction is not intended to affect anyone in any real sense, and issues involved therein ordinarily can be tried by the Co-operative Court as part of the trial of the dispute. Such notice is implied in the absence of express provision when there is a danger of a person being affected unheard. Any contrary view would involve trial within trial, resulting in unnecessary prolonging of the life of the litigation without any corresponding benefit and service to the cause.

18. Reliance, is placed on Rule 76 of the Rules introduced in 1973 to demonstrate that "satisfaction" is intended to have a trial. It reads as follows:

"76. Registrar's satisfaction regarding existence of a dispute.-

Where any reference of a dispute is made to the Registrar or any matter is brought to his n

notice, the Registrar shall, on the basis of the reference (if any) made to him in form 'P' and the relevant records and statements submitted to him, record his decision together with the reasons therefor whether he is or is not satisfied about the existence of a dispute within the meaning of Section 91. Such recording of decision shall be sufficient proof of the Registrar's satisfaction that the matter is or is not a dispute, as the case may be." The word "decision" and obligation to record the reasons do create an impression as if the "satisfaction" required under the first part of Section 93 involves the regular trial. A close examination of the Rules and its object would demonstrate how this could not be the intention. In the first place, no rule can enlarge the scope of any section. The rule, therefore, cannot be understood to require any trial of any part of the dispute when the section, for the working out of which the rule is framed, itself does not contemplate it. The words "decision" and "reasons" in Rule 76 shall have to be read down to bring them in conformity with the requirements of Section 93. Secondly, the recording of reasons and decision of "satisfaction" is intended to furnish proof of the Registrar having applied his mind. This is what the last sentence of the rule itself expressly indicates. Such a rule of proof or evidence can never be exalted to any substantive provision to require trial and over-ride the provision of the section itself.

19. Strong reliance is placed on the ratio of the Division Bench judgment in Hingorani's case (1965-67 Bom LR 306) (supra). The ratio is based entirely on the wording of Section 91(2) of the Act as it then stood. It read as follows :

"(2) When any question arises whether for the purposes of the foregoing subsection, a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final."

Section 93 obviously was required to be read with, this provision. The conception of "satisfaction" and its content were required to be moulded to make it accord with the scheme of Section 91(2) of the Act. The "satisfaction" was raised under this provision to the level of a decision. It was secondly declared to be "final". Thirdly, decision was left exclusively to the Registrar excluding the same from reference. It clearly indicated the legislative intent to make such a decision conclusive and binding even on the non-disputants, behind their back. The Division Bench had to imply obligation to give notice to the non-disputants for the trial of the issue involved before it became final and binding on them. As observed in the judgment itself (at page 310), all advocates had to concede to the need of such notice and adjudication. That this would result in anomalous splitting of the trial of the dispute" and inevitably but unnecessarily prolong the life of the litigation appears to have been present to the mind of the learned Judges. They, therefore, suggested suitable amendment in the concluding part of the judgment.

20. Section 91(2) of the Act has been deleted by Maharashtra Act 27 of 1969 presumably in compliance with this suggestion. Any doubt on this point can be dispelled by reference to the Statement of Objects and Reasons published in the Maharashtra Government Gazette, Part V Extraordinary, dated 25th Mar., 1969. It expressly shows how such deletion was necessitated to overcome the ratio in Hingorani's case and eliminate the consequential delay. The "satisfaction" required to be reached under Section 93 now stands stripped of the finality and ceases to be of any binding nature. The Registrar's exclusive jurisdiction on this point also is now taken away which really prevented the Co-

operative Court from trying it. Rule 76 is not a substitute for Section 91(2). What is sought to be so eliminated by the legislature by expressly deleting subsection(2) of Section 91 cannot be assumed to have been imported back by the executive by introducing Rule 76 by requiring the Registrar to record "decision" and give "reasons". No "Rule" can ever be introduced to override any provision of the section. We have seen what the real object is. Reliance of Hingorani's case now thus appears to us to have been misplaced.

21. Reliance was also placed on the wording of Section 152(4) of the Act. The section expressly provides for appeals against orders under certain sections of the Act. Orders under other sections are indicated to be subject to the revisional jurisdiction. All such orders are declared to be "final" subject to an order in such appeals and revisions. The wording of the section is wide enough to suggest as if the "decision" as to "satisfaction" of the Registrar required before any reference under Section 93 and recorded in compliance with Rule 76, also is so final and immune from reconsideration by the Co-operative Court. Two factors, however, militate against any such conclusion. Firstly, the nature of the order is also a determining factor, in ascertaining if the legislature could have intended to make it so final. We have seen how under the scheme of the Act contemplated "satisfaction" is of a *prima facie* nature intended to be recorded at a preliminary *ex parte* stage merely by reference to the plaintiff's dispute. An order made at this stage, on averments open to disproof at the trial of the dispute, could never have been intended to be final. Secondly, Section 91(2) and Section 152(4) co-existed in the statute for a long time. The legislature could not have felt the need to declare the Registrar's order under Section 93 to be final under Section 91(2), had it intended to cover the same by subsection(4) of Section 152. This, to our mind, is a conclusive answer to the reliance on Section 152(4). Deletion of subsection(2) from Section 91 is clearly aimed at stripping "satisfaction" of its finality.

22. Mr. Punwani relied before us not on Section 152(4) but on the finality adverted to under Section 163(3) of the Act. The section is aimed at ousting the jurisdiction of the civil and revenue courts as its marginal note indicates. Immunity from interference by the civil and revenue Courts in this context cannot cover immunity from adjudicative machinery created under this very Act itself for the

trial of the very dispute. The object of Section 163(3) is in a way really to ensure finality on the orders of the Co-operative Court subject to appeal and not to restrict the sphere of their operation. Reliance on both these sections is thus ill-founded.

23. Two unreported judgments of this Court point to the same view taken earlier. The learned Judge (Jahagirdar J.) has referred to the judgment of S.K. Desai J. dated 4th Aug., 1977 in Miscellaneous Petition No.570 of 1975.*He has distinguished it on the ground that the powers of the Registrar to record satisfaction under Section 93 also were delegated to such Officer on Special Duty. Suffice to note that the ratio of this case, unlike in the case of the Co-operative Court, is not so expressly based on such a distinction. One of us (myself) was a party to the second judgment of a Division Bench dated 16th Dec., 1971 in (*Smt. Chandra Chetanram Shivdasani v. Chander Shekar Sheth*). This does not appear to have been brought to the notice of the learned Judge. The point, however, arose in that case incidentally and not directly.

* Since reported in 1979 Bom CR 79.

** Since reported in ILR (1975) Bom 849.

24. It is true that the reference order contains admittedly two factual errors of clerical nature. It assumes the said "society" to be non-disputant and as if para 14 and not paragraph 12 of the plaint contains recitals about the cause of action. This betrays casual approach and is highly objectionable and is breach of the Rule 76. Its effect may be relevant in some other context but cannot by itself invalidate the reference. Invalidation results in the punishments of the litigants who have to face the agony of the prolonged trial and who have no control over the authors of the errors. Such errors can have no relevance, once it is found that the Co-operative Court itself can try the question whether the dispute is covered by Section 91 of the Act. To sum up, the "decision" in regard to "satisfaction" under Section 93 is of a *prima facie* nature. No notice to the non-disputants is necessary at this stage. Such "decision" is neither final nor can it prevent the Co-operative Court from trying any issue as to dispute being covered by Section 91 or not.

25. We agree with the learned Judge that the Act should be amended and litigants be

7 Spl. Civil Appln. No.1446 of 1971

permitted to file their disputes directly in the Co-operative Court. The power of "reference" by the Registrar is a relic of the past when the Registrar himself could dispose of the majority of the disputes and was required to refer only a few of them for want of time. Today the Registrar and his aides are burdened with enormous administrative functions. Defective references demonstrate how they cannot find time even to comply with Rule 76. This archaic provision has ceased to serve any purpose whatsoever. Authority to the Co-operative Court to receive the disputes directly would eliminate unnecessary litigation and also w

aste of time on preliminaries.

26. We accordingly allow the appeal, set aside the order of the learned trial Judge and direct the Co-operative Court to dispose of the dispute in accordance with law. Costs of both Courts, costs in the cause.

Appeal allowed.