

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 877 OF 2016
WITH
CIVIL APPLICATION NO. 14363 OF 2019

Baswaraj s/o. Madolappa Barole .. Appellant
[original
plaintiff]
Versus

Madevi w/o. Virbhadrappa Barole (died) .. Respondents
through her legal heirs.. [original
defendants]

Miss P.S. Talekar h/f. Talekar & Associates, Advocate for
the appellant.
Mr.C.R. Deshpande, Advocate for respondent Nos.1A to 1D.

CORAM : S.M.GAVHANE, J.
RESERVED ON : 17.12.2019
PRONOUNCED ON : 04.03.2020

O R D E R :-

. Heard learned Advocates for the parties on
admission of the appeal.

2. The appellant/original plaintiff has filed this
Second Appeal against dismissal of his Regular Civil
Appeal No. 202 of 2012 by the Adhoc District Judge-1,
Latur, confirming the order dated 22.07.2010 passed below

Exh.25 in Special Civil Suit No.102 of 2004, holding that said Court/Civil Court has no jurisdiction to try and entertain said suit, by answering preliminary issue framed in this respect in the negative and ultimately dismissing the said suit on the same day as per order below Exh.1. The parties are hereinafter referred to as per their position in the suit.

3. One deceased Virbhadrappa – husband of defendant No.1 and father of defendant Nos. 2 to 5 was elder brother of the plaintiff. The plaintiff filed suit for partition, separate possession and injunction against the defendants in respect of one residential plot and building thereon bearing CTS No.4094, Municipal Council House No.1-R/212, admeasuring 2925 sq.ft. situated at Old Adarsh Colony, Latur, which is hereinafter referred to as the “suit property”.

4. The case of the plaintiff before the Trial Court was that he and his brother Virbhadrappa were residing

jointly. They were members of joint Hindu family. Virbhadrappa was Karta of the joint family. Their other brothers were separated and they have no concern with the joint family of the plaintiff and Virbhadrappa. Said joint family was having business of trading, electrical motors, old engines, spare parts, fertilizers, seeds etc. The partnership deed was also prepared in respect of that business on 12.12.1969 at the instance of Virbhadrappa. In the said deed, plaintiff and defendant No.1 were shown as partners. Further, it is case of the plaintiff that Virbhadrappa purchased the suit plot CTS No.4094 on 05.10.1971, as Karta of joint family and he became member of Adarsh Housing Society (for short "housing society") and got allotted said plot from the land of the housing society for joint family of the plaintiff and Virbhadrappa. For that purpose, he had obtained written consent of plaintiff on 05.10.1971. The amount was taken from joint family business of the plaintiff and Virbhadrappa to purchase the suit plot. The amount was paid by Virbhadrappa as Karta of the joint family. The

construction on the suit plot was completed in the year 1973. Since then the suit property was possessed by the plaintiff and Virbhadrapa. In the year 1975, Vidbhadrapa was murdered. After his death, plaintiff and defendants – legal representatives of Virbhadrapa continued as member of the joint family. The plaintiff deposited various amounts with the housing society from time to time towards payment of loan of Maharashtra State Housing Finance Corporation.

5. According to the plaintiff, on 03.01.1995 defendant No.1 submitted application to the housing society to record name of the plaintiff and defendant No.1 in respect of suit plot and to transfer share in their names. The housing society has not taken any action on that application. On 04.01.2000, the plaintiff submitted application to the society to effect mutation in respect of suit plot and record his name and name of defendant No.2. The housing society informed the plaintiff to obtain partition certificate or succession

certificate from the Court. It is the contention of the plaintiff that he is in possession of one room on West-North corner on ground floor and two rooms on Western side and WC and bathroom on first floor of the suit building. The remaining portion is in possession of the defendants. When the plaintiff asked the defendants to partition and give his separate share and record his name in the record of housing society, the defendants denied and therefore he filed suit for the reliefs as said earlier.

6. The defendants have resisted the suit by filing written statement at Exh.20. According to them the suit is false, frivolous and vexatious and it deserves to be dismissed in limine. The suit is not tenable as the plaintiff has not sought any declaratory relief in respect of his alleged rights in the suit property and instead he filed suit for partition and separate possession. They have not disputed description of the suit property. They have contended that it is a fact

that the suit property was allotted to late Virbhadrapa Barole, who was member of the housing society. Said housing society is registered co-operative housing society and it has been classified as tenant ownership (Bhadekaru Malki) housing society by the Registrar of the societies. The society is owner of the suit plot CTS No.4094 and the house/structure built over the said plot is owned and possessed by the member. Therefore, the housing society is necessary party to the suit. Therefore, suit is bad for non-joinder of necessary party i.e. the housing society. Therefore, it is liable to be dismissed. Moreover, the dispute involved in the suit is in between the legal heirs of member of the society and the plaintiff, who is claiming through member of society and since the dispute is a dispute touching management and business of the society, in view of provisions of section 91 of the Maharashtra Co-operative Societies Act (hereinafter referred to as the "MCS Act"), Civil Court has no jurisdiction to entertain the suit. Therefore, as the suit is barred by law, the plaint is required to be

rejected under Order VII Rule 11 of the Civil Procedure Code (hereinafter referred to as the "CPC").

7. In the written statement the defendants have denied almost all the contentions of the plaintiff regarding acquisition of the suit property by the joint family of the plaintiff and Virbhadrappa. They have denied that the plaintiff and Virbhadrappa were members of joint Hindu family and that Virbhadrappa was Karta of the joint family. According to them as a matter of fact, there existed no joint family of the plaintiff and Virbhadrappa at any time. Deceased Virbhadrappa, plaintiff and other three brothers are separate and independent since last 40-45 years. All of them have been doing their own business, service and are separate from each other for all practical purposes. There was/is no joint family or ancestral property belonging to the plaintiff or his brothers, except ancestral residential house situated at Rachate Galli, Latur, which is still standing in the name of Madolappa.

8. It is further case of the defendants that in the year 1973, construction of the block, which was single storied tenement was completed. As a matter of fact, since its construction, the suit property was in possession of Virbhadrappa exclusively until his death and thereafter it has been in possession of the defendants being legal heirs of late Virbhadrappa. They have admitted that till 1980, the plaintiff and defendants were residing in ancestral house at Rachate Galli and the suit property was leased to the tenants. But they have denied that it was leased by the family as alleged by the plaintiff. In-fact, it was leased out by Virbhadrappa. According to the defendants, when Virbhadrappa died in 1975, defendant Nos.2 to 5 were minors and defendant No.1 being illiterate helpless widow, had no support of anybody. Therefore, the plaintiff who was then serving in the Sut Girni, Latur, extended helping hand with a view to assist defendant No.1, began to reside in the suit house along with

defendants. Thus, the plaintiff was permitted by defendant No.1 to reside in the suit house as she was in need of male support and protection to her minor sons. The plaintiff has been residing in the suit house along with defendants purely on the basis of permission and consent of defendant No.1. In-fact, the plaintiff has/had no right, title or interest in respect of the suit house, which is legally owned and possessed by the defendants as legal heirs of deceased Virbhadrappa. After death of Virbhadrappa, name of defendant No.1 was mutated in the record of society as his legal heir under the provisions of the MCS Act and therefore certificate under section 101 of the MCS Act was obtained against defendant No.1. The plaintiff never disputed the record of the society nor had claimed any right in respect of the suit property in past many years. According to the defendants, they have constructed initially two rooms on the first floor of the suit property in the year 1984-85 that too gradually and in phases. Thereafter, they also built additional two rooms on first floor in the year 1992-93.

All this construction has been made by the defendants and plaintiff has never spent any amount for said construction.

9. Further, it is the contention of the defendants that since 1999-2000, there are no cordial relations between the plaintiff and the defendants. Due to day-to-day quarrels, defendants had asked the plaintiff to leave the suit property, but due to mediation by the relatives, the defendants allowed the plaintiff to stay in the suit property until he makes alternative arrangement only on humanitarian ground. They have denied that plaintiff is in joint possession of the suit property with the defendants. It is denied that the plaintiff is in exclusive possession of portion of the suit property as contended by him. Due to growing family of the defendants, the available accommodation is finding short. Therefore, they requested the plaintiff to vacate the suit property. It seems that with *mala fide* intention to continue to occupy the suit property, the plaintiff

has raised this false and vexatious suit with a view to harass the defendants. Thus, they have prayed to dismiss the suit with compensatory costs of Rs.20,000/-.

10. Learned Civil Judge framed as many as 12 issues at Exh.25.

11. It appears that in view of order below Exh.108, learned Civil Judge treated issue No.10 "Whether this Court has jurisdiction to try this suit?" as preliminary issue. After giving opportunity to both the sides to adduce evidence and after hearing learned Advocates appearing for the parties, the Trial Court answered said preliminary issue in the negative and held that the Civil Court has no jurisdiction to try and entertain the suit as per order dated 22.07.2010 and ultimately dismissed the suit. Said order of learned Civil Judge was challenged by the plaintiff in the District Court, Latur in appeal bearing RCA No.202 of 2012 and the said appeal was dismissed by judgment and decree dated 25.08.2016,

which is impugned in the present appeal by the plaintiff on several grounds mentioned in the memorandum of appeal.

12. Miss Talekar, learned Advocate appearing for the plaintiff submitted that Virbhadrappa was elder brother of plaintiff. There was joint family of Virbhadrappa and the plaintiff. Virbhadrappa was *Karta* of the said joint family. There is no dispute that the housing society is owner of the land/suit plot. As per case of the plaintiff, Virbhadrappa became Member of the housing society and got allotted the suit plot on 05.10.1971 in his name as *Karta* of the joint family of the plaintiff and himself. The construction was made out of the income of the joint family. There is no dispute that Virbhadrappa died in 1975. It is submitted that on 03.01.1995 defendant No.1 submitted application to the housing society to record name of plaintiff and defendant No.2 in respect of suit plot and to transfer share in their names. But the housing society has taken no action. On 04.01.2000, the plaintiff also submitted

application to the society to record his name and name of defendant No.2, but no decision is taken by the society on the said application. The defendants denied to partition the suit property and therefore the suit was filed.

13. Learned Advocate for the plaintiff further submitted that there is no dispute that the housing society is owner of the suit plot. Member is owner of construction made on the suit plot. The plaintiff has claimed partition and separate possession of his share in the suit property. Said reliefs can be granted only by the Civil Court. Said reliefs claimed by the plaintiff are not touching the business of the housing society so as to say that the Civil Court has no jurisdiction to entertain the suit and the Co-operative Court has jurisdiction to entertain the dispute in the light of provision under section 91 of the MCS Act. Therefore, according to learned Advocate, the orders passed by both the Courts below holding that Civil Court has no

jurisdiction are not sustainable.

14. It is further submitted by the learned Advocate that when the Courts have held that the bar is created by law to the suit or that the Civil Court has no jurisdiction to entertain the suit, the Courts should have returned the plaint to the plaintiff to present the same before appropriate Court by rejecting the same as per Order VII Rule 11 of the CPC. Moreover, it is submitted that both the Courts below should not have treated the issue of jurisdiction as a preliminary issue as it is mixed question of law and fact and thus the Courts have failed to appreciate Order XIV Rule 2 of the CPC. Thus, according to learned Advocate for the plaintiff, following ground Nos. I, III, IV and V involve substantial questions of law for consideration of this Court and therefore, the appeal needs to be admitted. Said grounds are thus:

"I. Both the Ld. Courts below ought to have appreciated that the appellant has filed the Special Civil Suit against the respondents claiming partition and separate possession of the joint Hindu family property since the suit property was

purchased from the joint fund of the Hindu Undivided family.

III. Both the Ld. Courts below ought to have appreciated that once detailed orders were passed by the Ld. Lower Court while granting interim reliefs and deciding other ancillary applications by assuming jurisdiction, it was bound to decide the dispute in entirety.

IV. Both the Ld. Courts below ought to have appreciated that the suit property was purchased from the joint fund of the family and there was no point in deciding the preliminary issue on the ground that Co-operative court is competent court to decide the issue involved in the suit under Section 91 of the Maharashtra Co-operative Societies Act, 1961.

V. Both the Ld. Courts below ought to have appreciated that the applicant is claiming half share in the suit property on the ground that the suit property belongs to joint hindu family property and the same is purchased out of joint funds."

15. To support her submissions, learned Advocate for the plaintiff has relied upon following decisions :

(a) In Sanjaykumar s/o. Amrutlal Shah & Others Vs. Uttamlal Ratilal Shah dead through Bharatkumar Uttamlal Shah & Anr., 2008(1)Mh.L.J.205. In paragraph 17, it was observed thus:

"17. The next point for our consideration is about the rights of the Society and its members in relation to the property allotted to the members. Section 2 Sub-section 16 of the MCS Act defines "Housing Society", which reads thus:

[2] (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."

Section 12 of MCS Act empowers the Registrar to 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 by rules. The certificate referred to above

is clear that this Society is classified as a tenant-ownership Society by the Registrar exercising powers under Section 12 of the MCS Act.

Rule 10 of the MCS Rules is relevant at this stage to find out the rights of the Society and its members. This Rule empowers the Registrar to classify the Society into one or other of the classes and sub-classes of the society, mentioned in detail in this Rule. Housing societies are sub-classified under different sub-classes as referred at serial No. 5 of the classification. These sub-classes are:

- (a) Tenant-Ownership Housing Society;
- (b) Tenant Co-partnership Housing Society;
- (c) Other Housing Societies.

This entry at serial No. 5 also makes it clear that in case of Tenant-Ownership Societies, the land is held either on lease-hold or free-hold basis by the Societies and houses are owned or are to be owned by the members. In case of Tenant Co-partnership Housing Societies, the Society holds both land and buildings either on lease-hold or free-hold basis and allot them to their members. There is thus clear distinction between the nature of these two types of societies. In case of Tenant Co-partnership housing society, the Society holds both land and buildings on lease-hold or free-hold basis and allots the same to their members. However, in case of Tenant-Ownership Societies, the land is held either on lease-hold or free-hold basis by the society and the houses are owned or to be owned by its members.

This Society being a Tenant-Ownership Society, the member is an owner of the house and the Society has no concern with the ownership of the bungalow. This legal position is not disputed by the disputants themselves. Because in their pleadings itself, they have specifically pleaded that the disputant No. 2 (present respondent No. 1) is the owner of the property in question and in the dispute, the Society did not claim ownership over the suit bungalow. Apart from this admission in the pleadings, the witness examined on behalf of the Society who was the then Secretary of the Society has stated that plot No. 8B was allotted to the defendant No. 2 by the Society. Construction was raised on that plot. According to him, the Society borrowed loan from the Maharashtra Cooperative Housing Finance Corporation (MSFC). He also contends that for creating licence in favour of the appellants father, permission of the Society was not obtained. Though he made such a statement in the examination-in-chief, he has admitted that appellants father deceased Amrutlal was not a member of this Society. Further he admits that in the year 1970, the rights over the bungalow were given to the members. He also admitted that in respect of this bungalow, the entire loan obtained is repaid

upto 1990 only. In respect of Societys rights, he gave clear admission that except to recover the loan instalments and the service taxes, the Society is having no concern with the bungalow. Not only this, but he admitted that in the bye-laws of the Society also, there is no provision authorizing the Society to recover the loan dues or the taxes. He also admits that some of the members in this Society had filed suits for recovery of possession from the tenants and the Society did not take any action against those persons. From these admissions, it is clear that this Society is having no interest over the bungalows or in the matter of letting out the bungalows by the members of the Society to third persons.

Deceased Uttamlal (original defendant No. 2) was examined at the trial and he deposed that he is the member of the Society. Plot is allotted to him. He permitted his deceased brother Amrutlal to occupy the bungalow and he claimed to be the owner of this bungalow. He also admits issuance of notice dated 07-02-1989 to the present appellants and the appellants reply to the said notice on 10-03-1989. He has further deposed that before occupying the bungalow, the permission of the Society was not obtained. He denied the contentions of the appellants that this bungalow was allotted to Amrutlal in family partition. Though he is not cross-examined on behalf of these appellants, even in the examination-in-chief itself, he has not uttered a single word about the Societys rights over the bungalow or about existence of the Societys rights over the property after allotment of a plot to the member. From this material on record, it is clear that the Society had no existing right over the bungalow after the allotment of the plot to the members. The only right as claimed by the Secretary of the Society is to recover service taxes from the members and the loan instalments, but the admission of the Secretary of the Society makes it clear that such a right is not incorporated in the bye-laws. Uttamlal only raised a contention that permission of the Society was not obtained for creating licence or granting permission in favour of Amrutlal. Unfortunately, no material is placed on record to show that for creating the licence under any of the provisions of bye-laws, such permission from the Society is essential. In absence of any statutory provision or any provisions in the bye-laws, it cannot be presumed that there was restriction or prohibition on the member in creating licence in favour of third party or permission of the Society was required for such licence.

From the above facts and the evidence on record, it is clear that the Society had no existing interest over the suit bungalow, nor there is any prohibition on the right of a member to create licence in favour of third person."

(b) In Mohinder Kaur Kochar Vs. Mayfair Housing Pvt. Ltd., and Others, 2013(1)Mh.L.J.389. In paragraph 15, it was observed thus:

15. It is thus clear that respondent No. 4, by the very nature of its object, had purchased land and got the flats constructed in accordance with the provisions of the Ownership Flats Act and the Rules made thereunder. The object of the society was not to engage in the business of real estate and demolition of buildings, as it was in Marconi's case (supra). When the Society was formed in or about year 1965, it had purchased land and got the flats constructed and allotted the same to its members. After more than 40 years, when respondent No. 4- Society has undertaken the project of re-development of its property, it cannot be said that respondent No.4-Society has engaged in the business of re-development, i.e., as has specifically been held by this Court in the decision dated 7 March, 2011 in Vardhaman Developers Limited v. Thailambal Co-operative Housing Society Ltd. & Ors., wherein the learned Single Judge observed as under:-

"Section 91 (of the Act) brings within its purview disputes touching interalia the constitution, management or business of a society. Now in the present case, the process of re-development of the Society by the Developer does not constitute the business of the society within the meaning of Section 91. The demolition of the existing building and the reconstruction of the building of the society is not the business of the society. Section 91 is therefore not attracted."

(c) In Alok Agarwal and Ors. Vs. Punam Co-operative Housing Society Ltd. And Ors., 2013(1)Mh.L.J.104, in paragraph Nos.15 to 18, it was observed thus:

15. The real bone of contention, however, is whether the reliefs which have been sought before this Court are of a nature that would fall within the jurisdiction of the Co-operative Court under sub section (1) of Section 91. The co-operative society, which is the Plaintiff before this Court,

has among the reliefs sought claimed a declaration to the effect that the agreement dated 30 May 2007 under which the Appellant claims title is null and void and unenforceable as against the society. Declaratory relief of this nature cannot be granted by the Co-operative Court. [Section 31](#) of the Specific Relief Act 1963 provides that any person against whom a written instrument is void or voidable, and who has reasonable apprehension that if such instrument is left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. The power which is conferred upon the Civil Court under [Section 31\(1\)](#) of ordering cancellation of a written instrument is evidently not vested in the Co-operative Court constituted under the Maharashtra Co-operative Societies Act 1960. It is well settled that the jurisdiction which is conferred on a Civil Court under Section 9 of the Code of Civil Procedure 1908 to try all suits of civil nature can be abrogated only by an express provision of the statute or where it is impliedly barred. The provisions of Section 91 of the Maharashtra Co-operative Societies Act 1960 do not either expressly or by necessary implication confer jurisdiction on the Co-operative Court to grant declaratory relief especially of the nature referable as in the present case to [Section 31](#) of the Specific Relief Act 1963. The issue as to whether a declaration of this nature can be granted by the Co-operative Court is not res integra but has been dealt with in a judgment of the Supreme Court in [Ramesh Chand Ardawatiya v. Anil Panjwani AIR 2003 SC 2508](#) where the provisions of [Section 75](#) of the Rajasthan Co-operative Societies Act 1965 came up for consideration. [Section 75\(1\)](#) conferred jurisdiction on the Registrar, notwithstanding anything contained in any law for the time being in force in respect of disputes touching the constitution, management or the business of a co-operative society arising inter alia between members, or past members or between the society or its committee and any past committee. The Supreme Court held that a suit for declaration of title, or possessory title or for that matter seeking the restoration of possession would fall within the inherent jurisdiction of the Civil Court and would not be governed by [Section 75](#). In that regard the Supreme Court held as follows :

"The plaint as framed by the plaintiff is for declaration of title as owner (and in the alternative, his possessory title) and seeking restoration of possession, as also issuance of mandatory and preventive injunctions against a recent encroachment. Neither is it a dispute between the parties referred to in Clauses (a) to (e) of sub-section (1) of [Section 75](#), nor does the nature of the dispute fall in Clauses (a) to (c) of sub section (2) of [Section 75](#) so as to be one excluded from the domain of a Civil Court."

16. A more recent judgment of the Supreme Court dealing with the subject is in Margret Almeida v. Bombay Catholic Co-operative Housing Society Limited, (2012) 5 SCC 642, which specifically considered the provisions of Section 91(1) of the Maharashtra Co-operative Societies Act 1960. In that case, the First Respondent was a society and was the owner of a tract of land. Some of the tenant members of the society including the Appellants initiated proceedings for the division of the society. A resolution was passed by the general body of the society to sell the land in favour of Respondents 22 and 23 and a deed of conveyance came to be executed. Two suits were instituted on the Original Side of this Court, the principal prayer being for a declaration that the resolution of the society and the conveyance were void ab initio or voidable against the Plaintiff and the tenant members. A preliminary objection to the maintainability of the suit in view of the provisions of Sections 91 and 163 of the Maharashtra Co-operative Societies Act, 1960 was raised before but rejected by the Learned Single Judge, but in appeal the Division Bench upheld the objection. The Division Bench observed that what was principally challenged in the civil suit was a resolution of the general body, while the challenge to the conveyance was ancillary. The Supreme Court, while interpreting the provisions of Section 91 observed as follows :

"27. It can be seen from the scheme of Section 91, to confer exclusive jurisdiction on the Co-operative Court, the dispute must satisfy two requirements. It was held so in Marine Times Publications (P) Ltd. v. Shriram Transport & Finance Co. Ltd (1991) 1 SCC 469 at para 11: (SCC p. 474)

"11. Before a dispute can be referred to a Co-operative Court under the provisions of Section 91(1) of the said Act it is not only essential that the dispute should be of a kind described in sub-section (1) of Section 91 but it is also essential that the parties to the said dispute must belong to any of the categories specified in clauses (a) to (e) of sub-section (1) of the said section."

Both the subject-matter as well as the parties to the dispute must be those specified under the section. In other words, if either of the abovementioned two requirements is not satisfied then the dispute cannot be adjudicated by the Co-operative Court. If one of the parties to the dispute is not an enumerated person, the question whether the subject matter of the dispute is one which falls exclusively within the jurisdiction of the Co-operative Court need not be examined. Similarly, if it is found in a given case that the subject-

matter of the dispute is not covered by [Section 91](#), an enquiry into the question whether the parties to the dispute fall under any of the categories enumerated under [Section 91](#) would become irrelevant."

17. While holding that the premise of the judgment of the Division Bench of this Court was erroneous, the Supreme Court held as follows :

"If any party such as the plaintiffs (the appellants herein) disputes the validity of the title conveyed thereunder, necessarily such a dispute would have to be adjudicated by a competent court under Section 9 of the Code of Civil Procedure wherein, necessarily, the question whether a valid title was conveyed in favour of Respondents 22 and 23 by the society would arise for determination. The legality of the resolution would still have to be gone into again. Therefore, in our opinion, the premise in which the High Court commenced its enquiry itself is wrong."

18. In our view, both the judgments of the Supreme Court in *Ardawatiya* and in *Margret Almeida* would indicate that the declaration which the First Respondent has sought in regard to the invalidity of the agreement dated 30 May 2007 under which the Appellants claim title, in respect of the areas shown in the plan annexed at Exhibit A to the Plaint would not fall within the jurisdiction of the Co-operative Court."

16. Mr. Deshpande, learned Advocate appearing for the defendants submitted that considering the admitted facts referred earlier, the reliefs claimed by the plaintiff cannot be granted by Civil Court as the jurisdiction of the Civil Court is barred and the dispute between the parties is touching the business of the housing society and hence the Co-operative Court has jurisdiction as per section 91 of the MCS Act, which reads as under :-

"Section 91 - Disputes

(1) Notwithstanding [anything contained] in any other law for the time being in force, any dispute touching the constitution, 2 [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, 3 [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 4 [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 5 [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 7 [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 73-1C or a society specified by or under section 73-G, or refusal of admission to membership by a society to any person qualified therefor 9 [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, 10 [or any orders, decisions, awards and actions of the Registrar against which an appeal under section 152 or 152A 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 12 [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 13 [or an official Assignee of a de-registered society] and 14 [the members (including past members, or nominees, heirs or legal representative or deceased members)] of the same society shall not be referred 15 [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--

(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."

. Mr. Deshpande, learned Advocate further submitted that both the Courts below have treated issue No.10 as a preliminary issue regarding jurisdiction to try the suit and recorded concurrent findings that the Civil Court has no jurisdiction to try the suit. Therefore, according to learned Advocate, the Trial Court rightly disposed of the suit by dismissing the same in view of the negative finding on preliminary issue and the Appellate Court rightly upheld the finding recorded by the Trial Court and dismissed the appeal. Therefore, according to learned Advocate, no substantial question of law is arising in this appeal for consideration of this Court and therefore the appeal is liable to be dismissed.

17. To support his submission that the dispute in the present case is touching the business of housing society and therefore the Co-operative Court has jurisdiction to entertain the dispute as per section 91 of the MCS Act, the learned Advocate for the defendants has relied upon following decisions:-

i. Arun Wamanrao Shinde Vs. Prakash Bhagwan Dalvi & Ors., 1990(2) Mh.L.J.923.

ii. Ramagauri Keshvlal Virani Vs. Walkeshwar Triveni Co-operative Housing Society Ltd. & Ors., 2000(2) Bom.C.R.687.

iii. M/s.A.V.R. and Co. & Ors. Vs. Fairfield Cooperative Housing Society Ltd. & Ors., (1988) 4 SCC 408, wherein in paragraph 13 it was observed thus:-

"Sec. 91(b) of Maharashtra Co-operative Societies Act has been assailed as ultra vires of Articles 14 and 19 of the Constitution. The dispute between a Co-operative Society and a non-member claiming through a member of the Society as provided in Section 91(b) of the Maharashtra Co-operative Societies Act will be decided by the co-operative Court. This classification has got nexus to the object of the Act namely the Special procedure is applicable only to those non members claiming through a member of the Society as they form a different class. This classification has a reasonable and rational nexus with the object sought to be achieved by the Act. In C.P. Khanna v. V.K. Kalghatgi & Ors., AIR 1970 (Bombay) 201 it has been held that section 91 is not ultra vires of Articles 14 and 19 of the Constitution. Similar view was expressed by Gujarat High Court in Rasiklal Patel & Ors. v. Kailasgauri Ramanlal Mehta & Ors., [1971] Vol. XII G.L.R. 355 which held clause (b) of sec. 96 of the Gujarat Co-operative Societies Act, 1961 which corresponds to Sec. 91(b) of the said Act as valid though clauses (c)(d)(e) of the section 96 were held as ultra vires. We agree with the views expressed in those judgments and hold that Section 91 (b) is not ultra vires of Articles 14 and 19 of the Constitution. "

iv. Ishwaribai Tahilram Vs. Ramchand Vallabhdas Katara & Ors., 1987 CTJ 438, wherein in paragraph 9, it was observed thus:

"9. Section 91 (supra) has come up for consideration a number of times. Dr. Naik submits that questions raised by the petitioner were:-

- (1) Disputant's claim to being the half owner of shares and plot No.19.
- (2) Disputant's entitlement to construct upon half the

permissible area of plot No.19.

(3) Disputant's right to get all such assistance as was necessary to further the afore-mentioned objects.

In terms, therefore, the claim was against Tahilram and after his death, opponent No.1. The joinder of the Society was a mere formality. Counsel relies upon Maya Bhagwandas Advani V. Bhagwandas Tarachand Advani and others [1978 Mah.LJ 449]. The facts in that case were that five shares in a Housing Society stood in the name of Maya Bhagwandas. Her husband contended that Maya was a mere benamidar, the shares having been purchased by him in her name but for himself and with his own funds. Maya challenged the jurisdiction of Officer on Special Duty to entertain the dispute under Section 91 of the 1960 Act. A Division Bench of this Court speaking through Chandurkar, J. (as he then was) held :-

"The disputant could not say that he was claiming any kind of ownership in respect of the shares through his wife in whose name the shares stood as real and beneficial title vested in him and that the Officer on Special duty had no jurisdiction, the dispute not being covered by Section 91 (1)(b). There is no question of the benamidar having any beneficial title which could be asked to be transferred to the true owner. Where a person claims through another the presumption is that the person through whom the claim is made has some title which the person purporting to claim through him is able to derive. As in the case of the benami transaction the real title whether legal or beneficial vests in the true owner there is nothing which can be claimed by the true owner through the benamidar who is the holder as between the benamidar and true owner merely of a nominal nature."

Another authority relied upon by learned Counsel is Special C.A. Nos.1397 and 1398 of 1970 decided on 13.08.1975 reported in 1975 Mah.LJ Item No.81 Notes of Cases. In this case, there appears the following passage:-

"Ordinarily the jurisdiction to decide questions of granting specific relief under the Specific Relief Act and whether there is a breach of an agreement for sale is that of the ordinary Civil Court. The jurisdiction of the Civil Court is only taken away in those cases which fall within Section 91, Maharashtra Co-operative Societies Act, 1960. In order to attract Section 91 it is necessary that the dispute must be either concerning or affecting the Society."

Can it be said that the claim advanced in the petition by the

disputant was raised only as between him and opponent No.1 and that the joinder of the Society was a mere formality? To decide this question, it will be necessary to bear in mind the type of Society and the classification into which it falls. It is a Housing Society and a Tenant Housing Ownership Society at that. In such Societies, the land is held either on leasehold or freehold basis by the Society. The houses thereon are owned or are to be owned by members. Thus, unless the disputant gets himself recognized as a person entitled to put up a structure on half the portion of plot No.19, he will have no right, title or interest over it. It is true that the effective opposition to this desire of the disputant, comes not from the Society, but from opponent No.1. But for that reason, the Society does not become an idle or formal party. Even as between the rival claimants, the Society cannot decide for itself the dispute between them. Disputant is not claiming through opponent No.1. In fact, disputant's main claim is as to rights flowing from membership in the Society, and opponent No.1 is advancing a contention which is at variance with the claim of the disputant. This would be a dispute touching the business of the Society. That business is as to who is entitled to construct houses on plot No.19, viz. Whether opponent No.1 alone or she and the disputant in separate halves of plot No.19. Prayer clause (c) is for a direction to the Society to execute the relevant documents of title in favour of opponent No.1 jointly with the disputant. Unless this document of title be brought into existence, the disputant will be getting nothing substantial in plot No.19. The right to plot No.19 flows from the membership of the Society. That explains the declaration claimed vide prayer clause (a). Prayer clause (b) relates to a right to put up a structure on the permissible area of plot No.19, or rather, that part of it which can be said to constitute the disputant's half. Therefore, and to use the words of section 91 of the 1960 Act, the lis gives rise to "a dispute touching the business of respondent No.1 Society". That section's application is not determined by a comparison of the degree of resistance to disputant's claim as between opponent No.1 and the Society. The precedents afore-mentioned do not apply. The statutory Courts rightly held that the dispute was maintainable under section 91 of the 1960 Act. The result is that the petition fails and hence the order.

18. I have carefully considered the submissions made by the learned Advocates appearing for the plaintiff and the defendants. I have also gone through the pleadings

of the parties, the issues framed at Exh.25 by the Trial Court and the judgments and orders of both the Courts below.

19. Before dealing with the aforementioned submissions made by learned Advocates appearing for the parties, it is necessary to refer some relevant provisions in the CPC and MCS Act. These provisions are Order VII Rule 11 of CPC, Order XIV Rule 2 of CPC, Section 9A of CPC, Section 91 of the MCS Act (which is referred earlier) and section 134 of the MCS Act. These provisions except section 91 of the MCS Act, are reproduced as under:-

Order VII Rule 11 of CPC :-

Rejection of plaint- The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to so correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Order XIV Rule 2 of CPC :-

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 fact 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 issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

Section 9-A of CPC :-

"9A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken such issue to be decided by the court as a preliminary issue:— (1) Notwithstanding anything contained in this code or any other law for the time being in force, if at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction".

Section 134 of MCS Act :-

134. CONFIRMATION OF SALE

(1) On effecting the sale by ²[a Co-operative Agriculture and Rural Multi-purpose Development Bank] under section 133, the bank shall, in the prescribed manner, submit to the ²[State Co-operative Agriculture and Rural Multi-purpose Development Bank] and the result of the sales, and the ²[State Co-operative Agriculture and Rural Multi-purpose Development Bank] may with the approval of the Registrar confirm the sale or cancel it.

(2) Where the sale is effected by the ²[State Co-operative Agriculture and Rural Multi-purpose Development Bank] or the trustee under section 133, the ²[State Co-operative Agriculture and Rural Multi-purpose Development Bank] or the Trustee, as the case may be, shall in the prescribed manner submit to the Registrar a report setting forth the manner in which the sale has been effected and the result of the sale, and the Registrar may confirm or cancel the sale.

20. On perusal of the plaint, it is clear that the plaintiff claims partition and separate possession of half share in the suit property referred in detail in paragraph No.3 (supra). Further, on perusal of the pleadings i.e. plaint and the written statement filed by the defendants, there is no dispute that the housing society is classified as tenant-ownership (Bhadekaru Malki) Housing Society and the suit plot is owned by the

housing society. Deceased Virbhadrappa was member of the housing society. The suit plot was allotted to him as a Member of housing society. Member is only owner of construction/structure on the suit plot. So also, there is no dispute that share in the housing society was in the name Virbhadrappa and he died in the the year 1975. The plaintiff is not a member of the housing society. He claims right through Virbhadrappa – member of the housing society. After death of Virbhadrappa, the defendants are only his legal heirs. To claim right, plaintiff has to be a member of the housing society. Whether to allow him to become member or not of the housing society, said aspect will have to be decided by the housing society. Deceased Virbhadrappa was not owner of the suit plot. Though suit plot is owned by the housing society, said housing society is not party to the suit. Thus, on considering all the above facts, when the plaintiff/non-member of the housing society has claimed right, title and interest in the suit property which includes suit plot owned by the housing society, through deceased

Vidbhadrappa – member of the housing society, the dispute between the plaintiff and defendants certainly touches the business of the housing society within the meaning of section 91(b) of the MCS Act. Therefore, the Civil Court has no jurisdiction to decide the said dispute or the reliefs claimed by the plaintiff under the guise of partition and separate possession of his share in the suit property and the Co-operative Court has jurisdiction to decide said dispute. The decision in the case of Ishwarbhai (Supra) relied upon by the defendants is applicable to this case to state that the dispute in the present case touches the business of the housing society. The Trial Court has rightly held so relying upon said decision.

21. On perusal of the orders of both the Courts below, it appears that both the Courts have after referring the admitted facts referred earlier and observing that the plaintiff claims right, title and interest in the suit plot owned by the tenant-ownership

co-operative housing society, in the super structure on the suit plot as well as in the share of the society in respect of the suit plot, which is in the name of deceased Virbhadrapa - member of the housing society held that the dispute between the parties is touching the business of the society within the meaning of Section 91 of the MCS Act. Therefore, both the Courts recorded finding that the Civil Court has no jurisdiction to entertain the suit, but it is the Co-operative Court, which has jurisdiction to decide the dispute.

22. It appears that after filing written statement by the defendants the Trial Court framed in all 11 issues below Exh.25 and thereafter as per order below Exh.108, treated issue No.10 - "Whether the Civil Court has jurisdiction to try the suit?" as a preliminary issue. Thus, it appears that the Trial Court treated above issue No.10 as a preliminary issue as per sub-rule (2) of Rule 2 of order XIV of CPC. This sub-rule (2) empowers the Court to dispose of case on issue of law, if it relates

to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force. When the issue of jurisdiction was treated as preliminary issue by the Trial Court after framing the issues arising out of the pleadings of the parties, I find that the issue of jurisdiction has been decided by the Trial Court in the light of provision under sub-rule (2) of Rule 2 of Order XIV of CPC. Therefore, when it is not the case that the defendants had moved the Court for rejection of plaint under Order VII Rule 11 of CPC and when the Trial Court found that the Civil Court has no jurisdiction to entertain the suit and it has disposed of the suit, there was no need to return the plaint as argued by the learned Advocate for the plaintiff.

23. For the foregoing reasons, as both the Courts below have recorded concurrent finding that the Civil Court has no jurisdiction to entertain the suit, I am of the view that no substantial question of law is involved in the present appeal for consideration of this Court, so

as to admit the appeal. The decisions relied upon by the learned Advocate for the plaintiff are of no help to the plaintiff's case. Therefore, the appeal deserves to be dismissed. Accordingly, it is dismissed. No costs.

24. In view of dismissal of the appeal, Civil Application No.14363 of 2019 does not survive and is disposed of.

[S.M.GAVHANE, J.]